

KWDI Issue Paper

Research Title: Research on the Measures to Strengthen the Effectiveness of Women and Family-Related Legislations (X):
Gender-Sensitive Revision of the Constitution

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Gender-Sensitive Revision of the Constitution

Abstract

- ◆ The Constitution is the highest law of the state, serving as the principal document that guarantees people's fundamental rights and outlines the power structure and its dynamics. As such, it serves as a guiding force for state actions and as a foundational principle for other individual laws. The Constitution binds all branches of government, and its implementation is carried out through the judiciary and legislative and executive functions.
- ◆ Since the last constitutional amendment in 1987, our society has witnessed significant changes and progress in the gender-related environment and legal frameworks concerning women and family.
- ◆ Despite these changes and progress, digital-based gender-based violence has emerged, creating a vicious cycle that continues to affect women. Additionally, women's representation has only expanded to a limited extent, and traditional family structures remain deeply ingrained as social norms. Furthermore, there has been little substantive change in terms of women's sexual and reproductive health.
- ◆ The existing Constitution has not adequately anticipated or addressed these changes, leading to a disconnect between institutional frameworks and the realities faced by women. As a result, there is a pressing need to bridge this gap by ensuring state accountability for gender equality in practice such as, guaranteeing sexual and reproductive rights. This can be achieved by adapting the relevant norms in the Constitution in a substantive and comprehensive manner.

Abstract

- ◆ A gender-sensitive Constitution is needed to address women's historical and economic invisibility, provide a legal foundation for women's empowerment, and address the specific stakes and needs of women that differ from men. Additionally, the Constitution guides the overall direction of laws related to women and family and provides a framework for judicial reasoning. Through this, institutional opportunities can be created for women to make appeals towards the state. By offering opportunities for self-determined participation, positive impacts can be expected in women's lives and changes in gender relations.
- ◆ Under the conditions mentioned above, this research attends to the necessity of a gender-sensitive constitution in light of the 35 years that have passed since the ninth constitutional revision in 1987. The objective of this research is to provide recommendations for the constitutional amendments of certain clauses pertaining to gender equality and family.

The necessity of the gender-sensitive revision of the Constitution

- The Korean Constitution has been amended nine times, with the last revision taking place 35 years ago in 1987. The need for constitutional amendments that align with the changing times has been consistently raised in the National Assembly and academia. However, women's participation in the constitutional revision processes and recent debates on new amendments have been limited. Also, women's experiences and needs have been overlooked and constrained in the language of the Constitution. The main reasons for the necessity of gender-sensitive changes in the Constitution can be summarized as follows.
 - ▶ Today, there is a need for a paradigm shift in women and gender relations, considering the evolving gender-related environment. Over the past 35 years since the last constitutional revision, our society has undergone significant transformations in demographic structure, family structure, industrial structure, and more. In order to align with these changes, the Constitution must provide a vision for women and gender relations in our future.
 - ▶ The principle of gender equality serves as the supreme principle within the Constitution, guaranteeing people's fundamental rights. It establishes the standard that the state must adhere to in its legislation, interpretation, and execution. Simultaneously, individuals have the right to demand that the state treat them fairly and without unjustifiable discrimination.

- The everyday lives of women have been significantly impacted by the abolition of certain laws, such as the military service incentive, the traditional household system, the patriarchal family system, the adultery law, the ban on the same family name, and the patrilineal surname system which were deemed unconstitutional by the Constitutional Court. Alongside the progress in women and family-related laws, these legal changes have had a profound effect. However, despite these advancements, gaps persist between the legal framework and actual practice, creating blind spots. Therefore, there is a need for state accountability to address gender inequality, ensure sexual and reproductive rights, and achieve substantial gender equality through the normalization of a more gender-sensitive constitution.
- ▶ Moreover, gender-sensitive constitutional revision can create opportunities for women to make appeals to the state and actively participate in the processes. By enabling self-determined participation, these revisions can have positive effects on women's lives and gender relations.

