

2023

Summary of Research Papers 21



A Study for Enhancing the Effectiveness of Women and Family related Laws(X): Gender-Sensitive Revision of the Constitution

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of Women and Family related Laws(X):
Gender-Sensitive Revision of the
Constitution**

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I . Introduction

1. A Purpose of the Study and Necessity Thereof

- ☐ The constitution is the basic law of the country that protects basic rights of citizens and a supreme law of the country that determines the power structure and the principles of action thereof. Moreover, the constitution is a basic law by which the fundamentals of the State and a community, the fundamentals of a lifestyle of the members of the community, and an order thereof are formed. Accordingly, the constitution acts as the rationale for the prerequisites of an individual law which has a direction different from that of the constitution, thereby binding on all the State power, and is enforced through judicial action, legislative action, and administrative action.

□ Since 1987, which was the year of the last Amendment of the Constitution of Korea, various changes have been made to the environment surrounding gender relationships in the Korean society. Specifically, low birth rate and aging has occurred fast and declining marriage rate and late marriage are progressing rapidly. A change in family formation has also progressed dynamically and various forms of relationships have occurred, such as defamiliarization, deinstitutionalization, and individualization beyond family. One out of three households is a single-person household and a dual-income household now takes its place as a universal form of family. As women are highly educated, participation of women in economic activities has increased and the representation of women has improved in every sphere of society. In addition, gender equality has become an agenda of national policy, and gender mainstreaming has been adopted as a strategy for the gender equality policy, thereby bringing about the advancement of relevant institutions. However, women's employment still falls short of the average of the Organization for Economic Cooperation and Development (OECD) member states and a wide gender gap exists. Korea stands at the lowest rank in the gender wage gap and the glass ceiling index among the OECD member states. The single-person household is increasing and defamiliarization is progressing, however, family composition based on marriage and blood ties is still solid. The ratio of female members of the National Assembly of Korea and the ratio of female executives relatively increased due to the gender quota system but still remains at low levels compared with international levels. Together with this, a lot of changes were made in the legislation on women and family. Basic laws, such as the Framework

Act on Gender Equality, the Framework Act on Healthy Families, and the Framework Act on Prevention of Violence Against Women, were legislated to strengthen the State responsibility in connection with the concept of gender equality under the Constitution. Accordingly, the direction of relevant policies and the structure for implementing such policies were streamlined, and such policies were systematized and integrated. In the 1990's, the legislation on gender-based violence noticeably advanced, and the Act on the Punishment of Sexual Crime of Violence and Protection of Victims, the Act on the Prevention of Domestic Violence and Protection of Victims, the Act on Sex Protection of Children and Youth, the Act on the Prevention of Commercial Sex Acts and Protection of Victims, the Act on the Prevention of Human Trafficking and Protection of Victims, and the Act on the Punishment of Stalking Crime were legislated. The prohibition of gender discrimination in employment, motherhood protection, and work-family balance assistance were strengthened under the Labor Standards Act, and the Equal Employment Opportunity and Work-Family Balance Assistance Act. The provision on the patriarchal family system and the provision on the ban on same-surname-same-origin marriage were abolished, and assistance to various families types, such as the one-parent family and the multi-cultural family, made greater progress. The women's representation was expanded due to the gender quota system compared with the previous form. Recently, the Constitutional Court of Korea rendered a decision of constitutional nonconformity in the illegal abortion case, which resulted in the change of the topography in the discussion and discourse on reproduction and health of women.

- ☐ Irrespective of the changes, digital gender-based violence continues to evolve and a vicious cycle of women's labor and care remains. Women's representation has been expanded restrictively, and the traditional family relationships are still the social norm. It is difficult to feel substantive changes with respect to the sexual and reproductive rights of women. The current Constitution of Korea did not foresee such environmental changes as described above and a gap between institutions and reality remains. It is required to clearly specify the responsibility of the State through the substantive and proactive Constitutional norms to ensure realization of substantive gender equality and protection of the sexual and reproductive rights.
- ☐ A gender-sensitive Constitution is necessary to 'solve the problem of women's invisibility in history and economy', 'provide a legal framework for expansion of women's empowerment' and deal with the understanding of women and needs thereof that are different from those of men. Moreover, the Constitution provides a direction of the legislation on women and family and a frame of reference for judicial judgment and provides women with a means to raise an objection to the State so that women can participate voluntarily, thereby bringing about a positive effect on the lives of women and gender relationships.
- ☐ Under these circumstances, from where we stand after 35 years from the Ninth Constitutional Amendment of Korea in 1987, this study pays attention to the necessity of a gender-sensitive Constitution and intends to present a proposal for the amendment of the provisions on gender equality and family amidst the environmental changes surrounding the gender relationships in the Korean society.

