

From a Spouse to a Citizen: The Gendered and Sexualized Path to Citizenship for Marriage Migrants in South Korea

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Morality has been a key factor in naturalization. However, defining what constitutes good moral character has never been specified, leaving interpretation of the good moral character requirement to the discretion of immigration officials and judges. Based on an analysis of court cases filed by marriage migrants, this article expands our understanding of the legal interpretation of the “good morality” requirement in two significant ways. First, by examining the nature of the morality requirements applied to marriage migrants applying for citizenship, we identify that controlling sexual morality is one of the key mechanisms of gendering the path to legal citizenship. Second, our analysis questions the fairness of the judicial rulings and shows that judges are not reliable allies for immigrant spouses. South Korean judges tend to show great deference to the administrative branch and rarely rule against the decisions of the immigration officials. Further, the rulings tend to follow cultural and gendered, rather than legal, understanding of “good” wives and husbands. Ultimately, in the case of South Korea we show that that marriage migrant moral jurisprudence deviates from the developing jurisprudence that decriminalizes intimate choices and challenges the traditional gender roles within a family.

Two Joseonjok¹ (Korean-descended Chinese) women came to South Korea (hereafter Korea) as marriage migrants, Ms. X in December 2004 and Ms. Y in March 2006. The migrants applied for Korean citizenship in 2009 and 2012, respectively.² The Ministry of Justice (MOJ) rejected their applications, citing the lack of good moral character: each woman had been indicted for working as a masseuse without a proper license. Ms. X and Ms. Y each appealed the decision to the Seoul Administrative Court, and although their citizenship applications were rejected for the same

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¹ We follow the Revised Romanization of Korean.

² All the names of plaintiffs throughout this article are pseudonyms.

reason, the judges ruled in favor of Ms. Y³ but discarded Ms. X's⁴ appeal. The opposite rulings, and consequent diverging paths that Ms. X and Ms. Y took, reveal one significant dimension of the Korean marriage migrant moral jurisprudence. The judges found that Ms. Y's offense was acceptable because she gave massage only to female customers, while Ms. X's conduct was morally unacceptable, as she provided sexual services to male clients at the massage parlor. In rejecting Ms. X's appeal, the judges stated that "prostitution is a serious social ill that contaminates healthy social culture, and it needs to be eradicated."

Good morality is an almost universally used naturalization requirement. This article explores the nature of the good morality requirements applied to migrant spouses. Most modern states provide marriage migrants some privileged access to citizenship, but marriage migrants' claims to citizenship are often contested, resulting in "a legal limbo between full citizenship and alien status within which immigration officials, the courts, and immigrants themselves debated the consequences of citizenship, the importance of family, and the significance of race" (Gardner 2005: 15). We focus on the role of the courts and judges in the process. Our analysis starts with two features of marriage as a modern institution: as a state-sanctioned site of sex and procreation and as a citizenship-delineating institution. We engage with the scholarship that has exposed the gendered and sexualized nature of allegedly neutral naturalization requirements (see, e.g., Gedalof 2007; Narayan 1995; Salcido and Menjívar 2012) and confirm that controlling sexual morality is one of the key mechanisms gendering the path to legal citizenship. We further demonstrate that, even though the language of the Korean naturalization laws may be similar to those of other nation-state, Korean judges' rulings are based on a culture and context-specific understanding of normal marriage and good wives and husbands.

Korea is a particularly interesting case to study the interdependent constructs of citizenship and marriage. Ms. X and Y are two of the approximately 150,000 marriage migrants who currently live in Korea. Since the early 1990s, Korea has experienced a "bride shortage," where bachelors in rural areas, or with low socioeconomic status, have difficulty in finding brides (Freeman 2011). The bride shortage led to a gendered migration: foreign brides from China and Southeast Asian countries migrate to join Korean husbands and their family members in Korea (A. Kim 2009; H.-K. Lee 2008; M. Kim 2013). Currently, about

³ Judges CHA Haengjeon, JO Hyuwook, and KIM Haeseung. Case No. 2014GUHAP14761. Date of Verdict: October 30, 2014.

⁴ Judges JO Ilyoung, MOON Seongho, and KIM Dongkwan. Case No. 2012GUHAP21741. Date of Verdict: November 1, 2012.

7 percent of all marriages in Korea are between Koreans and foreign-born spouses, of which about 85 percent are female (Korea Immigration Service 2017: 50). Chinese marriage migrants accounted for 37 percent of total marriage migrants, followed by Vietnamese (27 percent), Japanese (9 percent), and Filipino (8 percent) (Korea Immigration Service 2017: 51). With restrictive nationality laws in place (Lee 2003), marriage is one of the most common routes by which Korean citizenship is acquired.⁵ In 2016, 63 percent of all naturalization cases were marriage-based (around 6400 out of 10,100; Korea Immigration Service 2017: 61–62), but not all marriage migrants secure Korean citizenship. As shown in the cases of Mses. X and Y, only those who meet the moral standards set and interpreted by the Korean legal authorities are granted citizenship.

Based on an analysis of court cases filed by marriage migrants or their Korean spouses, between 2006 and 2014, we identify details of the moral jurisprudence applied to these applicants. Marriage migrant moral jurisprudence captures the distinctive features of marriage as an institution—the site of state-approved sexual activity and procreation—and reveals the convergent construction of chaste spouses and worthy citizens, as indicated by the cases of Mses. X and Y. Our analysis builds upon a body of literature that considers the gendered and sexualized nature of allegedly neutral naturalization requirements (see, e.g., Gedalof 2007; Narayan 1995; Salcido and Menjívar 2012); we contribute to this scholarship in two important ways. First, we demonstrate that controlling sexual morality is one of the key mechanisms gendering the path to legal citizenship. Second, our analysis shows that judges' rulings are inconsistent and represent cultural understandings of "normal" marriage and "good" wives rather than legal principles. Ultimately, our analysis raises concerns over how migrants are judged by a standard that is distinct from the emerging sexual moral jurisprudence in Korea which deregulates and decriminalizes sex and intimate choices.

⁵ After reviewing required length of residency, required length of marriage, and allowance of dual citizenship for thirty-three European countries, Lee concluded naturalization requirements for marriage migrants in Korea are relatively easier than in those European countries (Lee 2014). The residency requirement is either two years after the marriage certificate is issued or one year of residency in combination with three years of marriage. This is shorter than a five-year residency requirement for nonmarriage migrants in Korea or compared to the ranges of three to seven years in the European countries (Lee 2014: 447). In addition to the reduced residency requirement, spouses of Korean citizens are exempted from the written naturalization test (but still need to pass an oral interview conducted in Korean).

1. Marriage, Morality, and Citizenship

Morality has been a key factor in determining who could become a citizen through naturalization (Firstenberg 2011; Gordon 2007; Lapp 2012; Minter 1993; Plischke 1939). However, defining what constitutes good moral character has never been specified, leaving the interpretation of the good moral character requirement to the discretion of legal authorities (Lapp 2012; Plischke 1939; Rhode 2017; Strange 1975). The lack of clarity has not only resulted in confusing and contradictory administration of the requirement, but more importantly, often has been used to exclude sexual (and racial) others (Luibheid 1998; Minter 1993). Good morality requirements have recently drawn considerable scholarly attention, as the political climate around the world has become more unfavorable to immigrants and the interpretation of the good moral character requirement has become increasingly strict (see, e.g., Chin and Hassan 2015; Lapp 2012; Rhode 2017). This paper explores the nature of morality requirements applied to marriage migrants. This is important in the context of the increasing concerns over trans-border marriages around the world. Our analysis centers on three crucial aspects of marriage: marriage as a state-sanctioned site of sex and procreation, as a citizenship-delineating institution and as a sociologically constructed institution.