Directions for gender-sensitive constitutional amendment

- According to the necessity of gender-sensitive constitutional amendment, the directions for revision can be presented as follows.
 - ▶ The Constitution is an ideological and political framework that guides the values the state should uphold. Amidst the ever-changing landscape of gender equality, the Constitution's reforms should strengthen its normative capacity and solidify the principle of gender equality as a constitutional value.
 - The universal and enduring value of the Constitution extends beyond its status as the supreme law and legislation for state institutions. Its true realization occurs when the concrete guarantee of people's freedom and rights is achieved.
 - ▶ During the ninth constitutional amendment in 1987, women's groups provided input for revising clauses related to gender equality and family. Given the impact of their efforts on society thus far and the evolving gender landscape, a more proactive review of the Constitution for gender equality is warranted. This entails a comprehensive examination of the existing framework and normative structure of the Constitution, and its alignment with international norms on gender equality.
 - ▶ Lastly, the constitutional revision should embody directions that reflect a vision for future-oriented and sustainable changes in gender relations.
 - The Constitution serves as an amalgamation of collective aspirations, providing a vision for the future of the state community and demonstrating the determination of its members for implementation. In terms of integration, it should reflect the demands of contemporary society for gender equality and encompass content that pursues more universal values in an open era.

Ways for a gender-sensitive constitutional amendment

● Integration of the value of care in the Preamble of the Constitution

- The Preamble of the Constitution is the statement preceding the general provisions and serves as a foundational part of the Constitution. It establishes the guiding and basic principles that underpin the Constitution. As such, the Preamble is essential for understanding the entire Constitution and holds significant importance as the highest-level principle.
- Gender equality is included in the part of the Preamble, which states, “to afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social, and cultural life.” This principle of equality is substantiated in relevant provisions, such as Article 11. Gender equality has been a consistent and integral part of the Constitution since its inception. Therefore, it would be more reasonable to pursue its substantive realization by revising relevant provisions rather than relying solely on mentioning gender equality in the Preamble.
- Differing from the revision of General Provisions, the revision of the Preamble is undertaken when there is a need to incorporate societal developments that may lead to certain changes in the constitutional ethos. When considering how to include the value of care in the Preamble, it is important to adopt progressive perspectives.
- Care refers to the act of nurturing and supporting individuals to live healthy lives and empowering them with the equal rights to make decisions and control their own lives. It is a broad concept encompassing various aspects such as childbirth, upbringing, education, and healthcare. Through the experience of being cared for and caring for others, which is a universal experience, individuals develop and grow, and a societal community can thrive and endure.
 - ▶ The notion of care should be enshrined in the Preamble of the Constitution as a core value that individuals, the state, and society should uphold and safeguard.
- The Constitution portrays human beings as free, just, and independent. However, this depiction often diverges from reality. The truth is that human beings are interdependent and vulnerable, and it is through receiving care that they can genuinely attain freedom and fairness. Therefore, care should be recognized as essential in pursuing the ideal human image outlined in the Constitution. The proposed revision of the Preamble is presented in Table 1 below.

<Table 1> The Proposed Revision of the Preamble

The current version of the Preamble	The proposed revision
[...] proud of a resplendent history and traditions[...] lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty, and happiness for ourselves and our posterity forever, do hereby amend [...].	[...] proud of a resplendent history and traditions[...] lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty, and happiness <u>and to develop into a care society</u> for ourselves and our posterity forever, do hereby amend [...].

● New provisions for gender “equal” participation in the equality rights

- Article 11(1) of the current Constitution was introduced as the general equality provision in the 1948 First Constitution. It is evident that this provision encompasses not only normative equality but also substantive equality. The Constitutional Court has interpreted the principle of equality as not implying absolute equality that negates all forms of discriminatory treatment but rather as relative and substantive equality that prohibits discrimination based on unreasonable conditions in the process of legislating or applying laws.
- In the discussions regarding constitutional amendments in the 2000s and beyond, there have been proposals to add additional provisions to ensure substantive gender equality alongside the general equality principle stated in Article 11. From the written interviews with experts, it was pointed out that provisions of general equality have limitations in achieving substantive gender equality.
- Sexual discrimination and patriarchy persist in social institutions and culture. Given that gender is the most prevalent form of discrimination, it is necessary to include gender equality as a separate provision.
- In the case of separate provisions for gender equality, the focus should be on how to encompass their content and form to promote substantive gender equality. It is, therefore, essential to ensure that the normative capacity of the Constitution is reflected in the legal system and effectively implemented in reality. This can be achieved by holding the state accountable for taking affirmative action and actively working towards achieving gender equality.
- In stipulating affirmative action for gender equality in the Constitution, there is a concern that it may be perceived as a temporary measure that will be abolished once a certain level of gender equality is achieved.
- Recently, the notion of “parité” or “paridad” has emerged as a distinct concept separate from affirmative actions for achieving substantive gender equality. Initially, it was understood as a form of affirmative action that involved implementing greater quotas. However, it has now evolved into a broader vision aimed at addressing women's underrepresentation. In other words, the vision for constitutional gender equality temporarily goes beyond correcting unfair outcomes. Instead, it seeks to identify and fulfil the principles of substantive democracy in a new way.
- The Constitution should encompass the perspective of gender-balanced participation in various domains, such as political representation, economic participation, and social activities. It is crucial to incorporate provisions for equal participation across sectors as a comprehensive principle. These provisions should align with the gender mainstreaming perspectives integrated into policy processes and decision-making at all levels.

