

# A Study to Enhance the Effectiveness of Women-and Family-Related Legislation(VII): Legal Responses to Diversification of Families

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(VII): Legal Responses to Diversification of  
Families**

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## **1. Background**

This study has investigated the effect of female and family related legislations for the last seven years and is to come up with proposals that can streamline the legal measures according to family type diversification.

Types of family are changing, and the connection between marriage and family is weakening. Against this backdrop, existing family-related rules and laws do not seem to embrace those who want a family other than traditional one. Thus, it is necessary to explore ways that can fill the gap between law and reality, remove segregation faced by different types of family, and endow legal and social rights and obligations.

This study focuses on the possibility of relationship other than civil marriage being socially and legally recognized in the midst of diverse legal responses to family diversification. In addition, this research

multi-dimensionally explores potential legal solutions, including those what can be done right away and accepted on a longer-term perspective, considering past experiences that radical changes were difficult to put in place.

## 2. Methodology

The study employed a variety of methods as below:

- a. literature review on previous domestic and foreign studies on differentiation of family types and family-related legal systems,
- b. comparative analysis on constitutional and other legal stipulations of Korea and other countries,
- c. secondary survey for understanding perception, value, and others on marriage and live-together, among others,
- d. Questionnaire and focus group investigation for uncovering public sentiment on and experiences of segregation among different family types,
- e. expert advisory for shedding light on ways of research direction and ideas of streamlining related legal provisions, and
- f. forums related to gender issues and legislation for activating public debates about major topics.

## 3. Outcomes

### 1) Gap between changing family types and family norms

Until now, family laws have been revised for the promotion of gender

equality and children's welfare. Yet, those revisions have not been enough for those laws to be reflected into rapidly changing surroundings and people's perception after the 1990s.

Family types have already undergone significant changes and are to continue further in the future. The notion of family has been changed from something traditional, including civil marriage, live-together, and blood-based one, to relation-focused ones, such as intimacy and bond. This shift does not mean a reduction in family size or a change in marriage type but mean difficulty in standardizing family types through existing institutions. Against this backdrop, an attitude that treats family as a single unit<sup>1)</sup> that has homogeneous desire will likely exclude emerging family types when preparing family policy.

Definition of family cannot be described via a single concept. In fact, we are living in an era that cannot force a certain type of family. Different people have different types of family. Therefore, it is necessary to provide legal measures for diversifying family types to be reflected in the legal system and for an individual's choice not to face any segregation.

## 2) Survey outcomes

In order to collect underlying data for understanding perception on family and draft related policy, a survey was conducted to adults aged 19 and upward to 65 throughout Korea. The examination showed that the perception in everyday life was broader than in law. Respondents who said the notion of family falls within the category of 'live-together'

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1) Lee, 2017, Diverse Family Types and Social Policy, Social welfare committee of the People power 21, Welfare, a monthly journal, p.6, Vol. 219.

or ‘emotional bond’ at a rate of as high as 64.4% and 62.5%, respectively, even though not formed on civil marriage or blood. To the question of requirement for two persons to be accepted as a couple, people said that ‘their perception on them as a couple’ is more critical than marriage registration, a process needed for legal recognition.

61.2% of survey participants were positive to live-together, while 38.8% negative. Although some acknowledged ‘live together’ when two persons cannot get married, others had the perception that live-together is available only for those who plan to get married. This demonstrates that the Korean society still prefers civil marriage to live-together. Put different, the society’s sentiment is not relatively supportive to a live-together that is not on marriage path.

Next, the survey examined levels of understanding on marriage and quasi-marriages. About 10% of respondents did not properly know the differences among civil marriage, de-facto marriage and live-together. Levels of understanding about rights and obligations recognized in civil marriage but not in live-together were lower than those about concept. Also, rights and obligations of de-factor marriage were lower than those of live-together. What was notable was that only 38.1% of respondents knew that a family member of de-facto marriage is entitled for employer’s health care plan and survivor’s benefit. Though legal and policy actions conceived to protect de-facto marriage are in place, they are not well known to the public and thus frequently overlooked.

