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Protection for Marriage and the Family in a German Context

— Focusing on the Implications on the Discussion of Same-sex Marriage in South Korea —

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| Abstract |

There has been very little progress in guaranteeing the rights of sexual minorities in South Korea, and the general situation in terms of recognizing same-sex relations is much worse than in the EU or Germany in that the acceptance level is extremely low.

The issue of same-sex relations, particularly same-sex marriage is a challenge in Korean society. When the political process does not work properly, complex political problems must be solved by means of the

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judiciary. The judgment of the court appeared as a form of civil discourse linking judicial activism, social movements, and the human rights movement. In this way, the civil discourse regarding law, rights, and justice no longer remains solely in the area of specialists. Judicial judgments initiate democratic communication between the people and the state, without being restricted to simply being the judgment about an individual's limited interests.

There is great diversity in modern family structure: heterosexual or same-sex couples who assume responsibility for children in marriages, registered partnerships, or de facto relationships; and children who are conceived naturally or by methods of assisted reproduction, and are related to both, only one or none of the two or more people they are raised by. In general, the concept of family that is protected under the Constitution is difficult to define as a specific family type because the concept of family is constantly changing amid the development of various family forms.

From the perspective of the evolving concept of family in a German context, differences between Article 119 of the Weimar Constitution and Article 6 GG can be pointed out. Firstly, marriage is no longer seen as the foundation of a family under the concept of family stipulated in Article 6 GG. Equality of both sexes has served to promote equality not only within the institution of marriage but also in society in general, which actually provided steps toward equal marriage rights. Equal marriage rights grant the right to marry to couples in different-sex relationships as well as same-sex relationships.

The Korean Constitution does not explicitly define the legal concept of marriage. The right to same-sex marriage should be protected as an individual life plan, and lifestyle including marriage or childbirth are respected. A democracy whose aim is to protect diversity should recognize a diversified form of the family. In respecting diversity, same-sex marriage

should also be recognized as a minority protection of human rights.

Key Words : Protection for marriage, Concept of the family, Same-sex marriage, Equal marriage right, German Constitutional Law

Ⅰ. Introduction

The debate over same-sex relations and discussions of same-sex marriage in Korea will be introduced here as background information. Subsequently, the importance of the concept of family will be pointed out as a standard to solve the conflicts involved in recognizing both same-sex relations and same-sex marriage.

1. The debate over same-sex relations in Korea[1)]

Since 1980s, the level of general human rights protection has improved considerably in South Korea. However, there has been almost no or very little progress in some matters, one of which is same-sex relations. The general situation in South Korea in terms of recognizing same-sex relations is much worse than in the EU or Germany in that the acceptance level is extremely low. Sexual minorities are considered to be one of the most vulnerable groups who suffer from severe discrimination in various sectors of society.

1) This part is the summary of the section 3.2 of my book (Lee, Hyun Jung, Discrimination based on sexual orientation, Springer, 2022, pp. 64-65.) Nevertheless, I have referred to all the sources used in the text specifically.

In some areas the standard of protection is not sufficient for sexual minorities even in the European legal system, such as in the area of same-sex marriage or adoption of same-sex couples. The level of protection is also surprisingly low in South Korea even in the cases where protection is mostly provided in the European context. One of those cases is the criminalization of same-sex relations between consenting adults.[2)]

The statistics show how Korean people have resisted acknowledging sexual minorities. An official public survey conducted in the year 2022 shows that overall 39% of 1,000 adult respondents feel a degree of resistance towards same-sex couples and 52% of 1,000 adult respondents answered that they are against the legalization of same-sex marriage.[3)] The debate on same-sex relations is particularly intense due to "the strong relevance of cultural social and religions concerns."[4)] The issues of same-sex relations, particularly same-sex marriage is a challenge in Korean society. Christian groups,[5)] which

2) This does not imply that Korea generally criminalizes same-sex behaviors. The scope of discussion on this matter is related to the Korean Military Criminal Law Article 92 and the Constitutional Court cases in 2002 (2001 Hun-Ba 70), 2011 (2008 Hun-Ga 21), and 2016 (2012 Hun-Ba 258).

3) Public survey on homosexuality by Korea Research, 1,000 adults respondents, Survey Conducted from 1 July to 4 July 2022, URL: https://hrcopinion.co.kr/archives/23960

4) Saiz I (2004) Bracketing sexuality: human rights and sexual orientation: a decade of development and denial at the UN. Health Hum Rights 7(2):48-80, p. 48.

5) Over 75% of the 1,000 adults Christian respondents have expressed their resistance against same-sex marriage. (Source: Public survey on homosexuality by Korea Research, 1,000 adults respondents, Survey Conducted from 1 July to 4 July 2022, URL: https://hrcopinion.co.kr/archives/23960).

form a major religion in Korea, are opposed to any legal recognition of same-sex relations in Korea.

2. The concept of family as a standard to solve the conflicts over same-sex marriage: discussion about the role of court and the constitution[6)]

If social conflicts over the issue of same-sex marriage intensify, a way should be found to solve the problem. In terms of democratic legitimacy, it is desirable that parliament resolves. However, when the political process does not work properly, complex political problems must be solved by means of the judiciary.[7)] Some argue against the idea of solving problems in this way, for example, Jeremy Waldron advocates the democratic ideal by claiming that at least all important decisions should be made by the people, rather than by "unelected and unaccountable judges."[8)] Waldron opposes the idea of allowing the judiciary to make contested value judgments. On the other hand, Taggart[9)] argues that the special role of the courts is an ultimate enforcement mechanism for justification of all public power by providing adequate reasons for the decisions. In this sense,

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6) This is part of an excerpt of the chapter 5.3 in my book (Lee, Hyun Jung, Discrimination based on sexual orientation, Springer, 2022, pp. 158-161.) Again, I have referred to all the sources used in the text accordingly.

7) Jeong, Mun-Sik, Verfassungsrechtliche Bedeutung der Ehe- und Familienschutz im Wandel, Hanyang Law, Review, Vol. 28-3 (Serial Number 59), 2017. August, p. 232.

8) Waldron J (1999) Law and disagreement. Oxford University Press, Oxford, p. 251.

9) Taggart M (1997) The province of administrative law, Hart, Oxford, p. 305.

we can understand that the role of courts does not replace the role of decision makers, but requests that decision makers fulfil their obligations.