1.1 Marriage as a State-Sanctioned Site of Sex and Procreation

Modern states, no matter how liberal and *laissez-faire* they may be, demarcate certain sexual expressions as illegal, such as polygamy and incest. Historically, it was legal marriage that differentiated legitimate from illegitimate sex. As Murray (2008) aptly points out, the traditional legal framework relied on the marriage-criminality duality of sex. Marriage, in this sense, was an exclusive site for state-sanctioned sex and procreation. The past five decades, however, have witnessed increasing deregulation and decriminalization of sex and intimate choices (Frank et al. 2010; Murray 2008), indicated by the abolition of anti-miscegenation laws, legalization of same-sex marriage, and decriminalization of prostitution and adultery. This emerging legal trend reflects the changed cultural view of sex as a matter of individual choice and pleasure (Frank et al. 2010; Giddens 1992), and it signals that the previous marriage-criminality duality in the law is being blurred (Murray 2008).

In the last decade, the Korean courts have made several decisions that clearly signaled the emerging trend of decriminalizing intimate choices. The first of these decisions was the ruling of the Criminal Code 304 (Case No.: 2008HUNBA58, Date of Verdict:

2009.11.26), which used to allow (only) women to sue men for enticing them to engage in intercourse under the false pretense of a marriage proposal. Not all women were eligible for this provision; women who had had multiple sexual partners were not eligible. Judges of the Constitutional Court ruled against the Code, citing that it “restricts men’s sexual autonomy and rights to privacy and freedom” and “treats women as if they are minors and the state unduly denies women’s self-determination under the name of protecting women.” In 2005, the Civil Code 7427, that prevented divorced women from remarrying for six months, was eliminated; and in 2015, the Constitutional Court ruled article 2 of the Civil Code 844 partially unconstitutional (Case No. 2013HUNMA623, Date of Verdict: 04.30. 2015). This article stipulated that babies born within 300 days of a divorce are assumed to be children of the ex-husband. The ruling stated that the article “violates the mother’s human rights and basic liberty in regard to marriage and family life.” Finally, in 2015, after almost a decade of legal debate, the Constitutional Court ruled Criminal Code 241 (adultery) unconstitutional (Case No. 2009HUNBA17, Date of Verdict: 02.26.2015). In ruling against adultery being a criminal offense, the judges declared that it “was beyond the bound of the state’s purview to restrict the sexual freedom and self-determinacy of individuals.”

Even within the emerging new legal framework, legal marriage and sex within legal marriage still remain the most valorized forms of intimate relationships (Murray 2008). This is especially true with female marriage migrants. Migrants, mainly female migrants, stir sexualized anxieties (Yeoh and Huang 2010) and are viewed as a moral threat to household and home (Näre 2014: 371). To take the United States as an example, the perception of Asian women as prostitutes justified the exclusion of Asian women as “a corrupting force and threat to monogamous Christian marriage” (Firstenberg 2011: 85). The Immigration Act of 1907 included a provision to screen out “women [who migrate] for lewd and immoral purposes” (Lee 2010: 248). It is noteworthy that the statutory provisions “did not apply to all forms of immoral behavior, only to sexual immoralities, of which prostitution was understood to be the prototype” (Dubler 2006: 762). Even today, female migrants are suspected of sexual imprudence, and the notion that marriage migrants pose a threat to the “sanctity” of marriage persists (Näre 2014; Yeoh and Huang 2010). Our analysis of the application of Korea marriage migrant court cases will show that despite increasing liberalization of sexual jurisprudence, Korean judges view marriage migrants through the lens of marriage-criminality binary and impose stricter sexual moral rules on marriage migrants.

1.2 Marriage as a Citizenship-Delineating Institution

Marriage also serves as a crucial institution for delineating the boundaries between citizens and noncitizens. Parents can confer citizenship onto their biological or adopted children, and one may acquire citizenship derivatively through marriage to a citizen. Concerns about “fraudulent marriages” are based on the role of marriage as a citizenship-delineating institution. For the state, marriage fraud may entail “an unwanted inclusion of new members whom the state would not have chosen if it had known the truth about them” (Abrams 2012: 53). But family laws in many liberal democratic states have become liberalized, and marriage has become an insufficient mechanism to regulate membership (Abrams 2012). As such, the state came to rely more heavily on immigration and criminal laws (Minter 1993); family reunification and fiancé visa policies have become increasingly restrictive in the past few decades (Bonjour and de Hart 2013; Eggebø 2013; Foblets and Vanheule 2006; Jones 1997; Lan 2008; Ruffer 2011; Schmidt 2011; Wray 2006). Compared to other laws, such as tax and pension, immigration law requires the most demanding and expansive proof of marriage (Abrams 2007, 2012; Jones 1997), and those migrants who are suspected of entering a fraudulent marriage are criminally charged.

Marriage, as a citizen-delineating institution, genders citizenship in two important ways. First, women’s citizenship has depended upon their marital status for a long time (Bredbenner 1998; Gardner 2005, Munday 2009; Nicolosi 2001). Second, descent-based citizenship is another mechanism of marriage gendering citizenship. While most modern states acknowledge both men’s and women’s rights to confer citizenship upon their children, for a child born out-of-wedlock, acquiring citizenship from their father often depends on the father’s willingness to acknowledge the child as their own (Augustine-Adams 2000). On the contrary, a child born to a married woman is assumed to be the offspring of the husband, who may or may not be the child’s biological father. By making the legal status of *husband* trump the biological status of *father*, marriage empowers the husband to determine “the terms of legitimacy that render some children citizens and others aliens” (Stevens 1997: 66; see also Abrams and Brooks 2009). As such, marriage- and descent-based citizenship reinforce the idea of “women as sexually responsible mothers” (Augustine-Adams 2000: 112) and justify harsher policing of women’s sexual transgressions than men’s (Abrams and Brooks 2009).

The changes in Korean nationality laws reveal how they gender citizenship and how migrant spouses’ access to Korean citizenship has become more restricted, while the family laws have

become more liberalized. Until 1998, women's citizenship in Korea was mainly derivative; a woman's Korean citizenship was rescinded when she married a foreign man. Further, one had to be fathered by a Korean man to be eligible for Korean citizenship—having a Korean mother was not enough. The discourse around marriage migrants started to change in 1997 with a set of amendments proposed to increase gender equality in the Korean nationality law. With the “gender-neutral” nationality law, migrant wives lost their automatic access to Korean citizenship. The then Minister of Justice explained that the rationale for revoking automatic citizenship for migrant women was “to prevent foreign women from using marriage to Korean men as an easy way to gain Korean citizenship.”⁶ Concerns over fraudulent marriages entered legal discussion again with the nationality law amendment of 2010, which allowed dual citizenship for the first time in Korean history. The 2010 law states that continued marriage to a Korean husband is one of the preconditions for dual citizenship. The fear of “fraudulent marriage” is used to justify exclusion of marriage migrants from full eligibility for dual citizenship. As an expert review committee member stated while the amendment was being drafted, “given the high divorce rates among international marriage couples, there have been some serious concerns that allowing dual nationality for all foreign brides will actually exacerbate the dissolution of those families.”⁷

Even after a marriage migrant finally acquires Korean citizenship, the 2008 Nationality Law Amendment made it possible for her citizenship to be revoked if it is proved that she acquired it illegally (e.g., a fraudulent marriage).⁸ In 2009, proposals to exempt marriage migrants who had given birth to a child from the citizenship repeal clause and to place a five-year limit on Korean citizenship annulment were up for consideration in the National Assembly. The proposals were rejected on the grounds that they would “legalize the status of those who have acquired Korean citizenship via illegal or criminal means and may increase the number of illegal immigrants.”⁹ Our empirical analysis will demonstrate that Korean judges share the same concerns

⁶ Cited in the 7th Legislation and Judiciary Committee of the 185th National Assembly Meeting, 1997, p.15.