- Some issues, such as migration, disability, and sexual orientation, are closely linked to gender discrimination and the level of gender equality. In order to better reflect the complexity of discrimination in practice, it is necessary to identify these subjects as “all persons” and expand the grounds of discrimination in Article 11(1). By including a broader range of grounds, the Constitution can address the intersectional nature of discrimination.

<Table 2> The Proposed Revision of the Article 11

The current version	The proposed revision
<p>Article 11</p> <p>① All citizens shall be equal before the law and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status.</p> <p><The rest omitted></p>	<p>Article 11</p> <p>① All persons shall be equal before the law and there shall be no discrimination in political, economic, social, or cultural life on account of <u>sex, disability, age, class, family type or situation, race, language, region of origin, sexual orientation, religion, or social status.</u></p> <p>② <u>Women and men have equal rights to participate in political, economic, social, or cultural life, and the State guarantees the rights.</u></p>

Enhancing state accountability for women's labor

- Special protection for women's and youth's labor has been guaranteed since the First Constitution. Article 17 of the First Constitution, which outlined the legal principles of rights, obligations, and labor standards, identified women's and youth's labor as subjects deserving special treatment. In the ninth constitutional amendment of 1987, a distinction was made between women's labor and youth's labor. Furthermore, the amendment stipulated that women's labor should not only be subject to protection but also free from discrimination.
- It is significant that the Constitution distinguishes women as a group in need of the state's protection and establishes the independent provision for gender equality and maternity protection.
 - Based on this provision, the Labor Standards Act and the Equal Employment Opportunity and Work-Family Balance Assistance Act have been developed, leading to significant progress in terms of reducing direct discrimination. The Constitutional Court has ruled that the military service incentive system is unconstitutional. Furthermore, the Supreme Court recently issued a judgment in the Jeju Medical Center case, recognizing that a mother and a fetus are a single entity, and therefore, any health damage to the fetus that occurs during the mother's work should be recognized as an occupational disaster.
- However, the term "special protection" in its current form remains ambiguous in its scope. This ambiguity can lead to misunderstandings that women's labor force is different from and potentially inferior to men's labor force.

- Despite the developments in legal frameworks concerning women and family, structural discrimination in the labor market has made little progress. Korea consistently ranks at the lowest in terms of the gender pay gap and the glass ceiling index among OECD member states. The emergence of the digital economy has further exacerbated the issue by increasing the number of low-paid and vulnerable workers, particularly in the form of platform-based work. The reduction in job opportunities for women and the widening gender gap highlights the urgent need to enhance the state's accountability in prohibiting discrimination against female workers.
- In foreign jurisdictions, many constitutions have separate provisions addressing gender equality in labor participation. Given the context of gender pay gap and the prevalence of female workers without permanent contracts in Korea, it is desirable to consider amending Article 32(4) to explicitly prohibit discrimination, enhance protection, and assign greater state accountability. Table 3 below illustrates the proposed revisions for this provision.

<Table 3> The Proposed Revision of the Article 32(4)

The current version	The proposed revision
<p>Article 32</p> <p>④ Special protection shall be accorded to working women and they shall not be subjected to unjust discrimination in terms of employment, wages, and working conditions.</p>	<p>Article 32</p> <p>④ Special protection shall be accorded to working women <u>depending on biological and physical attributes</u> and they shall not be subjected to unjust discrimination in terms of employment, wages, and <u>other</u> working conditions.</p>

