Historicizing Same-Sex Marriage Debate in the Legal Periphery: Savigny, Nakagawa, and the Korean Marriage

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Global advocates for incorporating same-sex marriage into local family laws often argue for it using universal language of rights and nondiscrimination. They also contrast progressive countries with those that are behind in this respect. This Article resists a thin comparison driven by a universalist impulse and instead engages in an exploration of "local" family law in South Korea.

Using the recent Supreme Court decision that extended spousal coverage of national health insurance to same-sex couples as an entry point, this Article offers brief histories of two distinct legal ideas and developments within Korean family law, both involving a deep and constant engagement with foreign laws. These two deeply rooted, conflicting legal ideas shape the ongoing conversation about same-sex marriage.

The first story traces back to the German jurist Friedrich Carl von Savigny (1779-1861)'s idea that family law is part and parcel of a moral, customary, and therefore mandatory order that regulates one's status. Introduced via Japan and central to classical understandings of marriage in Korean legal thought,

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this idea has persisted in Korea and is utilized in arguments against same-sex marriage. The second story traces a contradicting trend in Korean law: the jurisprudence of de facto marriage, linked to Japanese jurist Nakagawa Zennosuke (1897-1975) and understood to embrace modernist tendencies. Contrary to the classical notion that family law is customary and mandatory, de facto marriage eases certain rules of marriage and embraces non-conventional families.

More fundamentally, de facto marriage represents the fragmented existence of marriage in law and reveals the contradictions in the classical conception of marriage as stable and integrated. Revisiting the recent Supreme Court case with this insight, the Article concludes by cautiously endorsing the pragmatic, localized, yet progressive reform strategy used by Korean marriage equality advocates in the recent case.

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Introduction[**]

This Article is about the past, present, and future of marriage law in South Korea.

Global advocates and scholars of same-sex marriage routinely

[**] In this Article, I follow the East Asian practice of listing the family name followed by the given name, except when the original publication is in English. The English translations of Korean and Japanese sources are mine unless the original publications include English titles and/or abstracts. In such instances, the existing English titles are used verbatim, even when grammatical errors may be present.

engage in a comparative practice. International organizations and human rights groups compare, contrast, and rank countries based on the level of formal legal rights and safeguards they offer to their LGBTI population.[1] The "recognition" of same-sex marriage is usually considered the ultimate stage of this legal development, following the earlier stages of "decriminalization" and "protection."[2] Well-meaning legal academics with a global audience make broad comparisons that cut across numerous jurisdictions to "char[t] the progress" of the "human rights revolution."[3] They try to discern what is and is not generalizable from the experiences of the countries that have cleared the final stage, often focusing on Europe and North America, and draw lessons for others lagging behind.[4] They debate whether a country's path to same-sex marriage is "exceptional" or not-so-much, when compared to its peer nations' past experiences.[5] What drives such a comparative practice is often an understandable aspiration towards same-sex marriage as a human rights and equality issue.[6]

Despite its benefits, there are good reasons to be careful in engaging in this kind of comparative practice. Not only can thin comparisons be dissatisfactory as a scholarly endeavor, but they can also restrict local imaginations by inevitably foregrounding one

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1. *E.g.,* SUSAN DICKLITCH-NELSON ET AL., F&M GLOBAL BAROMETERS: LGBT HUMAN RIGHTS IN 203 COUNTRIES AND REGIONS 2011-2018 (2021), https://perma.cc/7PVG-VDCD; LUCAS RAMÓN MENDOS ET AL., STATE-SPONSORED HOMOPHOBIA 2020: GLOBAL LEGISLATION OVERVIEW UPDATE (2020), https://perma.cc/6B97-TL3J; OECD, OVER THE RAINBOW? THE ROAD TO LGBTI INCLUSION (2020), https://doi.org/10.1787/8d2fd1a8-en; *Marriage Equality: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Dec. 22, 2022, 9:30 AM), https://perma.cc/E5HL-XUEE; *Explore the Progress of LGBTQ+ Rights Across the World*, EQUALDEX, https://www.equaldex.com (last visited Oct. 1, 2024).

2. MENDOS ET AL., *supra* note 1, at 325–30; ANGIOLETTA SPERTI, CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY 1, 7 (2017).

3. Fergus Ryan, *Same-Sex Couples Before National, Supranational and International Jurisdictions*, 14 INT'L J. CONST. L. 310, 310 (2016) (book review).

4. SPERTI, *supra* note 2, at 10–11.

5. *See* Robert Wintemute, *Global Trends in Legal Recognition of Same-Sex Couples: Cohabitation Rights, Registered Partnership, Marriage, and Joint Parenting*, 15 NAT'L TAIWAN U. L. REV. 131 (2020); Erez Aloni, *First Comes Marriage, Then Comes Baby, Then Comes What Exactly?* 15 NAT'L TAIWAN U. L. REV. 49 (2020).

6. *See generally* Evan Wolfson, Jessica Tueller & Alissa Fromkin, *The Freedom to Marry in Human Rights Law Worldwide: Ending the Exclusion of Same-Sex Couples from Marriage*, 32 IND. INT'L & COMP. L. REV. 1 (2022); Michael T. Tiu Jr., *The Rainbow Flag Among the Flags of Nations: Are LGBTQ Rights International Human Rights?*, 93 PHIL. L. J. 56 (2020); Kelley Loper, *Human Rights and Substantive Equality: Prospects for Same-Sex Relationship Recognition in Hong Kong*, 44 N.C. J. INT'L L. 273 (2019); Jessica Brown, *Human Rights, Gay Rights, or Both? International Human Rights Law and Same-Sex Marriage*, 28 FLA. J. INT'L L. 217 (2016). For a critical account of the liberal convergence towards same-sex marriage and the resistance against it in the U.S. and Europe, see Fernanda Nicola, *Comparing Family Law*, *in* COMPARATIVE LAW: INTRODUCTION TO A CRITICAL PRACTICE 89 (Fernanda Nicola & Günter Frankenberg eds., 2024).

pathway over others.[7] By failing to heed the complex dynamics of legal reform on the ground, they may also lead to misguided reform strategies.[8] This is not to argue that national marriage laws must be studied in isolation or to deny the usefulness of comparison altogether. Rather, those involved in the scholarly and political discourse of legal globalization concerning same-sex marriage must consider how to avoid the violence of universalism without being blinded by parochialism, all while striving for justice for the LGBTI community in parts of the world that are radically different from the "model" countries.

Being attuned to the "local" does not occlude important contributions of comparative law. National laws have developed in constant engagement with foreign laws, a phenomenon that comparative legal scholars describe in terms of legal transplantation.[9] This perspective proves particularly relevant when studying laws in the legal periphery such as Korea. Modern Korean family law has been marked by selective reception and rejection of foreign influences during its tumultuous history of colonialism and postcolonial development, long before the advent of same-sex marriage.[10] This historical backdrop provides a key to decoding formalistic and often cryptic legal texts there.

Furthermore, one cannot fully grasp how Korean judges, lawyers, and law professors *think* about the law without understanding its historical and contemporary relationship to Japanese, German, and United Statesian legal influences. The legal thought dimension, frequently neglected in legal transplantation literature,[11] is pivotal for understanding the same-sex marriage debate in Korea—or the apparent *absence* of such debate among supposedly conservative mainstream legal elites. A cursory look through the lens of media coverage and NGO reports might suggest that the arguments largely echo the rights-based rhetoric, politicized and akin to the so-called

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7. *See* Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 COLUM. HUM. RTS. L. REV. 425, 427–30 (2009).

8. *See* Ivana Isailovic, *Same Sex But Not the Same: Same-Sex Marriage in the United States and France and the Universalist Narrative*, 66 AM. J. COMP. L. 267, 270, 314 (2018).

9. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd ed. 1993).

10. Rama Hyeweon Kim, *Lee Tai-young and First-Wave Korean Legal Feminism (1953-1977): Socializing Family Law for Women and for the Nation* (Sept. 15, 2022) (unpublished manuscript) (on file with author).

11. *But see* sources cited *infra* note 58; John K.M. Ohnesorge, *Western Administrative Law in Northeast Asia: A Comparativist's History*, Univ. of Wis. L. Sch. Legal Stud. Rsch. Paper NO. 1518 1, 84–182 (2019) (publishing Ohnesorge's 2002 S.J.D. Dissertation, Harvard Law School).

"culture wars" in the United States.[12] The United Statesian influence is also evident in academic discussions,[13] which are primarily led by scholars of gender and law, constitutional law, and human rights law, but *not* by scholars of private law.[14] However, this perspective misses the significant role that private law's vision for marriage and family plays in the ongoing debate—despite the silence on the part of private law scholars. Notably, Korean private law has been, and continues to be, influenced more by German and Japanese legal ideas than those of the United States.[15]

Two distinct legal ideas and developments within Korean private law, both having arrived there from abroad, shape the understandings of marriage and family. The first is the notion that marriage and family law regulate status-relations rather than the economic (patrimonial) relations governed by contracts and property law.[16] We will call this legal idea *classical* because the family/patrimony dichotomy was a tenet of nineteenth-century classical legal thought. Specifically, the idea is attributed to the renowned German jurist Friedrich Carl von

12. For a U.S.-style culture-war description of the conflict between conservative Christians and left-of-center advocates of LGBTI issues, see John Yoon, *South Korea Inches Toward Same-Sex Equality, but Broader Bill Is Stalled*, N.Y. TIMES (Feb. 22, 2023), https://perma.cc/Z8WM-FST7.

13. In the past two decades, particularly since *United States v. Windsor*, 570 U.S. 744 (2013), dozens of articles introducing U.S. constitutional law have been published in Korea. *See, e.g.*, Ha Jeonghun et al., *Migugui dongseonggyeolhon pangyeol sogae* [*United States' Same-Sex Marriage Case Introduction: Summary and Brief Commentary on United States v. Windsor and Perry v. Schwarzenegger*], 14 SEOUL NAT'L U. PUB. INT. AND HUM. RTS. L. REV. 261 (2014); Kim Jihye, *Dongseonghone gwanhan miguk pallyeui jeongae* [*Issues and Development of Court Decisions on Same-Sex Marriage in the United States*], 46 KOREAN J. L. & SOC'Y 267 (2014). When *Obergefell v. Hodges*, 576 U.S. 644 (2015), came out in June of 2015, four anonymous gay legal professionals translated and published the opinion of the Court in a weekly newsmagazine the very next month, followed by many journal articles. Gay Law Ass'n, *Dongseonghoneun jungdaehan heonsine ireuneun yuilhan bangbeop* [*Same-Sex Marriage Is the Only Real Path to Profound Commitment*] HANKYOREH (July 9, 2015, 5:01 PM), https://perma.cc/9ZMS-F9FF. For the United Statesian influence on those opposing same-sex marriage, see *infra* note 33.

14. *See, e.g.*, Kim Seonhwa, *Dongseonghonui beopjehwae gwanhan gochal* [*The Legalization of the Same-Sex Marriage*], 7 EWHA J. GENDER AND L., no. 3, 2015, at 31; Sung Joongtak, *Dongseonghone gwanhan beopjeok jaengjeomgwa jeonmang* [*Legal Issues and Prospects of Same-Sex Marriage*] 31 KOREAN J. FAM. L., no. 1, 2017, at 229; JEONG JONGSEOB, HEONBEOBHAGWONLON [CONSTITUTIONAL LAW] 258 (13th ed. 2022); Yi Donghun, *Dongseonghonui heonbeopjeok jaengjeom—heonbeopaeseogui hangye* [*Constitutional Issues of Same-Sex Marriage—Limits to Constitutional Interpretation*], 20 PUB. L. J., no. 2, 2019, at 155.

15. Private law, in the narrow sense that I use it, refers to the law of general matters, property law, law of obligations, family law, and inheritance law, unless the context dictates otherwise. These areas are organized into five separate books in the Korean Civil Act. *See generally* Minbeob [Civil Act] (S. Kor.).

16. *See infra* Part II.

Savigny (1779-1861), whose role in the development of the classical legal thought was essential and whose name and ideas have carried significance in Korean legal thought.[17]

The classical notion of marriage and family has two manifestations in Korean law. One is the idea that family law, or the law of status, is based on Korean customs, morals, and traditions. The other is that the status-relations created by marriage, birth, and adoption must be stable, coherent, and integrated as part of a mandatory social order. The mandatory-social-order vision of marriage is separate from the national-customs-and-morality vision: one can theoretically imagine a coherent and mandatory order that has nothing to do with the nation's past and is inclusive of same-sex marriage. In the ongoing same-sex marriage debate, though, the two dimensions are often conflated in bolstering conservative arguments against same-sex marriage.

Within the Korean private law correctness, however, a different vision for marriage and family exists.[18] This vision can be identified in a legal development that gives some, but not all, effects of marriage to marriage-like relationships. The development, called the jurisprudence of de facto marriage, traces back to twentieth-century Japan and, most notably, to the Japanese jurist Nakagawa Zennosuke (1897-1975).

Although Korean private law, including family law, has been classical as a whole, Nakagawan de facto marriage has historically embraced *modernist* tendencies. In so doing, it has introduced significant tensions into the classical regime's treatment of marriage and family. Despite the ostensibly mandatory nature of the classical order of status-relations, de facto marriage relaxes certain entry rules of marriage. Contrary to the classical assertion that family law is customary and moral, de facto marriage accommodates non-conventional families. There is no theoretical necessity that de facto marriage should include same-sex unions—it certainly did not in Nakagawa's era. Nonetheless, some marriage equality advocates recently tried to capitalize on de facto marriage's modernist potential, arguing for de facto same-sex marriage.

This Article unfolds in the following sequence. As a segue into both the contemporary Korean debate at the surface level and the

17. *See, e.g.*, Yang Changsu, *Sabini hyeondaeromabeopchegye seoeon* [*Introduction of Savigny's System of the Modern Roman Law*], 36 SEOUL NAT'L U. L. J., no. 3/4, 1995, at 172 (translating a small part of Savigny's System of the Modern Roman Law and commenting how the "text, written over 150 years ago, makes us bow our heads in contemplation even as we read it now."); *see also* sources cited *infra* note 292.

18. *See infra* Part III.

underlying private law ideas, Part I of this Article first discusses a recent Supreme Court case.[19] The unexpected decision by the supposedly conservative court extended spousal coverage of national health insurance to same-sex couples, marking the first judicial recognition of any aspect of a same-sex relationship in Korea. Parts II and III then present two concise historical narratives behind the classical conception of marriage and family, and de facto marriage, respectively. Both stories begin with non-contemporaneous and non-Korean law but end with the contemporary Korean legal debate on same-sex marriage.

To the extent that our knowledge about the past and the present informs our thinking about our future, this Article also contemplates the future of same-sex marriage. Part IV revisits the local advocates' strategy in the national health insurance case and highlights their technical and narrow argument that focused on only one stick in the bundle of marriage. Although this may appear to be disloyal to the universal language of rights and equality, this Article cautiously endorses the advocates' argument as being not only strategically sound but also potentially liberating. A paradox of Western and globalized marriage equality is that, while striving for its realization, it might inadvertently reinforce rather than dismantle the classical order, which views marriage as something *more* than legal and as being part and parcel of a mandatory-social-order. By the same token, the one-stick-at-a-time approach may prove transformative if, on the path to a more egalitarian future, it disrupts rather than fortifies the classical order—ultimately diminishing the overarching significance of marital status for all. Thus, this Article argues that the most fundamental, and potentially liberating, tension that de facto marriage introduces to the classical regime is not its embrace of modernist tendencies—but its challenge to the idea of marriage law as stable and integrated.

I. ENTERING THE PRESENT DEBATE

In July 2024, Korean marriage equality advocates achieved a landmark legal victory. The Supreme Court recognized a gay man as a "dependent" of his same-sex partner, vacating the National Health Insurance Service's refusal to do so under the National Health Insurance Act.[20] The Supreme Court affirmed the high court's decision from seventeen months prior and ruled that the NHIS had unlawfully

19. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).
20. *Id.*

discriminated against the plaintiff by depriving him of his dependent status when the same was granted to heterosexual "de facto" spouses (hereinafter, the "NHIS case").[21]

When the high court overturned the administrative court's decision and ruled in favor of the plaintiff in February 2023,[22] it came as a surprise in a country that provided scant legal protection for its LGBTI population. International media and organizations have portrayed Korea as gravely deficient in providing legal protection for its LGBTI population in accordance with international human rights standards.[23] They have labeled the country as "persecuting"[24] or tagged it as an "outlier among the world's wealthy democracies."[25] From some perspectives, the Supreme Court's recent decision might be even more surprising, especially given that only five out of the thirteen Justices are categorized as "liberals."[26] Four of the eight "center-conservative" Justices joined the liberals in the majority opinion, leading to the first judicial recognition of any aspect of same-sex relationships in Korea.[27]

Reactions to the largely unexpected decisions by the high court and the Supreme Court have been sharply divided. On one side, the National Human Rights Commission of Korea[28] and left-of-center media outlets hailed the decisions for rejecting discrimination against sexual minorities (*seongsosuja*) and upholding their human rights.[29]

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21. *Id.*

22. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.).

23. *See generally* Michael Mitsanas, *South Korea's LGBTQ Community Confronts Crushing Headwinds in Fight for Equality*, NBC NEWS (Dec. 12, 2022, 9:58 AM), https://perma.cc/X6XG-F3HF (providing a grim picture of how, in Korea, "national law provides no protection from discrimination" for LGBTQ population); OECD, *supra* note 1, at 97–98 (identifying Korea, alongside Japan and Turkey, as among the countries with the least progress in legal LGBTI inclusivity from 1999 to 2019 and reporting that Korea had implemented only 29 percent of the laws critical for LGBTI inclusion as of 2019).

24. DICKLITCH-NELSON ET AL., *supra* note 1, at 44.

25. Mitsanas, *supra* note 23.

26. Heo Uk, *Eom Sangpil Sin Sukhui daebeopgwan immyeong* [*Appointment of Justices Eom Sangpil and Sin Sukhui*], JOSEONILBO (Mar. 1, 2024, 5:10 PM), https://perma.cc/AL8P-V28P (categorizing conservative and liberal Justices).

27. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

28. *Dongseong pibuyangja jagyeogeul injeonghan seoulgodeungbeobwonui pangyeore daehan gukgaingwonwiwonjang seongmyeong* [*Statement on the NHIS Case*], NAT'L HUM. RTS. COMM'N OF KOR. (Feb. 22, 2023), https://perma.cc/6P7Q-NJY7.

29. *E.g.*, *Dongseongbubu geongangboheom sosongt seungso, chabyeol cheolpye gwihan cheotgeoreum* [*Same-Sex Couple Wins Health Insurance Litigation, the First Step to Abolish Discrimination*], HANKYOREH (July 18, 2024, 6:15 PM), https://perma.cc/ZQ9R-VGMU; *Dongseong keopeurui sahoebojang gwolli injeonghan*

Liberal commentators who supported same-sex marriage on constitutional grounds were likely pleased as well.[30] International media and human rights organizations, while noting that there is still a long way to go toward equality and nondiscrimination for same-sex couples, also highlighted how the courts' rulings would "help rectify this wrong."[31]

On the opposite side, evangelical Christian commentators and organizations castigated the decisions.[32] Influenced by politics and discussions in the U.S., evangelical Christians had begun their rally against same-sex marriage even before there was a significant scholarly or political debate domestically and have established themselves as a major political force on LGBTI issues in Korea.[33]

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cheot pangyeol hwanyeonghanda [*Welcoming the First Decision Recognizing Same-Sex Couples' Right to Welfare*], KYUNGHYANG SHINMUN (Feb. 21, 2023, 8:35 PM), https://perma.cc/78EP-JLCR.