⁷ The 2nd Legislation and Judiciary Committee of the 287th National Assembly Meeting, 2010, p. 3.

⁸ The case of Ms. N (case no 2013GUHAP11420), we mention later in this article demonstrates the devastating effect of this provision.

⁹ Assemblyman Hong Junpyo; The 3rd Legislation and Judiciary Committee of the 281st National Assembly Meeting, 2009, p. 60.

expressed by the members of the legislative branch introduced above and assume the role of gatekeepers of Korean citizenship.

1.3 Sociolegal Construction of Marriage

Marriage in a modern state is a legal phenomenon, where the sovereign state has the ultimate authority to classify a union as “marriage.”¹⁰ While marriage is a legal contract that is legitimated only by the state, for a judge to say what marriage “is” is complicated (Abrams and Brooks 2009: 6). The legal ambiguities stem from marriage being as much a cultural as a legal concept (Hull 2006). The burgeoning literature on family migration has shown us how specific understandings of love and marriage inform legal authorities’ decisions of which marriages are real and which are fraudulent. In Europe and North America, for example, marriage is considered authentic if two individuals enter freely and the union is based on “true love.” The indicators of fake marriage used by Belgian civil registrars include: parties have never met before the marriage, the intervention of an intermediary and a large age difference (Foblets and Vanheule 2006: 267–8). A similar list is found in Norwegian family reunification and immigration laws (Myrdahl 2010). These laws stigmatize arranged marriage, a practice that does not fit into the Western concept of romantic love and marriage based on individual autonomy and choice (Giddens 1992). This view also problematizes trans-border marriages, because they inevitably involve a pragmatic concern of migration, which is considered antithetical to “true love” (Constable 2003). In Japan, on the other hand, judicial visions of love, sex and marriage take a quite different form. Based on 2700 court opinions, West (2011) demonstrates that Japanese judges hold the position that love is a desirable but not an indispensable component of a marriage; to Japanese judges, “love ... is so unachievable in real-life marriages that its absence is expected” (West 2011: 217). Japanese judges instead pay more attention to whether each partner in a marriage is performing the duties and responsibilities of a married couple. In a similar vein, Friedman’s analysis of Taiwanese marriage migration policies also shows that duties and responsibilities are prioritized over emotions (Friedman 2015). The differing views indicate that marriage is a cultural artifact as well as a legal concept (Abrams and Brooks 2009; Hull 2006); and in deciding who gets to be a

¹⁰ Indeed, as Cott (1998) points out, a crucial part of modern nation-state building was “the state’s wresting of authority to regulate marriage from the church and vesting it in secular authorities.” (Cott 1998: 108).

citizen via marriage, judges not only rely on legal principles but also on their own preconceptions of love, sex and marriage.

Marriage is a culturally, as well as legally, significant institution in Korea. Traditionally, marriage was considered a gateway to adulthood (Kendall 1996) and was something one would need to do in order to live a “normal” life in Korea (Song 2010). Even today, Korea is a “marrying country” (Kendall 1996: 4). The pressure to marry is so great that some gay men and lesbians enter “contract marriages” to resolve the social pressure to get married (Cho 2009: 405). The marriage migration phenomenon reflects the cultural significance of marriage in Korea. The increasing number of unmarried men is viewed as a social, not just individual, problem, to which the state should attend; and the Korean state and local governments have actively supported marriage migration (Freeman 2011; Kendall 1996).

As much as the Korean state needs migrants to honor its male citizens’ right to have a wife and family, the state is also concerned about “undeserving” wives becoming Korean citizens and has intensified its intervention in the regulation of trans-border marriages. For example, the MOJ recently imposed a minimum income requirement for Korean male citizens to be eligible to apply for a marriage visa. MOJ also introduced new Korean language competency requirements. A Korean consulate may refuse to issue a visa to marriage migrants unless they pass a certain level of Korean language competency. It is important to note that these measures are at odds with the emerging cultural and legal view of marriage. As mentioned earlier, there is a developing jurisprudence that views marriage as a matter of individual choice and the state’s intervention and regulation is increasingly viewed as illegitimate.¹¹ On the contrary, MOJ has increasingly assumed the role of marriage police for trans-border marriages at all stages of their

¹¹ Here we introduce two additional legal decisions that signal this developing view. The first is the abolition of the Civil Code 809 Article 1 that banned marrying of two people with the same family name and the same family origin (*Dongseong Donghon*). In ruling the code unconstitutional, the all seven judges of the constitutional court stated that the ban was useful “in an agricultural caste society, but is not appropriate in an economically developed industrial, liberal democratic society.” (95HUNGA6, Date of Verdict: July 16, 1997) The second trend is the increasing acceptance of no-fault divorces by judges. The Korean family law does not allow no-fault divorce and the Civil Code 840 stipulates six conditions under which one is eligible for divorcing their spouse (often despite the spouse’s objection). Those six conditions are: (1) adultery, (2) abandonment, (3) extreme cruelty by the in-laws, (4) extreme cruelty by the spouse, (5) missing for more than three years, and (6) other reasons that a marriage can no longer be saved. In the last few decades, the family courts have interpreted the 6th clause in a liberal way, allowing de facto no-fault divorces. In addition, the Supreme Court ruled that the at-fault spouse may file for a divorce, which was prohibited previously and stated that “prohibiting the at-fault spouse from filing for a divorce cannot be defended as a reasonable measure when it has become clear that the marriage cannot be saved anymore” (Case No.: 2013MUI568, Date of Verdict: 9.15.2015).

existences: entry to marriage is scrutinized through financial solvency and language requirements; existing marriages are constantly monitored by the Bureau of Immigration officials, and termination of a marriage requires going through the court system, unless the migrant wife is uninterested in staying in Korea after the divorce. If a marriage migrant does not pass MOJ's scrutiny, their spouse visa may be revoked or their naturalization application may be denied or even revoked. Once that happens, their only hope is to appeal the decision to the court.

1.4 Bringing the Court Back In

Historically, the issues of immigration and citizenship have been mainly under the purview of the administrative branch, and the judicial branch has shown deference to the executive bodies of the government (see, e.g., Aleinikoff 2002; Charles 2010; Johnson 1993; Moyce 1986). Judicial deference is based on the idea that deciding national membership is a matter of state sovereignty, therefore legislative and administrative bodies of the government may exercise significant discretion. Korea is not an exception. The Constitutional Court (Case No. 2003HUNMA87) declared the issue of immigration to be a matter of state sovereignty and stated, "less strict standards [of checks and balances] shall be applied in judging whether an exercise of the government authority violated the Constitution" (cited in J.Y. Kim 2015: 76). This is one of the reasons why immigration scholars have focused mainly on the executive branch (see, e.g., Friedman 2010, 2015; Gilboy 1991; Heyman 1995; J. Kim 2011; Satzewich 2014).