2. Details of the Study

- ☐ First, the environmental changes surrounding gender relationships and the changes in the gender equality policy after the 1987 Ninth Constitutional Amendment of Korea are reviewed with a focus on the changes and advancement of the legislation on gender. Second, after reviewing the Preamble to the Constitution, the structure of the General Provisions of the Constitution, and the history of the provisions on gender equality and family, the details and issues around the provisions on gender equality and family among the details of the proposal for the amendment of the Constitution are organized. Third, an analysis was conducted on the results of an expert investigation into the necessity of the amendment of the Constitution of Korea and the proposal for the amendment of the provisions on gender equality and family under the Constitution. Fourth, an investigation and an analysis of the provisions on gender equality and family under the constitutions of foreign countries were conducted and significance was derived therefrom. Fifth, the proposal for the amendment for the gender-sensitive Constitution was presented by dividing the proposal into the Preamble to the Constitution and the provisions on gender equality and family.

3. Methods of the Study

- ☐ First, academic materials and reports on the right of gender equality under the Constitution of Korea and materials discussed in the National Assembly of Korea were collected and analyzed. A database on the constitution of a foreign country, a homepage of an institution exclusively dealing with these affairs, government documentation,

reports, academic dissertations, etc. were reviewed to conduct a study on the constitutional cases of foreign countries. Materials from the Statistics Korea and available secondary materials were analyzed to look at the environmental changes of gender relationships. Second, a written investigation was conducted for experts to identify in depth their opinions on: the environmental changes of gender relationships and the necessity of the amendment of the Constitution; the amendment of the Preamble to the Constitution; meanings and problems of the individual provisions related to the gender equality policy under the current Constitution and opinions on the amendment of such provisions; and the basic rights to be newly established in the Constitution in connection with gender equality. Third, an expert advisory meeting was convened for experts in connection with the direction of the study and the development of a questionnaire for the expert investigation. Fourth, a workshop for the amendment of the Constitution was convened to prepare the proposal for the amendment for the gender-sensitive Constitution and relevant experts participated in presentations and discussions for each agenda, such as gender equality, family, and the reproductive right.

II . Necessity of the Amendment for the Gender-Sensitive Constitution and the Direction of the Amendment

1. Necessity of the Amendment for the Gender-Sensitive Constitution

- ☐ The Constitution of Korea was amended nine times after the establishment of the first Constitution of Korea and 35 years have

elapsed since the last Amendment of the Constitution in 1987. Meanwhile, the necessity of the amendment of the Constitution arose to keep abreast with the new era and the discussions on the amendment of the Constitution have been going on in the National Assembly of Korea and the academic circle to rack their brains on the fundamental design of the Constitution. However, women's participation was limited throughout the nine times of the amendment of the Constitution of Korea and in the recent discussions on the amendment of the Constitution, which were led by the National Assembly and the academic circle. In addition, experiences and desires of women were invisible and too limited to appear in the language of the Constitution. Under these circumstances, the main reasons why the gender-sensitive changes are necessary in the Constitution are as follows. First, after 35 years have elapsed since the last Amendment of the Constitution of Korea, a paradigm shift in women and gender relationships is necessary with respect to the Constitution amidst the changing environment of gender relationships. Korea has shown rapid changes in the environment around gender relationships in the population structure, family structure, and industrial structure over the last 35 years since the last Amendment of the Constitution in 1987. It is necessary to present the future images of women, gender relationships, and families of the Korean society by accommodating the changing environment in gender relationships and reflecting such environment in the Constitution. Second, the principle of gender equality under the Constitution is: the supreme principle of the Constitution for the protection of the basic rights of citizens; the standard to be observed by the State in legislating laws; interpreting or executing laws; and