In the case of DeShaney[10] in the United States Supreme Court, Joshua DeShaney's mother filed a lawsuit on his behalf against Winnebago County, claiming that by failing to intervene and protect him from violence about which they knew or should have known, the agency violated Joshua's right to liberty without the due process guaranteed to him by the Fourteenth Amendment to the United States Constitution. The court opinion, by Chief Justice William Rehnquist, held that the process clause only protects against state action, and as it was Randy DeShaney who abused Joshua, a state actor of Winnebago County was not responsible. A state's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the state to provide members of the general public with

10) Case of Joshua DeShaney, by his guardian ad litem, and Melody DeSahney, Petitioners v. Winnebago County Department of Social Services, et al., decided on February 22, 1989, by the Supreme Court of the United States (DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989)): Joshua DeShaney lived with his father Randy DeSahney, who moved to Winnebago County in Wisconsin after a divorce court in Wyoming gave custody of Joshua to Randy in 1980. A police report of child abuses and a hospital visit in January, 1983, prompted the country Department of Social Services(DSS) to obtain a court order to keep the boy in the hospital's custody. But, three days later, the juvenile court dismissed the case and returned the boy to the custody of his father. A DSS social worker recorded suspicion of child abuse, but no action was taken. Visits in January and March 1984, when the worker was told Joshua was too ill to see her, also resulted in no action. Eventually, Joshua suffered very severe brain damage after Randy beat him severely.

adequate protective services. The Due Process Clause in the case of DeShaney[11] is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security. While it prevents the state itself from depriving individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the state to ensure that those interests do not come to harm by other means. The Supreme Court of the United States held that a state government agency's failure to prevent child abuse by a custodial parent does not violate the child's right to liberty for the purposes of the Fourteenth Amendment to the United States Constitution.

However, it is difficult to agree with the holding of the DeShaney case[12] in that the role of the court is to monitor and to urge fulfillment of states' responsibilities.[13] Court judgements work as a catalyst to provide society with various issues to discuss and conflicts to solve. In that sense, the experiment by the Indian courts is impressive in that the court extended the meaning of standing to sue, which was regarded as a weakness in an adversarial judiciary system. The case of the Indian Supreme Court is regarded as a successful case of the positive role of the judicature. In dealing with the case of Sheela Barse v. Union of India,[14] the Indian Supreme

11) DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989)
12) Ibid.
13) Taggart M (1997) The province of administrative law, Hart, Oxford, p. 305.
14) I introduced the United States Supreme Court case and the Indian case here although they are not directly related to the concept of family or same-sex marriage because I think these cases are good examples of the role of the

Court directly appointed a fact finding committee and investigated the case. This case concerned thousands of adults and children who were imprisoned without a limit to the detention period, on the grounds of regarding them as having a "non-criminal mental disorder." This judgment[15] from the Indian Supreme Court imposed positive obligations on the state to improve facilities in mental hospitals and cure sick people in the hospital, as well as negative obligations not to imprison people with mental disorders.

Jeremy Waldron is regarded as one of the scholars who is against

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judicature. I have approached the topic of the evolving concept of family as a standard to solve existing conflicts over recognition of same-sex relations or same-sex marriage. For this purpose, the role of courts as well as judicial decisions should be recognized as possible means to solve complicated social or political issue such as same-sex marriage. These cases show how far the Court could involve itself in the processes such as fact-finding and execution. In particular, the Indian Supreme Court cases are evaluated as successful incidents of the judicature playing an active role. (related: Fredman S (2008), Human rights transformed, Oxford University Press, Oxford, pp. 124-133)

15) Sheila Barse v. Union of India [1995] 5 Supreme Court Cases 654 (Indian Supreme Court): "The case was initiated in 1990 by the social activist Sheela Barse, who forwarded to the Court a copy of an article in which she exposed the plight of the thousands of children and adults in Calcutta who were committed to jail under the category of 'non-criminal lunatics' and left there indefinitely in miserable conditions with no recourse to either medical treatment or judicial proceedings. Having received an inadequate response to its direction to the State to provide the relevant facts, the Court appointed a Commission to ascertain the facts. Consisting of a professor of psychiatry and an academic lawyer, the Commission was required to visit a representative sample of prisons or institutions and gauge relevant facts, including the total number of mentally ill inmates, the procedure for admission, the care and facilities provided, the existence of mental health facilities in the relevant district, the pattern of qualified staff, and procedures for after-care and rehabilitation." (Fredman 2008, p. 129.)

an active role of the judicature.[16] Waldron argues that it is a serious challenge for democratic as well as representative competences of the people, if judges have the authority to decide the content of human rights. His argument is that "a judge's decision should be firmly preserved in the isolated area which the action of the legislature cannot reach because some suggestion devised by legislators who will be elected next year or ten years later can be erroneous or can contain a real intention different from that revealed."[17] In addition, he claims that we have to trust "common people," who are politically responsible.[18] However, the judgment of the court appeared as a form of civil discourse linking judicial activism, social movements and the human rights movement. In this way, the civil discourse regarding law, rights and justice no longer remains solely in the area of specialists. Judicial judgments initiate democratic communication between the people and the state, without being restricted to simply being the judgment about an individual's limited interests. Furthermore, judicial conversations could be seen as playing a positive role in overcoming the limits of democracy. Hence, the positive role of the judicature does not violate the principle of democracy.[19]

16) Fredman S (2008), Human rights transformed, Oxford University Press, Oxford.
17) Waldron J (1999) Law and disagreement. Oxford University Press, Oxford, p. 222.
18) Ibid., p. 251.
19) Related: Fredman S (2008), Human rights transformed, Oxford University Press, Oxford, pp. 128-134.

Ⅱ. Development of the concept of family under German Constitutional Law

Since men and women have had both relationships and have children throughout human history, the concepts of marriage and family have always existed in some forms. In Germany, the concepts of family and marriage have historically been stated in the constitution. For example, Paragraph 150 of the German Paulskirchenverfassung (PKV) of 1848/49[20] refers to compulsory civil marriage. The Paragraph 155 PKV[21] mentions parents and children in the context of compulsory education. Compulsory education is still controversial in Germany in relation to schooling under the circumstance of COVID-19[22] or home-schooling.[23] The background of the Paragraph

20) Verfassung des Deutschen Reichs vom 28. März 1849, Artikel V. Paragraph 150 states that the civil validity of marriage depends only on the execution of the civil act; the church marriage can take place only after the execution of the civil act. Religious difference is not a civil impediment to marriage. (Original German version is available at URL: https://www.jura.uni-wuerzburg.de/lehrstuehle/dreier/verfassungsdokumente-von-der-magna-carta-bis-ins-20-jahrhundert/verfassung-des-deutschen-reichs-vom-28-maerz-1849/. Accessed June 15, 2022).

21) Verfassung des Deutschen Reichs vom 28. März 1849, Artikel V. Paragraph 155 states that the education of German youth shall be sufficiently provided for by public schools everywhere; parents or their representatives may not leave their children or foster children without the instruction prescribed for the lower elementary schools. (Original German version is available at URL: https://www.jura.uni-wuerzburg.de/lehrstuehle/dreier/verfassungsdokumente-von-der-magna-carta-bis-ins-20-jahrhundert/verfassung-des-deutschen-reichs-vom-28-maerz-1849/. Accessed June 16, 2022).