30. *See, e.g.*, Yi Daehui et al., *"Dongseong keopeul bokji bojang seoneon" vs. "neomu apseonagan pangyeol"* [*"Assuring Welfare of Same-Sex Unions" vs. "Judgment That Has Gone Too Far Ahead"*], YONHAP NEWS (Feb. 21, 2023, 5:35 PM), https://perma.cc/5EV3-LWLS (quoting a statement by Han Sanghui, a professor at Konkuk University Law School, that "this is a truly welcome ruling.").

31. *E.g.*, *South Korea: Supreme Court Ruling a Historic Victory for Same-Sex Couples*, AMNESTY INT'L (July 18, 2024), https://perma.cc/2L36-FCEJ; *South Korea: high court Health Insurance Ruling Offers Hope for Marriage Equality*, AMNESTY INT'L (Feb. 21, 2023), https://perma.cc/TW57-DC6X.

32. *See, e.g.*, Song Gyeongho, *Dongseongkeopeul pibuyangja injeongeun heonbeopgwa gukjebeop modu wibae* [*Granting Dependent Status to Same-Sex Couples Violates Both Constitutional Law and International Law*], CHRISTIAN TODAY (July 31, 2024, 4:05 PM), https://perma.cc/Q7GL-5NRC; Choe Gwanghui, *Dongseongkeopeul geonbo pibuyangja jagyeoginjeongpangyeol pansa gyutanhanda* [*Reprimanding Judges of the Case Recognizing Dependent Status of Same-Sex Couples in National Health Insurance*], CHRISTIAN FOCUS (Feb. 28, 2023, 9:08 AM), https://perma.cc/Y232-XYTN. For an English article describing domestic reactions to the NHIS case, see William Gallo & Lee Juhyun, *Narrow but Significant Win for LGBT Rights in South Korea*, VOA (Feb. 23, 2023, 7:14 AM), https://perma.cc/ERD8-RKZW.

33. Evangelical Christians in Korea have been reacting to LGBTI politics in the U.S. and importing discussions from the U.S. as if they were directly relevant to Korea. *See generally* Joseph Yi et al., *Evangelical Christian Discourse in South Korea on the LGBT: the Politics of Cross-Border Learning*, 54 SOC'Y, no.1, 2017, at 29, 33 (explaining how, "despite local LGBTs' very limited mobilization and success in politics and the courts," Korean evangelicals are "reacting to stories of LGBT dominance and Christian persecution in the United States, which is viewed as a culturally and religiously proximate nation"); J. Lester Feder & Jihye Lee, *This Man's Story Explains the Emergence of South Korea's Anti-LGBT Movement*, BUZZFEED NEWS (July 31, 2015, 9:26 AM), https://perma.cc/FE4E-HWZV; Kim Mokhwa, *Miguk gyeolhonbohobeop wiheon gyeoljeong, yugamida* [*United States v. Windsor Is a Regretful Decision*], GIDOKGYO YEONHAPSINMUN (June 27, 2013, 5:30 PM), https://perma.cc/6E67-CFBP. Some Christian lawyers and scholars are lending their legal skills to support the cause of evangelicals. In their legal arguments, one can clearly see the influence of constitutional law jurisprudence and domestic politics in the U.S. *See, e.g.*, JEONG SOYEONG, MIGUGEUN EOTTEOKE DONGSEONGGYEOLHONEUL BADADEURYEONNA [HOW DID THE

Following the high court's "social-activist decision,"[34] hundreds of anti-LGBTI organizations and churches published a collective response, where they argued that the three judges at the high court had deviated from existing law, influenced by their personal values.[35] They urged the Supreme Court to "rectify the wrong decision" by upholding "the order of marriage law" in private law as well as in the Constitution.[36] To their disappointment, only four out of the thirteen Justices did so.[37]

Among the three courts and seven opinions,[38] the now-overturned administrative court's opinion spelled out the gist of the Christian conservatives' legal argument most clearly, which has since been favorably cited by those opposing same-sex marriage: "After all, the institution of marriage is a manifestation of the social and cultural implications of each society; the recognition of same-sex marriage is thus a legislative matter within each individual country, based on its [own] social demands and consensus."[39] Given this *national* character of marriage law, wrote the administrative court and repeated the Christian conservatives, the court could not "expand the definition of

U.S. ACCEPT SAME-SEX MARRIAGE] (2016) (introducing landmark U.S. Supreme Court decisions, beginning with *Loving v. Virginia*, which led to same-sex marriage and finding a lesson for Koreans to stop legalization of same-sex marriage); Kim Hyeon, *Chabyeolgeumjibeoban geomtouigyeon* [*Legal Opinion on Anti-Discrimination Law*], PEOPLE MAKING GOOD LAWS (Sep. 24, 2020), https://perma.cc/V8WN-LAHC (arguing unconstitutionality of anti-discrimination legislation on the grounds of, *inter alia*, freedom of religion and speech).

34. Yun Yonggeun, *Dongseonggyeolhap pibuyangja jagyeok injeong pangyeore buchyeo* [*Comment on the Case Recognizing Dependent Status of Same-Sex Couples*], GIDOKSINMUN (Feb. 27, 2023, 6:19 PM), https://perma.cc/3DGW-846N (describing the high court decision as a "social-activist decision").

35. Song Gyeongho, *Dongseongkeopeul geonbo jagyeok injeong jeongchi pangyeolhan 3in gyutan* [*Reprimanding Three Political Judges of the Case Recognizing Dependent Status of Same-Sex Couples*], CHRISTIAN TODAY (Feb. 24, 2023, 5:16 PM), https://perma.cc/2Q5R-E9N7.

36. *Id.*

37. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.). The dissenting opinion agreed that there was a procedural defect in the NHIS's disposition but did not deem that the disposition discriminated against the plaintiff in violation of the constitutional principle of equality, creating a substantive defect. This Article does not address the issue of procedural defect.

38. In addition to the administrative court's opinion and the high court's opinion, the thirteen Justices of the Supreme Court produced five opinions: (i) the majority opinion, written by eight Justices; (ii) the main dissenting opinion, written by four Justices; (iii) a separate concurring opinion, written by two of the four liberal Justices in response to the dissent; (iv) two separate dissenting opinions, each written by one of the dissenting Justices in response to the concurrence. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

39. Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.).

marriage to include same-sex unions without concrete legislation."[40]

The surface-level culture wars just described, where both sides accuse each other of being "wrong" and in need of "rectification," overlook a critical piece of the Korean legal landscape: how mainstream Korean legal elites, including the Justices and judges in the NHIS case, think about family and its law. Despite coming to opposing conclusions, a careful reading of the opinions in the NHIS case reveals commonalities between those who accepted the plaintiff's claim and those who rejected it, reflecting mainstream Korean legal thinking.

Foremost, the Justices and judges often acknowledged the global trend towards greater recognition of same-sex relationships and emphasized that the law must not condone discrimination based on sexual orientation, including in the opinions that rejected the plaintiff's claim. For instance, Justice No Taeak, in his separate dissenting opinion, asserted that "discrimination based on sexual orientation or identity shall not be allowed, and the pains of sexual minorities shall not be ignored."[41] Similarly, dissenting Justice Gwon Yeongjun wrote that "[t]he conclusion reached in this case could be meaningful progress not only for same-sex couples but for all members of [Korean] society," and that he "agrees in some respects with the direction."[42] The administrative court, before eventually concluding with an emphasis on the national character of marriage law, conceded that "the gradual trend is to extend the right to marry to non-heterosexuals as a matter of personal freedom and to understand [the right to same-sex marriage] as [part of] the right to privacy and family life."[43]

This convergence can be attributed to the mainstream legal elites' perception of the law's role in protecting minorities in general, and their evolving understanding of sexual minorities in particular. As Professor Frank Upham pointed out regarding Japanese judges,[44] the stereotype of a reactionary, passive, and conservative judiciary fails to capture the contemporary Korean judges' belief that the law, generally understood to be apolitical and neutral, does and should protect the "weak."[45] Moreover, despite the gloomy portrayals of the

40. *Id.*; Song, *supra* note 32.

41. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

42. *Id.*

43. Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.).

44. Frank K. Upham, *Same-Sex Marriage in Japan: Prospects for Change*, 15 ASIAN J. COMP. L. 195, 206–15 (2020).

45. This observation is based on my experience in elite Korean legal education

Korean legal situation by international organizations, there has been evidence suggesting that courts are thinking about homosexuality in notably more liberal terms than before.[46] Together, this suggests that—despite the dearth of noticeable changes in formal rules until the NHIS case—mainstream legal elites are quietly becoming more open to changes in LGBTI law.

Nonetheless, and contrary to the Christian conservatives' criticism, neither the Supreme Court's majority nor the high court necessarily "expand[ed] the definition of marriage."[47] One major argument posed by the marriage equality advocates was that, even if the Civil Act did not provide for same-sex marriage, the plaintiff and his partner's marriage-like relationship should be deemed a de facto marriage. Without the Japanese-Korean historical context, and assuming de facto marriage is similar to common law marriage in the United States, this strategy might seem odd: why would a court recognize an unformalized same-sex marriage when there is no same-sex marriage at all? From this perspective, it may be unsurprising that the high court explicitly rejected, and the Supreme Court avoided, the de facto marriage argument, invoking the notion that marriage is "a morally and customarily legitimate union . . . between a man and a woman."[48] As a matter of existing Korean law, there was no such thing as same-sex de facto marriage.

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and the legal profession, ongoing research on the history of Korean legal thought, and conversations with Korean legal elites on the topic of same-sex marriage in the summer of 2021.

46. While attempts to pass anti-discrimination legislations—a key battleground between LGBTI advocates and social conservatives—have been unsuccessful, the past fifteen years have seen courts generating discourses on homosexuality that are notably more liberal than before. This trend, initially observed in lower courts, reached a pinnacle in a recent Supreme Court decision. Daebeobwon [S. Ct.], Apr. 21, 2022, 2019Do3047 (S. Kor.) (ruling that military sodomy law that criminalizes "anal intercourse and other indecent act" is not applicable to consensual sex). However, it did not result in a new constitutional court case. Hunbeobjaepanso [Const. Ct.], Oct. 26, 2023, 2017Hunga16 (S. Kor.) (upholding the constitutionality of military sodomy law). For earlier lower court cases that indicated a similar change in the climate, see Suwon Jibangbeobwon [Suwon Dist. Ct.], Sept. 29, 2011, 2001No2157 (S. Kor.); Daegu Jibangbeobwon Pohang Jiwon [Daegu Dist. Ct.], May 16, 2019, 2018Gahab11195 (S. Kor.); Busan Godeungbeobwon [Busan High Ct.], Feb. 12, 2014, 2013Na51414 (S. Kor.); Seoul Jungangjibangbeobwon [Seoul Central Dist. Ct.], May 25, 2011, 2010Gahab99977 (S. Kor.). Public opinion is also evolving quickly, with a majority endorsing the idea that homosexuality is a form of love according to a recent poll. *See infra* note 327. The Korean legal landscape surrounding homosexuality is closely tied to, but not the same as, the legal context for same-sex *marriage*. This Article aims to provide insight into the latter.

47. *See supra* note 40 and accompanying text.

48. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

To truly grasp the situation, we need to explore the history of Korean legal thought. The marriage equality advocates' appeal to de facto marriage made sense given the idea's historical association with modernist marriage law in Japan and Korea. But the Justices and judges were seemingly constrained by the classical regime, established through a Germano-Japanese transplantation. According to the classical vision, there is and ought to be one coherent, integrated, and national conception of marriage, de facto or de jure, and any change to marriage had to be made in congruence with the existing "system" or "order." As we will revisit later, the Supreme Court's majority and the high court, even as they sought to preserve this classical order, ultimately sided with the marriage equality advocates.[49] This outcome was possible not only due to the Justices' and judges' empathy with the cause, but also thanks to the advocates' narrow yet progressive argument that highlighted the fundamental tension that de facto marriage brought into the classical regime.

In the subsequent Parts, I will delve into the histories behind the two conflicting ideas and developments in Korean private law: classical understanding of marriage, family, and their laws (Part II) and jurisprudence of de facto marriage that has developed within and against the classical regime (Part III).

II. A "GERMANO-JAPANESE" PAST: DE JURE MARRIAGE IS PART OF NATIONAL CUSTOMS AND ORDER

For readers unfamiliar with Korean history, the Korean peninsula was ruled by the Joseon dynasty from 1392 until it became a colony of Japan from 1910 to 1945. Central to Joseon Korea's governance was the regulation of family matters under Neo-Confucian law.[50] It was only in the late nineteenth century that Confucian-literati elites of Joseon were introduced to modern European law. As a last-ditch effort to maintain the nation's independence from encroaching imperial powers, these elites belatedly tried to modernize their legal system. Although various colonial powers were still vying for influence at this time, Japanese influence was already central in these pre-colonial legal reforms. The Japanese influence, which itself drew heavily from German law, continued to impact

49. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

50. This involved another legal transplantation: Joseon's literati elites consciously and persistently imported Neo-Confucian discourse from China. *See* MARTINA DEUCHLER, THE CONFUCIAN TRANSFORMATION OF KOREA: A STUDY OF SOCIETY AND IDEOLOGY (1995) (examining Joseon's literati elites' reception of Confucianism).

Korean legal elites after liberation from Japan in 1945.[51] At the same time, postcolonial private law scholars also turned towards German law—partly in an effort to decolonize Korean law by doing German law of the previous century better than their Japanese rulers and teachers. Thus, the name Savigny has continued to hold significance in postcolonial Korean legal discourse.[52]

In Korean private law, there is an idea that family law regulates one's "status-relations."[53] Status (*sinbun*), here, refers to one's position or identity in the family such as wife, husband, (grand)child, (grand)parent, aunt, and so on.[54] A change in one's status supposedly affects not only the individual themselves but also other people, both because status comes in "relations" and because it is socially important per se. Accordingly, a paramount goal of family law is to regulate one's status-relation in a stable, clear, and orderly manner. Another long-held idea in Korean private law is that family law is *not merely legal*, but also customary and moral. Therefore, the law of status—the old name for family and inheritance law—is *Korean.* It should and does reflect the particular customs and morality of the Korean people.

Both ideas lead to another characteristic of family law: because family law governs status-relations and because it is based on national customs and morality, family law is deemed public, socially important, and mandatory. In other words, it is *strictly legal*. And all of this posits the rest of private law as a point of comparison. The law of obligations (*i.e.*, contracts and torts) and property law govern pecuniary, or "patrimonial," relations as opposed to status-relations. They are thus grouped together as "patrimonial law" and deemed merely legal (positive); less Korean and more universalistic; more private; less socially important; and facilitative. As I will demonstrate later in this Part, the seemingly banal definition of marriage as "a *morally* and *customarily* legitimate union" is of a piece with this broader and deeply entrenched tendency to theorize family law and the rest of private law as if they were opposites of each other.

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51. *See* Kim, supra note 10, at 16–23 (describing postcolonial Korean legal elites' rejection and reception of legal influences from the U.S., Germany, and Japan).

52. S*ee, e.g.*, sources cited *supra* note 17.

53. *See, e.g.*, *Sinbunbeop* [*Status law*], NAVER KOREAN DICTIONARY, https://perma.cc/AYH3-R22P (defining "status law" as follows: "A term that collectively refers to laws governing status-relations. Recently, the term "family law" is often used [instead].").

54. *See, e.g.*, *Sinbun* [*Status*], NAVER KOREAN DICTIONARY, https://perma.cc/XHC3-3R8G (including in the definitions of "status" the following: "In private law, the legal status held by individuals as members of status-relations such as parent, child, family member, and spouse.").

A few Korean scholars criticize the tendency to group family and inheritance law together as status law and term it as an exceptional field within private law.[55] They argue that it is analytically imprecise to do so and try to de-exceptionalize family and inheritance law to varying degrees. In so doing, some hold the twentieth-century Japanese jurist Nakagawa Zennosuke responsible either for the name status law[56] or for the theory that posits special characteristics of status law (called "status-act theory").[57]

Contrary to the Korean critics' belief that Nakagawa invented the status-act theory, the idea that family law, while being an integral part of private law, is distinct from the rest of private law, in that it is more customary, moral, national, public, and therefore mandatory, predates twentieth-century Japan. So does the association of status with family law. The family(status)/patrimony distinction was a crucial component of classical legal thought, which spread from nineteenth-century Germany to many parts of the world,[58] including Meiji Japan.[59]

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55. Yang Changsu, *Gajokbeopsang beomnyulhaengwiui teukseong* [*Special Characteristics of Juridical Act in Family Law*] 46 SEOUL NAT'L U. L. J., no. 1, 2005, at 40 (criticizing the tendency in private law scholarship to theoretically and systematically exaggerate the difference between status law and patrimonial law); SONG DEOKSU, CHINJOKSANGSOKBEOP [FAMILY AND INHERITANCE LAW] 1–2 (7th ed. 2024) (arguing that inheritance law belongs to patrimonial law rather than status law); Yun Jinsu, *Jaesanbeopgwa bigyohan gajokbeobui teukseong* [*The Characteristics of Family Law Compared with the Property Law*] 36 KOREAN J. CIV. L. 579 (2007) (criticizing status-law theory, especially for associating family law with irrationality, and arguing that the most distinct feature of family law compared to patrimonial law is that the former correctly views family as a sphere of altruism).

56. KIM JUSU & KIM SANGYONG, CHINJOKSANGSOKBEOP [FAMILY AND INHERITANCE LAW] 13 (19th ed. 2023).

57. Yang, *supra* note 55, at 54; YUN JINSU, CHINJOKSANGSOKBEOP GANGUI [FAMILY AND INHERITANCE LAW] 13 (5th ed. 2023) (criticizing the concept status-act and attributing it to Nakagawa).

58. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 32 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*]; Duncan Kennedy, *Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010) [hereinafter Kennedy, *Family/Patrimony Distinction*]; Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

59. Yun-Ru Chen, The Emergence of Family Law in Colonial Taiwan: A Genealogical Perspective 29–76 (2013) (S.J.D. Dissertation, Harvard Law School) (on file with Harvard Law School Library). There is a long list of literature that investigated the parallel developments of the Savignian family/market distinction in various places, ranging from the U.S. to India to Greece. *See, e.g.*, Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J. L. & HUMAN. 1 (2011); Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L. 873 (2010); JULIA STEPHENS, GOVERNING ISLAM: LAW, EMPIRE, AND SECULARISM IN SOUTH ASIA 22–56 (2018); Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004); Sylvia

Koreans, in turn, were introduced to the distinction by their Japanese rulers and teachers. It has remained resilient up to the present day, offering legal arguments against the legalization of same-sex marriage.