the right of people to demand that ‘the State should not unfairly treat people without a reasonable cause’ and demand a ‘fair treatment’. The advancement of the legislation on women and family, and the annulment of the veterans extra point system, the patriarchal family system, adultery, patrilinealism, and the ban on same-surname-same-origin marriage, which were determined unconstitutional by the Constitutional Court of Korea, exerted a huge effect on daily lives of women. However, irrespective of the advancement of the legislation on women and family to realize the gender equality ideology after the 1987 Amendment of the Constitution, a blind spot has occurred due to a gap between legislation and reality, and there exists another reality where a gender gap is not bridged. That is why it is required to strengthen the responsibilities of the State through further substantive and proactive Constitutional norms with respect to the resolution of gender inequality, protection of the sexual and reproductive rights, and realization of substantive gender equality. Third, furthermore, the reason the amendment for the gender-sensitive Constitution is necessary is that the Constitutional norms of women and gender equality provide women with a means to raise an objection to the State so that women can participate voluntarily and bring about a positive effect on the lives of women and gender relationship.

2. Direction of the Amendment for the Gender-Sensitive Constitution

- ☐ According to the necessity of the amendment for the gender-sensitive Constitution as explained above, the direction of the amendment for the gender-sensitive Constitution is explained below. First, the Constitution is an ideological and political value system that the

State as a community has to pursue. The amendment of the Constitution has to be implemented in a way that restructures the provisions on gender equality under the Constitution based on the rights of equality and the principles of society and the State amidst the changing environment surrounding gender relationships to raise the normative power of the Constitution and realize the form of gender equality to be pursued by us as a constitutional value. Second, the universal and perpetual values of the Constitution can only be manifested when the Constitution does not remain merely as the supreme law and the government organization law but realizes the freedom and rights of people concretely and ensures such freedom and rights substantively. Third, the provisions on gender equality and family under the current Constitution, which were amended by reflecting the position of women's circles in the 1987 Ninth Amendment of the Constitution of Korea, should be supplemented in due consideration of the purpose thereof, the effect exerted so far, and the changing gender environment, and the rights to be newly established for gender equality should be further reviewed proactively. To this end, it is necessary to look at the existing framework of the Korean Constitution and the normative structure thereof and accommodate the international norms in the Korean Constitution. Last but not least, the amendment of the Constitution should be implemented in a way to show a vision for forward-looking and sustainable changes in gender relationships. The Constitution is a final product which presents a future image of the State as a community and in which the wills of people constituting the State are integrated to realize the future image. From the perspective of integration, it is necessary to reflect the demands of

the times for gender equality on every aspect of our lives and contain further universal values and contents directed toward an open age.

III. Measures for the Gender-Sensitive Amendment of the Constitution

1. Reflection of the Value of Care in the Preamble to the Constitution

- ☐ The Preamble to the Constitution of Korea is an introductory statement positioned before the body of the Constitution and constitutes a part of the Constitution to prescribe the guiding ideology and the basic principles of the Constitution. The Preamble to the Constitution acts as a guideline to construe the entire Constitution and is substantially the highest norm in the stage-structured Constitutional norms. Gender equality is presumably included in the language of the Constitution, “afford equal opportunities to every person in all fields, including political, economic, social and cultural life”, and the spirit of equality is embodied in Article 11 of the Constitution and other relevant provisions. Gender equality has consistently constituted a fundamental principle of the Constitution since the first Constitution of Korea. Accordingly, it seems reasonable to seek actualization of gender equality through the amendment of relevant provisions of the Constitution rather than to include gender equality in the Preamble to the Constitution. Dissimilar to the amendment of the provisions of the Constitution, the amendment of the Preamble to the Constitution is presumably implemented when it is necessary to embrace a social opportunity that brings about a change to the spirit