22) Sauer, Heiko: Auch die Schulpflicht sollte gelockert werden, VerfBlog, 2020/05/02, https://verfassungsblog.de/auch-die-schulpflicht-sollte-gelockert-werden/,

155 PKV was different from today's discussion because child labour in factories was widespread in Germany from 1839,[24] and this paragraph seems to refer to compulsory education in this context. For this reason, it is questionable whether this paragraph was intended to grant all children the right to education. Yet it is undeniable that the German Paulskirchenverfassung (PKV) of 1848/49 mentioned the concept of family and marriage. Nevertheless, it was not regarded as constitutional protection. The Weimar Constitution is considered as beginning with the specific protection of marriage, family, parental rights, maternity protection, child education and state supervision, and protection of illegitimate children, which will be discussed in the following.

1. The Protection of Family and Marriage under the Weimar Constitution

The Weimar constitution of 1919 is regarded as the first constitution in Europe to contain regulations related to the protection of family and marriage.[25] To look at specific articles, Article 119[26]

DOI: 10.17176/20200502-133136-0.

23) Ist Homeschooling in Deutschland erlaubt?, Schulpflicht in Deutschland - Rechtliche Rahmenbedingungen, URL: https://www.hausbeschulung.de/recht. Accessed June 16, 2022.

24) Michael E. O'Sullivan. "Review of Dieter Kastner, Kinderarbeit im Rheinland: Entstehung und Wirkung des ersten preussischen Gesetzes gegen die Arbeit von Kindern in Fabriken von 1839," H-German, H-Net Reviews, January, 2006. URL: http://www.h-net.org/reviews/showrev.cgi?path=314271145975354.

25) Dölle, Familienrecht (1964), paragraph 3 I.

26) Verfassungen des Deutschen Reichs (1918-1933), Zweiter Abschnitt. Das

contains regulations pertaining to marriage, family, parental rights, and motherhood, Article 120[27] regulates parental rights, child education, and state supervision, Article 121[28] concerns about equal treatment of illegitimate children, and Article 122[29] the protection of minors. It is not clear how these regulations of marriage and family are integrated into Weimar Constitution because the stipulations are the product of a subcommittee and the deliberations by the

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Gemienschaftsleben, Artikel 119. (1) Marriage is under the special protection of the Constitution as the basis of family life and the preservation and propagation of the nation. It is based on the equality of the two sexes. (2) The preservation of the family's hygiene, health and social promotion is the task of the state and the municipalities. Families with many children are entitled to compensatory welfare. (3) Motherhood is entitled to the protection and care of the state. (Original German version is available at URL: http://www.verfassungen.de/de19-33/verf19-i.htm. Accessed June 15, 2022).

27) Verfassungen des Deutschen Reichs (1918-1933), Zweiter Abschnitt. Das Gemeinschaftsleben, Artikel 120. The education of the offspring in terms of physical, mental and social fitness is the supreme duty and natural right of parents, whose activity is supervised by the state community. (Original German version is available at URL: http://www.verfassungen.de/de19-33/verf19-i.htm. Accessed June 15, 2022).

28) Verfassungen des Deutschen Reichs (1918-1933), Zweiter Abschnitt. Das Gemienschaftsleben, Artikel 121.Children born out of wedlock are to be provided by legislation with the same conditions for their bodily, psychological and social development as children born in wedlock. (Original German version is available at URL: http://www.verfassungen.de/de19-33/verf19-i.htm. Accessed June 15, 2022).

29) Verfassungen des Deutschen Reichs (1918-1933), Zweiter Abschnitt. Das Gemienschaftsleben, Artikel 122. (1) Minors should be protected against exploitation and against moral, mental or physical neglect. The state and the municipality shall make the necessary arrangements. (2) Welfare measures by way of coercion may only be ordered on the basis of the law. (Original German version is available at URL: http://www.verfassungen.de/de19-33/verf19-i.htm. Accessed June 15, 2022).

subcommittee are not documented.[30] Nevertheless, marriage and family seemed to be considered as endangered concepts challenged by modernity[31] and in need of constitutional protection after the political and economic developments of the years 1918/1919.

Under the Weimar Constitution, the protection of marriage and family was understood as a future law (Zukunftrecht) or a statement on legislation yet to come without conferring subjective rights.[32] The concept of marriage and family under the Weimar Constitution has been understood as being a useful and important institutions in relation to society and community life as the Article 119 is stated under the section of community life (Das Gemeinschaftsleben). As Article 119(2) states that the preservation of the family's hygiene, health and social promotion is the task of the state and the municipalities, the state has extensive powers to maintain the hygiene and health of the family. It is not very clear when a family is considered as unhealthy, but the Weimar Constitution seems to preserve the concept of family in the conventionally traditional sense.[33] Although marriage and family have been established as an independent institution under the Grundgesetz (GG), marriage was stated as the basis of family life under the Article 119(1) of the

30) Schwab D., Festschrift für Friedrich Wilhelm Bosch zum 65. Geburtstag 2. Dezember 1976. Hrsg. Von Walther J. Habscheid, Hans Friedhelm Gaul und Paul Mikat, 1976, p. 895.

31) Fietz, Die neue Ordnung 54 (2000), p. 219.

32) Christian Seiler, in : Wolfgang Kahl/Christian Waldhoff/Christian Walter (Hrsg.), Bonner Kommentar zum Grund (gesetz, Loseblattsammlung, Heidelberg (81. - 83. Lieferung 1997/98), Art. 6 Abs. 1, Rn. 39ff.

33) Schwab, Festschrift Bosch, p. 895.

Weimar Constitution. Therefore, under the constitutional sense of the Weimar Constitution, there was no family without marriage. Article 119(1)[34] states that marriage was based upon the idea of equality of the sexes. This implies that the concept of a healthy family under the Weimar Constitution is not merely conservative.

2. Marriage and Family under the Grundgesetz (GG)

The constitutional provisions on marriage and family are stipulated in Article 6 of the Bonn "Grundgesetz" (GG). Marriage was initially defined as 'the life community'[35] of a man and a woman (Lebensgemeinschaft von Mann und Frau) in the enactment process,[36] but was deleted for editorial reasons. Nevertheless, marriage is generally understood as a community of support or responsibility between a man and a woman (Beistands- und Verantwortungsgemeinschaft).[37]

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34) This article is stated similarly to Article 36, Paragraph 1 of the Constitution of the Republic of Korea, which reads as follows: Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the both sexes, and the State shall do everything in its power to achieve that goal. (Some scholars in Korea interpret the expression of "equality of both sexes" mean the marriage is only possible between a man and a woman and this is the reason why same-sex marriage is not permitted in Korea.)