Lastly, this research investigated how people think about allowing three rights granted in civil marriage to de-facto marriage, including right to inheritance and adoption. 57.5% of the respondents agreed to co-adoption, and more than 60% supported a spouse’s right to inheritance and full adoption of children from de-facto marriage. Particularly,



agreement to full adoption received the highest level of support, 67.8%. To the question of giving same rights stated in civil marriage to live-together, the rate of negative responses was relatively higher than in the case of de-facto marriage.

There were nine items where live-together received a set of same rights allowed to civil marriage. Among them were only two issues that collected more positive responses than negative: One was a right to agree to medical treatment as a guardian, and the other a right to hold funeral celebration when a partner passed away. But, there is a caveat when interpreting survey outcomes; numbers of samples of de-facto marriage and live-together were small, failing to secure data enough to fully understand their idea.

The outcomes may be understood that the concept of family that used to be on marriage and blood is now changing to be on care, bond, and intimacy. Yet, these are examples of perceptive change only, and Koreans are still conservative in and away from recognizing and expanding scopes of rights to different types of family.

Regarding the question of registered life partnership, which is an alternative for recognizing relationship other than of civil marriage, 56.8% of the respondents said that they do not totally or partly support the idea, while 43.3% of them totally or partly support it. In the groups that can become interested parties if this partnership is introduced, including those who live together, those who live alone, those who do not plan to get married, and those who have unconventional thoughts with regard to marriage, they showed higher levels of support.

To the question whether registered partnership should be given the same rights with in civil marriage, there was a similar tendency to the

case of live-together. As rates of agreement to specific questions were slightly higher among registered partners than those who live-together, the first seemed more positive than the second to the ideas of institutional, or public recognition that would bring in legal rights. Thus, legal registration of partners would help to increase social acceptance.

### 3) FGI outcomes

Qualitative research conducted FGIs to a total of 20 persons who are members of six non-marital groups. Interview questions were made of five areas: reasons for choosing live-together, perception on live-together and levels of openness, concept and meaning of family, experience of segregation, and ways of seeking changes for addressing discrimination.

Reasons behind live-together widely varied, though there were common causes, including burden on marriage, fear for divorce, no interest in rearing a child, objection from children, phases of potential conflicts before getting married, wish to live a better live, and intimacy between two persons. Females in their 20s and 30s accepted live-together as an option they can choose in life, while setting up freedom, instead of rigidity, as an important value. Yet, males in the same age group tended to think of live-together as a phase just before marriage or suspension of marriage, describing live-together relationship as not flexible but stable. Males mostly cited as reasons for the relationship fear for divorce, ease in completing relationship, and economic and practical convenience, whereas females did burdens accompanying marriages, including of in-law family relations, pregnancy and delivery, balance between work and life, and gender norms lasting throughout life, gender-discriminatory roles, and social practices. Among the old-aged live-together group, objections of

children played a critical role in deciding not to marry but to stay together. In addition, a new friendship, or intimate relationship itself played crucially when they opted for the living mode. These tendencies are clearly evident among same-sex couples in the Korean society which does not issue marriage license to them.

Those in their 40s and 50s chose live-together after divorce or a spouse's passing away. Most of them prioritize harmony between their biological children and new children coming from a new relationship. This is not an easy task, so tension frequently breaks out. In some cases, those kids who joined a family later were regarded as outsiders.

Good points of live-together are as follows: a partner may focus on and care for the other partner; a partner can continue with what he/she has been doing and secure his/her own individual space; less difficulty when completing their relationship. Bad points of it are in the followings: social prejudice and negative perception make live-together an unrecognized way of living; partners cannot publicly speak of their living status; partners feel a sense of anxiety in their old age that they might live alone, or worry about a lack of institutions that stop them from building a more caring relationship. Particularly, there is a social prejudice that women who chose to live together are promiscuous, which leads to the denunciation of those females. In the face of such gender-biased idea, some of them have long felt guilty for their choice. Live-together after divorce or a spouse's passing away still receives blames for failing to live on "till death do part us."

Perceptual spectrum on the concept and meaning of family was wide: Some see a family as a unit formed by marriage and blood, while others by choice, caring and bond. What is evident is that live-together couples have a more democratic way of discussion than civil act couples do. Of

course, support, caring and sharing among family members are important, but still a long-held concept of family and learned gender roles serve critical parts for people to opt for “normal” family.