of the Constitution to some extent, in this sense, the measure for including the value of ‘care’ in the Preamble to the Constitution requires us to think deeply in a forward-looking manner. Care means to raise a healthy member of a society who will live together with other members in the society, and to support the members of the society to have the right of choice and the right of control in their lives on an equal footing. Care is a broad concept in which childbirth, child-rearing, education, and medical care are incorporated. A human is formed as a human through care comparable to air, that is, through universal experiences of receiving care from someone and giving care to someone, and a community can exist and can be maintained thereby. It is necessary to stipulate such care in the Preamble to the Constitution as a value to be pursued and protected by an individual, the State, and the society, and reestablish a human image and the concept of care under the Constitution so that care can constitute the ideological value system of the State as a community. The Constitution of Korea presupposes a free, equal, and independent human image, but such human image is not a real human image. A human is a dependent and vulnerable being, and such a human receives care from someone and grows to become a free and equal human. Care is an essential element to becoming a human presupposed in the Constitution. A proposal for the amendment of the Preamble to the Constitution to reflect the concept of such care is described below.

〈Table 1〉 A Proposal for the Amendment of the Preamble to the Constitution

The Current Constitution	A Proposal for the Amendment
A resplendent history and traditions... <u>to ensure</u> security, liberty, and happiness for ourselves and our posterity forever... hereby amend.	A resplendent history and traditions... to ensure security, liberty, and happiness for ourselves and our posterity forever and <u>develop toward a caring society</u> ... hereby amend.

2. New Establishment of the Provision on Equal Participation by Men and Women in the Rights to Equality

- ☐ Since the first Constitution of Korea in 1948, Article 11 (1) of the current Constitution of Korea has been adopted in the form of the provision on equality in general. There is no question that not only formal equality but also substantive equality are included in the interpretation of the Constitution. The Constitutional Court of Korea has also construed that the principle of equality under the Constitution does not mean absolute equality in denial of any discriminatory treatment whatsoever but means relative and substantive equality that bans discrimination on unreasonable grounds in application of a law or legislation of a law. After the 2000's, in addition to the provision on equality in general in Article 11, a separate provision to realize substantive gender equality was proposed in the discussions on the amendment of the Constitution. It was also pointed out in the result of the investigation by the experts in this study that the provision on equality in general alone has limitations to realize substantive gender equality. Considering that gender discrimination and patriarchy remain intact in the Korean social system and culture, and gender is one of the most representative ground for discrimination, it is necessary to add gender equality in the form of an independent provision. Granting

that the independent provision on gender equality is necessary, what content will be included in the independent provision for realizing substantive gender equality and in what form will become an issue. It is desirable to stipulate that the State has a duty to take proactive action for realization of substantive gender equality and realize gender equality so that the normative power of the Constitution can be reflected to the legal system and reality. If such proactive action is prescribed in connection with gender equality under the Constitution, there is a concern that the proactive action as temporary action may be construed as abolished when numerical equality is achieved. In the recent gender-sensitive constitutional cases, equality ('parité' or 'paridad') between the sexes has newly emerged, separate from proactive action for substantive gender equality. The concept of equality between the sexes was initially understood as part of the proactive action to strengthen the quota system for elective offices in the political realm. At the moment, equality between the sexes does not remain as temporary action to remedy existing women underrepresentation, that is, to correct an unequal consequence, but has progressed in a way to newly define a vision of gender equality under the Constitution as realization of substantive democracy or constitute such vision. It is necessary that such perspectives as political representation, economic representation, balanced gender participation in economic and social activities are all integrated and melted in the Constitution, and the perspective of gender mainstreaming, which integrates gender-based perspectives, also needs to be reflected in all policies implemented as gender equality policies at all levels and steps thereof. From these perspectives, the provision on 'equal participation' under the Constitution has to be

introduced integrally irrespective of realms. Migration, disability, sexual orientation, etc. are deeply related to the reality of gender discrimination and the realization of gender equality and accordingly, it is necessary that the main agent under Article 11 (1) of the Constitution has to be all ‘people’ and the reasons for discrimination ban have to be expanded and stipulated to reflect multiple discrimination appearing overlapped.