35) It is difficult to translate „Lebensgemeinschaft" into English words. Under the "Lebensgemeinschaft", it means cohabitation as well as living as one community. For this reason, I have translated "life community" instead of "cohabitation".

36) Frauke Brosius-Gersdorf, in: Dreier (Hrsg.) GG. 2. Aufl., 2013. Bd. I. Art. 6. Rn. 9ff.

37) Jeong, Mun-Sik, Verfassungsrechtliche Bedeutung der Her- und Familienschutz im Wandel, Hanyang Law Review, Vol. 28-3 (Serial Number 59), 2017, August, p. 234, Janyang Law Association.

In the enactment process, the expression 'family comes from marriage' has been deleted due to discriminatory attitudes,[38] and although marriage and family are closely related, they are not identical, and each has been established as an independent system. The provisions on marriage and family protection in the Bonn "Grundgesetz" (GG) remained unchanged even after German reunification in 1990 and has been maintained since then.

Nevertheless, the social reality relating to marriage and family life has changed significantly such as the rise in unwed parents, divorce rates, re-partnering, same-sex partnerships and artificial reproduction. There has been transition from the extended family to the nuclear family, the decrease in the marriage rate and fertility rate, the increase in non-married, cohabiting relationships, the increase in childless families or double-income couples, and the increase in single-parent families due to the rising divorce rate. Such changes impact family life, particularly the lives of children: more than 800,000 children grow up in a de facto partnership and more than 10 percent of all children below the age of 18 grow up in step, or reconstituted families in Germany.[39] There is great diversity in modern family structure: heterosexual or same-sex couples who assume responsibility for children in marriages, registered partnerships, or de facto relationships; and children who are conceived naturally or by methods of assisted

38) Frauke Brosius-Gersdorf, in: Dreier (Hrsg.) GG. 2. Aufl., 2013. Bd. I. Art. 6. Rn. 19.

39) German Ministry for Families, Senior Citizens, Women and Youths, Familien Report 2010 at 23.

reproduction, and are related to both. Nina Dethloff argues in her article that German legislations do not adequately accommodate the changes in family forms that modern society has undergone.[40]

Article 6 GG protects marriage, family, and children in the German Constitutional Law. Article 6 GG reads as follows:

> "1. Marriage and the family shall enjoy the special protection of the state.
>
> 2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
>
> 3. Children may be separated from their families against the will of their parents or guardians only pursuant to a law and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
>
> 4. Every mother shall be entitled to the protection and care of the community.
>
> 5. Children born outside of marriage shall be provided for by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage."

The scope of protection covers a guarantee for the legal institution (Art. 6 para. 1 GG). Art. 6(1) protects marriage and the family from state interference, and also creates a special principle of equality.

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40) Nina Dethloff, Changing Family Forms: Challenges for German Law, (2015) 46 VUWLR, pp. 681-682.

Art. 6(2) states the parental right to the care and education of children. Constitutional rights to benefits are created to protect mothers and children born out of wedlock in the Art. 6(4) and 6(5).

In general, the concept of family that is protected under the Constitution is difficult to define as a specific family type because the concept of family is constantly changing amid the development of various family forms. For this reason, the German Federal Constitutional Court also identified the concept of family focusing on the core function of supporting and educating children.[41] From the formal perspective, a 'life community' composed of cohabitating parents and children for a certain period of time is understood in the concept of family.[42] The concept of family is understood as a 'life community' with cohabitating children and parents, an educational community, a supporting community (beistandsgemeinschaft), or economic community.[43] Furthermore, family is a place where individual personality is expressed, communion between members is formed, and cultural socialization takes place.[44]

Under the Grundgesetz (GG), a parent-child relationship is established with the birth of a child or through legal effects such as recognition or adoption of a child. Nevertheless, this does not mean that the family relationship ends when the child reaches the age of majority. In the concept of the family protected by the

41) Kloepfer, Verfassungsrecht Bd. II. Rn. 19f.
42) BVerfGE 80, 81(90).
43) BVerfGE 80, 81(95).
44) Markus Kotzur, in: Stern/Becker(Hrsg.), Grundrechte-Kommentar, 2. Aufl., 2016, Art. 6, Rn. 37.

Constitution, it does not matter if the parents are married or unmarried, whether the child has been adopted, whether a parent is single or remarried. Same-sex couples, together with their children, are also included in the constitutional concept of family. In principle, the family relationship between parents and children is defined according to the legal relationship under the stipulations of family law. Nevertheless, the reality of society does not necessarily coincide with the legal stipulations. Accordingly, the concept of the family from a constitutional perspective should be widely accepted and a wide range of families should be protected constitutionally.[45)]

From the perspective of the evolving concept of family in a German context, differences between Article 119 of the Weimar Constitution and Article 6 GG can be pointed out. Firstly, marriage is no longer seen as the foundation of family under the concept of family stipulated in the Article 6 GG. Initially, it was intended to define marriage as “the lawful form of the life community of men and women” and “the foundation of the family”. Nevertheless, the current version in the “Grundgesetz” is a compromise originating from the SPD[46)] which leaves it up to the individuals as to whether they found their families upon marriage or not. Secondly, state interventions in “unhealthy” families are no longer explicitly permitted in the Grundgesetz. Article 119 of the Weimar Constitution regards marriage and family as the foundations of community life. Nevertheless, under the Grundgesetz the right to form marriage and

45) Matthias Jestaedt, in: Kahl/Waldhoff/Water (Hrsg.), BK, Art. 6 Abs. 2, Rn. 52.
46) V. Mangoldt, Art. 6 GG Anm. 1.

family is protected as right which is free from state interference.[47]

3. Steps towards equal marriage rights

Article 36, Paragraph 1 of the Constitution of the Republic of Korea is generally accepted in the Korean Constitution as a basis for rejecting same-sex marriage. The provisions for "equality of both sexes" are interpreted as an expression of the legislature's will to regard marriage only as the union between men and women. There was similar article in the Weimar Constitution stating that marriage was based upon the idea of equality of the sexes (Art. 119 WC). Nevertheless, the interpretation has been very different from Korean courts because the article has been interpreted to promote gender equality. Even if there was no real attempt to promote gender equality by means of laws or statutes,[48] it has not served as grounds for rejecting same-sex marriage but as a provision for gender equality. This idea of equality of both sexes has been transferred to the principles of equal rights of men and women in the Article 3[49] para.

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47) BVerfGE 76, 1(42)

48) Knut Wolfgang Nörr, Zwischen den Mühlsteinen ß Eine Privatrechtsgeschichte der Weimarer Republik (1988), p. 94.