One social discrimination that non-marriage families go through comes from ‘family certificate.’

Diverse social institutions and policies are designed for civil marriage family, so types of family other than this cannot benefit from them.

Not only post offices, banks, public offices and schools but even cell phone shops require family registration and other similar documents when they provide their services. This practice makes those who cannot make those papers issued feel a sense of isolation, establishing a barrier that hinders them from being embraced by the society. Failing to give signature to an agreement on operation in medical facility as a legal guardian and receive benefits of welfare policy, they feel their civil rights are being limited and forced to move to the periphery of the society. In a reality that does not acknowledge civil rights to partners, those who lead a non-marriage family life have only to sacrifice, paying single tax as a social contribution. Housing and economic policies, both of which are to provide basic necessity, are mostly designed for newly-weds. Against this backdrop, those who sit outside civil marriage find themselves lose a game, playing on a slanted ground.

Respondents had a tendency of construing social segregation as a sacrifice they have to bear rather than as something unfair and discriminatory that should be addressed. Some of same sex couples did not expect the society to change social institutions and responses. Not a few survey participants did not well understand ways to support those in their 50s and older of the live-together group. Although others did

not want to receive unfair treatment, exclusion, or inconvenience from medical and educational fields and housing policies, they failed to point out specifically names of needed social policies. This reflects practical limitations that the Korean society has not properly discussed social policies in response to the change in diversifying family type. What all of the participants agreed to was that the society needs a change in social perception on the members of live-together. In other words, it is necessary for the society to promote a change in perception that live-together is not an abnormal one but a choice for which anyone who has a close intimacy to another can opt. They demanded access to social resources and equal institutional support in the midst of society's perceptual change so that live-together couples do not find discrimination that civil marriage couples will not experience. They also said that they have to produce social statistics for them to be used as policy foundation for couples outside the normal marriage to make their voices heard.

It seems necessary to raise a question if exploring ways to find social and institutional measures becomes a socially critical issue rather than an issue of a limited number of people. Although it is time to come up with specific solution, going beyond simply identifying a problem, people still seem to stick to long-held policies which was proven ineffective to handle related issues. Given that, greater efforts to change the course are in need. In this regard, it can be very critical to hear the voices of non-civil marriage families and explore discriminatory experiences. In addition, it is necessary to hold more discussions about ways to equally provide social resources and opportunities, which are centered on laws, policies and institutions, for non-marriage families. Those debates should be met with efforts to invite more citizens.

#### 4) Foreign legislation related to non-marriage families

Regarding methods of including non-marriage families in the legal system, this study divided them into two ways: fact-based one and registration-based one.

For example, Australia stipulates the definition, recognition and effect of de-facto marriage in its family law. In the meantime, Sweden drafted an individual law of live-together law, which provides rights and obligations, including definition, condition, cancellation, property title, property apportionment, care-giving obligation, and others.

For the registration-based system, in France, when an agreement on live-together is registered with a relevant national system, the agreement can be construed as legal provisions according to civil solidarity pact (Pacte Civil de Solidarite) under the civil act system. In Belgium and the Netherlands, a registration of live-together will secure legal protection in accordance with relevant laws, and matters, including rights and obligations and cancellation, will be subject to applicable laws. In Japan, unlike the aforementioned countries, registration of relationship can be made by ordinance and guidelines of local autonomy authorities. When registered, the relationship is given a certificate, though it does not enforce legal rights and obligations.

The Korean society has undergone rapid aging and low birth rate, together with demographic change and relationship structure. Relationship among family members are diversifying themselves quickly, and questions and discussions regarding the scope and definition of them just ensue. Several petitions with regard to registered life partnership have been filed with Korean Presidential Blue House's website. They have in common requested that the government should recognize the

relationship other than civil marriage and treat it as equally as the legally recognized marriage. This is because those voiceless couples are excluded from policies of social welfare, housing, healthcare, tax, among others.<sup>2)</sup>