〈Table 2〉 A Proposal for the Amendment of Article 11 of the Constitution

The Current Constitution	A Proposal for the Amendment
Article 11 (1) All <u>citizens</u> shall be equal before the law, and there shall be no discrimination in all fields, including political, economic, social, or cultural life on account of sex, religion, or social status.	Article 11 (1) All <u>people</u> shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life <u>for any reasons of sex, age, origin, family form or situation, race, language, region of origin, disability, sexual orientation, religion, or social status.</u>
〈the rest is omitted〉	(2) <u>Men and women shall have the right to participate on an equal footing in all fields, including political, economic, social, or cultural life and the State shall guarantee the same.</u>

3. Strengthening of the State Responsibility for Working Women

- ☐ Special protection for working women alongside special protection for minors has been ensured since the first Constitution of Korea. In Article 17 of the first Constitution of Korea, which prescribes the rights and obligations of workers and the legalism of labor standards, ‘working women’ alongside ‘working minors’ are prescribed as an object of special protection. In the 1987 Ninth Amendment of the Constitution of Korea, it is prescribed that working women and working minors shall be separated, and working women shall be not

only the object of protection but also shall not be subject to discrimination. It is meaningful in that women are separated from a protection group requiring protection from the State, and gender equality and motherhood protection are dealt with in independent provisions under the Constitution. These provisions have served as the basis for the Labor Standards Act and the Equal Employment Opportunity and Work-Family Balance Assistance Act and explicit discrimination, that is, direct discrimination was reduced by a large extent. Specifically, the veterans extra point system was rendered unconstitutional by the Constitutional Court of Korea and the Supreme Court of Korea held in the Jeju Medical Center case that ‘a pregnant mother and a fetus during pregnancy is one united body and damage to the health of the fetus due to dangerous work should be reasonably recognized as an accident on duty’. However, the scope of ‘special protection’ is ambiguous and, moreover, leaves room to construe that female labor is different from male labor serving as a basis of labor and falls short of male labor. Irrespective of the advancement of the legislation on women and family, the change of structural gender discrimination in the labor market is meager, which is manifested in the fact that Korea stands at the lowest rank in the gender wage gap and the glass ceiling index among the OECD member states. The advancement of a digital economy increases low income and unstable workers in platform labor, and in particular, reduction in jobs for women and a wider gap between the sexes shows that there is a need to further strengthen the State responsibility to ban discrimination against working women. There are quite a number of constitutional cases of foreign countries in which gender equality in the realm of labor

is stipulated in a separate provision. In due consideration of the Korean characteristics of gender inequality in the labor market, such as gender wage gap and women becoming non-regular workers and referring to the constitutional cases of foreign countries, it is desirable that Article 32 (4) of the Constitution of Korea is amended to specify a discrimination ban against working women and protection of working women and impose responsibility on the State as described below.

〈Table 3〉 A Proposal for the Amendment of Articles 32 (4) of the Constitution

The Current Constitution	A Proposal for the Amendment
Article 32 (4) Special protection shall be accorded to working women, and they shall not be subject to unjust discrimination in terms of employment, wages, and working conditions.	Article 32 (4) <u>Working women shall not be subject to unjust discrimination in employment, wages, and other working conditions and the State shall provide special protection to working women according to physiological and physical characteristics.</u>

4. New Establishment of the Sexual and Reproductive Rights

- ☐ The concept of the reproductive right appeared in the international norms in the mid 1990's. The right to determine whether or not to have a child and the number of children and the frequency of childbirth was established not as population control but as the right guaranteed to an individual beyond human rights and parents. An integrated concept of the 'sexual and reproductive health and rights' was established, which includes the right to determine whether or not to have a sexual relationship, when and with whom to have such relationship based on a close connection between sex and reproduction, and the relationship between health and the right. In

the Korean society, the discussion on the reproductive right has appeared in recent days. The discussion on reproduction in the society appeared in the process of the discussion on the proposal for the amendment of the Constitution of Korea in the 2017-2018 period, and such discussion appeared in earnest on the occasion of the 2019 decision of constitutional nonconformity in the illegal abortion case, rendered by the Constitutional Court of Korea. As such, a new topography was created to ensure the sexual and reproductive health and rights, but the legislation and policy on reproduction are still formulated based on marriage and family, and reproduction is not prescribed in the perspective of the right to determine reproduction freely and responsibly, substantive protection of such right, and the reproductive health, thereby causing a wide legislative gap to appear. The rights related to reproduction under the current Constitution of Korea can be found in the self-determination right derived from the personal rights in Article 10, motherhood protection in Article 36 (2), and special protection for working women and a discrimination ban therefor, and the health right in Article 32 (4). Article 36 (2) of the current Constitution is meaningful in that the State responsibility related reproduction is confirmed and the grounds for the assistance policy for pregnancy, childbirth, nursing and child-bearing are provided. However, the concept of ‘motherhood’ is ambiguous and the reproductive right is limited to motherhood protection, that is, protection for pregnancy and childbirth, nursing, and more broadly into child-rearing and fails to accommodate a comprehensive realm to be protected by the reproductive right. Moreover, the provision on ‘motherhood protection’ assigns responsibilities solely to women. The reproductive right is