A. FRIEDRICH CARL VON SAVIGNY'S FAMILY/PATRIMONY DISTINCTION

Almost two centuries ago, Friedrich Carl von Savigny (1779-1861), a famous German jurist who was a major creator of classical legal thought, popularized two legal ideas: one was that law was historical, organic, and reflected a particular people's spirit (*Volksgeist*); the other was that law was a universalistic, systematized, and modern *science*.[60] As many commentators have pointed out, the two ideas were in tension with each other.[61] When Savigny elaborated on how to build a scientific yet organic system of law in his eight-volume masterwork, *System of the Modern Roman Law*, he tried to synthesize the two incompatible ideas by creating a dichotomy between family law and patrimonial law.[62] He attributed a distinctly more historical and organic character to family law, and a more universalistic and systematic character to patrimonial law.

In *System*, Savigny provided an early, yet eloquent and extremely influential, articulation of the so-called "will theory," a term coined later by its critics. Will theory in private law encompasses various efforts to theorize and justify private law rules as facilitating and protecting the actualization of the individual "will."[63] It was a quintessential expression of how nineteenth-century legal scientists thought about the law: as a coherent structure consisting of interrelated will-based rules. Notably, in Savigny's articulation of will theory, the goal of individual self-actualization was significantly restrained in the realm of family law, but not in patrimonial law.

According to Savigny, every person has two aspects: an

Wairimu Kang'ara, *Beyond Bed and Bread: Making the African State Through Marriage Law Reform—Constitutive and Transformative Influences of Anglo-American Legal Thought*, 9 HASTINGS RACE & POVERTY L.J. 353 (2012).

60. The two ideas were present in his highly influential essay written in 1814. FRIEDRICH CARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans. 1831).

61. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 811–12; FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY 312–13 (Tony Wier trans., 1995); Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 868–69 (1990).

62. *See generally* Kennedy, *Family/Patrimony Distinction*, *supra* note 58.

63. Kennedy, *Three Globalizations*, *supra* note 58, at 26.

"independent whole" and an "incomplete being."[64] On one hand, a person as an independent individual exercises their will vis-à-vis the outer world, which could involve either another person or object.[65] These relations are governed by the law of obligations and property law, respectively.[66] This is the aforementioned will theory. However, a person also exists as an incomplete being that constitutes a mere part of the "organic whole of mankind."[67] This aspect is reflected in family law relations between husband and wife and parent and child.[68]

From the complete individual versus incomplete part distinction, Savigny derives another distinction between patrimonial law versus family law: Relations governed by patrimonial law are grounded in individual will, and so patrimonial law matters are "less necessary, more arbitrary and positive" than family law matters.[69] By contrast, family law has a "necessary" nature, because it governs relations that are grounded in a "natural coherence."[70]

Paradoxically, the particular (i.e., arbitrary and positive) and the universal (i.e., necessary based on natural law) shift sides in another distinction between patrimonial law and family law. Rules of patrimonial law share similarities across countries because they aim to "wide[n] . . . individual freedom," a universal goal.[71] By contrast, once the basic natural elements are established, many family law rules are "merely positive" and vary in different countries according to their cultural and moral *Volksgeist*, with the laws of Christian states having achieved the highest development.[72] This is where family law assumes the role of preserving the historical, organic, and particular nature of the law, which the scientific and universalistic will theory cannot fully encompass.

The idea that particular family law rules reflect the development of a particular people's culture and morality, in turn, bestows another "necessary" characteristic to family law: family law rules tend to be

64. FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 277 (William Holloway trans., J. Higginbotham 1867) (1840) [hereinafter SAVIGNY, MODERN ROMAN LAW]. Unless otherwise noted, this and the following four paragraphs are based on Duncan Kennedy's reading of Savigny. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 813–19.

65. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 814.

66. *Id.*

67. SAVIGNY, MODERN ROMAN LAW, *supra* note 64, at 276.

68. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 814

69. SAVIGNY, MODERN ROMAN LAW, *supra* note 64, at 301.

70. *Id.* at 277.

71. *Id.* at 301.

72. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 819.

"absolute" and "mandatory," unlike default rules in patrimonial law that can be overwritten by individual will.[73] According to Savigny's logic, family law is *not merely legal* and is also natural, moral, and customary, but because it is so, it is *strictly legal*.[74]

Savigny played an essential role in establishing family law as an independent legal domain.[75] Family law and patrimonial law mutually defined each other, and their distinction was an integral part of the classical architecture he built. His dichotomized distinction was repeated at different levels of description.[76] The organism/individual distinction that described two aspects of humans corresponded to the public law/private law distinction within the larger system of law, as well as to the family/patrimony distinction within private law.[77] It gave his system symmetrical and orderly aesthetics, while enabling him to generate rules, propositions, and principles by deploying the distinctions at any level.[78]

Moreover, Savigny portrayed family law as not only distinct from patrimonial law but also somewhat lagging behind it. This aspect can be seen in Savigny's discussion about the Roman law concept "status." In his effort to systematize and modernize Roman law, Savigny redefined and recategorized the three primary statuses in Roman law: *status libertatis*, *status civitatis*, and *status familiae*.[79] As Savigny

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73. *Id.* at 818.

74. For the strictly legal character of family law rules, see also FRIEDRICH CARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES 78 (William Guthrie trans., T. & T. Clark 2nd ed. 1880) (1849) [hereinafter SAVIGNY, PRIVATE INT'L LAW].

75. For Savigny's role in establishing family law as an independent field of law, see Wolfram Müller-Freienfels, *The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England*, J. FAM. HIST. 31, 38 (2003) (explaining how family law as an independent category emerged against the backdrop of systematization, categorization, and rationalization efforts in law since the seventeenth century onwards and noting a significant role that Savigny played in that history).

76. Kennedy called this technique "nesting." Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 821–22.

77. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 822–24. There is yet another distinction within family law. *See*, *e.g.*, SAVIGNY, PRIVATE INT'L LAW, *supra* note 74, at 140 ("The family appears partly in its original nature as a permanent mode of life (pure family law), partly in the important influence which its various branches exercise upon property (applied family law).").

78. For an example of how Savigny derives a choice-of-law rule on marriage (*lex domicilli*) from the family/patrimony distinction, see SAVIGNY, PRIVATE INT'L LAW, *supra* note 74, at 290–91.

79. *Status libertatis* concerned whether one was free or enslaved, *status civitatis* concerned whether one was a Roman citizen or belonged to foreigner groups, and *status familiae* concerned whether one was under the power of the head of the household. VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 33 (2019).

viewed it, the common definition of status as conditions or attributes of persons that were tied to their legal personhood or jural capacity had to be updated.[80] He redefined status in terms of relationships between persons,[81] recategorized the three statuses into the dichotomized public law and private law statuses, and assigned private law status to the family.[82] Status, in private law, now meant "the position which the individual Man occupies in the different forms of Family Relations."[83]

In giving the private law concept status to the newly constructed field of family law, Savigny divorced capacity matters from status and made it clear that "all Relations of the Family Law . . . are to be reckoned without distinction as *status*," regardless of whether they influence one's capacity.[84] This was to categorize *all* family relations under the redefined concept status,[85] rather than to completely liberate family relations from incapacity or limited capacity. Quite the contrary: while *status libertatis* and *status civitatis* have little significance in the modern era where there is no slave or foreigner whose capacities are deprived or restricted,

> there undoubtedly still subsists in our Modern Law the dependence upon Paternal Power, and the restricted Jural Capacity founded thereon has also to some extent remained unchanged: indeed, even where it has undergone material modifications by the written Laws of the Christian Emperors, it can still only be correctly understood and practically

80. SAVIGNY, MODERN ROMAN LAW, *supra* note 64, at 324; FRIEDRICH CARL VON SAVIGNY, JURAL RELATIONS, OR, THE ROMAN LAW OF PERSONS AS SUBJECTS OF JURAL RELATIONS 320 (W. H. Rattigan trans., Wildy & Sons 1884) (1840) [hereinafter SAVIGNY, JURAL RELATIONS]. Jural capacity refers to the condition to become the subject of legal rights, or, in the Savignian terms, is a matter of "who can be the Bearer or Subject of a Jural Relation." *Id.* at 1. Jural capacity is thus connected to the legal personhood and distinguished from what he calls the "capacity of action." For discussion of Savigny's understanding of personhood and jural capacity, see KURKI, *supra* note 79, at 44.

81. SAVIGNY, JURAL RELATIONS, *supra* note 80, at 322 ("Status, in this technical sense, means with the Roman Jurists the Position or Standpoint which the individual Man assumes in relation to other Men.").

82. *Id.* at 322–26.

83. *Id.* at 326. As such, Savigny argued that the first book of The Institutes of Justinian, which outlined Roman Law of persons, was "almost precisely the same . . . as family-law." SAVIGNY, MODERN ROMAN LAW, *supra* note 64, at 325.

84. SAVIGNY, JURAL RELATIONS, *supra* note 80, at 324.

85. Thus, even though marriage "produces no change whatever in our Jural Capacity," it is undoubtedly a family relation recognized as status. SAVIGNY, JURAL RELATIONS, *supra* note 80, at 320, 325.

applied in connection with the Ancient Law.[86]

Despite all his recategorization and redefinition, then, the ancient idea of hierarchical and unfree status did have an enduring significance in modern law, specifically, in modern *family* law!

To sum up: the dichotomous relationship between family and patrimonial law was important in Savigny's effort to synthesize the two great ideas of the nineteenth-century German legal science. In his eloquent yet incomplete synthesis, both private law as a whole and family law as its part were at once historical/organic and scientific/systematic. Within the constitutive relationship, however, family law was *more* historical/organic than its counterpart: it was a reservoir of *Volksgeist*, of national morals and customs, of potentially unfree and hierarchical but timeless traditions; and because it was so, it had an absolute and mandatory nature. These two ideas, transmitted through Japanese "law of status" and through Koreans' belated effort to build a classical legal system, became deeply entrenched in Korean private law.

B. CLASSICAL IDEAS IN KOREAN LAW

Meiji Japanese elites in the late nineteenth century were aware of both classical ideas—(family) law as a reservoir of *Volksgeist* and as (part of) a scientific system—and deployed them in their debate about legal modernization and codification.[87] When they wrote the Japanese Civil Code in 1898, the European-educated Japanese elites tried to preserve the Japanese "house (*ie*)" in the neo-traditionalist family and inheritance law, while conceding to a more individualist patrimonial law.[88] The family/patrimony dualism was repeated in their colonial governance. After they annexed Korea in 1910, the Japanese ostensibly refrained from interfering with local family and inheritance law while imposing the rest of their Civil Code, as many other colonial powers did.[89] Meanwhile, Korean elites acquired European legal

86. SAVIGNY, JURAL RELATIONS, *supra* note 80, at 109.

87. Chen, *supra* note 59, at 29–76.

88. *Id.* Put simply, *ie* refers to a patriarchal stem family system where house head, usually the father, enjoyed great authority over his spouse and lineal descendants. Only one married child—usually, but not always, the first-born son—inherited the family property and the status of house head.

89. During the colonial period (1910-1945), the Governor General of Korea, granted the legislative power in the colony, applied the civil and commercial codes of Japan with the notable exceptions on the matters of capacity, family, and certain real property rights, which were governed by Korean customs. However, this distinction was both ideological and fluid. The customs themselves were found and made by the

knowledge through Japanese intermediaries beginning at the dawn of the annexation, throughout the colonial period, and well into the post-liberation years.

Unlike Savigny, for whom family law meant rules of marriage, divorce, and parent-child relationships, but not inheritance, Japanese jurists grouped together the law of relatives (family) and the law of inheritance, codified as the fourth and fifth books of the Japanese Civil Code.[90] They understood it as a single subfield in private law and called it status law.[91] During the colonial period, Koreans learned both the categorization and the nomenclature from the Japanese, although the name status law is no longer in use. Since the term status most commonly refers to social hierarchies in Joseon Korea or premodern societies in general, the name is now deemed "inappropriate"[92] and replaced with, simply, family law.[93]

Interestingly, the term "status" likely had been introduced to Koreans as a legal terminology before it acquired other meanings. According to a recent historical study, the word was imported from Japan circa 1895 and became associated with premodern hierarchies only in the 1920s.[94] At first, status referred to one's position in public office or identification/standing in law.[95] To these earlier meanings, we can add the Savignian one: an individual's place within the

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Japanese through the process of customs survey as well as through court cases. Furthermore, the exceptional area where Korean customs had to be respected did not remain constant. Over time, Japanese family law became increasingly applicable. *See generally* MARIE SEONG-HAK KIM, LAW AND CUSTOM IN KOREA: COMPARATIVE LEGAL HISTORY 172–234 (2012); YI SEUNGIL, JOSEONCHONGDOKBU BEOPJE JEONGCHAEK [LEGAL POLICY OF THE GOVERNOR GENERAL OF KOREA] (2008); YANG HYEONA, HANGUK GAJOKBEOP IKGI: JEONTONG, SINGMINJISEONG, JENDEOUI GYOCHAROESEO [READING KOREAN FAMILY LAW: AT THE CROSSROADS OF TRADITION, COLONIALITY, AND GENDER] 138-40, 173-76 (2011).

90. Chen, *supra* note 59, at 19.

91. Precisely when and how the Japanese name and categorization came into place is out of the scope of this Article. Given the salience of the patriarchal house system in both family and inheritance law, however, the categorization is not surprising.

92. KIM & KIM, *supra* note 56, at 13–14.

93. Therefore, "family law" in Korea may refer to family law in the narrow sense or family and inheritance law together. The usage of "family law" in this Article depends on the context. When referring to Korean family law without specifying whether it includes inheritance law, it is because the distinction is not relevant for the discussion at hand.

94. Baek Kwangryeol, *Hanguk geundaejeonhwangi 'sinbun' 'sinbunje' yongeoui seongnipgwa byeoncheon* [*The Establishment and Evolution of the Terms 'Estate (Stände, Shin-bun) / Estate (Shin-bun) System' During Korea's Transition to Modernity*], 22 CONCEPT AND COMMUNICATION 163 (2018).

95. *Id*. at 187–94. Baek does not investigate the Savignian meaning of the term. *Id.* at 169.

family.[96] The Civil Registry Act of 1909 used the term precisely in that sense.[97] The law marked the beginning of the colonial state's regulation of the population through the selective implantation of the Japanese house registration system.[98] While the 1909 law left the substance of Korean family norms generally untouched, it transformed the existing family registry under Joseon Korean law into a document that published and disclosed *legal* families, rather than cohabiting households, and the individuals' *status* within those legal families.[99] Likewise, from early on, the term was used in colonial courts to describe and contest Korean family law customs as in "status of parent and child,"[100] "status of adopted son,"[101] and "status of concubine."[102]

Outside the colonial government and courts, and even before the formal annexation, Korean elites were introduced to the classical distinctions and the idea of "status" through Japanese legal books and scholarly writings. The first legal textbook in the Korean language was published in 1905, more than a half century after Savigny published his *System*.[103] The author, part of the first group of late-Joseon elites who went to Japan to learn modern knowledge, based the work on a

96. *See supra* note 83 and accompanying text.

97. YI, *supra* note 89, at 226, n.200.

98. In addition to the codification of family law as part of private law, modern house registration system was put in place and developed during the Meiji period. Together, they played a critical role in the governance of Japanese empire, allowing the colonial state's control of its subjects while marking differences between the subjects in the metropole and in the colonies. *See generally* YI JEONGSEON, DONGHWAWA BAEJE [ASSIMILATION AND EXCLUSION] (2017). Meanwhile, Joseon Korea had maintained its own family registry, and Joseon Korean law had incorporated its own Confucian household system. Both of these underwent substantial changes under the Japanese rule. The Civil Registry Act of 1909 marked the beginning of the Japanese influence in the family registration system, which preceded the formal annexation in 1910. YI, *supra* note 89, at 225–32. For English accounts, SUNGYUN LIM, RULES OF THE HOUSE: FAMILY LAW AND DOMESTIC DISPUTES IN COLONIAL KOREA 39-43 (2018); Barbara J. Brooks, *Japanese Colonialism, Gender, and Household Registration: Legal Reconstruction of Boundaries*, *in* GENDER AND LAW IN THE JAPANESE IMPERIUM 219, 227–28 (Susan L. Burns & Barbara J. Brooks eds., 2014).

99. YI, *supra* note 89, at 223–24; LIM, *supra* note 98 at 40–41.

100. *E.g.* [1 MINSAPYEON] S. CT. LIBR. OF KOR., GUGYEOK GODEUNGBEOBWONPANGYEOLLOK [JOSEON HIGH COURT CASES IN KOREAN TRANSLATION] 200–01 (2004) (in a 1911 case).

101. *E.g.*, *id*. at 303–06 (in a 1912 case).

102. *E.g.* [2 MINSAPYEON] S. CT. LIBR. OF KOR., GUGYEOK GODEUNGBEOBWONPANGYEOLLOK [JOSEON HIGH COURT CASES IN KOREAN TRANSLATION] 64–66 (2006) (in a 1912 case).

103. YU SEONGJUN, BEOPAKTONGNON [GENERAL THEORY OF LAW] (1905). Savigny's *System* was published between 1840 and 1849.

famous Meiji Japanese textbook.[104] Opening his chapter on private law, he wrote that "private right is not completely equal and does not avoid some tendency towards inequality, which comes from differences in *status*, such as special rights of a parent and a husband."[105] Beyond repeating Savignian ideas in Korean instead of Japanese or German, the author played his own part in the construction of the *Korean* family/patrimony distinction through selective translation. He included some aspects of family and inheritance law that he thought were worth referring to, while omitting others, based on the rationale that those aspects were and ought to instead be based on Korea's own customs and traditions.[106] Textbooks translated in such a manner were then used in contemporary Korean schools.[107]

A half century later, in the 1950s, when postcolonial legal elites began to build a "civil law system of . . . [their] own,"[108] they had already internalized the Savignian logic and language. In the codification debate of the 1950s, most legal elites agreed that family and inheritance law governed status-relations of the Korean people[109] and had to be based on the "morality and historical tradition of our own country, society, nation and people."[110] Unlike property and contract law, "no country could import the family and inheritance law of another country."[111] The colonial law that designated family as a sphere of local customs must have influenced their thinking. Without realizing that the "customs" themselves had been found, made, and transformed by the Japanese as part of their colonial governance,[112]

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104. Yu's book was based on Meiji Japanese scholar Kishimoto Tatsuo's book. Yoshikawa Ayako, *Geundae chogi hangugui minbeopak suyonggwa pansae daehan yeonghyang: 1900-1910 nyeondae ihonbeobeul jungsimeuro* [*Reception of Private Law in Early Modern Korea and its Influence on Judges*], 46 KOREAN J. LEGAL HIST. 349, 361 (2012).

105. YU, *supra* note 103, at 205 (emphasis added).

106. Divorce, for instance, was included in Yu's textbook as well as a similar textbook. Yoshikawa, *supra* note 104, at 374–76.

107. *Id.* at 364.