49) Article 3 [Equality before the law]
All persons shall be equal before the law.
Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability. (Original English version is available in the homepage of the Federal Ministry of Justice at URL:

2 GG. Equality of both sexes has served to promote equality not only within the institution of marriage, but also in society in general, which actually provided steps towards equal marriage rights. Equal marriage rights grant the right to marry to couples in different-sex relationships as well as same-sex relationships.

Article 3 para. 2 GG is considered as the starting point of an evolutionary change in the concept of family since the 1950s in Germany. Conservative legal policy wanted to consider the Article 3 para. 2 merely as a programmatic statement that does not confer any specific rights. Nevertheless, the Federal Constitutional Court of Germany decided that all laws and statutes in violation of Article 3 para 2 GG were null and void.[50] In Germany, the idea of marriage based upon equality of both sexes has moved towards promoting equality, and provided the grounds for equal marriage rights promoting the right to marry, the principle of non-discrimination, the legal recognition of marriage, and benefits linked to the concept of marriage.

Ⅲ. Discussion of Same-Sex Marriage

Discussion of Same-Sex marriage is closely related to the concept of family. In the EU, since the European Court of Human Rights decided that the relationship of a cohabiting same-sex couple living

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https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026. Accessed June 17, 2022.)

50) BVerfGE 3, 255.

in a stable partnership, fell within the concept of "family life",[51] different treatment based sexual orientation has been dealt with particularly seriously and same-sex couples have been able to enjoy more rights than before.

1. Discussions of Same-Sex Marriage and Constitutional Interpretation in Korea[52]

Same-sex marriage is not yet legally recognized in South Korea. Unlike other parts of the world such as Europe or the United States of America, the discussion started relatively recently in Korea in the late 1990s. Society at large has only been interested in it since the early 2000s. Due to the Supreme Court decision in 2011,[53] the topic

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51) The European Court of Human Rights, Schalk and Kopf v. Austria (Applications no. 30141/04), Chamber judgment of 24 June 2010.: The applicants are a same-sex couple living in Vienna, born in 1962 and 1960. In the judgment, the Court notes "a rapid evolution of social attitudes towards samesex couples" since 2001, resulting in many States having afforded them legal recognition. Therefore, the Court considers that the relationship of the applicants, "a cohabiting same-sex couple living in a stable partnership," fall within the notion of "family life." Cited from URL: http:// unionafirmativa.org.ve/unaf/wp-content/uploads/Case-schalk-kopf-vs-Austria-2010.pdf. Accessed June 17, 2022.

52) This is part of an excerpt of the section 8.2 in my book (Lee, Hyun Jung, Discrimination based on sexual orientation, Springer, 2022, pp. 221-228.)

53) Supreme Court of Korea, 2009 Su-I 117, Grand Chamber Decision of September 2, 2011: The applicant was born male, married a woman and had a child. Nevertheless, the applicant always felt that she was a female in a male body. The applicant divorced, underwent gender reassignment surgery, and lived as a woman. The applicant applied for the change of legal gender from male to female, which was rejected by the Supreme Court decision on the ground that she has a child from the previous marriage. She could not change her legal gender even if she had already divorced.

of same-sex marriage generated debate as to whether the identity number must be allowed when a different gender from that at birth was already recognized. Yet the discussion has developed slowly. For example, in the United States, there are considerable numbers of same-sex couples who could affect election results, whereas there are few same-sex couples in South Korea and thus politicians do not really have any interests in protecting their rights.

The Constitution of the Republic of Korea has no provision to define the legal concept of marriage. Generally, Article 36, Paragraph 1[54] of the Constitution is accepted in the Korean Constitution as a basis for rejecting same-sex marriage. The provisions of "equality of both sexes" is an expression of the legislature's will to regard marriage only as the union between men and women. Such an interpretation is nothing less than a paradoxical situation in which the provisions of gender equality serve as grounds for rejecting same-sex marriages. This situation has created a need to interpret the will of the legislators. Otherwise, the question arises as to whether the basis to recognize same-sex marriage can only exist if the constitution is amended.

As stated briefly above, the Korean Constitution does not explicitly define the legal concept of marriage. Of course, this can be regarded as an omission because of the natural premise of marriage as a bond

54) Article 36, paragraph 1 of the Korean Constitution reads as follows: Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the both sexes, and the State shall do everything in its power to achieve that goal.

between men and women. However, it serves instead as a basis for not rejecting same-sex marriage because there is no specific provision in the constitution at all.[55] In the more recent report,[56] seven among nine judges in the Constitutional Court of Korea stated that they recognize homosexuality as an individual's sexual orientation; however, so far, only one judge has publicly expressed an opinion in support of same-sex marriages. In the current Korean situation where there is no explicit stipulation to define the concept of legal marriage, constitutional interpretations are considered important in the question of same-sex marriage.

Regarding a constitutional interpretation, no specific methodology is prescribed in the Korean Constitution. Winfried Brugger[57] cited the following as measures of constitutional interpretation recognized as methods of practice in the United States: (1) Constitutional texts, historical intention, constitutional theory, precedent argumentations for moral, political, and social values, (2) Dogmatic prudence arguments, analysis of constitutional texts such as objective arguments, history, and structure. According to Brugger, literay or textual interpretation ("die gramatishce"), logical interpretation ("die

55) Han S-H (2015) Should same sex marriage be legalized?: Same sex marriage is originally legitimate. Column in Joon-Ang Daily Newspaper, published on July 31, 2015. https://news.joins.com/article/18358135. Accessed November 30, 2021.

56) "7 judges of the Constitutional Court of Korea to recognize homosexuality as a sexual orientation, but why does only one judge support same sex marriage?" Column in Joonang Daily Newspaper, published on April 19, 2019. URL: https://news.joins.com/article/23445289. Accessed November 30, 2021.

57) Brugger W (1994) Verfassungsinterpretation in den Vereinigten Staaten von Amerika. JöR 42, p. 575.

logische"), historical interpretation ("die historische"), systematic interpretation ("die systematische") and teleological interpretation ("die teleologische") are regarded as constitutional interpretative methods in Germany.

One of the most important factors to consider when interpreting a constitutional clause is the intent of those who drafted the Constitution, and another important factor is an obligation to reinterpret articles to fulfill the level of progressively developed human dignity. When the constitutional provisions are not clearly defined, it is necessary to faithfully interpret and indicate the intentions of the drafters who originally created the provisions. At the same time, instead of sticking solely to the original intention of the drafters of the Constitution, one should also examine whether the constitution corresponds to the changed circumstances of the human rights situation in modern society. Direct interpretation of articles in the Constitution or sticking only to the drafters' original intentions could result in the changes in circumstances being ignored. As P. Łącki argues, the dynamic interpretation is not a matter of setting a completely new standard, but of better understanding the importance of the rights protected.[58] Similarly, the duty of the judge is to face the issues that the articles pose reflecting the currently prevailing societal views.