restricted to motherhood protection, thereby causing a problem that the reproductive right of an individual is not accommodated in the reproductive right. Considering that the reproductive health and right recognized in the international norms cannot be ensured sufficiently and integrally, along with the increasing necessity to stipulate the reproductive health and right in the constitution, many countries introduced the provision on the reproductive right in their constitutions. Looking at the background that the reproductive right emerged as a right, the limitation of the current Constitution of Korea in which the reproductive right remains as ‘motherhood protection’, and the constitutional cases in other foreign countries in which reproduction is recognized as a right, it is necessary to proceed with discussions in detail on the new establishment of the sexual and reproductive rights in the Constitution of Korea. The reproductive right is of a complex nature in that it is not clear whether the reproductive right is a basic right as the right of freedom or a basic right as the social right, and an attempt to determine the nature as one of the two basic rights is inappropriate in ensuring such right substantively. Accordingly, it is necessary to introduce the reproductive right in the form of a new and independent basic right to protect reproduction as the basic right organically and integrally. It is necessary to introduce the reproductive right in a provision separate from the provision on motherhood protection and the provision on marriage and family and stipulate the reproductive right as the right of an individual. It is necessary to constitute the reproduction right in the form of harmonizing the sexual and reproductive rights integrally when introducing the reproductive right. In order to ensure the reproductive right, the State has to

ensure such right proactively and respond to the needs of the sexual and reproductive health, and it is necessary to particularly stipulate that the State has a duty to ensure and support such right.

〈Table 4〉 A Proposal for the New Creation of the Reproductive Right under the Constitution

New Establishment
Article 00 All people shall have sexual and reproductive rights and the State shall ensure the rights and support the rights.

5. New Establishment of the Right to Be Free from Gender-based Violence

- ☐ As the international norms started to deal with ‘gender-based violence’ from the late 1980’s, home and workplace were specified as main areas where violence against women occurred and a declaration was made that the State has a duty to intervene in gender-based violence. Violence against women was construed as an integral phenomenon of gender-based violence in the international norms and each country was required to respond to gender-based violence. In parallel, as violence against women was experienced and became an issue through a feminist movement in each country, efforts were made to uproot violence against women. Gender-based violence was accommodated in the constitution mostly in the countries where the level of gender equality is low or gender-based violence occurs frequently. In particular, the Republic of Bolivia specified ‘violence against women’ by dividing the types of such violence into physical, sexual, and psychological violence in the 2009 new constitution in which it was prescribed that the State shall have responsibility to take action necessary to prevent, eliminate, and

punish gender-based violence in the realms of society and family. In the Korean experience since the 1987 Amendment of the Constitution of Korea, a response to violence against women has been a main agenda. Gender-based violence among the legislation on women and family can be seen as the area where the most legislative changes were made after the Ninth Amendment of the Constitution of Korea. However, it was pointed out that individual legislations divided based on a behavior made it difficult to appropriately understand the nature of violence against women or gender-based violence and respond to violence that is being diversified. Since the late 2000's, in the process of the discussions on the amendment of the Constitution of Korea, few discussions have been made on the new establishment of gender-based violence, particularly, in connection with the introduction of a new basic right in the Constitution of Korea. Gender-based violence was once included in the provision on substantive gender equality in the Ten Largest Issues for Gender Equality in the Amendment of the Constitution by the Korea Women's Associations United in 2017. However, irrespective of relevant legislations, gender-based violence still remains intact and moreover, the types of gender-based violence are diversified, such as illegal photographing and distribution and production of a sexual exploitation video. Digitalization transforms the appearance of gender-based violence itself into technology-mediated gender-based violence. Given that gender-based violence requires a more integrated understanding than other problems and the State's duty to intervene therein is imperative to proactively protect victims and take action, it is necessary to stipulate gender-based violence independently in the Constitution of Korea. Separate from bodily