In the past few decades, however, scholars have noted the growing role of the courts in protecting the rights of migrants (see, e.g., Joppke 1998, 2010; Kwar 2011; Martin 1983; Soennecken 2013; Schuck 1984; Schuck and Wang 1992). According to this view, courts and nonelected judges are insulated from the public pressures of anti-immigrant sentiment and have increasingly overruled decisions made by re-election-seeking legislators and restriction-minded state executives. More and more immigrants challenge the administrative branch's decision by suing the government (Palmer et al. 2005; Schuck 1984). The role of the courts is particularly significant in interpreting the good morality requirement. The ambiguity of the requirement not only leaves room for migrants to challenge executive decisions, but also for judges to intervene with their own interpretation of the legal meaning of moral character. The discretionary power given to bureaucrats or judges can be a double-edged sword for migrant applicants and

petitioners, as it can lead to unpredictable and seemingly arbitrary decisions. Indeed, observing remarkable disparities in decisionmaking from one asylum office to another and from one immigration judge to another, Schoenholtz et al. (2007) characterize the US asylum adjudication system to be one of “refugee roulette,” rather than “equal justice under the law.” In the case of Korea, the majority of the court statements we reviewed had a common phrase, stating “bad moral character does not necessarily mean having a criminal record. It is an overall assessment of a person’s quality as a future member of [Korean] society, and it has to consider a broad range of factors such as gender, age, occupation, family relationship, criminal records, etc.” With this definition, Korean judges hold significant discretionary power in interpreting what constitutes moral character.

Despite its increasing significance, systematic empirical analysis using court cases is still largely lacking. A few existing studies focus mainly on whether and how frequently courts make decisions favorable for the immigrant petitioners (see, e.g., Schuck 1984; Schuck and Wang 1992; Schoenholtz et al. 2007), leaving the rich data found in court statements underutilized. Judicial opinions are socially embedded and the language and rationale the judges provide in the court statements are sociologically important data, as a reflection of the discursive and symbolic power of law (He and Ng 2013: 282). With an in-depth analysis of these data, this article sheds new light on how the judiciary uses marriage to construct citizenship in a gendered and sexualized manner.

2. Marriage Migrant Moral Jurisprudence in South Korea

2.1 Data and Case Selection

Court decisions were collected through three different sources: (1) naturalization litigation filed against the MOJ, (2) visa litigation filed against the Bureau of Immigration and (3) cases posted on the Supreme Court Web site. For the first two sources, the first author used the “case search service” at the Supreme Court Library (library.scourt.go.kr), in May 2015. The combined search terms of “naturalization” (*gwihwa*) and “visa” returned 582 cases. To keep the number of cases manageable, we limited case inclusion to those filed at the Seoul Administrative Court, where the plurality of appeals are filed. The Seoul Administrative Court processed 104 naturalization and 84 visa litigations filed by marriage migrants. Among these 188 Seoul Administrative Court

appeals cases, about 55 percent were initially rejected by MOJ for suspicion of fraudulent marriage, followed by 15 percent for having criminal records, 14 percent for violating immigration regulations and 15 percent for other reasons. Most of the plaintiffs (57 percent) were female and 19 percent male. About 23 percent of the cases the court documents did not contain sufficient information to determine the sex of the plaintiff. Judges ruled in favor of migrant spouses in 19 out of these 188 cases, about 10 percent.

The authors read the 188 cases and jointly chose thirty-four cases that contained themes of sexual morality; of these, fourteen cases involved sexualized labor and twenty cases involving fraudulent marriage charges due to perceived sexual imprudence on the part of marriage migrants. These thirty-four cases are used for the first and the third empirical analysis sections. Out of thirty-four cases, all but eight involved migrant wives and Korean husbands; five cases involved male migrants and wives with Korean citizenship and it was impossible to match the gender and nationality in the remaining three cases. The rate of favorable ruling is among those thirty-four selected cases was 11 percent (4 out of 34 cases). We provide a detailed analysis of the four favorable ruling cases in the third empirical section. But it is important to note that this percentage is much lower compared to the overall rates of favorable decisions of administrative litigation cases in Korea, which hovers around 50 percent.¹²

The Supreme Court posts a few selected decisions that they consider to be important to their Web site. The authors reviewed and analyzed an additional seven of these posts that involved marriage migrants. These cases were decided at various courts such as Family Courts ($n = 3$), District Courts ($n = 3$) and the Supreme Court ($n = 1$). Out of the seven cases, four cases were filed by Korean husbands who were seeking annulment of a marriage and the last three cases were filed by marriage migrants, challenging the fraudulent marriage charges by the Prosecutors' Office. These seven cases are used for the second empirical analysis section. The list of all the cases and basic information can be found in Appendix A.

Our analysis is limited in two ways. First, we do not claim that our sample is representative or systematic. Using different search terms might have returned different cases. Second, the scope of our analysis is limited to the information available in the court statements. For example, there is no way for us to know whether Ms. X indeed engaged in sexual massage while Ms. Y did not. In addition, we do not know whether a particular plaintiff had good

¹² Korean National Index, retrieved from http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1724

legal representation. However, finding the truth of each case or examining the effectiveness of legal representation is not the goal of our analysis. Instead, we use the information included by *judges* (not the lawyers representing marriage migrants) in their rulings to understand how they arrived at their judgments (West 2011), and how those statements reflect the gender and sexual norms that define “good” spouse and “real” marriage.

The format of each court statement is similar. Each statement, which is between three and seven pages long, starts with a brief account of the facts (the migrant’s background information and immigration history), when they applied for visa extension or naturalization, why the MOJ decided to reject the application and a summary rebuttal statement by the marriage migrant (plaintiff). After that comes the main focus of our analysis—judges’ ruling and the rationale behind their decision. The length of the judges’ ruling is about one paragraph when the ruling rejects the plaintiff’s appeal, but it is about two or three paragraphs when the ruling overturns MOJ’s initial decision. Our empirical analysis consists of three parts. The first section analyses the cases where the judges have found marriage migrants not chaste enough. On the other hand, being too reserved sexually is also seen as a sign of fraudulent marriage, which is the focus of the second section. The third and final section reviews the four cases where judges overlooked alleged or confirmed sexual misconduct and sided with migrant spouses.

2.2 When Marriage Migrants Are Not Chaste Enough

Signaling that the marriage-criminality binary (Murray 2008) is the prevalent view in the marriage migrant moral jurisprudence, Korean legal authorities regard any sexual or intimate relationship outside of a marriage as a sign of fraudulent marriage. First, any extramarital relationship or hint of infidelity raises suspicion of fraudulent marriage and may disqualify migrants from Korean citizenship. The cases of Ms. N and G exemplify the degree of scrutiny placed on the sexual behavior of marriage migrants.

Ms. N came to Korea in June 2003 as a marriage migrant from Vietnam, but her Korean husband left for Canada in December 2005 and never contacted Ms. N again.¹³ Since Ms. N maintained her marriage with her now-absent husband for two years (from June 2003 to December 2005), per Korean Nationality Law, Article 6, clause 2.3, she was eligible for naturalization. She applied for and gained permanent residency in December

¹³ 2013GUHAP11420.