108. KIM JEUNGHAN & AN IJUN, SIN MINBEOPCHONGCHIK [GENERAL MATTERS OF NEW PRIVATE LAW] (1960), *quoted in* Yang Changsu, *Hanguk minbeopak 50nyeonui seonggwawa 21segijeok gwaje* [*Accomplishments of 50 Years of Korean Private Law and its Task in the Twentieth Century*], 36 SEOUL NAT'L U. L. J., no. 2, 1995, at 1, 4.

109. *See, e.g.*, Gukoejeonggihoeuisokgirok [Records of National Assembly's Regular Sessions], 3rd National Assembly, 26th Session, no. 29, at 14–16 (Nov. 5, 1957) (statement of Bae Yeongho).

110. Gukoejeonggihoeuisokgirok [Records of National Assembly's Regular Sessions], 3rd National Assembly, 26th Session, no. 30, at 7 (Nov. 6, 1957) (statement of Kim Byeongro).

111. *Id.*

112. *See supra* note 89.

postcolonial legal elites simply accepted as truth that family law was, and had to remain, "Korean." As such, Kim Byeongro (1887-1964), the head of the codification committee and a proud Confucian-traditionalist, argued that the "Japs" were "unable" to apply their family and inheritance law in Korea, even as "they controlled our politics and our law willy-nilly."[113] Under Kim's lead and despite opposition from Western-minded Christian feminists,[114] the Korean Civil Act (1958) enshrined the "Korean" traditions in family and inheritance law. In contrast, in the realm of patrimonial law, the Act consulted "the progress in civil law codes around the world, according to the changing trends of the times.[115]

In addition to writing a Korean code, the postcolonial legal elites also wrote Korean textbooks. Textbook-writing was a crucial part of professorial work, as much as textbook-reading was for law students.[116] Textbooks were meant to provide a clear and concise view of the private law system.[117] The first-generation postwar professors began to publish "Korean" textbooks even before the 1958 code was drafted, largely referring to famous Japanese textbooks.[118] There, too, Savignian legacies were unmistakable. In a 1953 textbook, a leading private law scholar opened the private law section by outlining the nested distinctions between public law versus private law, and patrimonial law versus status law; the former was about one's life as a citizen versus as a human being, whereas the latter was

113. Gukoejeonggihoeuisokgirok [Records of National Assembly's Regular Sessions], 3rd National Assembly, 26th Session, no. 30, at 11 (Nov. 6, 1957) (statement of Kim Byeongro).

114. *See infra* note 227 and accompanying text.

115. Gukoejeonggihoeuisokgirok [Records of National Assembly's Regular Sessions], 3rd National Assembly, 26th Session, no. 29, at 7 (Nov. 5, 1957) (statement of Jang Gyeonggeun).

116. Yang, *supra* note 108, at 2–4. Writing textbooks continues to be a respected task undertaken by legal academics, although it is not as important as it once was.

117. *See* KIM JEUNGHAN, MINBEOPCHONGCHIK [GENERAL MATTERS OF PRIVATE LAW] 1 (1963).

118. During the colonial period (1910-1945), especially in its first half, Koreans had limited access to elite legal institutions and academia due to the organization of the legal education and profession. The word choice of "first-generation" postwar professors makes sense in this regard. After liberation, the small group of Koreans who had been privileged with elite colonial legal education and training embarked on a dual mission: to Koreanize and systematize the law. However, these two objectives often came into conflict. On one side, they emphasized the need to break free from the Japanese legacies. On the other, they were unable to systematize out of nothing, and the easiest resource to look for was Japanese. Consequently, postcolonial Korean legal elites frequently referred to Japanese codes, court decisions, textbooks, and journal articles, though they did not always openly acknowledge these references. *See generally* Kim, *supra* note 10, at 12–23 (describing the emergence of post-war Korean legal thought against the background of colonial institutions).

about economic versus family lives of human beings.[119] He noted that status law was grounded in Korean customs, and that the guiding principles of modern private law, rooted in individual freedom, were less pronounced in status law.[120] Even the writers who embraced consciously anti-traditionalist visions for family law rarely broke away from these classical distinctions entirely.[121]

Despite another half-century passing since then, Savignian patterns and ideas have endured shockingly well in Korean private law.[122] Most scholars still begin their textbooks with discussions about the "special characteristics of family law." Here, they often contrast family law with patrimonial law using pairs of opposites such as: "uncalculating versus calculating"; "altruistic versus individualistic"; "paternalism versus individual autonomy"; "mandatory rules versus default rules"; "conservative and sensitive to [particular] customs versus progressive and universal"; and "more formalities versus fewer formalities."[123]

Returning to the discussion of same-sex marriage, the most obvious implication of the Savignian legacies is that they supply an easily available legal argument against its recognition: same-sex marriage is a brand-new institution, considered foreign to Korean law. This is demonstrated in the few cases that preceded the recent NHIS case, in which legal decision-makers of different ranks grappled with the same-sex marriage question. In 2004, a gay couple tried to file a marriage registration after holding a small but public

119. KIM JEUNGHAN, BEOPAKTONGNON [GENERAL THEORY OF LAW] 174–75 (2nd ed., 1953).

120. *Id.*

121. *See, e.g.*, JEONG GWANGHYEON, SIN CHINJOKSANGSOKBEOP YORON [NEW FAMILY AND INHERITANCE LAW] 46–48 (1958) (arguing that family and inheritance law, unlike the law of obligations, is "organizational norms that regulate and create status-relationships in status-lives"). However, Jeong not only dismisses the persistence of unequal tradition in family law, but also emphasizes that family law is merely positive. *Id.*

122. The shocking endurance of the Savignian patterns and ideas may be attributed to several factors. These include the appeal of the symmetrical and orderly aesthetics, the structured nature of legal argumentation, the way Korean legal elites reproduced themselves and rewrote their textbooks, or some combination of the above.

123. *See, e.g.*, SIN YEONGHO & KIM SANGHUN, GAJOKBEOP GANGUI [FAMILY LAW] 7–11 (4th ed. 2023); SONG, *supra* note 55, at 3–4; YI GYEONGHUI & YUN BUCHAN, GAJOKBEOP [FAMILY LAW] 4–7 (10th ed. 2021); KIM & KIM, *supra* note 56, at 16–21. *But see* YUN, *supra* note 57, at 7–9 (criticizing the scholars' tendency to generalize family law as a sphere of irrationality and conservativeness). Yun does not go all the way and concedes that there is a meaningful difference between the law of obligations and family law. *See infra* notes 146–148 and accompanying text.

wedding.[124] The village office, after debating for six hours, told them they could not accept the application because "it was against good customs."[125]

In 2013, another gay couple, a filmmaker/gay rights activist and his boyfriend and cinematic collaborator, held a widely publicized wedding and, again, unsuccessfully tried to register their marriage.[126] This time, the couple brought the matter to court. The public interest lawyers who took the case argued that the village office's refusal violated the plaintiffs' freedom and equality rights.[127] This was the first case to present a facial challenge to the heterosexual marriage law at the judiciary.[128] The district court dismissed the case in 2016.[129] After balancing the plaintiffs' rights against the need to protect marriage as a social and public institution, the court ruled that there was an internal but essential restriction that marriage had to be "a *morally* and *customarily* legitimate union . . . between a man and a woman,"[130] even though, unlike bigamy or incest, there was no such explicit requirement to that effect in the Civil Act.[131] The definition

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124. *Namseong dongseongaeja gonggae gyeolhonsik yeollyeo* [*Male Homosexuals Hold Public Wedding*], HANKYOREH (Mar. 6, 2004, 3:48 PM), https://perma.cc/UX84-3YK9.

125. Park Seongjun, *[Maineoriti ripoteu] "sarangdo gyeolhondo dangdanghage injeongbatgo sipeoyo"* [*[Minority Report] "We Would Like Our Love and Marriage Publicly Recognized"*], SEGYEILBO (May 21, 2004, 6:28 PM), https://perma.cc/H6VX-5BTA.

126. For an English account of this event, see Todd A. Henry, *Queer Korea: Toward a Field of Engagement*, *in* QUEER KOREA 1, 1–2 (Todd A. Henry ed., 2020).

127. *See* Seoul Seobujibangbeobwon [Seoul W. Dist. Ct.], May 25, 2016, 2014Hopa1842 (S. Kor.).

128. *But see* Incheon Jibangbeobwon [Incheon Dist. Ct.], July 23, 2004, 2003Deuhap292 (S. Kor.) (rejecting plaintiff's claim for a division of marital assets and damages based on a de facto same-sex marriage argument).

129. Seoul Seobujibangbeobwon [Seoul W. Dist. Ct.], May 25, 2016, 2014Hopa1842 (S. Kor.).

130. *Id.*

131. The Civil Act outlines instances where a marriage is null and void (*e.g.*, close consanguineous marriage) and situations where a marriage is voidable (*e.g.*, bigamy, other consanguineous marriage). Minbeob [Civil Act] art. 815, 816 (S. Kor.). Unsurprisingly, these provisions do not specifically address marriages between same-sex partners. This has enabled some scholars to argue that private law implicitly allows for same-sex marriage, or that the Civil Act should be interpreted as such. They cite the principle that when multiple interpretations are possible, preference should be given to those in line with the Constitution. *E.g.*, Son Myung Ji, *Dongseonghone daehan jaego—hyeonhaengbeopsang haeseongnoneul jungsimeuro* [*A Study on Same-Sex Marriage: Focusing on the Interpretation of Current Law*], 33 KOREAN J. FAM. L., no. 3, 2019, at 1; Seong Jungtak, *Dongseonghone gwanhan beopjeok jaengjeomgwa jeonmang* [*Legal Issues and Prospects of Same-Sex Marriage*], 31 KOREAN J. FAM. L., no. 1, 2017, at 229, 240–41; Han Sanghui, *Dongseonghoneun wollae hapbeobida* [*Same-Sex Marriage is Already Legal*], THE JOONGANG (July 30, 2015, 11:23 AM),

was conveniently available from Supreme Court cases and reflected the now-familiar Savignian idea that institutions in family law, including marriage, rest on moral and customary, not just legal, norms,[132] and that the law should and does reflect and align with these moral and customary norms.[133]

The morality and customs in question are, of course, *Korean* morality and customs. This national aspect of marriage is more salient in the international setting. In 2018, a British man, who married a Korean man in the U.K., applied to the Ministry of Justice for a spousal visa. In its response written in English, the Ministry wrote that "[i]n Korea, marriage has been regarded and traditionally operated as [sic] combination of different sexes, and Korean people have had such view."[134] Referring once again to the legal notion that marriage must be "justified in terms of morals and custom," the Ministry of Justice stated that, in the absence of "a national consensus," they were unable

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https://perma.cc/BM6T-U34U. Long before the advent of the marriage equality discourse, Japanese private law scholars in the first half of the twentieth century incorporated various interpretive solutions into their textbooks to address the issue of same-sex marriage. This was deemed necessary because, despite its "obvious" impossibility, the code did not expressly list same-sex marriage as a ground for nullity or voidability. For a deeper dive into this intriguing history, see Daniel Machado, *The Lost Discussion on Sexual Difference in Marriage Law in Prewar Japan*, 87 J. SOC. SCI. 109 (2020).

132. For Savigny, family law had a threefold nature of the moral, the natural, and the legal. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 816. The religious/natural law perspective on family law has not held much significance in Korean private law.

133. *E.g.*, Daebeobwon [S. Ct.], July 13, 1982, 82Meu4 (S. Kor.). The complete definition given is: "Marriage is a morally and customarily legitimate union [formed] for the purpose of lifelong community based on affection between a man and a woman." *Id.* Before the rise of same-sex marriage, the Supreme Court used the expression, among others, in unsuccessful divorce cases where it denied a divorce request on the grounds that there was no irretrievable breakdown of marriage or that the plaintiff was at fault. *E.g.*, *id.*; Daebeobwon [S. Ct.], Feb. 12, 1999, 97Meu612 (S. Kor.); Daebeobwon [S. Ct.], Feb. 26, 2015, 2014Meu4734 & 4741 (S. Kor.). In a 2015 en banc decision, the Supreme Court reevaluated whether a spouse at fault should be allowed to walk out of marriage against the wishes of the other spouse. The Court began the opinion by stressing the high level of duties inherent in marriage, described as "a contract [to create a] *status*." Daebeobwon [S. Ct.], Sept. 15, 2015, 2013Meu568 (S. Kor.) (emphasis added). The Court highlighted moral as well as legal duties to nurture, protect, and diligently maintain one's marriage, alongside the "moral and ethical view of the society," to support its conclusion: no divorce for cheaters and deserters. *Id.*

134. Jung Min-ho, *Korean Gov't Rejects Visa Request From Same-Sex Marriage Couple*, THE KOREA TIMES (June 5, 2018, 3:45 PM), https://perma.cc/CE6J-E8UB. After the Ministry's rejection, Simon Hunter-Williams, the British man involved in the case, lodged a petition with the National Human Rights Commission of Korea, but to no avail. Kim So-hyun, *Rights Panel Says It Doesn't "Deny" Same-Sex Marriage*, THE KOREA HERALD (Feb. 27, 2019, 3:29 PM), https://perma.cc/P5WQ-MZDN.

to grant the petitioner spousal visa status.[135]

Social conservatives have not overlooked the Savignian morals-and-customs argument against same-sex marriage. Following the high court's decision and during the seventeen months leading up to the recent Supreme Court decision in the NHIS case, anti-LGBTI organizations argued that the high court's ruling, which deemed the NHIS's exclusion of same-sex partners as discriminatory, went against the morality and customs as well as the written and unwritten laws of Korea.[136] They highlighted the courts' definition of marriage as a "morally and customarily legitimate union . . . between a man and a woman."[137] In language strikingly similar to that of the Confucian-traditionalists from decades before, the Christian-traditionalists argued in the same anti-universalist and nationalist terms: "the LGBT community and cultural sycophants have blindly accepted the recommendations from the UN, as if they were self-evident"; by so doing, they have "trampled over the customs and the legal system of Korea"; Koreans should not subscribe to "[Western] gender theories," which violate the "traditional family system"; neither should they accept anti-discrimination and equality laws of the West, which were born in an entirely different historical background; the administrative court, therefore, was absolutely right in rejecting the plaintiff's international human rights argument and in holding that the "institution of marriage is a manifestation of the social and cultural implications of each society."[138]

There are multiple layers of irony in this history. Confucian-traditionalists in the mid-twentieth century deployed the logic of Savigny, a nineteenth-century German jurist, to defend the Korean family.[139] That German jurist was defending a Christian tradition of indissoluble marriage against radical liberal-individualists,[140] while at the same time differentiating it from marriage laws of "uncivilized" nations.[141] Without realizing it, the mid-century Confucian-traditionalists replicated the Christian jurist's logic, asserting the

135. Jung, *supra* note 134.

136. Song, *supra* note 35.

137. *Id.*

138. *Id.*

139. *See supra* notes 113–115 and accompanying text; Kim, *supra* note 10, at 24–26.

140. Kennedy, *Family/Patrimony Distinction*, *supra* note 58, at 826. For Savigny's politics, see also WIEACKER, *supra* note 61, at 306 ("Savigny was a firm believer in Kant's theory of law and his liberal ethics, yet his politics and religion made him a supporter of the existing political and ecclesiastical order and of the traditional rights of the crown, the Church, the corporations, and the privileged class.").

141. *See, e.g.*, SAVIGNY, PRIVATE INT'L LAW, *supra* note 74, at 78–79.

superiority of Korean cultural and moral values over Western or Japanese ones.[142] Opposing the Confucian-traditionalists, Christian feminists emerged as the primary anti-traditionalist force, although their efforts fell short during the codification process.[143] Now, decades later, it is the Christian-traditionalists who are employing the same logic to defend, once again, the "Korean" family!

Moreover, not only does Korean private law embrace the national-customs-and-morality vision of marriage, but it also views the institutions of marriage and family as integral to a public, socially significant, and compulsory order—even when that order isn't necessarily traditional. This effectively reflects the latter part of the Savignian notion that family law, by virtue of being more than merely legal, must be strictly legal within a national legal system. It also carries forward the colonial Japanese understanding and use of "status" as a tool for state regulation of individuals. This mandatory-social-order vision of marriage and family holds relevance beyond the far-right, traditionalist-nationalist discourses and appears in mainstream legal elites' thinking about same-sex marriage.

Professor Yun Jinsu, one of the most thoughtful writers in the field, criticizes scholars' tendencies to generalize family law as a sphere of conservatism and customs.[144] He correctly notes that, in Korea, the pace of change in modern family law has been faster than that of patrimonial law, and that the changes in family law have been in the direction of individualism and equality.[145] Despite his criticism, however, Yun does not depart from the family/patrimony distinction entirely. The most distinctive characteristic of family law, according to Yun, is that it consists of mandatory rules and requires more formalities, whereas the law of obligations is governed by the freedom of contract.[146] This is because one's status, as a fundamental basis for one's legal relationships, demands a high level of certainty and stability.[147] As such, institutions of family law, in many cases, constitute the "good customs and public order."[148]

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142. *See supra* notes 113–115 and accompanying text; Kim, *supra* note 10, at 24–26.

143. *See infra* note 227 and accompanying text; Kim, *supra* note 10, at 27–28.

144. *See* YUN, *supra* note 57, at 7–8.

145. *Id.*

146. *Id.* at 8.

147. *Id.*

148. Understood narrowly, the notion that institutions in family law constitute part and parcel of the "good customs and public order" simply means that one cannot contract around family law rules. *See* Minbeob [Civil Act] art. 103 (S. Kor.) ("Any juridical act that violates good customs and public order shall be null and void"); *id.* art. 105 (S. Kor.) ("If a party to a juridical act manifests a will that diverges from any

In a similar vein, courts have understood the institutions of marriage and family as constituting a certain "order"[149] that is significant for society as a whole.[150] Courts do not talk about the "order of contracts" or worry about "dismantling the institution of contracts." However, when dealing with marriage and family, they often stress the need to consider whether decisions will disrupt the "proper marriage order,"[151] violate the "family order based on social norms,"[152] or "dismantle the institution of marriage and family."[153] The stability of that "order" is believed to be essential for society because family law governs one's *status*-relations.[154]

Just like the national-custom-and-morality vision of marriage, this mandatory-social-order vision of marriage provides a readily available legal argument against same-sex marriage. In the 2016 case where the district court rejected the filmmaker couple's freedom and equality rights claim on the basis of social order, the "social" importance of marriage was so great that even education, workplace, and healthcare were deemed "personal" in comparison to marriage and family.[155] Similarly, in the NHIS case, the Supreme Court's dissent stressed that "'spouse' is a concept related to status-relations, which crucially demand stability," and the administrative court considered the "public interest request for the maintenance" of the "existing marriage law order" in rejecting the plaintiff's claim.[156]

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provision in the Act that does not concern good customs and public order, such will shall prevail."). For instance, the Supreme Court has ruled that a contract not to divorce is null and void as it violates good customs and public order. Daebeobwon [S. Ct.], Aug. 19, 1969, 69Meu18 (S. Kor.). Understood more broadly, of course, the notion is a repetition of the Savignian idea that family law rests on "good customs" or "good morals" and is thus part of a mandatory, "public order."