● New provision for sexual and reproductive rights

- Reproductive rights emerged in the international discourse in the mid-1990s. The issues of whether individuals have the right to decide on having children, the number of children, and the frequency of childbirth were established as rights that extend beyond their parents and general human rights, rather than being solely focused on population control. These rights were formulated as a comprehensive norm known as “sexual and reproductive health and rights.” This norm encompasses the intimate connection between sex and reproduction and emphasizes the rights of individuals to determine the timing and nature of their sexual relationships based on the interplay between health and rights.
- Recently, discussions surrounding reproductive rights have gained prominence in our society. In 2017 and 2018, these discussions were particularly significant during the constitutional amendment process. However, the discourse became even more active following the Constitutional Court's decision to declare the anti-abortion law unconstitutional in 2019. This decision has shaped a new landscape for sexual and reproductive health and rights. Despite this shifting environment, the existing legal framework and policies primarily revolve around marriage and family, leaving gaps in addressing reproductive rights. Insufficient attention has been given to the right to determine one's reproductive choices freely and responsibly, ensure substantive guarantees, and prioritize reproductive health.

- The current Constitution encompasses certain rights that are relevant to reproductive rights, such as the right to self-determination (Article 10), protection of maternity (Article 36(2)), special protection, prohibition of discrimination against women's labor, and health rights (Article 32(4)).
 - ▶ Article 36(2) is significant as it establishes state accountability for reproduction and includes provisions that justify supportive policies for pregnancy, childbirth, breastfeeding, and childcare. However, the term "maternity" is ambiguous and fails to encompass the entire spectrum of reproductive rights comprehensively. This limitation arises from confining the scope of protection to pregnancy, childbirth, breastfeeding, and childcare. By focusing solely on protecting mothers, the provision narrows down the responsibilities to women, thereby excluding the broader aspect of individual reproductive rights. Due to the restriction of reproductive rights to maternal protection, the comprehensive rights of individuals regarding their reproductive choices are not fully embraced.
- In line with the recognition of comprehensive reproductive rights and health as an international norm, there has been an increasing need to enshrine these rights in constitutions. As a result, many states have adopted provisions specifically addressing reproductive rights within their constitutions.
 - ▶ Given the emergence of reproductive rights, the limitations of the current Constitution focusing primarily on maternal protection, and the recognition of reproductive rights in other states, it is crucial to initiate concrete discussions for a new provision on sexual and reproductive rights in the Constitution.
 - ▶ Reproductive rights encompass both aspects of basic rights relating to freedom and social rights, resulting in a complex and ambiguous nature. However, it is not ideal to create a strict division between these dimensions to ensure substantive guarantees for these rights. To address this, it is essential to adopt reproductive rights as new, stand-alone fundamental rights within the legal framework.
 - ▶ It is necessary to separate maternity protection from marriage and family provisions and recognize reproductive rights as individual rights. Reproductive rights should comprehensively encompass sexual and reproductive rights.
- It is imperative to stipulate the state's active guarantee, response, and support for reproductive rights.

<Table 4> The Proposed New Provision of Reproductive Rights

The proposed provision
<p><u>New article</u></p> <p>Every person has sexual and reproductive rights, which the State guarantees and supports.</p>

● New provision for freedom from gender-based violence

- Violence against women has gained significant attention in international discourses since the late 1980s. It has been acknowledged that homes and workplaces are standard settings where violence against women occurs, emphasizing the responsibility of states to intervene in such cases.
- In international discourses, violence against women has been recognized as a form of gender-based violence, acknowledging its comprehensive nature. As a result, states have been called upon to respond to this issue, while women's movements in many countries have actively worked to address and raise issues about violence cases.
- Constitutional accommodations for gender-based violence have been implemented in countries with low levels of gender equality or where gender-based violence is prevalent. For instance, Bolivia explicitly categorizes violence against women into physical, sexual, and psychological types in the 2009 Constitution. The Constitution also identifies the responsibility of the state to take necessary measures to prevent, eliminate, and punish gender-based violence within society and the family.
- Since the Constitutional amendment in 1987, addressing violence against women has become a significant agenda in our society. Notably, the ninth revision marked a substantial legislative change in the area of gender-based violence among laws on women and family. However, different laws addressing specific acts make it challenging to grasp the ongoing and complex nature of violence against women or gender-based violence as a whole. Furthermore, it has been observed that responding to the diversifying forms of violence has become more difficult.
- During the discussion of constitutional revision in the late 2000s and onwards, there was limited discourse surrounding new clauses specifically addressing gender-based violence concerning the introduction of basic rights. However, in 2017, this agenda gained attention and was included as one of the clauses for achieving substantive gender equality in the 'Ten Policy Tasks for Gender-Equal Constitutional Revision' by the Korean Women's Association United.
- ▶ Despite relevant laws, gender-based violence persists, taking on various forms. With the advent of digitalization, the nature of gender-based violence has expanded to include illegal recording and dissemination of intimate content, sexually exploitative behavior online, and other technology-based forms of violence.