2010. She filed for divorce from her missing husband in July 2011. Sometime after her husband's disappearance and before the divorce was finalized (the court document does not provide specific timing), Ms. N started to date a Vietnamese man. The couple had a baby together in April 2011. The MOJ notified Ms. N of the revocation of her permanent residency in February 2013. The judges in the case ruled that the revocation met the conditions of "special circumstances" stated in Article 89, Section 1 of the Immigration Control Act, under which immigration decisions can be rescinded. The judges stated that "MOJ's decision was made without knowing that she had been dating another man and had given a birth to an *illegitimate*¹⁴ child, and it was highly unlikely that MOJ would have approved the application, had MOJ been informed about the fact."

Similar to Ms. N, Ms. G had her permanent residency status revoked when she remarried to a Chinese man less than two months after her divorce from her Korean husband. Based on how soon she remarried, MOJ concluded that her marriage to the Korean ex-husband must have been fraudulent.¹⁵ Ms. G appealed the decision, arguing that she and the Chinese man (now her husband) were just friends while she was married to her Korean ex-husband, and MOJ violated her privacy by checking her text messages without her consent. The judges found that the evidence submitted by MOJ (pictures of Ms. G and her new husband together saved in her cellphone) was convincing enough to prove Ms. G's infidelity, making her first marriage fraudulent (rather than an open relationship, or a failed marriage). It is worth noting that Civil Code 7427, which prohibited women from remarrying for six months after a divorce, was abolished in 2005. While their decision to remarry was legal, in both cases the act was used to deny them Korean citizenship. It is also noteworthy that both Ms. N and G had their permanent residency status *revoked*. These two cases underscore the undue burden imposed upon marriage migrants in Korea; their actions may be scrutinized even after they have acquired what they believe to be secure legal status. Marriage migrants can have their legal status revoked based on how inferred sexual misconduct affects the perception of their moral character.

Further, any display of emotion toward a former (non-Korean) spouse is heavily policed and any sustained contact with a former spouse is presumed to be a marker of fraudulent marriage and of emotional (and physical) infidelity to current

¹⁴ *Emphasis added.*

¹⁵ 2013GUHAPI7770.

spouses. A Joseonjok man divorced his wife in May 2003 and married a Korean woman that December. When he applied for a visa extension as the spouse of a Korean citizen, the Bureau of Immigration rejected his request on the grounds that “he and his ex-wife were on the same flight to China, while he and his current wife have never traveled abroad together.” But the Bureau did not find enough evidence to criminally charge the Joseonjok man for fraudulent marriage. The judges sided with the Bureau of Immigration nonetheless, in part based on the fact that he “had been paying for his ex-wife’s cellular phone bills and supporting his son (with his ex-wife) back in China,”¹⁶ duties and responsibilities that Korean judges found a *husband* would do.

A Joseonjok woman’s visa extension was also rejected on similar grounds—that she “made on average only about two phone calls to her husband,” while she “talked more frequently with her ex-husband on the phone.”¹⁷ Another Joseonjok woman asked for her Korean husband’s cooperation during an immigration officials’ home visit and said “I may have to go back to my husband in China if I don’t get citizenship here.” The statement was later used against her in court, because it made the judges suspect that “she may have been maintaining a *de facto* marriage with her ex-husband in China.”¹⁸ Another female migrant was denied a visa extension because she “sent money to Mr. A’s and Mr. B (her current boyfriend)’s bank accounts while she was married to her husband.”¹⁹ That she was in a relationship with Mr. B at the time of the ruling was used to retroactively prove her infidelity during her marriage, thus making her morally unqualified for Korean citizenship. These decisions point to the aspect of marriage as an exclusive site of sex and procreation, showing how Korean judge use the marriage-criminality binary and consider transnational family ties as evidence of emotional (and physical) infidelity.²⁰

Korean judges’ view is also informed by *gendered* sexual norms. While migrant wives’ alleged infidelity disqualifies them

¹⁶ 2014GUHAP58020.

¹⁷ 2014GUHAP11878. Similar cases include: 2011GUHAP24491, 2014GUDAN57891, 2010GUHAP32082, 2014GUHAP14945, and 2014GUDAN57891.

¹⁸ 2009GUHAP57252.

¹⁹ 2014GUDAN15088.

²⁰ Leinonen and Pellander (2014) report a similar finding from immigration court cases in Finland but interpret the finding as an issue of loyalty to the country. The authors argue that immigration judges are more likely to reject immigrants with transnational family ties not only for fear of chain migration but for lack of loyalty to Finland and less urgency to come to Finland.

from staying in Korea, Korean husbands' infidelity does not carry much weight in judges' decisionmaking, confirming that a wife's sexuality is more heavily policed than a husband's. For example, Ms. Q appealed the MOJ's decision, arguing that she divorced because "her ex-husband continued to meet with his ex-wife, and he even had her live in the same house and maintained two households under the same roof." Nonetheless, the judges ruled in favor of MOJ.²¹ Indeed, we found only one case (out of 105 naturalizations based on marriage) where the migrant's appeal was upheld because the migrant spouse was not deemed responsible for the failure of the marriage. That case was a Joseonjok female migrant whose husband "became physically and emotionally abusive and started to *demand that she earn money* when his business started to struggle."²² While the judges apply a strict sexual moral standard to migrant wives, the judges find a husband's inability to support his family more morally appalling than his infidelity. These decisions indicate that judges' decisions are as influenced by their gendered understanding of the duties of husbands and wives as by legal principles.

In addition to infidelity, intolerance of female migrants' sexualized labor is one of the main features that characterize marriage migrant moral jurisprudence in Korea.²³ As the cases of Ms. X and Ms. Y introduced at the beginning of the article suggest, sexualized illegality is more harshly judged than nonsexualized illegality. Further, penalties for engaging in sexualized labor may go beyond the female migrant who engaged in the activity. Two Chinese migrants, for example, applied for citizenship on the grounds that their adopted father was a Korean citizen, Mr. C (their mother, Ms. C, married Mr. C). But Ms. C was convicted of solicitation four times between 2010 and 2014. Ms. C was also suspected of infidelity, as she was found to have "exchanged frequent text messages and gifts with another man." The MOJ found Ms. C's immorality particularly unacceptable, given that she "had cohabited with another *man while she was married* to Mr. C, and engaged in prostitution *while she was married* to Mr. C,"²⁴ and the MOJ ordered Ms. C to leave Korea

²¹ Judges LEE Gwangbyeom, KIM Woohyun and LEE Dongwook. Case No. 2010GUHAP5776.

²² 2010GUHAP6441. *Italics added*. We did not include this case to our 34 Seoul Administrative Court cases because this case deals with gender norms rather than sexual norms.

²³ The paucity of migrant husband cases makes it challenging to make any generalizable observations on male migrant moral jurisprudence. Out of the thirty-four cases, we chose for in-depth analysis, only five cases are those of migrant husbands and Korean wives but none of the five cases involves charges regarding sexualized labor.

²⁴ 2014GUHAP15665. *Italics added*.

immediately. The judges seemed to find the fact that Ms. C had had an affair and was convicted of solicitation *while she was married* appalling, rendering Mr. C and his marriage victims of an immoral female migrant. While the plaintiffs' naturalization applications were based on their relationship with Mr. C, their adopted father, not Ms. C, their biological mother, judges ruled that the sexual immorality of Ms. C (infidelity and prostitution charges) was proof of a fraudulent marriage between Mr. and Ms. C, and there was a good enough reason to doubt whether the adoption itself was genuine. The sexual moral jurisprudence of Korea found that not only Ms. C, but also her offspring, were unworthy of Korean citizenship.