149. This order is an amalgam of the legal, the moral, and the customary. *See, e.g.*, Seoul Gajeongbeobwon [Seoul Fam. Ct.], Jan. 16, 2004, 2002Deudan69092 (S. Kor.) ("the marriage order such as laws, morals, and customs").

150. *See, e.g.*, Daebeobwon [S. Ct.], Sept. 15, 2015, 2013Meu568 (S. Kor.).

151. *E.g.*, Seoul Gajeongbeobwon [Seoul Fam. Ct.], Mar. 10, 2005, 2004Leu910 (S. Kor.) (stating that the legislative intent of art. 816 para. 3 of the Civil Act, which renders a marriage voidable when one party was induced to enter into the marriage due to fraud or duress, is to "establish a proper marriage order that complies with laws, morals, and customs" and that the provision is applicable *per analogiam* "if there is a sufficient need to . . . to establish the proper marriage order by nullifying a marriage").

152. *E.g.* Daebeobwon [S. Ct.], Apr. 13, 2001, 2000Da52943. *See also* Daebeobwon [S. Ct.], Dec. 24, 2010, 2010Seu151 (discussing the "internal order of the family").

153. *E.g.* Daebeobwon [S. Ct.], Sep. 15, 2015, 2013Meu568.

154. Therefore, the term "status order" frequently appears in legal texts. *E.g.*, Daebeobwon [S. Ct.], June 18, 2020, 2015Meu8351 at 32 (S. Kor.).

155. Therefore, the judiciary could protect sexual minorities from discrimination in education, occupation, or healthcare, but not in marriage. Seoul Seobujibangbeobwon [Seoul W. Dist. Ct.], May 25, 2016, 2014Hopa1842 (S. Kor.).

156. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.); Seoul

Despite the salience of the Savignian and classical thinking to Korean private law discourse, it does not accurately describe how family law developed or what the law *is* in Korea. For one, the history of Korean family law since the 1958 codification testifies against the idea that the law of status reflects a timeless Korean tradition. At the time of the codification, mainstream legal elites (mistakenly) believed two fundamental institutions to be distinctly Korean: the broad ban on consanguine marriage between individuals with the same family name and family seat (hereinafter, "consanguinity rule"), and the household system that designated who became the head of each patrilineal household (typically the eldest male) and allocated property and inheritance rights accordingly.[157] The household system was significantly modified by feminist-initiated legislative reforms in 1977 and 1989.[158] The consanguinity rule and what remained of the household system were later declared unconstitutional by the Constitutional Court in 1997 and 2005, respectively, striking a massive blow against the "traditional" family law.[159]

Unlike in the mid-twentieth century, no one in the ongoing same-sex marriage debate is a true "Eastern" or "Confucian" traditionalist. Despite the use of Savignian rhetoric in legal arguments, mainstream legal elites, including judges, are not ideologically traditionalist. Indeed, the only traditionalist stance is held by evangelical Christians, whose crusade against same-sex marriage is, overall, parasitic on the U.S. culture wars phenomenon. They are defending a Western tradition against Western-liberal legal developments.

Notably, in addition to the big legislative and constitutional reforms that were consciously anti-traditional, the boring, technical, and depoliticized court opinions and private law textbooks also contain a body of law that is silently, but decidedly, in tension with the Savignian ideas: the jurisprudence of de facto marriage. That is what the marriage equality advocates in the NHIS case resorted to and what the following Part discusses.

Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.).

157. Since the household system was closely related to premodern neo-Confucian law, which was transplanted from China to Joseon Korea, many postwar Korean legal elites viewed the system as a Korean tradition rather than a Japanese colonial legacy.

158. YANG, *supra* note 89, at 277–305.

159. Hunbeobjaepanso [Const. Ct.], July 16, 1997, 95Hunga6 (consol.) (S. Kor.); Hunbeobjaepanso [Const. Ct.], Feb. 3, 2005, 2001Hunga9 (consol.) (S. Kor.).

III. A "JAPANESE" PAST: DE FACTO MARRIAGE CREATES TENSIONS IN NATIONAL CUSTOMS AND ORDER

The jurisprudence of de facto marriage refers to a body of law that gives a range of effects to relationships that are marriage-like but remain unformalized. A key argument of the marriage equality advocates in the NHIS case was that the plaintiff's same-sex relationship with his partner should qualify as a de facto marriage.[160] The plaintiff and his partner had been in a romantic relationship since 2013.[161] In 2017, they moved in together.[162] In 2019, they had a wedding ceremony in front of more than 300 guests.[163] They were economically dependent on each other. Therefore, argued the plaintiff, the "substance" of their relationship was not different from that of a marriage.[164]

Marriage equality advocates in Korea have correctly identified some of the anti-classical potential of de facto marriage. There are at least three ways in which the institution of de facto marriage creates tension in the classical marriage/family regime. First, and most obviously, it relaxes certain entry rules of marriage, which contradicts the notion that family law rules are more, rather than less, mandatory than patrimonial law rules ("Tension 1"). Second, de facto marriage has been historically and contemporaneously associated with the protection of families that did not, or could not, fit into the traditional and Savignian family law regime ("Tension 2"). Third, de facto marriage at once creates and exemplifies instability and disintegration of marriage within the supposedly stable and coherent "system" of law ("Tension 3"). I will address the first two tensions in this Part, saving the last tension for the next Part IV.

Identifying even the relatively clear first two tensions in court cases and conventional writings by private law scholars is not a simple task—it takes a good amount of historical research and analytical work to do so. This is because de facto marriage, despite all the contradictions and tensions that come with it, still exists within the Korean classical regime. Common arguments defending de facto

160. *See* Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

161. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

162. *Id.*

163. Park Goeun, *Gyeolgugen sarangi iginda . . . haengbokan harabeoji bubuga doel geot* [*Love Wins Eventually . . . Will Become a Happy Old Men Couple*], HANKYOREH (Jan. 15, 2022, 8:02 PM), https://perma.cc/AB44-T7UU.

164. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.).

marriage still turn on the family/patrimony distinction, sometimes particularly so. For instance, the Supreme Court has argued that in status law, formalities are merely secondary to substance and that an already existing status-relation should not be invalidated merely due to the lack of formalities.[165]

To understand the Supreme Court's sweeping statement about form and substance in family law, we must once again travel, this time starting with twentieth-century Japan. I will center the story around Nakagawa Zennosuke (1897-1975), a prominent private law scholar. Not only did he defend de facto marriage, he was one of the most sophisticated theorists of status law. Along with his contemporaries such as Wagatsuma Sakae, Nakagawa's writings were a readily available and dependable resource for postcolonial Korean legal elites.[166] They read Nakagawa for his general theories of status law, his defense of de facto marriage, or both.[167]

A. NAKAGAWA ZENNOSUKE'S STATUS-ACT THEORY

In his 1941 book, *General Matters of Status Law: Status-Right and Status-Act*, Nakagawa expounded on the so-called "status-act theory," or the general idea that a juridical act under status law, called "status-act," is or ought to be distinct from general juridical act.[168] Juridical act

165. Daebeobwon [S. Ct.], Dec. 27, 1991, 91Meu30 (S. Kor.).

166. Wagatsuma Sakae (1897-1973), a highly influential private law scholar and a draftsman of the postwar amendments to the Japanese Civil Code, was a go-to reference for postwar Korean scholars, and one of the most popular private law textbooks in postwar Korea was based on Wagatsuma's textbook. Yang, *supra* note 108, at 2–5. Although I do not know of a Korean textbook that is entirely based on Nakagawa's, Nakagawa's influence is also acknowledged by Korean scholars. *See* Yang, *supra* note 55, at 54–55; Han Unggil, *Gajokbeop mit sinbunhaengwi gaenyeome gwanhan sogo* [*A Study on Family Law and Concept of Status-Act*], *in* HYEONDAE GAJOKBEOPGWA GAJOKJEONGCHAEK [CONTEMPORARY FAMILY LAW AND POLICY] 113 (Samyeongsa, 1988); YUN, *supra* note 57, at 13. For postwar Korean private law scholars' reliance on Japanese legal scholars in general, see *supra* note 118.

167. As I will explain in the following pages, Nakagawa's general theories of status law supported de facto marriage. However, Korean legal elites did not always read and/or accept the entirety of Nakagawan theory. Koreans seem to have referred to Nakagawa and other Japanese scholars on an issue by issue basis, especially early in the postcolonial history. *See* Han, *supra* note 166, at 121–24. Nakagawan ideas were thus received piecemeal by scholars and courts. For an early discussion of Nakagawa, Wagatsuma, and other Japanese scholars' takes on de facto marriage, see Jeong Gwanghyeon, "*Sasilhonbohoui hyeonsanggwa geu ganghwaron*" [*The "De Facto Marriage": The Current Legal Status and the Measure to Promote its Protection*], 6 SEOUL NAT'L U. L. J., no. 2, 1964, at 77, 81–83.

168. NAKAGAWA ZENNOSUKE, MIBUNHŌ NO SŌSOKUTEKI KADAI: MIBUNKEN OYOBI MIBUNKŌI [GENERAL MATTERS OF STATUS LAW: STATUS-RIGHT AND STATUS-ACT] (1941) [hereinafter NAKAGAWA, GENERAL MATTERS]. Kim Jusu (1928–2021), a famous private

(*Rechtsgeschäft*) is a civil law concept originating from nineteenth-century legal science. A juridical act is a declared will of one or multiple persons, which then "sets the law in motion and produces legal consequences—the acquisition, transfer, and extinction of rights."[169] Making a contract, transferring ownership, or creating a partnership are all juridical acts. So too are celebrating a marriage or adopting a child. Marriage, however, is distinct from general juridical acts such as contract because it creates, alters, and terminates status-relations.

A few, but influential, private law scholars in Korea have criticized status-act theory. Professor Yang Changsu described Nakagawa's status-act theory as "peculiar to Japan and can only be understood, partly, under particular circumstances of the time and the place."[170] Writing at the moment of heated discussions about the long overdue abolition of the household system and subsequent reforms to family law in 2005, Yang cautioned that Nakagawa's status law theory might support traditionalist arguments against family law reforms.[171]

Yang's concerns were valid, as Nakagawa's theorization closely traced the Savignian pattern and language. Yet, in postwar Japan, Nakagawa argued against "those who [were] trying to preserve and revive the family system as the finest of our country's old traditions."[172] He was a draftsman of the postwar revisions to the Japanese Civil Code, which reformed the traditionalist family and inheritance law and disintegrated the house (*ie*) system.[173] It takes a careful examination and some background knowledge to identify the instances where he departs from Savigny.

Nakagawa begins *General Matters of Status Law* by noting the enduring differences between intimate and economic relationships and how they are reflected in the law.[174] Unlike economic relationships that are "chosen by the relevant individual's deliberation and calculation," relationships for the "preservation of the people" are "predetermined as a form of the entirety."[175] In other

law scholar, listed this particular book in the bibliography of his 1958 study on marriage law. KIM JUSU, SINHONINBEOBYEONGU [STUDY OF NEW MARRIAGE LAW] 100 (1958).

169. Nikolaos A. Davrados, *A Louisiana Theory of Juridical Acts*, 80 LA. L. REV. 1119, 1129 (2020).

170. Yang, *supra* note 55, at 40.

171. *Id.* at 55.

172. Nakagawa Zennosuke, *A Century of Marriage Law*, 10 JAPAN Q., no. 2, 1963, at 182, 191 [hereinafter Nakagawa, *A Century*].

173. *Id.*

174. NAKAGAWA, GENERAL MATTERS, *supra* note 168, at 1–2.

175. *Id.*

words, while economic relationships are built on individual choices and calculations, intimate relationships are more collective and predetermined by nature, morals, and customs.[176] Status law is the legal expression of the latter, whereas patrimonial and commercial law is that of the former.[177] Hence, status-law-relations are "given," "predestined," and non-instrumental, whereas patrimonial-law-relations are "made-up," "chosen," and "calculated."[178]

Nakagawa's status(family)/patrimony distinction, and his derivation of some of the characteristics of status law, are strikingly similar to what we have seen in Savigny's *System*. Much like Savigny, Nakagawa argues that humans have two aspects: in patrimonial-law-relations, "an independent, free, and self-contained being bargains with another similarly self-contained being"; whereas in status-law-relations, "each person constitutes the whole as its component, along with another person who is likewise a component of the whole."[179] Again, like Savigny, who derived the "absolute" and "mandatory" nature of family law from the claim that family law is a reservoir for *Volksgeist*, Nakagawa argues that status law is mandatory because the content of the "whole" is predetermined by customs and traditions.[180] While people may agree on contractual terms that diverge from contract law rules, "people have only two choices of either accepting or rejecting the organization [of marriage] as it is, whose substance is predetermined."[181]

However, Nakagawa's emphasis on *affect* as well as morality, mandatory customs, and tradition in the sphere of status is a marked departure from Savigny. Nakagawa states that in intimate relationships, individuals are "tied/related to each other by nature and affection rather than by deliberation and calculation."[182] According to Nakagawa, although both status-act and patrimonial act are based on an individual's will, the motivations behind them are different. The will to engage in a status-act, or "essential will," is completely different from the will to engage in a patrimonial act, which he calls "purposive will":

> In contrast [to purposive will], essential will is not a calculated will. One may as well say that it is a felt will. It is a

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 3.
180. *Id.*
181. *Id.*
182. *Id.* at 1, 206.

> given will rather than a chosen will. However, *it does not mean that it is forced from outside*; instead, it means that one cannot but give [the will] to oneself, based on his own nature. It is determined autonomously, not heteronomously . . . .[T]his is especially apparent in will to marry, which is an exclusive and absolute will determined by affection. It is neither calculated nor rational. Even when a choice is possible, such choice is not a rational one and is just an emotional stir, nothing more than a will that is determined irrationally at the direction of the attachment.[183]

While maintaining the "uncalculated versus calculated" dyad, Nakagawa turns the earlier dyad of "predestined versus chosen" on its head. The will to marry may be *unfree* in the sense that one is dominated by irrational affection but *free* in the sense that it comes from oneself!

For Nakagawa, it is therefore possible for individuals to exercise their will in the sphere of status, and the latter is not a pure exception to will theory.[184] What's more, essential will in the sphere of status, whose only purpose lies in the status-act itself, must be respected to the utmost—much more so than the calculated and instrumental will that is exercised in the sphere of patrimony.[185] Nakagawa does concede that people may consider economic and other calculated factors in marrying someone, but nonetheless argues that such marriages do not represent the pure and true form of marriage.[186] It is his sophistical maneuver and idealized understanding of family that lead him to argue that the denial of will in the sphere of status equals the "denial of the entire personhood."[187] The "nature of status-relationship," says Nakagawa, calls for the will doctrine (*Willenstheorie*) in interpreting status-act: the true will of the manifesting party must be given precedence over the manifested will when there is a divergence between the two, regardless of any contrary rules and theories in patrimonial law.[188] Notice how he just opined on the perennial legal problem of form and substance—for Nakagawa, will in status law is not only essential and important but

183. *Id.* at 168 (emphasis added).
184. *Id.* at 167.
185. *Id.*
186. *Id.* at 2, 168, 207.
187. *Id.* at 168.
188. *Id*. at 168–69. In a debate about the manifestation of will in the law of general matters, the "will doctrine (Willenstheorie)" refers to the position that true will of the manifesting party must be given precedence over manifested will when there is a divergence between the two.

also *substantive*. It is a true will in one's heart to create a status-relation in real life. As such, collusive marriages or divorces, lacking the true will of the parties involved, are void in principle.[189]

Similarly, Nakagawa argues that facts precede law in status law, while the opposite is the case in patrimonial law.[190] He suggests that although both factual and legal requirements must be met to create a patrimonial right, a piece of land or a whale does not become someone's property from the *fact* that they purchased the land or hunted the whale; they become property only because property *law* preceded such facts.[191] By contrast, one becomes a child, parent, and spouse from the *fact* of childbirth, childrearing, and marriage without the need to wait for any *law* to create/effectuate the statuses.[192] *Naturally*, status law in its original form upholds de facto marriage, and it is rather exceptional that modern marriage law requires formalities. Even under the modern law, two strangers cannot become spouses merely by meeting legal formalities, because facts should always precede the law in the sphere of status.[193]

To comprehend why Nakagawa put substance over form in status law, we need some background knowledge on the long debate about formalities of marriage during Japanese legal modernization. Japanese legal elites first debated whether the law should mandate formalities requirements for marriages.[194] Once the Japanese Civil Code (1898) required registration, they debated whether marriage-like relationships lacking formalities, for various reasons, should be legally acknowledged.[195] Possible reasons why one would not (be able to) formalize their marriage included: the lack of consent by parents or the house head; the societal custom that withheld registration until the woman was fully accepted as a member of the patrilineal house; and, in the case of the working class, either the lack of legal knowledge

189. *Id.* at 177–80.

190. *Id.* at 15.

191. *Id.* at 15–16. For a similar analogy in Savigny's discussion of intent in juridical act, see Davrados, *supra* note 169, at 1130 n. 58 and accompanying text ("Conversely, a hunter who captures a wild animal may acquire ownership of the animal directly by operation of law, not on the basis of the hunter's intent.").

192. NAKAGAWA, GENERAL MATTERS, *supra* note 168, at 16.

193. *Id.*

194. Sakai Yuichiro, *Jijitsukon to minshu shugi: shiza no hen'yō kara kangaeru gendaiteki kadai* [*Non-Registered Marriage and Democracy: Focusing on the Transformation of the Discourses*], 74 STUD. IN SOCIO., PSYCH. AND EDUC. 1, 3 (2012); Park Inhwan, *Sasilhonbohobeomniui byeoncheongwa gwaje* [*Issues and Changes of Theory of De Facto Marriage*], 23 KOREAN J. FAM. L., no. 1, 2009, at 133, 138-40; Nakagawa, *A Century*, *supra* note 172, at 186, 188.

195. Sakai, *supra* note 194, at 4; Nakagawa, *A Century*, *supra* note 172, at 186, 188.

or the practical inconvenience of registration.[196] Socially oriented scholars in interwar period saw these marriage-like relationships (*naien*) as representing a problematic gap between social reality and the written law and argued for greater protection of *naien* wives and migrant factory workers.[197]

Although the Japanese Civil Code (1898), which required formalities for legal marriage, remained unchanged, the judiciary began to give limited effects to marriage-like relationships. As early as 1915, in a seminal case where a man abandoned a woman after a wedding and a brief cohabitation but before marriage registration, the Great Court of Cassation ruled in its dicta that a promise to marry, as a matter of principle, was a legally valid contract; a breaching party was liable for damages, even though specific performance was not allowed.[198] In the 1920s and the 1930s, social legislation increasingly recognized marriage-like relationships, as evidenced, for instance, in industrial workers' compensation law.[199]

It was against this background that Nakagawa, by building on the status/patrimony distinction, normalized the policy choice on whether to give legal effect to marriages lacking formalities. Nakagawa's theory would do much more than grant damages for abandoned women—it aimed to give effect to marriage-like relationships *as if* they were legal marriages. The "as-if" theory gained influence among private law scholars. By 1958, even the Supreme Court of Japan remarked that a marriage-like relationship is "virtually equivalent to" a marriage in that it is a "union where a man and a woman cooperate and maintain a life as a married couple."[200]

As I will show in the following pages, both the general discussions surrounding unformalized marriage-like relationships and the Nakagawan modification of the Savignian will theory influenced the development of de facto marriage jurisprudence in Korean law.