- There is a pressing need for a comprehensive understanding of gender-based violence as a distinct and crucial issue. It is imperative to recognize it in the Constitution as a separate clause, highlighting the state's responsibility to protect and respond to this issue actively.
- In order to establish gender-based violence as a fundamental issue, it is crucial to include it as a distinct constitutional agenda, separate from the broader concept of physical integrity or inviolability. Specifically, it is necessary to explicitly stipulate "gender-based violence" as a clear and indicative statement that recognizes the unique nature of violence against women. Following the proactive approach seen in the Bolivian case, incorporating gender-based violence as a basic right ensures the protection and guarantee of these rights. Moreover, it is essential to emphasize the state's responsibility to prevent gender-based violence and protect individuals from any potential dangers.

<Table 5> The Proposed New Provision of Gender-Based Violence in the Constitution

The new provision
<p>New article</p> <p>① Every person has the right to be free from gender-based violence.</p> <p>② The State shall take measures to prevent gender-based violence and ensure the protection of individuals from such harm.</p>

● Revision of family-related provisions

- Article 36(1) is the only provision in the Constitution that addresses marriage and family. However, this clause does not explicitly recognize them as basic rights. Instead, it focuses on the state's responsibility to support and uphold the institutions of marriage and family formation and maintenance.
- Marriage and family institutions hold significant importance as constitutional agendas in many countries. Their recognition and treatment within the constitution are closely tied to each country's specific social and cultural contexts, acknowledging the unique characteristics of these institutions.
- ▶ The Korean family structure has undergone significant changes over the past three decades. Factors such as an increase in the average age of first marriage and a weakening of marriage norms have contributed to a decrease in the marriage rate. Additionally, there has been a rise in divorce and second marriage cases, reflecting a shift in societal attitudes towards marriage. Today, diverse forms of relationships that go beyond traditional marriage and blood-centered families are observed, including defamilization, deinstitutionalization, individualization, and family reformation. A notable trend is the rapid increase in single-person households, which has become the most common household type as of 2015, rising from 9.0% in 1990 to 33.4% in 2021. This shift in household composition is a significant indicator of the changing nature of families in Korean society.

- The term "the sexes" used in Article 36(1) of the Constitution can be interpreted as limited to the traditional understanding of marriage and family between women and men. To ensure inclusivity and gender equality, it is necessary to revise the provision to use the term "gender equality" instead. This change would recognize individuals as marriage and family actors, irrespective of gender. Additionally, the revision should acknowledge and support various family forms, including same-sex marriage. However, it is important to note that there is still a continuous cycle of labor and care, with care responsibilities predominantly falling on women. Social, institutional, and cultural discrimination, as well as patriarchal norms, continue to influence perceptions and practices related to marriage and family. In light of these realities, the revised provision should emphasize respect for individual dignity and maintain the language of gender equality in the context of marriage and family.
- It is necessary to establish a new clause recognizing the right to form a family independent of marriage or family lives. The current Constitution lacks clarity regarding this right. It is important to note that international human rights discussions and practices in other countries distinguish between the right to marriage and the right to form a family. The latter is now recognized as a distinct basic right. For example, the 2019 Constitution of Cuba explicitly acknowledges the right to form a family separate from marriage. It provides protection for diverse forms of family, thereby embracing and promoting diversity in family formation and structures.
- ▶ To address concerns about misinterpretation and highlight the significance of the right to form a family, the provision on the right to form a family should precede the clause on marriage and family lives in the constitutional framework.

<Table 6> The Proposed Revision of the Article 36

The current version	The proposed revision
Article 36 ① Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal. (The rest is omitted).	Article 36 ① Every person has the right to form a family. ② Marriage and family life shall be entered into and sustained on <u>the basis of individual dignity and gender equality, and the State shall do everything in its power to achieve that goal.</u>

Responsible organization	: The National Assembly
Relevant organization	: Ministry of Employment and Labor Ministry of Gender Equality and Family National Human Rights Commission for Korea, and so forth