Sexualized labor is not only seen as a threat to the sanctity of marriage, but also to social morality in general, as indicated by the judges' statement in the case of Ms. X (introduced at the beginning) that "prostitution is a serious social ill that hurts healthy social culture and needs to be eradicated."²⁵ However, it is misleading to assume that judges apply sexual moral standards in the same way to Korean nationals and migrant women, as illustrated by the case of Ms. M, whose application for naturalization was denied because of her conviction for solicitation. She appealed her naturalization denial, arguing that "other than being convicted of solicitation,"²⁶ she "does not have any other criminal record, has worked hard and saved up a considerable amount of money, has donated money for good causes and volunteered." But the judges did not find her good deeds (being industrious and generous) enough to grant her citizenship "because it is prudent to restrict *foreigners who engaged in prostitution* from naturalizing in the context of increasing social concerns regarding female migrants engaging in prostitution."²⁷ The judges of this case did not try to hide that their decision was based more on her being a migrant than on her own morality. In some sense, what is sexualized is not the nature of the work per se but the migrant bodies (Näre 2014; Yeoh and Huang 2010). What matters more is *who* is doing a particular work, not *what* the work itself is. Female migrants who have worked at massage parlors or karaoke bars are often assumed to have engaged in sexualized labor (unless proven otherwise) and to be unworthy of

²⁵ Judges JO Ilyoung, MOON Seongho and KIM Dongkwan. Case No. 2012GUHAP21741. Date of Verdict: November 1, 2012.

²⁶ In Korea, prostitution is limited to the case that involves penile-vaginal intercourse, other sexual activities, which we use the term "solicitation" for, are considered as lesser of a crime.

²⁷ 2013GUHAP25641. *Italics added.*

²⁸ Eight cases involved working at massage parlors and six cases that involved working at karaoke bars. See Appendix A.

citizenship,²⁸ even if the actual labor may not have entailed any sexual activities.

2.3 When Marriage Migrants Are Too Sexually Reserved

As demonstrated in the previous section, suspected sexual imprudence often disqualifies marriage migrants from citizenship. But inability or unwillingness to have a sexual relationship raises suspicion of marriage fraud and also may block a marriage migrant's path to Korean citizenship, solidifying the notion that marriage is a state-sanctioned vehicle for sex and procreation. There were a few cases where Korean judges annulled the marriage itself, depriving the migrant spouses of any chance to stay in Korea. The case of Ms. D, a Vietnamese migrant, is one example.²⁹ The judges of the case ruled in favor of her Korean husband, stating that Ms. D "had a boyfriend back in Vietnam who is now working in Korea and continued to see him when she came to Korea" and "there was a *no sexual relationship between Ms. D and her Korean husband.*"³⁰ However, the opposite can be true as well; as long as migrant spouses are willing to consummate the marriage (regardless of whether the migrant spouse truly intended to marry and stay married to the citizen spouse), the marriage is real from a legal perspective. For example, judges sided with a Chinese woman, Ms. Z, when she appealed the fraudulent marriage charge. The court's decision was based on Ms. Z's performance as a wife; she "lived in the same house and *had a sexual relationship* with Mr. K (her husband) several times, visited a relative of Mr. K, twice on holidays."³¹ In August 2009, the Suwon District Court made a similar decision in another case. The court ruled that the marriage was valid because the migrant wife "has lived and had a *sexual relationship* with the husband for a year after she came to Korea."³²

These cases demonstrate that having sex constitutes an essential feature of the marriage relationship in Korean judges' decisionmaking. From a legal perspective, a marriage cannot be annulled when there is a sexual relationship. Divorce is still a possibility, but the marriage is *legally* real. Even this seemingly simple fact is complicated by judges arbitrarily drawing lines regarding what constitutes a significant enough sexual relationship between a married couple. A Korean husband filed for an annulment of

²⁹ Other cases include: 2013DUDAN6915 and 2013RU632.

³⁰ Busan District Family Court, Case No. 2011RU00. *Italics added.*

³¹ Seoul North District Court. Judges Han Chang Ho, Lee Dong Jin, and Yoo Dongkyoon. Case No. 2008NO1702. *Italics added.*

³² Suwon District Court, Case No. 2009NO1987. Date of Verdict: August 11, 2009. *Italics added.*

his marriage to a Filipina migrant when she left him after a month of marriage. The Seoul Family Court rejected the Korean husband's request on the grounds that "[the migrant] had lived a conventional married life for a month, such as traveling together to Jeju Island."³³ The Korean husband appealed the Family Court decision to the Supreme Court. The Supreme Court had a different view. Noting that "given there were only a few sexual intercourses for that one month because the accused [migrant wife] has refused to do so,"³⁴ the Supreme Court ruled that the marriage should be annulled; marriage is legally real when there is a "significant" sexual relationship.

2.4 When Judges Overlook Alleged Sexual Imprudence

Our analysis has shown the high sexual moral standards applied to marriage migrants in Korea, sometimes even after those migrants thought they had secured legal status. Further, similar to other migrant-receiving countries, the Korean courts tend to show a great degree of deference to the administrative branch when it comes to immigration and citizenship decisions and rarely overrule the MOJ's decisions.³⁵ Indeed, among our sample of thirty-four Seoul Administrative Court cases, only three other marriage migrants (one male and two female), in addition to the case of Ms. Y mentioned at the beginning of this article, had MOJ's rejection overturned in court, and each case is worth reviewing in detail. The analysis of these court cases suggests that justification for deeming marriage migrants "moral" was whimsical and inconsistent. But these three cases did have one factor in common—all three "pardoned" marriage migrants were, at the time of the ruling, in a legal marriage. These cases imply what Dubler (2006) calls the "marriage cure"—legal marriage can turn an illicit relationship into a licit one.

The first case is Mr. W, a Joseonjok man whose visa extension request was denied because he was found guilty of fraudulent marriage. But when Mr. W appealed the decision, the judges ruled in favor of Mr. W on three grounds.³⁶ First, the judges suspected the validity of the fraudulent marriage charge, given that the fraudulent marriage charge was based only on the confession of Mr. W's (now

³³ 2009RU2577 (Date of Verdict, 2009.12.18), Cited in 2010MU574 (Date of Verdict: 2010.06.10).

³⁴ Supreme Court. Justices KIM Nunghwan, KIM Youngran, LEE Honghooon, and MIN Ilyoung. Case No. 2020MU574.

³⁵ For more detailed discussion on the judicial deference on the issue of immigration in Korea, see N. Kim (2016).

³⁶ Case No. 2011GUHAP39158.

³⁷ She confessed that she agreed to marry Mr. W in exchange for about \$700 per month from him.

ex-) wife (a Korean citizen), without cross-checking her statement against that of Mr. W.³⁷ Second, the judges found that the marriage had features of a bona fide marriage based on text and phone call records; the judges noted that Mr. W and his ex-wife called and texted each other frequently. The judges also noted that Mr. W paid for his ex-wife's medical bills, a responsibility of a husband. Finally, the judges found Mr. W deserved to stay in Korea because, after he divorced his Korean wife, he re-married a permanent resident (Korean-Chinese) and they had a daughter together. The judges ruled that "raising a child in Korea is a good enough reason to grant a visa extension" (to Mr. W, his current wife and their children). Note that this decision is based on the cultural understanding of the duties of a husband, and as long as a migrant husband performed his duties, his marriage from the Korean judges' perspective, was real. Also note that the decision contradicts the case of Ms. N, where judges did not find a Vietnamese couple raising an ethnically Vietnamese child was a strong enough reason to not rescinding the mother's permanent residency. Given the role of marriage as a citizenship-delineating institution, judges seem to find marriages/families that involve ethnic Koreans worthier of keeping intact than marriages/families consisting solely of nonethnic Koreans. As such, the idioms of nationhood and ethnicity, in conjunction with gendered sexual norms, inform judges' decisions of drawing national boundaries.