196. Park, *supra* note 194, at 140.

197. Colin Philip Charles Jones, *Living Law in Japan: Social Jurisprudence in the Interwar Period* 7, 64 (2017) (Ph.D. dissertation, Columbia University).

198. NINOMIYA SHŪHEI, JIJITSUKON NO HANREI SŌGŌ KAISETSU [COMMENTARIES ON DE FACTO MARRIAGE CASES] 7–9 (2006). The Court, however, denied damages in the given case.

199. Ōmura Atsushi, *Sasilhone gwanhan ilbonbeobui hyeonhwang: pallyewa ipbeobui donghyang* [*Current Status of Japanese Law on De Facto Marriage: Cases and Legislations*], 26 KOREAN J. FAM. L., no. 1, 2012, at 219, 221 (Gwak Minhui trans.).

200. NINOMIYA, *supra* note 198, at 11–12.

B. JURISPRUDENCE OF DE FACTO MARRIAGE AND NAKAGAWAN IDEAS IN KOREAN LAW

The problem of unformalized, marriage-like relationships emerged in Korea only in 1923, when colonial law was amended to require registration for a marriage or divorce to be valid.[201] By 1932, a case that hinged on the registration requirement reached the Joseon High Court.[202] The plaintiff woman sued a man and his father for abandoning her after a traditional wedding but before marriage registration. The defendants argued that the couple's cohabitation was not a "legally protected relationship," since "the old customs of Joseon were abolished, and registration was now a validity requirement for marriage."[203] The court rejected the defendants' argument and granted damages to the woman for the unlawful breach of the promise to marry.[204] In 1935, the Joseon High Court once again granted damages to a woman whose unregistered marriage broke down soon after the wedding due to violence, or according to the man's account, "discipline."[205]

In both cases, the women plaintiffs argued that their chastity was infringed upon because of the men defendants' bad behaviors, rather than arguing for the protection of de facto or de jure marriage.[206] The cases could have remained as part of the history of infringement of

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201. The Japanese-style status registration system was implanted in Korea before the formal annexation. *See supra* note 98 and accompanying text. However, it was not until 1922 that the Civil Ordinance was revised to mandate registration as a validity requirement for marriage and divorce by consent (the revision took effect in 1923). At the same time, the Civil Registry Act of 1909 was remade into the much more comprehensive Regulation of the Joseon Family Registration. YI, *supra* note 89, at 245. For an English account of this history, see LIM, *supra* note 98, at 56. Before 1923, a traditional wedding ceremony was sufficient to establish a legal marriage, and courts did not require registration for a marriage to be legally valid. This held true even for marriages that could not have been registered. In 1915, the colonial government ceased to accept marriage registrations involving males under the age of seventeen and females under the age of fifteen. YI, *supra* note 89, at 195. However, the Joseon High Court deemed such marriages valid. *See, e.g.*, [15 MINHYEONGSAPYEON] S. CT. LIBR. OF KOR., GUGYEOK GODEUNGBEOBWONPANGYEOLLOK [JOSEON HIGH COURT CASES IN KOREAN TRANSLATION] 208–11 (2011) (in a 1928 case).

202. [19 MINHYEONGSAPYEON] S. CT. LIBR. OF KOR., GUGYEOK GODEUNGBEOBWONPANGYEOLLOK [JOSEON HIGH COURT CASES IN KOREAN TRANSLATION] 24–28 (2013).

203. *Id.* at 26–27.

204. *Id.* at 26, 28.

205. [22 MINHYEONGSAPYEON] S. CT. LIBR. OF KOR., GUGYEOK GODEUNGBEOBWONPANGYEOLLOK [JOSEON HIGH COURT CASES IN KOREAN TRANSLATION] 18–23 (2014).

206. In the 1935 case, the plaintiff/woman's argument included the breach of promise to marriage as well as infringement of chastity. *Id.*

chastity lawsuits instead of becoming part of the de facto marriage jurisprudence.[207] That is not what happened. Postcolonial private law scholars, who were heavily influenced by Nakagawa and other Japanese scholars' theorization of de facto marriage, discussed the cases as part of the law of de facto marriage.[208] By the early 1970s, the Nakagawan "as-if" theory, which tried to give as many effects of marriage as possible to unformalized relationships, had become the majority view among Korean private law scholars.[209]

However, giving legal effect to unformalized relationships conflicts with the Savignian notion that family law rules tend to be absolute and mandatory (Tension 1). The Supreme Court of Korea noticed this tension and was initially reluctant to relax the rule that "marriage shall become effective by registration."[210] In a 1959 case, the Supreme Court stated:

> [A]s long as the institution requires legal formalities for marriage, the nature of that requirement as a *mandatory rule* concerning *social order of morality* demands that those who promised marriage . . . but did not meet the formalities should not be able to acquire spousal *status*.[211]

The Court's statement was undeniably Savignian: the formalities rule was mandatory because it regulated one's status as part of the social and moral order.

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207. In the 1920s and 1930s, some Korean women brought to court damage claims for infringement of chastity against their male partners who abandoned them: some believed that they were married to their men but were not legally married; others thought that they would marry their men sooner or later but never could; still others were concubines and paramours of already married men. *See generally* SO HYEONSUK, IHON BEOPJEONGE SEON SINGMINJI JOSEON YEOSEONGDEUL [COLONIAL JOSEON WOMEN WHO STOOD IN DIVORCE COURTS] (2017) (discussing the introduction of modern marriage and divorce law and women's active utilization of modern legal systems in colonial Korea, including in infringement of chastity lawsuits). In this regard, although the Joseon High Court in both cases discussed in the main text invoked a "promise to marry," as did the Great Court of Cassation in the metropole, the high court's legal logic was far from clear.

208. For an example of early discussion, see Jeong Gwanghyeon, *Sasilhon bohomunje* [*Protection of De Facto Marriage*], 18 BEOPJEONG, no. 7, 1963, at 74, 75-76. For a later example, see Kim Jusu, *Sasilhonui gaenyeomgwa sasilhon boho ironui jaegeomto* [*Reexamination of the Concept and Protection of De Facto Marriage*], BEOPANGNONCHONG, Nov. 1986, at 127, 128.

209. *See, e.g.*, Go Changhyeon, *Sasilhone gwanhan gochal* [*Thoughts on De Facto Marriage*], 22 BEOPJO, no. 6, 1973, at 32, 33.

210. Minbeob [Civil Act] art. 812 (S. Kor.).

211. Daebeobwon [S. Ct.], Feb. 19, 1959, 4290Minsang749 (S. Kor.) (emphasis added).

The plaintiff in the case, a man who had (de facto) married and cohabited with a woman, sued another man for damages, accusing him of becoming intimate with the woman.[212] It appears that the Supreme Court was sympathetic towards the plaintiff. After paying lip service to the Savignian nature of marriage law, the Court ruled for the plaintiff—not because he was in a "de facto marriage" with the woman, but because the defendant, by sleeping with the woman, had made it impossible for the plaintiff to (legally) marry her.[213] Much like the colonial Joseon High Court cases, the Supreme Court gave effect to a marriage-like relationship by resorting to the law of obligations even though the fact pattern was different from the infringement of chastity lawsuits.[214] The Court's anxiety about de facto marriage did not last long, however. By 1965, the Supreme Court ruled that a man who, after wedding and cohabitation, had a relationship with another woman, was at fault for the "unlawful dissolution of a de facto marriage."[215]

Along with the law of de facto marriage in general, Korean legal elites also received the Nakagawan status-act theory, which may have alleviated, but never eliminated, some of the tensions that de facto marriage created in the classical regime.[216] In 1991, the Supreme Court issued an opinion that has since appeared in every family law textbook.[217] In an oft-cited paragraph, the Court wrote:

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212. *Id.*

213. *Id.*

214. Even though the Court did not use the term de facto marriage and was reluctant to dismiss the formalities rule, those who supported de facto marriage at the time discussed this case as part of the de facto marriage jurisprudence, along with the abovementioned Joseon High Court cases. *See* Jeong, *supra* note 208, at 76–77. For the history of de facto marriage jurisprudence in Korea, see generally Park, *supra* note 194, at 148–53.

215. Daebeobwon [S. Ct.], May 31, 1965, 65Meu14 (S. Kor.).

216. For that matter, other theories of will have been similarly unsuccessful in eliminating the tensions. *See* Yi Hwasuk, *Gajokbeopsang beomnyulhaengwie isseo uisawa singo* [*Intention and Registration of Legal Action in Family Law*] 36 KOREAN J. CIV. L. 613, 620–25 (2007).

217. Although there have been some criticisms, the idea that status-act is distinct from general juridical act still appears in contemporary textbooks. The typical place where private law scholars invoke status-act theory is the question of whether the first book of the Civil Act applies to both patrimonial and family law matters. They maintain that many rules in the first book, which govern issues such as the discrepancy between declared will and subjective will or the ratification of a void juridical act, should not be applicable to status-acts, despite the name of the book ("general provisions") and the structure of the code. The 1991 Supreme Court case supposedly took the same position by ruling that a void status-act, such as marriage or adoption that lack formalities, may become retrospectively valid by ratification, despite the contrary rule in the first book of the Civil Act. Minbeob [Civil Act] art. 139 (S. Kor.). For a recent Supreme Court case about inheritance wherein the majority and minority opinions debated in the terms of

> [T]he essence of status-act [such as marriage and adoption] . . . lies in the formation of [actual] status-relation, whereas procedural formalities such as registration are nothing more than secondary requirements that externally finalize the [already established] status-act; if, after a void status-act, a status-relation that fits the substance [of the void status-act] was actually formed . . . denying the validity of the already existing status-relation on the grounds that the registration was void would be contrary to the parties' will . . . .[218]

The Court's generalization that the essence of a status-act is to create a status-relation in *substance*, such as an actual relationship that looks like a marriage or parent-child relationship, closely aligns with the Nakagawan distinction between "precedence of facts" in status law and "precedence of law" in patrimonial law.[219] The Court's argument that the requirement for formalities needed to be relaxed to respect the parties' (true) will also echoes Nakagawa's views.

Although this oft-cited paragraph came from a case about adoption, private law scholars have cited it in their discussions about the relationship between will and formalities in family law as a general matter.[220] This discussion encompasses a variety of legal issues and fact patterns, including our problem of de facto marriage. For those who are influenced by Nakagawan ideas, will to marry *is* substantive;[221] will to formalize a marriage is simply subsumed in the substantive will or implied by the fact of cohabitation.[222] Thus, a famous family law scholar, agreeing with the conclusion of the 1991 case, has commented that "the spirit of family law is to recognize already existing de facto relations and seek stability of status."[223] To leave existing de facto marriages outside the protection of law, according to this scholar, goes against the "essence" of marriage and the "precedence-of-facts principle" in status-act.[224]

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status-act theory, see Daebeobwon [S. Ct.], Nov. 19, 2020, 2019Da232918 (S. Kor.).

218. Daebeobwon [S. Ct.], Dec. 27, 1991, 91Meu30 (S. Kor.).

219. *See supra* text accompanying note 190–193.

220. *See* Yi, *supra* note 216, at 626; YANG CHANGSU & KIM JAEHYEONG, GYEYAKBEOP [CONTRACTS] 817–19 (3d ed. 2020); KIM & KIM, *supra* note 56, at 89 n.25, 115 n.56.

221. It is a "true will" in one's heart to create a status-relation in real life, not a manifested will. KIM & KIM, *supra* note 56, at 19.

222. *See* Yi, *supra* note 216, at 620–21. According to Yi, this is the majority view among family law scholars.

223. KIM & KIM, *supra* note 56, at 20–21 (arguing that art. 139 is not applicable to status-act).

224. KIM JUSU, JUSEOKCHINJOKBEOM II [COMMENTARIES ON FAMILY LAW II] (1998), *cited*

While Japanese influence is undeniable,[225] Koreans did not blindly accept Japanese theories and case law without good reason. This leads us to the second way in which de facto marriage is anti-classical. As the imported law of de facto marriage unfolded in South Korea, it came to be closely linked with the protection of women and non-conventional families, aligning de facto marriage with a modernist vision for marriage and family, rather than a traditional one (Tension 2).

During the codification process in the 1950s, Korean legal elites went through their own debate about the formalities of legal marriage. Some members of the National Assembly criticized the draft civil code, which retained the formalities requirement from the colonial period, for betraying the actual practices of the Korean people.[226] Notably, the most sophisticated and organized criticism came from the feminists of the 1950s and their male allies, who also opposed the patriarchal and traditionalist institutions in family law. These postwar feminists, many of them under the influence of Christian education and/or religion in one way or another, were anti-traditionalist on the one hand and tried to strengthen the modern institution of marriage on the other hand.[227] According to them, it was

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in Park, *supra* note 194, at 133 n.1.

225. Apart from the case law and private law textbooks/writings, colonial legislatures and government regulations must have influenced the postcolonial development of de facto marriage. *See, e.g.*, Gungminsaengmyeongboheombeom sihaenggyuchik [Enforcement Rule of National Life Insurance Act], Ministry of Postal Service Decree No. 35, Mar. 15, 1953, art. 39 para. 3 (S. Kor.) (including de facto spouse as a surviving family member of the insured, following the earlier practice under Joseon Interim Life Insurance). For a list of legislation or regulations that did and did not recognize de facto marriage as of 1964, see Jeong, *supra* note 167, at 89–91. For the exclusion of de facto spouses in tax deductions and national health insurance in the 1970s, see So Hyeonsuk, *Bugyehyeoltongjuuiwa "geonjeonhan" gungmin saiui gyunyeol: 1950-70 nyeondae dongseongdongbongeumhonjereul dulleossan beopgwa hyeonsil* [*The Rupture between Paternal Jus Sanguinis and "Sound" Citizens: The Ban on Same-Surname-Same-Origin Marriage and its Reality in South Korea during the 1950s–1970s*], 51 KOREAN J. L. & SOC'Y 201, 217 (2016).

226. The critics of the formalities requirement contended that the law disregarded the reality that a significant number of Koreans did not register life events like birth, death, or marriage in the family registry in a timely manner. They also argued that the formalities requirement betrayed the average Korean's belief that a marriage is established on the day of the traditional wedding ceremony. *See, e.g.*, Gukoejeonggihoeuisokgirok [Records of National Assembly's Regular Sessions], 3rd National Assembly, 26th Session, no. 57, at 5–6, 10–11 (Dec. 11, 1957) (statement of Byeon Jingap). Jang Gyeonggeun, a Japan-educated legal elite and a member of the codification committee, defended the government draft on the grounds of legal certainty. Jang suggested that, as seen in Japan, courts and special legislation should be able to address potential inequities. *Id.* at 7–8 (statement of Jang Gyeonggeun).

227. *See generally* Kim, *supra* note 10, at 30; So Hyeonsuk, *1950-60 nyeondae 'gajeongui jaegeon' gwa ilbuilcheobeomnyulhonui hwaksan:*

always the women who suffered, economically and otherwise, when the law denied the protections of marriage due to a lack of formalities. Among other things, the feminists worried that men would simply abandon their "wives" without facing any legal consequences.

As previously mentioned, the feminists experienced limited success in challenging the traditionalists during the codification debate on the issues of the consanguinity rule and the household system.[228] However, they did bring about a meaningful legal change only a few years later. In 1963, the feminists played an important role in establishing a system that allowed parties in a de facto marriage to seek confirmation of their relationship from the family court and unilaterally register their marriage.[229] As such, de facto marriage has become associated with the protection of women and the more vulnerable party in a relationship.

Furthermore, as the law of de facto marriage developed through the combined efforts of feminists, scholars, and courts, the discourse incorporated not only marriages that were not formalized for nonlegal reasons but also those that could not have been legally formalized in the first place.[230] The most telling example came from the couples who could not legally marry under the consanguinity rule because they shared the same family name and seat.[231] From the

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hangukgajeongbeomnyulsangdamsoui hwaldongeul jungsimeuro [*The 'Regenerating Domesticity' Discourse and the Propagation of Monogamous Civil Marriage: Activities of the Korea Legal Aid Center for Family Relations in the 1950s and 1960s*] 19 CRITICAL STUD. ON MOD. KOREAN HIST., no. 1, 2015, at 97.

228. *See supra* notes 108–115 and accompanying text.

229. Kim, *supra* note 10, at 30, 34–35.

230. *See, e.g.*, Jeong, *supra* note 167, at 79–83; Daebeobwon [S. Ct.], Nov. 25, 2010, 2010Du14091 (S. Kor.) (extending a pension benefit to a surviving partner in a de facto marriage that could not have been registered because the couple were close relatives); Gwangju Haengjeongbeobwon [Gwangju Admin. Ct.], Oct. 18, 2018, 2018Guhap11319 (S. Kor.) (extending a pension benefit to a surviving partner in a de facto marriage that could not have been registered because the couple shared the same family name and family origin under the old rule); Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Feb. 7, 2020, 2019 Guhap66385 (S. Kor.) (prioritizing de facto spouse over legal spouse in a military pension case on the grounds that "there had been a meeting of minds between the legal spouse and the deceased to divorce and that their legal marriage had existed only in form"). *But see* Kim Eungyeong, *Geundaegajokgwa minjujuuiui tajadeul: hanil minbeop pallyereul tonghae bon sasilhongwa junghonjeok sasilhon cheoui beopjeok jiwiwa simingwon (1945–1979)* [*The Others of Modern Family and Democracy: Citizenship of Wives in Common-law Marriage in Civil Law Precedents of Korea and Japan (1945–1979)*], 44 THE J. HIST. 241 (2022) (arguing that bigamous wives have been generally excluded by the law of de facto marriage in Korea).

231. In the ideal, Koreanized-Confucian discourse, men and women who shared the same family name and the same family seat were considered as belonging to a single patrilineal kin group. In reality, hundreds of thousands of people could belong to a "consanguine" kin group.

1950s, the postwar feminists argued against the consanguinity rule.[232] One of their reasons was that it would deny legal protections of marriage to couples who were already in marriage-like relationships.[233] By the 1970s, the victims themselves began to express their desire to change the law.[234] After a young couple committed joint suicide because they could not marry under the rule, the issue garnered public attention.[235] In 1977, the Special Act on Marriage was passed to allow couples who were "de facto married" in violation of the consanguinity rule to formalize their relationships—but only if they did so in the year of 1978.[236] On January 4th, 1979, a man who could not register his marriage reached out to a feminist organization that supported the reform movement.[237] When he realized that it was too late, he lamented, "How does it make sense that a *status law* changes overnight?"[238]

In this context, de facto marriages, simply by their existence, stood in opposition to the "tradition." Despite traditional and mandatory family law attempting to regulate the intimate lives of Koreans, people were entering into consanguine "marriages." The special legislation that aimed to remedy this situation further undermined the alleged permanence and stability of status law.[239]

Since the early 2000s, de facto marriage has also become part of

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232. *See* YI TAEYEONG, GAJOKBEOP GAEJEONGUNDONG 37 NYEONSA [37-YEAR HISTORY OF FAMILY LAW REFORM MOVEMENT] 398–99 (1992).