Researchers believe that the Swedish system, a fact-based one that focuses on the protection of factual aspects, can be applicable to Korea. Koreans generally find it strange to put agreement itself or contractual issues into intimate relationship. In fact, this is largely the reason why Koreans fail to use the matrimonial property system, the voluntary guardianship contract system, and other similar measures frequently as well as to prepare a will and advance medical directives. On top of that, Korea's formality on civil marriage is very simple, which would not bring practical and legal benefits to registered partners. All of these make it desirable and valid the idea that Korea had better follow the example of Sweden, while focusing on facts. Specifically, if acknowledged as de-facto marriage by court rulings, non-marital relationship would have almost all rights and obligations stipulated to a civil marriage, including social security benefit. Exception to it is only inheritance. It is possible to make a new, individual legislation by restructuring rights and obligations between related parties, including of conditions for the recognition of de-facto marriage, property settlement, cancellation, and care-giving, in light of court rulings.

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2) Park, Seon-young, senior researcher at Korean Women's Development Institute, "Who is family?" The Women News, Mar.15, 2019.

## 4. Conclusion and policy implication

### 1) Implications

This study examined different types of family in the Korean society through diverse statistical data and investigated limitations found with applicable laws and their implementation. To understand general public's perception and need for legal response about family, it conducted survey questionnaire, listened to the voices of persons of relevant family via FGI, and reached a conclusion that the society needs legal response to adopt diversified types of family.

### 2) Meaning of Clause 1 of Article 36 of the Korean Constitution

If the Clause 1 of Article 36 of the Korean Constitution is construed to discriminate or ignore families other than ones formed by civil marriage, it will violate human rights of members of such families, even though they lead a family that secures practical aspects of marriage and family. The constitutional provision is meaningful in that it protects families, be it traditional or not, and suggests guidelines so that all family members' dignity and equality of are realized. In case that the stipulation is not observed, it can be understood as the government does not fully protect its people. Even if some constitute new forms of family that are not traditional, their human rights should be respected and defended. The constitution stipulates legal protection and benefits all.

### 3) Shift of perceptive perspective mirrored into the legal system

There should a dramatic shift in perceptive perspectives in Framework Act on Healthy Homes and Framework Act on Low Birth Rate in an



Aging Society, both of which were drafted in the face of family crisis. That transition should be done in such ways that comprehensively recognize decisions of individuals, including on reproduction and formation of family, placed ahead of state development. It also has to accept diversified forms of family and other recent changes in areas of marriage and family life, instead of denying such shifts.

#### 4) Seeking changes to expand private autonomy: Development of interpretation theory and legislation theory

##### (1) Reform on civil act

Under the patriarchal registry system in the past, both relationship among relatives and definition on family played crucial roles. Yet, now, the Korean society needs to reform civil act so that it can support constitutional rights by which individuals freely choose to form a family and enjoy a happy life with their chosen family members. It is proposed that the reform should offer provisions for diverse partners of non-civil marriage, departing from existing stipulations that are centered on the relationship of relatives. In addition, it has to stipulate for relationship of parent-child and relatives in broader ways.

##### (2) Removal of the scope of family focused on marriage and blood

Provisions about the scope of family in Korean civil act do not have effective power itself. Yet, it has impact on other legal systems, incurring exclusion and segregation. Thus, the scope and definition in the civil act and Framework Act on Healthy Homes should be removed. Removal of the scope provision from the first can leave an impact on the laws that

do not provide their own stipulation but borrow. It is necessary to investigate whether the term, family, in individual provisions includes not only legal aspects but also practical ones. Moreover, the investigation should work to minimize confusion in relation to scopes, including of spouse, linear ascendants, and linear descendants, by putting focus on the purpose and reason of relevant stipulations.

(3) Need for conceptual change of de-facto marriage: Building a concept that centers around facts of shared life

Formality of de-facto marriage needs to loosen. Subjective intents should be excluded from the requirement for the recognition of shared life. Also, formative elements of such life should be rendered enough for judges to cast rulings, as is the case with civil marriage. When all of the aforementioned are materialized, life partnership will be protected as much as de-facto marriage is.