Second is the case of Ms. L.³⁸ She was found guilty of fraudulent marriage in May 2008 by Busan District Court and she pleaded guilty to the charge. Despite the ruling, Ms. L remained in the same relationship throughout the period and applied for naturalization in July 2009, but the Ministry again rejected her application in March 2012 on the grounds of fraudulent marriage. However, in the following year, 2013, judges ruled in favor of Ms. L, arguing that the marriage was real *now*, even if they started without a true intention to marry, because "she has lived and maintained a normal marital life with her husband for years." The judges pardoned her "impure" intention because she was acting like she was married. Similar to Mr. W's case, the case of Ms. L indicates that Korean

³⁸ Case No. 2012GUHAP16237.

³⁹ Scholars refer to this rule as the "establish-a-life" principle (Abrams 2012; Foblets and Vanheule 2006). From the "establish a life together" perspective, marriage is real as long as the participants are willing to follow through and behave as a married couple. This principle is often contrasted with the "primary purpose principle" where marriage is considered fraudulent if the primary purpose of entering a marriage is to circumvent immigration law. From the latter perspective, transnational marriages, which inevitably involve a pragmatic consideration of crossing borders, are easily deemed to be fraudulent (Wray 2006).

judges consider a marriage to be real as long as one is willing to perform like a married couple, regardless of the intention at its inception.³⁹ Indeed, Korean judges express a rather broad and liberal interpretation of “intention to marry.” As a judge at the Daejeon District Court states, “as long as [they] have the intention to maintain what our society would consider married life, a desire to pursue social and economic upward mobility cannot make the marriage a fraudulent one.”⁴⁰ Notice how this view does not assume “love” as a prerequisite and sole reason for marriage. Love has little to do with making a marriage legal or fraudulent in the Korean cultural and legal contexts. Nor does this view treat pragmatic considerations and true love as antithetical to each other. This broader interpretation of intention to marry points to the aspect of marriage as a culturally and legally constructed institution and reflects the cultural understanding of love and marriage in Korea, where arranged marriages and marriages by introduction are not an uncommon practice.⁴¹ This interpretation also arises in part because it is ethnic Korean men who are bringing in migrant wives (unlike Western European countries, where citizens from immigrant backgrounds bring in spouses from their home countries) and judges honor men’s rights to have a wife and a family.⁴² As shown in the case of Ms. L, even if the intention to marry had nothing to do with love and everything to do with gaining Korean citizenship, the judges were willing to forgive her because of her continued performance as a wife.

Even if Korean judges share a similar liberal interpretation of “intention to marry” and value duties and responsibilities over the initial intention of marriage, judges arbitrarily evaluate what constitutes good enough performance. Ms. C, who was charged with fraudulent marriage, like Ms. L, was not as lucky as Ms. L. Ms. C appealed the decision to deny her naturalization

⁴⁰ Case No. 2010GOJUNG936, Date of Verdict: 2011, 08. 26, Judge JANG Jiyong.

⁴¹ Ethnographic studies show that pure love and pragmatic considerations and free choice and arrangement are not mutually exclusive binaries in Asia. For example, in her ethnographic study of correspondence marriages, Constable notices how pragmatic considerations such as foreign men’s wealth, light skin, and personal freedom, does not rule out but “indeed may provide the basis for, real or imagined feelings of love, affection, and devotion” for Chinese women (Constable 2003: 135). Yan (2003) documents that while individual choice has become a common practice of spouse selection, individuals rarely marry against their parents’ objections in China.

⁴² For example, in the Netherlands, Dutch native men were explicitly excluded from the image of fraudulent marriages because it was not unusual for Dutchmen to fall in love while abroad and it was “natural” for a woman to follow her husband. On the other hand, Dutch native women bringing in foreign spouses were heavily scrutinized (Bonjour and de Hart 2013). Gedalof (2007) reports a similar gendered pattern in the UK immigration policies.

to the Seoul Administrative Court, arguing that “[she] has maintained a normal married relationship since 2005 when she married Mr. C., has helped Mr. C with his farming, and has completed the Korean language and cultural understanding programs for marriage migrants.” But the judges of Ms. C case rejected her appeal, citing “Nowhere in the Korean Nationality Law guarantees foreigners the right to acquire Korean citizenship.”⁴³

The third and the last is the case of Ms. P, who married a Korean citizen in 1999 and came to Korea in 2000. She applied for naturalization in 2006, but MOJ rejected her application on the grounds of lack of good moral character. Ms. P did not learn of the decision until 2008 and, when she found out, she filed a lawsuit at the Seoul Administrative Court. By the time of the lawsuit, Ms. P was divorced from her first Korean husband and was remarried to another Korean man. MOJ’s decision to reject her application cited Ms. P’s visa overstay (immigration violation), working at a hostess bar and cohabiting with a married man (adultery). Many plaintiffs’ appeals are rejected on the grounds of overstay alone, never mind working at a hostess bar and cohabiting with a married man. But in the case of Ms. P, the judges ruled that the listed factors “do not prove that she has characteristics that are unsuitable to be a future member of our society.” The judges took the view that Ms. P worked at a hostess bar “only for a short period of time to make ends meet” and that she “stayed at home and did not have a job after she entered a common-law marriage [with the married man].”⁴⁴ The judges found Ms. P had good enough moral character because “there is no proof that she engaged in prostitution even if she worked at a hostess bar ... and she lived with the married man under the assumption that they would get married once the man’s divorce became final, and they did get married in March 2009 following his divorce in February 2009.” The judges gave Ms. P the benefit of the doubt that she did not engage in prostitution even while she worked at a hostess bar. They also pardoned Ms. P’s affair with a married man because Ms. P married the man with whom she had the affair. In exonerating adultery and cohabitation when it led to a marriage, Korean judges relied on the marriage-criminality binary and constructed “marriage as both the antithesis of immoral sex and as a cure for legal immorality” (Dubler 2006: 764). It is worth noting that the judges decided to mention

⁴³ Case No. 2011GUHAP30397. Similar cases include: 2009GUHAP47446, 2009GUHPA44850, 2010GUHAP14848, and 2010GUHAP29482.

⁴⁴ Judges SUNG Jiyong, LEE Changhyun, and KANG Moonhee. Case No. 2008GUHAP45122. Date of Verdict: April 9, 2009.

Ms. P “stayed at home and didn’t have a job after she entered a common-law marriage,” leaving her (immoral) hostess work behind. The judge’s statement portrays marriage, both literally and figuratively, as a cure for Ms. P.