233. Kim, *supra* note 10, at 30–31.

234. So, *supra* note 225, at 218.

235. *Id.* at 216.

236. Honine gwanhan teungnyebeop [Special Act on Marriage], Act No. 3052, Dec. 31, 1977 (S. Kor.). Until the Constitutional Court struck down the consanguinity rule in July 1997, the Legislature passed such special laws two more times, in 1987 and 1995. Honine gwanhan teungnyebeop [Special Act on Marriage], Act No. 3971, Nov. 28, 1987 (S. Kor.); Honine gwanhan teungnyebeop [Special Act on Marriage], Act No. 5013, Dec. 6, 1995 (S. Kor.).

237. YI, *supra* note 232, at 214.

238. *Id.* (emphasis added).

239. Other legal barriers to marriage that had created unformalized relationships have also been gradually abolished or significantly relaxed through a series of legislative amendments to family law. These include: the age requirements for marriage without parental consent, which used to be higher; the prohibition of remarriage for women for six months after the dissolution of a previous marriage, which is now abolished; and the scope of *void* (not voidable) incestuous marriage, which used to be broader than the current scope, even after the abolition of the consanguinity rule. The narrowing down of the scope of void incestuous marriage is still ongoing. *See* Hunbeobjaepanso [Const. Ct.], Oct. 27, 2022, 2018Hunba115 (S. Kor.). For a discussion of de facto marriages created for these reasons, see Park, *supra* note 194, at 155–56. *But see* Kim, *supra* note 230. Bigamy is still not allowed. Minbeob [Civil Act] art. 810 (S. Kor.).

the liberatory discourse promoting "family diversity,"[240] along with nonlegal terms such as "cohabitation," "non-married," and "alternative families."[241] In 2021, the Ministry of Gender Equality and Family suggested increased recognition and protection for de facto marriages in public policies, including housing support and family care.[242] Among other suggestions, the Ministry proposed expanding "the strict and narrow definition of the family" based on marriage, blood, and adoption to include cohabiting or de facto married couples.[243] The proposal was met with opposition from right-wing Christians, who understood it as a starting point for the legalization of same-sex marriage.[244] In 2022, under a new administration, the Ministry revised its stance and withdrew the previous proposal on the more inclusive definition of family.[245]

This historical context explains why marriage equality advocates recently argued that marriage-like same-sex relationships should be regarded as de facto marriages. The plaintiff's lawyers in the NHIS case tried to capitalize on de facto marriage's historical association with vulnerable parties and non-conventional families. They contended that, since the law of de facto marriage evolved to protect status-relationships resembling marriage, the need for such

240. For examples in debates surrounding the Civil Act and the family registration system, see Yeoseonggajogwiwonhoe hoeuirok [Records of Gender Equality and Family Committee], 17th National Assembly, 250th Session, no. 4, at 11 (Nov. 25, 2004) (statement of Yi Gyeongsuk) (criticizing a government bill to amend the civil code for failing to reflect diverse family relationships such as de facto families, unmarried mothers/fathers, and foster families); Beopjesabeobwiwonhoe hoeuirok [Records of Legal and Judicial Committee], 17th National Assembly, 252nd Session, no. 2, at 19 (Feb. 21, 2005) (statement of Gwak Baehui). For an example in debates about the Healthy Family Framework Act, see Lee Soyoung, *Geonganggajeong bohoui beopjeok gyebo: geonganggajeonggibonbeobui 'geonganggajeong' gaenyeome daehan gyebohakjeok damnonbunseok* [*Legal Genealogy of the Protection of Healthy Homes: Genealogical Discourse Analysis of the Concept of 'Healthy Homes' as in the Framework Act on Healthy Homes*], 26 KOREAN J. FAM. L., no. 3, 2012, at 217, 244 n.109.

241. *See, e.g.*, Im Jaeu, *Eomneun jonjae dwaebeorin beoboe gajokdeul . . . 'saenghwaldongbanjabeop nonuihal sijeom'* [*Families Outside the Law Are Non-Existent . . . 'It's Time to Discuss the Registered Partnership Act'*], HANKYOREH (May 13, 2021, 5:00 AM), https://perma.cc/9UB4-HVQG; Lee Hyo-jin, *Gender Ministry Backtracks on Plan to Legally Recognize Alternative Families*," THE KOREA TIMES (Sept. 25, 2022, 4:50 PM), https://perma.cc/Z78G-K99Z.

242. MINISTRY OF GENDER EQUAL. & FAM., JE 4 CHA GEONGANGGAJEONGGIBONGYEHOEK (2021-2025) [4TH BASIC PLAN FOR A HEALTHY FAMILY POLICY (2021-2025)] 24 (2021), https://perma.cc/8W25-33KL.

243. *Id.* at 17.

244. Lee, *supra* note 241; Kim Yeonju, *Yeogabu tsasilhontpdonggeot gajok injeong anhagiro* [*Gender Ministry Is Not Recognizing De Facto and Cohabiting Families*], JOSEONILBO (Sep. 24, 2022, 7:00 AM), https://perma.cc/DFA8-FUQC.

245. Kim, *supra* note 244.

protection was even greater for same-sex couples than for heterosexual couples (given their minority status).[246] Besides, the NHIS's settled practice and its internal rule, which allowed those in unformalized relationships to become their insured partners' dependents as de facto spouses, were originally adopted to safeguard couples who could not formalize their relationships under the now-repealed consanguinity rule.[247]

But here is the sticking point: Certainly, courts, legislators, and advocates considered equity and policy issues when debating whether to grant certain effects of marriage in specific cases involving unformalized relationships. However, once the concept of de facto marriage entered the legal discourse, the classical tendency to systematize drove the legal elites to think about de facto marriage itself as a coherent status. There would be standardized requirements for de facto marriage, and once those were met, all the effects of de facto marriage would be given as a package.[248] As more and more effects of marriage have been attached to de facto marriage, de facto marital status has come to resemble marital status more closely. The "as if" theory, while aiming to deliver more protections of marriage to women and non-conventional families, has also made the boundaries of unformalized marriage similar to those of formal marriage. As de facto marriage mirrors marriage in all aspects except for the absence of formalities, its modernist potential to include relationships that could not have been formalized from the beginning, fades away.[249]

The administrative court, the high court, and the Supreme Court's dissent in the NHIS case ruled that there was neither "will to marry" nor "marital life," two requirements of de facto marriage.[250] Why? We know the answer already: because marriage, under the "existing system of law," is "a morally and customarily legitimate union . . . between a man and a woman"; without legislation, they were unable

246. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.). This argument appeals to the judiciary's role to protect the "weak." *See supra* notes 44–45 and accompanying text.

247. Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.).

248. *See generally* YUN, *supra* note 57, at 157–70.

249. Park, *supra* note 194, at 152–53.

250. Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.); Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.). The Supreme Court's majority, on the other hand, did not explicitly state this point; rather, in affirming the high court's decision, it assumed that the plaintiff's relationship with his partner is *not* a de facto marriage per se. Justice Gwon Yeongjun pointed this out in his separate dissent.

to change the Savignian definition of marriage, de facto or de jure.[251]

Despite the courts' rejections of the de facto marriage argument, the advocates were not misled when they saw a liberatory potential in de facto marriage. This is because there is yet another way in which de facto marriage is anti-classical, as I will show in the next Part.

IV. A "KOREAN" PATHWAY TO REFORM

Although its history in Korea may suggest otherwise, de facto marriage is not entirely liberating. In fact, its ascriptive nature is deeply in tension with free marriage.[252] The notion that the true will of the parties should be respected to the utmost in family law does not clarify whose will, at what point of the relationship, should determine whether the parties are bound to an effect of marriage—even as one or both parties try to escape the grip of marriage in court. There is nothing inherently progressive about putting substance over form, either.[253]

How, then, can we find a silver lining in the dark clouds? Here is my suggestion: de facto marriage is great not (only) because it possibly approves of relationships that cannot, do not, or refuse to belong to the normative family order but (also) because it simultaneously creates and reveals the many fissures in that order (Tension 3). If marriages truly created perpetuating and overarching status-relationships and served as a foundation for a stable society,[254] and if family law primarily consisted of mandatory rules, the line between married and unmarried would be clear, stable, and make a lot of difference. We have already discussed how de facto marriage jurisprudence relaxes the supposedly mandatory entry rules of marriage. But there are less obvious and potentially more fundamental ways in which de facto marriage testifies against the

251. Seoul Haengjeongbeobwon [Seoul Admin. Ct.], Jan. 7, 2022, 2021Guhap55456 (S. Kor.); Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

252. The abovementioned 1959 Supreme Court case displayed an anxiety on this point as well by mumbling about how marriage is "free and cannot be forced by anyone because its goal can only be achieved by free will." *See* Daebeobwon [S. Ct.], Feb. 19, 1959, 4290Minsang749 (S. Kor.).

253. For instance, in a series of cases where they denied the validity of marriages between Korean men and non-Korean women (typically from China and the Philippines) seeking to immigrate to Korea, courts have justified their decisions based on the absence of true and substantive will to marriage. *See, e.g.*, Daebeobwon [S. Ct.], June 10, 2010, 2010Meu574 (S. Kor.).

254. *See, e.g.*, Daebeobwon [S. Ct.], Feb. 26, 2015, 2014Meu4734 & 4741 (S. Kor.); Daebeobwon [S. Ct.], Feb. 4, 2021, 2017Meu12552 (S. Kor.).

depiction of not-merely-but-strictly-legal status-relationships steadily holding together society as a whole.[255]

First of all, de facto marriage picks and chooses from the various effects that are meant to be integrated into "marriage." For instance, unlike de jure marriage, de facto marriage may be unilaterally terminated by one party at any time.[256] However, they may need to pay damages to their partner if they were unfaithful[257] or the breakup was otherwise without "reasonable cause."[258] Similarly, the surviving party in a de facto marriage may take over the deceased partner's lease[259] but is not entitled to the spousal share of the probate estate under the law of inheritance.[260] They may sue for property division upon breakup[261] but not upon death.[262] They are eligible for spousal coverage under their partner's health insurance or for compensation in case of work-related death of the partner,[263] but the couple is considered unmarried when applying for public housing for newlyweds.[264] The list of the cherry-picked effects is long and is constantly developing.

Second, de facto marriage's retrospective character shifts the line between married and unmarried *temporally*. From the beginning of a relationship when two people first meet, until the end when they break up or one of them dies, the potential formation of a de facto marriage depends on when and for what purpose the couple encounters the court or other legal decision-makers. Consider a 2010 Supreme Court case, where the Court extended a pension benefit to the surviving partner in a marriage-like relationship.[265] In that case,

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255. Janet Halley described this vision perfectly: "the relationships *between* marriages become the web for weaving a fully integrated and stabilized "social": in such a world, all marriages would be marriage all the time and everywhere, and all social life would be linked in some tight way to the marriages and to marriage." Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 45 (2010).

256. *E.g.*, Daebeobwon [S. Ct.], Mar. 22, 1977, 75Meu28 (S. Kor.).

257. *E.g.*, Daebeobwon [S. Ct.], Jan. 24, 1967, 66Meu39 (S. Kor.).

258. *E.g.*, Daebeobwon [S. Ct.], Aug. 21, 1998, 97Meu544 (S. Kor.).

259. Jutaegimdaechabohobeop [Housing Lease Protection Act] art. 9 para. 1 (S. Kor.).

260. Hunbeobjaepanso [Const. Ct.], Aug. 28, 2014, 2013Hunba119 (S. Kor.).

261. *E.g.*, Daebeobwon [S. Ct.], Mar. 28, 1995, 94Meu1584 (S. Kor.).

262. *E.g.*, Daebeobwon [S. Ct.], Mar. 24, 2006, 2005Du15595 (S. Kor.).

263. Geullogijunbeop sihaengnyeong [Enforcement Decree of the Labor Standard Act] art. 48(1) (S. Kor.).

264. *Sinhonbubu jeonseimdae* [*Rental Housing for Newlyweds*], MINISTRY OF GOV'T LEGIS., https://perma.cc/8FSJ-PB4Q.

265. Daebeobwon [S. Ct.], Nov. 25, 2010, 2010Du14091 (S. Kor.).

the deceased man had lost his wife in 1992.[266] The wife's younger sister began taking care of their children, which ultimately brought her into a marriage-like relationship with the man sometime between 1992 and 1995.[267] The two maintained the relationship until the man's death in 2009.[268] Formalizing the relationship was never an option because they were close relatives.[269] The Court nonetheless balanced "the nature of [their relationship] that violated morality and public interest" against, among other things, the specifics of their relationship including the "length of their communal life."[270] "The immoral and anti-public-interest nature of their de facto relationship," according to the Court, "did not reach a point where it fundamentally violated the order of marriage law."[271] One has to wonder, had the man died in 1996 instead of 2009, would the court still have regarded the relationship as de facto marriage?

This destabilizing effect is even more pronounced when there are three people involved. In a 2010 case, the Supreme Court ruled that a bigamous de facto spouse of a military member was entitled to pension benefits if the legal spouse had passed away, thereby curing the bigamous nature of the de facto marriage.[272] The Court wrote as if the bigamous de facto marriage had existed even before the death of the de jure spouse, noting that bigamous marriage is voidable, not void, under the Civil Act.[273] However, in the entangled lives of the three people, if the bigamous de facto spouse had gone to the Court before the de jure spouse died and had filed for damages upon breakup of the de facto relationship, then the Court would have held that "no de facto marriage that is legal and deserves legal protection was formed"—as the Supreme Court held in a 1996 case where a woman sued for damages and property upon the breakup of her de facto relationship with a man who was legally married to another woman.[274]

Third, the line between the married, the unmarried, and the de facto married becomes increasingly blurred once we consider legal decision-makers other than the Supreme Court. As an example, partners who have shared the same address for a year are entitled as

266. *Id.*
267. *Id.*
268. *Id.*
269. Minbeob [Civil Act] art. 809 para. 2 (S. Kor.).
270. Daebeobwon [S. Ct.], Nov. 25, 2010, 2010Du14091 (S. Kor.).
271. *Id.*
272. Daebeobwon [S. Ct.], Sept. 30, 2010, 2010Du9631 (S. Kor.).
273. *Id.*
274. Daebeobwon [S. Ct.], Sept. 20, 1996, 96Meu530 (S. Kor.).

de facto spouses to receive government subsidies for infertility treatments.[275] This one-year-address rule differs from other criteria used to determine whether a relationship qualifies as a de facto marriage in the administrative *or* judicial contexts. In the NHIS case, an NHIS employee initially accepted the plaintiff's application to be treated as a dependent of his insured partner.[276] It was not until several months later, after the plaintiff's story gained media attention, that the NHIS revoked its earlier decision.[277] The employee, though not a lofty Supreme Court Justice, was a legal decision-maker, who gave effect to the plaintiff couple's relationship.[278] Thanks to that employee, the plaintiff and his partner were de facto married for the purpose of national health insurance—until they were not.[279]

Which effect of marriage is attached when, and to what kind of relationship, is variable. As long as this is the case, we may argue that the Korean marriage, as it exists in law, betrays the Savignian or, more generally, the classical vision that sees marriage, family, and their laws as integrated, coherent, and constituting part and parcel of stable social order. De facto marriage is an excellent, but not the only, piece of evidence that supports this descriptive claim.[280]

In addition to providing the previously explored arguments against same-sex marriage, the classical regime also inhibits our imagination for the future by forcing us to choose between two "orders": one that fully recognizes same-sex marriage and one that fully rejects it. The concepts of "marriage order" or "status order" may themselves be based on a spectrum of ideologies, not just traditional or socially conservative ones. Indeed, it seems that a moderately liberal marriage order that embraces same-sex relationships is

275. MINISTRY OF HEALTH AND WELFARE, 2021 MOJABOGEONSAEOP ANNAE [INTRODUCTION FOR MOTHER AND CHILD HEALTH SERVICES], 100 (2021), https://perma.cc/8CQV-7Q5B.

276. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

277. *Id.*

278. For the idea that "a peculiar class of officials and semi-officials" who "do things" under law, not just judges, are "lawmen" who give effects to the law, see Karl Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1296–97 (1932). *See also* Halley, *supra* note 255, at 44–58 (proposing a similar reconceptualization of U.S. marriage law).

279. Couples who shared the same family name and seat provide yet another example. Lower-level public officials, responsible for registration, had substantial discretion over what kind of evidence could demonstrate that couples' family seats were different, or whether they required any evidence at all. Consequently, some couples could successfully formalize their relationships, while others could not. So, *supra* note 225, at 213–15.

280. For instance, I could have provided further evidence from the law of de facto divorce and collusive divorce.

already well within the consciousness of today's mainstream legal elites, especially those in the judiciary.[281] As previously discussed, the Justices and judges in the NHIS case who did not rule in favor of the plaintiff still noted the trend towards greater recognition of same-sex couples.[282] Even in the earlier 2016 case, where the filmmaker couple unsuccessfully argued for freedom to marry and equality under the Constitution, the district court expressed "empathy" towards their situation.[283]

Nevertheless, legal decision-makers tend to believe that, until the legal system transitions to the new order,[284] it remains impossible to accept *any* same-sex marriage. In 2011, the Supreme Court ruled that *married* transgender people were barred from changing their legal gender in the family registry, qualifying its 2006 decision that allowed the change of legal gender in principle.[285] The Supreme Court held that such changes would "create an appearance of same-sex marriage" and "affect status-relations of other people or cause negative impacts in the society."[286] One way to understand this decision is that the Court was unwilling to bear *some* same-sex marriages without extending them to all cisgender same-sex couples. The Ministry of Justice's refusal to grant a spousal visa to the British man[287] can also be understood in this regard: bound by the national legal system's supposedly coherent understanding of marriage, they were unable to recognize the petitioner's *foreign* same-sex marriage for the specific purpose of *immigration*.

Even those who are sympathetic to the cause of marriage equality frequently fail to imagine a path for reform other than by a legislative overhaul of the entire system. In a recent article, Professor Yun Jinsu

281. *See supra* notes 41–46 and accompanying text.

282. *See supra* notes 41–43 and accompanying text.

283. Seoul Seobujibangbeobwon [Seoul W. Dist. Ct.], May 25, 2016, 2014Hopa1842 (S. Kor.). The court also acknowledged that legalizing same-sex marriage would *not* offend tradition or lead to the breakdown of the institution of marriage.

284. Some even argue that constitutional amendment is required to legalize same-sex marriage. The constitutional debate, however, is much more politicized. That is, only the antis argue that constitutional amendment is necessary. For this debate, see sources cited *supra* note 14.

285. Daebeobwon [S. Ct.], Sept. 2, 2011, 2009Seu117 (S. Kor.) (holding that transgender people who are *either* married *or* have an underage child are not permitted to change their legal gender in the family registry). *But see* Daebeobwon [S. Ct.], Nov. 24, 2022, 2020Seu616 (S. Kor.) (overruling partially the 2011 case by holding that unmarried transgender people with underage children are allowed to change their legal gender).