(4) Granting equal rights to property liquidation

It is necessary to expand rights and obligations that fall unto a spouse of de-facto marriage. Up to now, the Korean legal system has implemented protective measures for a spouse of de-facto marriage, while not acknowledging his/her right to inheritance because of different reasons, including objectivity in deciding on whom to be a due heir/heirress, safety in transacting inherited properties, and clarity in arranging diverse legal matters. A lawsuit arguing Clause 1 of the Article 1003 of the Korean civil act violates Korean Constitution as the provision does not allow the right to inheritance to a spouse of de-facto marriage was filed with the Korean Constitutional Court. Yet, the justices of the court found it constitutional.<sup>3)</sup>

According to Article 1057-2 of the civil act, the scope of special connection to a deceased person includes those who lived together with him/her. This means that a spouse of de-facto marriage or life partner can be a special person. However, the stipulation is applicable only when there are no relatives who are the deceased person's brothers, sisters, or their children. Given that, legal change should be made for special persons to have equal apportionment.

#### (5) Guaranteeing status of life partner as a surviving family

Inheritance related stipulations in the civil act are designed for certain relatives to secure rights rather than focusing on a deceased persons's will. This is to apportion the deceased's properties properly to help surviving family members' living and to consider their efforts in amassing them. This is embodied in a legal portion of an heir. For this feature of the current legal system, even if a person with special connection to a deceased one is to be given certain portion of his/her property by will, the special person cannot fully secure the portion. To address this issue, provisions should be changed in ways that enlist a life partner onto the list of heirs/heirresses as a spouse or somebody with a similar status. Furthermore, lists of persons whose living expenses are to be considered should be shortened, including the elimination of brothers and sisters of a deceased person.

Moreover, housing rights of life partners of a deceased person should be reinforced. Currently, Housing Lease Protection Act, a Special Act on Civil Affairs, provides that housing rights of a deceased is assigned to a surviving spouse of de-facto marriage. However, in case that the deceased held a house or dwelled on a house that is not protected by

3) Constitutional Court of Korea, 2013Hun-Ba119, August 28, 2014.

the housing lease act, housing contract cannot be assigned to an inheritor. Housing rights protection should be provided to those who live a shared life; there should be no difference in the rights before and after the death of a lease agreement signer.

#### (6) Legislation of life partnership act (tentatively)

Legislation of life partnership act is in high need as the act would provide legal protection to same-sex couples and diverse options to different-sex couples who consider other choices than marriage.

Life partnership act (tentatively) should set forth the definition of life partnership, conditions of its formation and cancellation, effects on property and non-property matters, ways to prove such relationship, among others. Also, it is necessary to come up with stipulations as special affairs of the civil act in modifying rights and obligations granted to relatives. Additional revision is needed so that life partners in the act are granted a status of spouse recognized by social welfare acts.

To secure rights and obligations, demonstration of such relationship needs to be comfortable. Revision of enforcement ordinance of Resident Registration Act made it an obligation that a household has to register, so it is recommended that resident registration be used as a supportive certificate by way of adding a life partner to the list of those who live together.

#### **5) Movement on social perception improvement and development of regional approach**

It is necessary to explore phased approach for the purpose of increasing social awareness, together with new legislation. First, it is an effort to

lessen inconvenience that diverse family members undergo in their daily life, before the adoption of institution. Guideline for those planning to a shared life, a tentative booklet, provides information about rights and obligations of different types of family formed by other than civil marriage and about potential challenge.

Second, locally based approach, similar to Japanese practice. Japan recognizes relationship of partners through ordinances or guidelines of local authorities. What makes this approach critical is that it offers a chance of changing ignorance and no-right to social and political participation as well as enlightenment and spill-over effect.

#### 6) Laying a framework of statistical data production for understanding state of diverse family types

Survey on perception on family shows trends of diversifying family type. But there are limited amounts of data that demonstrate actual landscape of them, except of civil marriage. The questionnaire of this study shows composition of family types: 58.9%, civil marriage; 1.3%, de-facto marriage; 0.6%, live-together; single/not willing to get married, 39.1%. It is just 1.9% to add live-together to de-facto marriage.

Regarding relatively smaller rates of live-together, some say that social prejudice against the type of living forces respondents not to tell their actual situation. In the meantime, outcomes of limited amounts of quantitative research sometimes set up a barrier to improving institutions. Thus, in order to seek ways to eliminate prejudice against live-together family and provide institutional support, it is necessary to secure statistical data that can be helpful for understanding changing landscapes of family type.

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