Article 20 Paragraph 3 of the German Basic Law[59] aims at both

58) Łącki P (2021) Consensus as a basis for dynamic interpretation of the ECHR - a critical assessment. Human Rights Law Rev 21(1):186-202. https://doi.org/10.1093/hrlr/ngaa042. Accessed November 30, 2021, p. 200.

the formal as well as substantive elements of constitutionalism by stipulating that judges are bound by law and justice ("Recht und Gesetz" in German). Judges are strictly obliged to protect people's rights even when the law does not explicitly prescribe it. For this reason, the demand for legal positivism cannot be generally accepted.[60] The law is incomplete because it cannot prescribe every detail in its stipulations. This is why constitutional interpretation is needed. For these reasons, judges are bound by the law. This implies that Constitutional interpretation, should not only be tied to texts, but should consider the intent of the drafters as well as historical contexts of the Constitution. Dynamic and evolutionary interpretations are particularly needed to fill the gap in the stipulations of law and order so that they can adapt to the "attitudes" or "ideas prevailing in democratic States" to "the common axiological standard"[61] as of today.

There have been no constitutional cases on same-sex marriage in the Constitutional Court of Korea yet. Therefore, the view of Korean courts can be inferred from a decision of the first district court decision about same-sex marriage. In this case, the district court

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59) Article 20, paragraph 3 of Basic Law for the Federal Republic of Germany reads as follows: The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (In German: Die Gesetzgebung ist an die verfassungsmäßige Ordung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.).

60) M. Jachmann, Maunz/Dürig, Grundgesetz-Kommentar IX, Article 95 Rn. 13.

61) Łącki P (2021) Consensus as a basis for dynamic interpretation of the ECHR - a critical assessment. Human Rights Law Rev 21(1):186-202. https://doi.org/10.1093/hrlr/ngaa042. Accessed November 30, 2021, p. 190.

dismissed the claim by the same-sex couple who had public wedding celebrations in 2013. They submitted a marriage registration, which was rejected by the Seoul Seodaemun District Office in Korea. The Seoul Seo-Bu District Court decided in this case as follows:

The applicants, who were male same-sex couples, tried to register their marriage legally, but the District office refused to allow it. In this case where the applicants filed a complaint against this same-sex marriage ban, the Court clarified its position about the marriage system in Korea. The marriage system has changed in various ways. However, the essence of the marriage system, which is the union of a man and a woman, does not seem to have changed considerably. The general public's perception of this has not changed either. Considering all these circumstances, the Court can interpret "marriage" as stipulated in the Constitution, the Civil Code, and the Act on Registration of Family Relations referring to the "union aimed at living together for a long life based on the affection of men and women as justified morally as well as by custom." Beyond such a common textual interpretation of the current law, it cannot be interpreted as an extension to "union for the purpose of a shared life based on the affection of two people regardless of their genders." For this reason, with the common interpretation of the Court, the applicants' consents cannot be regarded as a legally proper consent to marry; therefore, their marriage registrations cannot be recognized as legal registrations of marriage.[62)]

62) Seoul Seo-Bu District Court, 2014 Ho-Pa 1842 Decision, May 25, 2016 (translated and commented by myself).

As noted above, the Seoul Seo-Bu District Court referred to the provisions of Article 36(1) of the Constitution of the Republic of Korea as grounds for limiting marriage to the union between men and women. In addition, the District Court also introduced some Supreme Court decision as well as the interpretation by the Constitutional Court of Korea in other related decisions. The Supreme Court's interpretation on marriage is that "marriage is based on the affection of men and women, morally justified integration for the purpose of life time co-habitations."[63] Since there have not been any same-sex marriage cases in the Constitutional Court of Korea yet, the interpretations come from other cases.

The Seoul Seo-Bu District Court cited the interpretation of marriage from the Supreme Court decision. In this decision, the Supreme Court of Korea decided that "Article 36, Paragraph 1 of the Korean Constitution stipulates that marriages and family lives have to be performed and maintained on the basis of individual dignity as well as the equality of the two sexes, and the state has to guarantee this. In this sense, marriage is established through physical and mental integration between men and women. It is

63) Supreme Court of Korea, 82 Mu-I 4 Decision, July 13, 1982. (Actually, this is a divorce case to decide whether divorce can be claimed with some specific circumstances where the relation of married couple becomes problematic due to temporary hazards or obstacles. In this case, the Supreme Court of Korea defines marriage as the union between men and women.); Supreme Court of Korea, 97 Mu-I 612 Decision, February 12, 1999. (This is also the case of divorce and alimony. This case defines marriage as the union based on the affections of men and women, citing Article 826, paragraph 1 of Civil Act of Korea. However, Article 826 (1) does not define marriage as the union of different sexes.)

interpreted that the Korean civil law system allows marriage between different sexes only. Same-sex marriages are not permitted in the Korean civil law system."[64] The Constitutional Court of Korea has interpreted marriage as "physical and mental integration of one male and one female and there is no change with this concept,"[65] or "marriage fundamentally means the union of male and female based on mutual love and trust."[66] Nevertheless, such interpretations of Korean courts are not considered dynamic interpretations, which consider the importance of the rights of sexual minorities and evolving societal views.

2. 'Marriage for all' in Germany

On June 30, 2017, the German parliament (Bundestag) adopted an amendment to the Civil Code that allows same-sex couples to enter into marriages. The amendment was passed with 393 yes, 226 no, and 4 abstentions.[67] According to the Draft Act on the introduction of the right to marriage for the persons of the same-

64) Supreme Court of Korea, 2009 Su-I 117, September 2, 2011, Grand Chamber Decision (translated and commented by myself).

65) The Constitutional Court of Korea, 95 Hun-Ga 6, July 16, 1997, Grand Chamber Decision.

66) The Constitutional Court of Korea, 2009 Hun-Ba 146, November 24, 2011, Grand Chamber Decision. (This case is to decide whether to pay more taxes when owning more assets because of marriage discrimination based on marriage or not. In this case, such a tax violates the non-discrimination principle based on marriage and violates the freedom to marry.)

67) Gesetzes zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlects ß Eheüffnungsgesety, BGB! I 2787.

sex,[68] prohibition of same-sex marriage is seen as a matter of discrimination based on sexual orientation and gender identity. The Draft also emphasizes the view of the social changes and the associated change in the understanding of the concepts of marriage and family. Considering that a wide range of families should be protected constitutionally, there are no justifiable grounds to treat same-sex couples and different-sex couples differently, which would prohibit marriage only to same-sex couples. Additionally, the Draft pointed out that same-sex couples are still at a disadvantage compared to marriage in a number of legal areas despite the introduction of registered civil partnerships in 2001.