integrity and inviolability of a physical body which are discussed to be newly introduced as the rights under the Constitution, it is necessary to set a constitutional agenda for gender-based violence. Specifically, it is necessary to stipulate ‘gender-based violence’ as the language to clearly indicate the nature of violence against women, and it can be said that stipulation of gender-based violence in the form of a basic right as in the case of the Republic of Bolivia is a method for proactively protecting such right. In addition, concerning gender-based violence, it is necessary to stipulate that the State has the duty to protect the basic rights of people to prevent violence and protect people from a danger.

〈Table 5〉 A Proposal for the New Establishment of Gender-based Violence under the Constitution

New Establishment
Article 00 (1) All people shall have the right to be free from gender-based violence. (2) The State shall prevent gender-based violence and protect people from the gender-based violence.

6. Measures to Amend the Provisions on Family

- ☐ In the Constitution of Korea, Article 36 (1) is the only provision that stipulates marriage and family. This provision is not in the form directly prescribing the existence of the basic right but is composed in the form prescribing that the State shall ensure the system by which marriage and family life are entered into and sustained and prescribing the principles thereof. In every country, marriage and family life are dealt with as crucial constitutional agendas, deeply related to a unique culture of the relevant country and grounded on the different social and cultural reality of each country. The Korean

families have gone through dynamic changes for the last 30 years. As marital norms weakened, the age at first marriage rose, the marriage rate declined, and divorce and remarriage increased, clearly manifesting the weakening marital norms. Defamiliarization, deinstitutionalization, individualization, family recomposition, and other various ways of formation of relationship appear in intimacy and caring beyond a family based on marriage and blood ties. The share of single-person households increased sharply from 9.0 % in 1990 to 33.4 % in 2021 and has already become the major form of household in 2015. This is a major yardstick by which to judge family changes in the Korean society. The term ‘sexes’ in Article 36 (1) of the Constitution leaves room to construe the formation of marriage and a family life as limited to a form united by and between a female and a male. It is necessary to make a change by amending ‘equality of the sexes’ to ‘gender equality’ so that not a male and a female but an individual can be set to become the main agent and various forms of family including same-sex marriage can be recognized. Meanwhile, focusing on the reality that caring responsibility is still solely assigned to women, a vicious cycle of labor and caring continues, and gender discrimination and patriarchy remain intact in perception, form, and practice in the realms of marriage and family life in terms of social systems and culture, it is necessary to keep the language that marriage and family life are not only based on individual dignity but based on ‘gender equality’. It is necessary to newly establish the right to form a family, separate from marriage and family life. The current Constitution of Korea does not stipulate the right to form a family, that is, the right to have a family. The right to marry and the right

to have a family have been separated and stipulated in the international norms and in many countries. The right to have a family, conventionally deemed to be closely connected to marriage, is now construed as the basic right separate from the right to marry. The 2019 Constitution of the Republic of Cuba stipulated the right to have a family separate from marriage and prescribed that the protection of various forms of family shall be determined by law, thereby further strengthening diversity of family formation and form. In order to dispel concerns that the right to have a family may be construed in close connection with marriage, it is necessary that the right to have a family preempts the provision on marriage and family life.

〈Table 6〉 A Proposal for the Amendment of Article 36 of the Constitution

The Current Constitution	A Proposal for the Amendment
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.	Article 36 (1) All <u>people</u> shall have the <u>right to have a family</u> . (2) Marriage and family life shall be entered into and sustained on the basis of individual dignity and <u>gender equality</u> , and the State shall do everything in its power to achieve that goal.

Thematic classification of research performance catalogue: family and care, representation, law and plan, labor and employment, gender-based violence and safety

Key words: gender-sensitive Constitution, gender equality, equal number of men and women, equal participation, sexual and reproductive rights, the right to found a family, and gender-based violence

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