286. Daebeobwon [S. Ct.], Sept. 2, 2011, 2009Seu117 (S. Kor.).

287. *See supra* note 134 and accompanying text.

expresses such a view.[288] After devoting much of the article to introducing European cases and discussions, Yun criticizes both those who argue that courts should recognize same-sex marriage based on the Constitution and/or a purpose-driven interpretation of the Civil Act, and those who argue that same-sex marriage cannot be recognized without constitutional amendment.[289] While the conclusion of the article suggests that Yun himself supports the cause, the only *legally correct* path for reform, in his view, is through a legislative amendment to the Civil Act.[290] Even a registered partnership is a "transitional measure," which becomes not only unnecessary but also problematic if same-sex marriage is fully recognized.[291] Yun's position likely represents the way many private law experts approach the issue, except that most of these experts, unlike Yun, do not bother to write about it.[292]

By removing the Savignian/classical lens and recognizing marriage's unstable, changing, and fragmented existence in Korean law *as it is*, we can identify avenues to equality that are not limited to making a single, massive transformation from the current order of darkness[293] to the more inclusive order that is yet-to-come. Unlike mainstream legal elites, the marriage equality advocates in the NHIS case must have known this. Apart from arguing that de facto marriage *in general* could and did include same-sex marriage-like relationships, the lawyers emphasized that, at the very least, the plaintiff and his same-sex partner should be treated as de facto married *for the specific purpose of* determining the scope of spousal coverage of employer-provided national health insurance.[294] They pointed out that the

288. Yun Jinsu, *Yureobeseoui dongseonghonin mit dongseonggyeolhabe gwanhan choegeunui donghyang* [*The Recent Trend of the Same-Sex Marriage and Same-Sex Partnership in Europe*] 35 KOREAN J. FAM. L., no. 2, 2021, at 1.

289. *Id.* at 29–38.

290. *Id.* at 36–38.

291. *Id.* at 37.

292. For a remarkable exception to this statement, see Yi Dongsu, *Hyeonhaeng beopjilseoeseoui gajokbeobui wisanggwa gwaje* [*The Place of Family Law in Current Legal Order*], 28 J. COMP. PRIV. L., no. 2, 2021, at 25. This article perfectly demonstrates the Korean legal consciousness that this Article undertakes to describe. It affirmatively introduces Savigny's theorization of status as well as his family/patrimony distinction as illuminating for "systematic understanding" of law. *Id.* at 25, 32–36. Based on this classical understanding, Yi argues that "same-sex marriage or de facto marriage is difficult to recognize under the existing family law." *Id.* at 25. Nevertheless, Yi writes about potential recognition of same-sex marriage or de facto marriage through "balancing" and "evaluation" of constitutional values. *Id.* at 52.

293. *See supra* notes 23–25 and accompanying text.

294. Zoom Interview with Park Hanhui, Attorney, Korean Lawyers for Public Interest and Human Rights (KLPH) (May 8, 2023) [hereinafter Zoom Interview with Park]; Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023 2022Nu32797 (S. Kor.).

requirements and the scope of protection for unformalized relationships varied in different social legislations and stressed that there was no reason for the NHIS to treat same-sex and heterosexual de facto couples differently from the perspective of health insurance policymaking.[295] Although the high court explicitly—and, in my view, incorrectly—rejected the argument that de facto marriage had more than one meaning,[296] the lawyers' narrow argument that focused on a specific stick in the marriage bundle ultimately persuaded both the high court and the Supreme Court's majority to rule in favor of the plaintiff.

The high court and the Supreme Court's majority devoted significant parts of their opinions to explaining why and how the NHIS had made the discretionary decision to include heterosexual de facto spouses in one context, but not in others, when determining the scope of an economic unit.[297] Given the way in which the NHIS had been making and implementing that specific policy decision, the courts reasoned, there was no reason to treat same-sex partners differently from heterosexual de facto spouses.[298] The Supreme Court's majority noted that the decision did not mean that same-sex relationships must be accommodated under other social legislations that similarly accommodate de facto marriage; nor did it change the meaning of marriage in private law.[299] To this, the dissent responded that the classical order was nonetheless at risk.[300] Justice Gwon, formerly a private law professor at Seoul National University, most clearly stated the classical vision:

> "Spouse" is a fundamental position that generates numerous legal effects in a wide variety of laws . . . .To use an analogy, from the stem of "spouse," numerous branches extend, and the National Health Insurance Act's dependent system is just one branch that derives from this stem.[301]

To Justice Gwon, "status-concepts [used in the national health insurance context] such as spouse, siblings, and lineal ascendants

295. Zoom Interview with Park, *supra* note 294.

296. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.).

297. *Id.*; Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

298. Seoul Godeungbeobwon [Seoul High Ct.], Feb. 21, 2023, 2022Nu32797 (S. Kor.); Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

299. Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

300. *Id.*

301. *Id.* (quotation marks added).

were already clearly established in the [Korean] legal system."[302] Even if the majority treated the plaintiff as being in a relationship *comparable* to de facto marriage, rather than in a (same-sex) de facto marriage per se, and only for the specific purpose of national health insurance, he was still worried about the integrity of the classical status-order. The already-existing fissures in this system, some of which the advocates highlighted, escaped his vision.

Hidden behind the universal rights discourse that populates the debate in the media and in academia alike is the Korean advocates' carefully localized strategy. On the one hand, theirs is a pragmatic approach: to attack the marriage bundle one stick at a time to win over mainstream legal elites. It resonates with a step-by-step approach, which had been advocated by some, but not all, supporters of marriage equality in the U.S. context.[303] On the other hand, the Korean advocates' approach shown in the NHIS case has an effect of disintegrating, rather than reinforcing and valorizing, the classical idea of marriage. In this sense, it is not a stretch to say that the advocates' strategy has a liberatory potential that was absent from Justice Kennedy's opinion in *Obergefell*.[304]

In the early to mid-2000s, Korean LGBTI activists began discussing "family-formation rights (*gajokguseonggwon*)" and dreaming of a future that went beyond a family order that simply included same-sex couples.[305] In a 2006 workshop organized by a leading gay men's rights organization, the executive director of the organization[306] warned of the risk that a movement that aimed to

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302. *Id.*

303. *See* William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001).

304. For a critique of Justice Kennedy's opinion for "reif[ying] marriage as a key element in the social front of family," see Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 23 (2015). For a critique of marriage equality discourse in the U.S. before *Obergefell*, see Halley, *supra* note 255, at 58 (arguing that pros as well as antis reinforced the classical idea of marriage as a status, "a normatively compelling, fundamental legal personhood saturated with public normativity."). For a claim that the Taiwanese path to marriage equality demonstrated the "rise of marital supremacy," see Chao-ju Chen, *Migrating Marriage Equality Without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L.J. 65, 65 (2019).

305. *See, e.g.*, Han Chaeyun, *Seongjeok sosuja chabyeorui bonjilgwa silje geurigo haeso bangan* [*Essence and Reality of, and Solutions to, Discrimination Against Sexual Minorities*], *in* SEONGJEOK SOSUJAUI INGWON [HUMAN RIGHTS OF SEXUAL MINORITIES] 43, 61–63 (Han Inseop & Yang Hyeona eds., 2002).

306. Han Garam (also known as O Garam) was the former executive director of *Chingusai* (Between Friends), one of the first gay rights organizations in Korea. He is now one of the few public interest lawyers who specialize in sexual orientation issues. He is also one of the seven lawyers at KLPH, the public interest law firm that led the

grant family-formation rights to LGBTI people might also function as "an attempt to assimilate into the conservative and oppressive institution [of family]."[307] The "family" in family-formation rights, while "a target to be fought for," was at the same time "a reality that does, and a future that will, oppress [us]."[308] As such, he argued that the movement should not aim "to *acquire* civil rights and to be *incorporated* in the institution of family" as they currently existed; instead, they had to aim to "reconstruct and transform" these institutions.[309] This critique of the normative family led him to come up with proposals that were based on a strategy to disintegrate, rather than reinforce, the institutions of marriage and family. For one thing, he argued that the family-formation rights movement in Korea, unlike its counterparts in many Western countries, should not center around intimate relationships between couples, but should include diverse forms of households formed for economic *or* intimate purposes.[310] He also suggested the possibility of not using "family" as a unit of legal regulations and rights.[311]

Similarly, some LGBTI advocates proposed a step-by-step approach as early as 2005.[312] As a preceding step to a "legislative recognition of intimate or economic relationships between cohabiting same-sex couples," they proposed expanding spousal rights in individual pieces of legislation through interpretation by either the government or the judiciary.[313] Thoughtful advocates also cautioned against uncritically importing foreign discussions on same-sex marriage or prematurely initiating a constitutional challenge.[314] They

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NHIS case.

307. O, *Dongseongaeja gajokguseonggwon undongui gwajewa jeollyak* [*Strategy and Task of the Movement for the Family-Formation Rights of Homosexuals*], *in* DONGSEONGAEJAUI GAJOKGUSEONGGWON TORONHOE [WORKSHOP ON FAMILY-FORMATION RIGHTS OF HOMOSEXUALS] 51, 53 (2006), https://perma.cc/U9MU-F7KR; *see also* Kim Wonjeong et al., *Daeanjeok gajok nonuie daehan bipanjeok geomtowa gajokguseonggwon nonuiui chulbaljeom* [*Critical Examination of Discussions on Alternative Family and the Starting Point of Discussions on Family-Formation Rights*], *in* DAEANJEOK GAJOKJEDO MARYEONEUL WIHAN GICHOJARYOJIP [BASIC MATERIALS FOR AN ALTERNATIVE FAMILY SYSTEM] 15, 26–27 (2008), https://perma.cc/V36Q-MNKW (arguing that plea for same-sex marriage might be interpreted as a demand to be included in the existing family regime).

308. O, *supra* note 307, at 53.

309. *Id.* at 54.

310. *Id.* at 55.

311. *Id.* at 58.

312. JO YEOUL ET AL., GUKGA INGWON JEONGCHAEK GIBON GYEHOEK SURIBEUL WIHAN SEONGJEOK SOSUJA INGWON GICHO HYEONHWANG JOSA [BASIC INVESTIGATION OF HUMAN RIGHTS OF SEXUAL MINORITIES] 124 (2005), https://perma.cc/YP23-KSRK.

313. *Id.*; O, *supra* note 307, at 58.

314. *Toron* [*Discussion*], *in* SEONGJEOK SOSUJAUI INGWON [HUMAN RIGHTS OF SEXUAL

worried that such actions might not only increase the risk of backlash[315] but also reinforce the "normative family ideology that center[ed] around marriage."[316]

In 2013, the filmmaker couple provided the first opportunity to fight for same-sex marriage at the court,[317] but some LGBTI advocates were ambivalent about the opportunity.[318] In a workshop that took place one week after their public wedding, one of the public interest lawyers for the case expressed her anxiety about bringing the lawsuit prematurely.[319] As a future option, she suggested looking for diverse plaintiffs to contest a specific rule or right, rather than "directly challenging marriage."[320] Another presenter at the workshop, the director of a major LGBTI organization, cautioned against the possibility that "an attempt to institutionalize [same-sex marriage] would restrain other imaginations" and leave behind "those outside the institution of marriage."[321] As an example of a "conscious effort to expand social welfare and social security beyond the institution of family," she argued that "while advocating for the medical decision-making rights of same-sex partners may be important, it is also possible to change the guardianship system."[322]

As previously mentioned, the district court dismissed the filmmaker couple's lawsuit in 2016.[323] After losing the appeal in December 2016, the plaintiffs and advocates decided not to take the case to the Supreme Court.[324] Three years later, in February 2020, the

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MINORITIES] 169, 182 (Han Inseop & Yang Hyeona eds., 2002) (Statement of Han Chaeyun) (mentioning the backlash in the U.S. and stressing the need to build a local movement) [hereinafter *Toron*]; O, *supra* note 307, at 56; Gwak Igyeong, *Seongsosuja undonggwa dongseonggyeolhap sosong* [*Sexual Minority Movements and Same-Sex Union Lawsuits*], *in* DONGSEONGGYEOLHAP SOSONG EOTTEOKE HAL GEOSINGA [HOW TO APPROACH SAME-SEX UNION LAWSUITS] 62, 69 (2013), https://perma.cc/D3MX-PPSB (differentiating Korea from the U.S.).

315. *Toron, supra* note 314, at 182; JO ET AL., *supra* note 312, at 120.

316. O, *supra* note 307, at 59.

317. *See supra* note 126 and accompanying text.

318. Gwak, *supra* note 314, at 67; Gang Hyemin, *Dongseonggyeolhon? gyeolhon seontaekal gwolli hoekdeukaneun geot* [*Same-Sex Marriage? Obtaining the Right to "Choose" Marriage*], BIMAINEO (July 16, 2013, 2:07 PM), https://perma.cc/8EKK-KUX2.

319. Jang Seoyeon, *Hangugeseo dongseonggyeolhap sosong eotteoke hal geosinga* [*How to Pursue Same-Sex Union Lawsuits in Korea*], *in* DONGSEONGGYEOLHAP SOSONG EOTTEOKE HAL GEOSINGA [HOW TO APPROACH SAME-SEX UNION LAWSUITS] 4, 40 (2013), https://perma.cc/D3MX-PPSB.

320. *Id.*

321. Gwak, *supra* note 314, at 69.

322. *Id.* at 69–70.

323. Seoul Seobujibangbeobwon [Seoul W. Dist. Ct.], May 25, 2016, 2014Hopa1842 (S. Kor.).

324. Zoom Interview with Park, *supra* note 294.

plaintiff in the NHIS case and his partner—both LGBTI rights activists—filed an application to be treated as a de facto married couple.[325] From there, the events unfolded as previously discussed.

As we look ahead, many questions arise. Will Korean LGBTI advocates maintain their one-stick-at-a-time approach? If they do, will it be successful in the long run? One potential benefit of the advocates' approach in the NHIS case is that it could help to avoid a destructive culture war of the sort that occurred in the U.S., while still incrementally delivering justice to Korean same-sex couples. Critics, on the other hand, might argue that a culture war is already underway in Korea.[326] These critics might claim that the antis will interpret *anything* other than the status quo as an all-out attack against their religious and cultural values, as they have demonstrated over the last fifteen years. True, a culture war might happen regardless of what advocates do. But the advocates will not be *responsible* for it—the antis will be.

My own sense is that the advocates' pragmatism shown in the NHIS case is reasonable in the Korean context. This is because the cultural divide closely follows the generational divide,[327] and elites and non-elites alike are relatively sensitive to cultural influences from Western societies. The right-wing Christian groups are far to the right of center, and it seems unlikely that this will change in the near future.[328] Not only will the advocates successfully deliver same-sex

325. Kim Minpyo, *Dongseong keopeul geongangboheom pibuyangja? "doenda"→ "an doenda" → "doenda,"* [*Dependent Status in Health Insurance for Same-Sex Couples? "Possible" → "Impossible" → "Possible"*], SBS NEWS (Feb. 21, 2023, 6:27 PM), https://perma.cc/6Q9K-NAFE; Daebeobwon [S. Ct.], July 18, 2024, 2023Du36800 (S. Kor.).

326. *See* Yoon, *supra* note 12.

327. According to a 2021 poll, 58 percent of respondents answered that they viewed homosexuality as a form of love, and 38 percent expressed their support for same-sex marriage. *Hangukgaelleom deilli opinieon je448ho* [*Gallup Korea Daily Opinion No. 448*], HANGUKGAELLEOP [GALLUP KOREA] 17, 20 (May 21, 2021), https://perma.cc/4E8B-2AU5. This marks a significant shift from twenty years prior when less than 17 percent of respondents affirmed support for same-sex marriage. *Id.* at 17. In the age group of 18 to 29 years, 82 percent of women and 65 percent of men were in favor of same-sex marriage. *Id.* at 20. In contrast, in the 60 and above age group, support dropped to 18 percent among women and 17 percent among men. *Id.*

328. This is not to say that the right-wing Christians' influence is limited to their own constituency. For instance, the NHIS hired a major law firm known for its Christian values for the final round at the Supreme Court. *Gongdongseongmyeong* [*Joint Statement*], RAINBOW ACTION (Mar. 18, 2023), https://perma.cc/XY96-VK9V; *Logos Corporate Identity*, LOGOS LAW, https://perma.cc/SL5S-527R. This was not the first occasion where Christian lawyers have lent their support to the government. An evangelical Christian organization reported that when the filmmaker couple filed the 2016 lawsuit, it arranged a meeting with the alderman of Seodaemun District and offered to secure pro-bono legal representation for the District in the lawsuit. The

marriage to Koreans, which I am certain will ultimately happen, but also, depending on how the reform movement evolves, they may reduce the importance of marriage in Korean society, which I hope will happen. If this happens, the narrow and technical arguments in the NHIS case will prove to be no less liberatory than, for instance, arguments that Korea must "apply [human rights or constitutional] principle now."[329]

Conclusion

In their quest for justice, globalizers of same-sex marriage often defend it in the universal language of rights and nondiscrimination and draw upon comparisons between countries nearing the universal ideal and those lagging behind. This Article resists a thin comparison driven by a universalist impulse and instead complicates the picture of "local" family law in South Korea—a legal periphery. It achieves this by historicizing the contemporary same-sex marriage debate in terms of the much longer history of Korean law's interactions with foreign laws. It shows that law in the periphery, through its development via receptions and rejections of influences from the center, has its own distinct legal tools for resisting and accommodating same-sex marriage, another influence from the center.

This Article's approach to Korean law suggests that we need to exercise both more caution and creativity in our efforts to generalize, compare, and globalize. For instance, it would not only be more plausible but also potentially more fruitful to compare and contrast the family law of Korea, Japan, and Taiwan rather than comparing Korea with the U.S. or Germany. This is largely due to the shared legal consciousness of these countries, which was shaped by their similar, but different, relationships with German, Japanese, and United Statesian legal influences during periods of Western and Japanese imperialism, as well as anti- and post-colonial nationalism. Despite how obvious this suggestion may seem, it might not be so apparent to some globalizers of same-sex marriage. Local advocates, on the other hand, may be well aware of this, as exemplified by a key Korean

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alderman agreed to this proposal. The legal team, comprised of six attorneys, was led by Jo Yeonggil, a recognized figure among those opposing same-sex marriage. Yi Yonghui, *Dongseonggyeolhon hapbeopwa makgi wihan gidowa yeonhapgwa heonsin isseotgie* [*Because There Was Prayer, Unity, and Dedication to Prevent the Legalization of Same-Sex Marriage*], CHRISTIAN TODAY (Sept. 10, 2021, 5:30 PM), https://perma.cc/ZF9S-5XX8. Nonetheless, not a single Justice in the NHIS case wrote a "traditionalist" opinion.

329. Robert Wintemute, *Same-Sex Marriage in National and International Courts: "Apply Principle Now" or "Wait For Consensus"?*, 1 PUB. L. 134, 134 (2020).

lawyer's claim that they do not look to the U.S. but rather to Japan—a country that does not yet recognize same-sex marriage—and Taiwan.[330]

330. Zoom Interview with Park, *supra* note 294.