The Same-Sex Marriage Act was passed in the Bundesrat in Germany on 7 July, 2017 and the act passed both chambers without a change to the constitution. The Act states that by supplementing Article 1353 of the Civil Code (BGB) same-sex persons can also enter into marriage. The stipulation of the Article 1353(1) has been amended to 'Marriage is to be established between two persons of the opposite sex or same-sex for a lifetime'[69]. Such an amendment would not be possible without the role of the Constitutional Court. The decisions taken by the Federal Constitutional Court of Germany have almost eliminated discrimination between marriage and life partners in the country. Nevertheless, joint adoption has still been

68) Deutscher Bundestag, 18. Wahlperiode, Gesetzentwurf des Bundesrates, Dricksache 18/6665 as of 11. 11. 2015 (Original German version is available at URL: https://dserver.bundestag.de/btd/18/066/1806665.pdf. Accessed June 17, 2022).

69) "Die Ehe wird von zwei Personen verschiedenen oder gleichen Geschlechts auf Lebenszeit geschlossn."

allowed only for married spouses. However, with the implementation of the Marriage Opening Act (Eheöffnungsgesetz) on October 1, 2017, joint adoption is also allowed to life partners.

The process of recognition for same-sex marriage in Germany did not happen overnight. Criminal punishment for homosexuality in Germany existed until 1994, the Partnership Act was enacted in 2001, and it was a long journey until the law recognized same-sex marriage in 2017. There was no constitutional decision to recognize same-sex marriage by the Federal Constitutional Court of Germany. Nevertheless, the Constitutional Court has contributed significantly through its constitutional interpretation in the concept of family as well as eliminating discrimination based on sexual orientation, which affected the legislative process of the parliament. The Parliament (Bundestag) legislated the Civil Partnership Act which allows same-sex couples to have their relationship legally recognized. Afterwards, the Federal Constitutional Court decided to correct the discrimination between marriage and Civil Partnership. The most important aspect in this process was the role of the evolving concept of family. Various types of families were created in the reality, and the law had lagged behind the evolving reality. The Constitutional Court interpreted the concept of family in a wide scope so that same-sex couples can be included in the scope of protection. The Parliament (Bundestag) reflected changing social views in the understanding of marriage and family in the draft act on the introduction of the right to marriage, and finally the legislature opened up ‘marriage for all'.

Ⅳ. Conclusion: Implications for legal recognition of same-sex marriage in Korea

When looking into some specific law articles, Article 10 of the Korean constitutional law stipulates the right of individuals to pursue happiness. The Constitutional Court of Korea (CCK) interprets the scope of protection with this Article 10 to include the general freedom to behave, the freedom to express individuals' personality and characteristics, and the right to sexual self-determination[70]. Since there is no article specifically stipulating the right to marry, same-sex couples should claim their right to marry based on the interpretation of the CCK. One possibility is to claim Article 10 of the right to pursue individual happiness based on the interpretation by the CCK above. Article 10[71] of the Korean Constitution guarantees that all citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the state to confirm and guarantee the fundamental and inviolable human rights of individuals. Article 10 can be the grounds for protecting the freedom for general behavior, the right to free expression of individual's character and the right to self-determination.[72] Therefore, Article 10 could provide legal grounds to guarantee the right to marry for

70) The Constitutional Court of Korea, 2004 Hun-Ba 65, decided on April 28, 2005.

71) The Korean Constitutional Law, Article 10: All citizens shall be assured of human worth and dignity and have the right to the pursuit of happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

72) The Constitutional Court of Korea, 2004 Hun-Ba 65, decided on April 28, 2005.

same-sex couples. In addition, Article 10 of the Constitution can be considered as legal grounds for same-sex marriage in the absence of specific legal stipulations about it.

Another possibility is to claim based on Article 17[73] (the privacy of the citizen) since this article can be compatible with Article 8 (Right to respect for private and family life) ECHR. Unlike Article 8 ECHR, the Constitution of Korea does not stipulate private life and family life together as one article. Therefore, Article 36 (1)[74] (Marriage and family life) of the Korean Constitution can also provide a legal basis to claim the right to same-sex marriage.

To discuss same-sex marriage in the Korean context, it must be remembered how the CCK interprets marriage, namely as "physical and mental integration of man and woman."[75] This interpretation did not come from the case of same-sex marriage, but from the case dealing with the constitutionality of Civil Law Article 809 (1). The article stipulated the prohibition of a marriage between two persons with the same family name and family origin.

South Korean courts are still reluctant to legalize same-sex marriage because they feel it is against the wishes of the people.[76]

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73) Article 17 of the Korean Constitution reads as follows: The privacy of no citizen shall be infringed.

74) Article 36, paragraph 1 of the Korean Constitution reads as follows: 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.

75) The Constitutional Court of Korea, 1995 Hun-Ga 6, decided on July 16, 1997.

76) Brief introduction of progress of same-sex marriage issue in Korean courts: Regarding the people's sentiment about same-sex marriage in Korea, recent statistics show that about 58% of the people are against legal recognition of

The first court case[77] dealing with same-sex marriage in Korea was on May 25, 2016.[78] In the decision the District Court referred to the fact that most Korean people's sentiment is still against same-sex marriage. The Appeal court[79] dismissed the applicants' appeal on 6 December, 2016.[80] The Appeal court decided that the right to same-sex marriage cannot be recognized based on the interpretation of the CCK regarding marriage as the integration of man and woman.

Despite the court decisions mentioned above, same-sex marriage must be recognized in Korea from a legal perspective. Firstly, Korean

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same-sex marriage (referenced by the survey on "same sex marriage" by Gallop Korea, available at: http://m.post.naver.com/viewer/postView.nhn?volumeNo¼1835954&memberNo¼10005291&vType¼VERTICAL, Accessed November 30, 2021). Comparing the percentage on the results of the survey between 2001 and 2014, the percentage of supporting same-sex marriage increased from 17% to 35% while the opposing percentage has dropped from 67% to 56%. Looking at the difference among age groups, 66% in their 20s, 50% in their 30s, 35% in their 40s, 19% in their 50s, and 13% in their 60s think that same-sex marriage should be allowed in the Korean legal system. The younger the age groups are, the more positive they are about same-sex marriage.

77) http://news.heraldcorp.com/view.php?ud¼20161206000799. Accessed November 30, 2021.

78) The applicants were two Korean males, who had had a stable relationship for many years and celebrated a wedding ceremony in September 2013. The Seoul District Court stated that legal marriage is interpreted as being allowed only among opposite sex couples in the current Korean legal system.