Our analysis has shown that migrant spouses are subject to stricter sexual moral jurisprudence that relies on the traditional marriage-criminality binary. The review of three “pardoned” cases hints that the amorphous criterion of “good moral character” is unevenly applied to migrants of different marital status, and the greatest scrutiny seemed to be applied to those who are at the margin of conventional marriage: divorced, widowed, separated or child-less.⁴⁵ Being married may increase one’s chance of being pardoned, but there is no guarantee and whether one gets pardoned seems to depend on judicial whimsy. To bring the case of Ms. X again, the judges ruled Ms. X’s solicitation charges were unpardonable “*even if she is now married to Mr. X ... and takes care of Mr. X’s mother.*”⁴⁶

3. Conclusion

Moral worthiness has played a central role in regulating immigration and citizenship (Firstenberg 2011; Plischke 1939). Legal authorities tend to have considerable discretion in handling cases (Gilboy 1991) and the good morality requirement is a primary example of such legal discretion. As shown in our analysis, *sexual* morality becomes a factor used by Korean judges to determine which spouses are worthy or citizenship. This is an expected finding, given the function of modern marriage as a state-sanctioned site of sex and procreation and as a citizenship-delineating institution. At the same time, our analysis has shown the culturally specific nature of Korean judges’ view of love, marriage and the relationship between the two, which is distinct from those documented in Europe and North America. Korean judges do not consider the presence of love, either prior to or during a marriage, to be crucial. What makes marriage legally authentic from the Korean judges’ perspective is convincing performances as wife and husband. While the presence of passion in a marriage has low importance to Korean Judges, the display of

⁴⁵ The analysis of 105 cases of naturalization via marriage litigation shows a qualified support for the nonmarriage penalty. Although not statistically significant, currently married women show a slightly higher rate of one’s appeal being accepted compared to those who are currently divorced or widowed. While 29 percent of married people’s appeals were accepted (5 out of 17), only 15 percent of their counterparts were accepted (4 out of 27). For more detailed analysis, see N. Kim (2016).

⁴⁶ 2012GUHPA21741. *Italics added.*

love or devotion toward someone other than their spouse is viewed as an indication of their infidelity to their spouse, marriage or family.

Our analysis raises fairness of immigration-related court rulings on three grounds. First, Korean judges show a significant degree of deference to the administrative branch and rarely overrule the MOJ's rulings. Recall that the rate of ruling in favor of plaintiffs for immigration cases was only 10 percent, while it is about 50 percent for other administrative court cases. This means that migrants may not be benefiting from the principle of checks and balances, a core principle of democracy, the same way Korean citizens do. Second, we have found that Korean judges' rulings tend to be inconsistent and contradictory and are based as much on cultural understanding of "good" spouses and "real" marriages as on legal principles. The inconsistency of Korean judges' rulings can make it challenging for marriage migrants and their legal representatives to decide whether to challenge the MOJ's decision and how to prepare legal strategies. Finally, and most importantly, Korean judges rely mainly on the traditional marriage-criminality binary, which is at odds with the emerging sexual moral jurisprudence that decriminalizes intimate choices in Korea. As some of the cases we analyzed demonstrated, the fear of being suspected of fraudulent marriage and of being rejected from citizenship unfairly limits the freedom of migrants during marriage and their right to divorce or to remarry. In this sense, our analysis has demonstrated how the privilege of citizenship extends to the most private and intimate spheres of our lives.

Our analysis points to the urgent need for enhancing consistency and predictability of court rulings. Doing so not only will improve the credibility of court rulings but also help migrants and their legal representatives decide whether and how to legally challenge the administrative branch's decisions. The inconsistency and unpredictability of judicial rulings may result, in part, from the lack of shared understanding and expectations among judges. Immigration is a relatively new area of jurisprudence in Korea, and judges, most of whom have not studied immigration laws in-depth, are asked to make judgments while dealing with other types of cases filed at their courts. Establishing independent immigration courts may help deepen the expertise of judges on the issue and increase consistency of rulings.

4. Appendix A.

4.1 List of Collected Cases

Case No.	Presiding Court	Sex, Plaintiff	MOJ's Reason for Rejection	Court Ruling Favorable?
2006GUHAP16083	Seoul Administrative Court	F	Fraudulent marriage	N
2008GUHAP45122	Seoul Administrative Court	F	Working at bar	Y
2009GUHAP44850	Seoul Administrative Court	U	Fraudulent marriage	N
2009GUHAP47446	Seoul Administrative Court	U	Fraudulent marriage	N
2009GUHAP57252	Seoul Administrative Court	F	Fraudulent marriage	N
2010GUHAP5776	Seoul Administrative Court	F	Fraudulent marriage	N
2010GUHAP14848	Seoul Administrative Court	F	Fraudulent marriage	N
2010GUHAP29482	Seoul Administrative Court	F	Fraudulent marriage	N
2010GUHAP32082	Seoul Administrative Court	M	Fraudulent marriage	N
2011GUHAP22198	Seoul Administrative Court	F	Working as masseuse	N
2011GUHAP24491	Seoul Administrative Court	M	Fraudulent marriage	N
2011GUHAP30397	Seoul Administrative Court	F	Fraudulent marriage	N
2011GUHAP39158	Seoul Administrative Court	M	Fraudulent marriage	Y
2012GUHAP16237	Seoul Administrative Court	F	Fraudulent marriage	Y
2012GUHPA21741	Seoul Administrative Court	F	Working as masseuse	N
2012GUHAP27046	Seoul Administrative Court	F	Working as masseuse	N
2013GUHAP14573	Seoul Administrative Court	F	Working as masseuse	N
2013GUHAP20486	Seoul Administrative Court	F	Working as masseuse	N
2013GUHAP10090	Seoul Administrative Court	F	Working at bar	N
2013GUHAP11420	Seoul Administrative Court	F	Fraudulent marriage	N
2013GUHAP17770	Seoul Administrative Court	F	Fraudulent marriage	N
2013GUHAP25641	Seoul Administrative Court	F	Working as masseuse	N
2014GUDAN15088	Seoul Administrative Court	F	Fraudulent marriage	N
2014GUDAN57891	Seoul Administrative Court	F	Fraudulent marriage	N
2014GUHAP6029	Seoul Administrative Court	F	Working at bar	N
2014GUHAP10189	Seoul Administrative Court	F	Working at bar	N
2014GUHAP11878	Seoul Administrative Court	F	Fraudulent marriage	N

(Continues)

Case No.	Presiding Court	Sex, Plaintiff	MOJ's Reason for Rejection	Court Ruling Favorable?
2014GUHAP14761	Seoul Administrative Court	F	Working as masseuse	Y
2014GUHAP14945	Seoul Administrative Court	M	Fraudulent marriage	N
2014GUHAP15665	Seoul Administrative Court	F	Fraudulent marriage	N
2014GUHAP16088	Seoul Administrative Court	F	Working as masseuse	N
2014GUHAP56512	Seoul Administrative Court	U	Working at bar	N
2014GUHAP58020	Seoul Administrative Court	M	Fraudulent marriage	N
2014GUHAP74916	Seoul Administrative Court	F	Working at bar	N
2008NO1702	Seoul North District Court	F	Fraudulent marriage	Y
2009NO1987	Suwon District Court	F	Fraudulent marriage	Y
2010GOJUNG936	Daejeon District Court	F	Fraudulent marriage	Y
2010MU547	Supreme Court	M	Annulment	Annulled
2011RU00	Busan Family Court	M	Annulment	Annulled
2013DUDAN6915	Daejeon Family Court	M	Annulment	Annulled
2013RU632	Daejeon Family Court	M	Annulment	Annulled

5. Appendix B.

5.1 Other Court Cases Cited

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 2003HUNMA87.
 2008HUNBA58.
 2009HUNBA17.
 2010GUHAP6441.
 2013HUNMA623.
 2013MUI568.

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