79) The Appeal Court also agreed with the decision by the District Court, when saying that the decision by Seoul Western District Court could be sufficiently justified, in that the marriage should be allowed only among "opposite sex couples" under the current Korean legal context. (Source: The Korean News Article, The Court decision on the first same sex marriage case, May 25, 2016, available at: https://www.lawtimes.co.kr/Legal-News/Legal-News-View?serial¼100762&kind¼&key¼%ED%8C%90%EA%B2%B0&page¼1. Accessed November 30, 2021.)

80) Seoul Seo-Bu District Court, 2014 Ho-pa 1842, December 6, 2016.

laws never explicitly prohibited same-sex marriage in their stipulations. According to the Korean family law,[81] marriage is accomplished through the consent of the two persons over 18 years old.[82] There are no other law articles stipulating that marriage must only be contracted between a man and a woman. Furthermore, the fact that there is no explicit recognition cannot be interpreted as absolute prohibition considering the general principle of protecting constitutional rights. Constitutional rights and freedom must be fully guaranteed in principle, and they will be limited only in necessary cases.[83] In conclusion, same-sex marriage must be recognized according to the principle of constitutional rights to be fully guaranteed and can be limited when the limitation is necessary according to the principle of proportionality. A complete ban on same-sex marriage in the

81) Korean Civil Law Article 812 (Formation of Marriage) (1) A marriage shall take effect by reporting in accordance with the provisions of the Act on the Registration, etc. of Family Relationship. (2) The report mentioned in paragraph (1) shall be submitted in writing with co-signatures of both parties and two adult witnesses

82) Korean Civil Law Article 800 (Freedom of Matrimonial Engagement) Any adult person may freely enter into a matrimonial engagement. Korean Civil Law Article 801 (Eligible Age for Matrimonial Engagement) Any person who has attained the age of 18 may enter into a matrimonial engagement upon the consent of his/her parents or adult guardian. Article 808 shall apply mutatis mutandis to such cases. [This Article Wholly Amended by Act No. 10429, 7 Mar. 2011].

83) The Korean Constitutional Law Article 37(1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution. (2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

current Korean situation is not considered as a necessary limitation because the state will not have sufficient reasoning to balance a serious interference to same-sex couples caused by a complete ban.

Some legal scholars in Korea claim[84] that Article 36[85] of the Korean Constitution can be grounds for prohibiting same-sex marriage. The scholars think "the sexes" in this article mean two different sexes due to the "plural" form; therefore, same-sex marriage is not included to the concept of legal marriage because it is not based on the two sexes. However, this cannot be used as grounds to prohibit same-sex marriage in Korea considering the intention of the stipulators.[86] This article is stipulated to eliminate the inequality that existed between men and women. In any case, the article does not stipulate that marriage must be contracted only between a man and a woman.

Furthermore, in a modern society, reproductive capacity is no longer a condition of marriage. In the same sense, reproductive capacity cannot be used as grounds to prohibit same-sex marriage or discrimination based on sexual orientation. In this case, such arbitrary reasons cannot be justified as the grounds for prohibition. The right to same-sex marriage should be protected as an individual life plan, and lifestyles including marriage or childbirth should be

84) Lee J-H (2016) A study of same-sex marriage in South Korea and Germany's Act on registered life partnerships. Won Kwang Law J 32(2), p. 74.

85) Article 36, paragraph 1 stipulates that "Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the two sexes."

86) http://h21.hani.co.kr/arti/PRINT/35264.html. Accessed November 30, 2021.

respected.[87] A democracy whose aim is to protect diversity should recognize a diversified form of the family.[88] In respecting diversity, same-sex marriage should also be recognized as minority protection of human rights.

87) Ryu S-J (2013) US Supreme Court's recent decisions about homosexuality: analysis and meaning of US V. Windsor case. Public Law Study 14(4):87-114. https://doi.org/10.31779/PLJ.14.4.201311.004. p. 94.

88) Cho H-S (2007) New model of 'Family': constitutional possibility and limit. Public Law J 8(4): 221-241.

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〈초록〉

독일 헌법에서의 혼인과 가족의 보호
- 한국의 동성 결혼 논의에 관한 시사점을 중심으로 -

이 현 정*

현재 한국의 법제에는 동성 관계를 법적으로 인정하고 있지 않다. 동성 관계를 어떻게 법적으로 인정할 것인지, 나아가 동성간의 혼인을 인정하는 문제는 한국 헌법이 향후 해결하여야 할 과제이다. 사회 갈등을 유발하는 복잡한 문제가 정치적으로 해결되지 않을 때 그 문제는 사법부를 통하여 해결하여야 한다. 법원의 판결은 사법 행동주의, 사회운동, 인권 운동을 연결하는 시민적 담론의 형태로 나타났으며, 이러한 법, 권리, 정의에 관한 시민적 담론은 더 이상 전문가만의 영역에 머무는 것만은 아니다. 사법적 판단이 더 이상 개인들 간의 제한된 이익에 관한 판단에 국한되지 않고 국민과 국가 간의 민주적 소통으로서 기능하고 있기 때문이다. 현대 사회에서 가족의 개념과 가족의 구조는 큰 다양성을 띈다. 헌법에서 보호하고 있는 가족의 개념은 다양한 가족 형태의 발전과 함께 가족의 개념이 끊임없이 변화하고 진화하고 있기 때문에 어떠한 특정한 가족 형태와 관련한 것으로 정의하는 것은 어렵다. 독일의 바이마르 헌법 제119조와 기본법 제6조의 차이점을 통하여 진화하는 가족 개념을 발견할 수 있다.

첫째, 기본법 제6조에 규정된 가족의 개념에서 더 이상 혼인을 가족을 이루는 기초로 보지 않는다는 점이다. 둘째, 양성 평등은 혼인제도 내에서뿐만 아니라 사회 전반에서 평등을 촉진하는 역할을 수행하였으며 실제로 모두에게 평등한 혼인할 권리를 향한 기초를 마련하였다. 모두에게 평등한 혼인할 권리는 이성 관계의 커플뿐만 아니라 동성 관계의 커플에게도 혼인할 권

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리를 부여한다. 한국의 헌법은 혼인의 법적 개념을 명시적으로 규정하고 있지 않지만, 동성 간에 혼인할 권리는 혼인이나 출산과 같은 개인의 생활양식이나 개인의 인생 계획으로서 보호되고 존중되어야 한다. 다양성을 보호하는 것을 목표로 하는 민주주의 사회에서는 다양한 형태의 가족 또한 인정해야 하기 때문이다. 나아가 동성 결혼을 인정하는 것은 국제인권법 하에서 소수자 인권 보호로서도 인정될 수 있다.

주제어 : 혼인의 보호, 가족 개념, 동성 결혼, 모두에게 동등한 결혼할 권리, 독일 헌법