

Two Years of the Reformed Adult Guardianship Law in South Korea: A Retrospect*

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Abstract

The reform of the adult guardianship law in South Korea is the first crop of the Civil Code amendment project which was promoted by the government. Since two years passed since the new law took effect, it is time for a retrospect. This article, based on the author's presentation delivered at the 9th BESETO Conference on November 8, 2015, at the Peking University Law School, sketches the outline of the reform and analyzes its virtues and shortcomings. Furthermore, it describes the lawyers' responses to the new rules, which show both a worrying trend and a hopeful sign. This overview ends with assessing the obstacles with which the legislation is confronted today, such as the tendency of hasty legislation and reign of the old law in thinking.

KEY WORDS: Civil Code reform, adult guardianship, limited guardianship, specific guardianship, guardianship contract, controlling guardian, administration of ward's personal matters

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I. Introduction

It is my honor to participate in this BESETO Conference on *Codification and Re-codification of the Civil Code in China, Japan, and Korea*. With regard to this not only interesting but also an important theme, I would like to speak about South Korea's experience of amending the adult guardianship law. The reform of adult guardianship is the earliest amendment of the Civil Code which was confirmed by the Parliament. It is, so to speak, the first crop of our efforts. Since it took effect on July 1, 2013, we made some experiences with this new law. These experiences and the circumstances provide us with an opportunity to reflect the daunting task of reforming the Civil Code.

II. Preparing the Reform

1. Shortcomings of the Old System

I begin with the pre-reform status of the law.¹⁾ The original Civil Code from 1958 knew two protective measures for mentally vulnerable adults: *Judicial interdiction* for *severely impaired* persons and *limited interdiction* for *feeble-minded or spendthrift* persons. It is notable that *restraints on legal capacity* went with such measures. Under judicial interdiction, a juridical act of the concerned person was always avoidable (art. 13; the articles cited in II. 1. refer to those of the pre-reform Civil Code). Adults, who were placed under limited interdiction, were confined to the same capacity as minors: in principle, to conclude a valid contract, they needed their legal representatives' consents, without which the contract was also avoidable (art. 10, 5 I). A guardian was *ipso jure* appointed for the interdicted ward (art. 933, 934, 935) and as legal representative became endowed with an *extensive and comprehensive authority* on almost all patrimonial matters (art. 938, 949 I). The adults under interdiction were called "incapables" by the Civil Code

1) Cf. Youngjoon Kwon, *Civil Law and Civil Procedural Law*, Korea Legislation Research Institute. 118-19, 136 (2013).

itself.

It is no wonder that this system of law was subject to a lot of criticisms.

First, these rules limited the ward's legal capacity regardless of his/her concrete mental capacity and thus ignored his/her autonomy even when he/she was willing and able to manage his/her own matters. This disregard of proportional balancing smacked of the old law's unconstitutionality.

Second, the interdiction procedure, which purported to protect mentally vulnerable adults, paid little attention to the concerned person's will and emotions. For example, the law did not explicitly demand his/her hearing. One couldn't help but get the impression that the concerned person was treated as a mere "object" in the course of the procedure initiated by others.

Third, the old system was both vulnerable to abuses and unsuited for a rapidly aging society. As I said before, the guardian was automatically appointed to the concerned adult's closest relatives, whereby his/her spouse and older blood relatives were preferred (art. 933, 934, 935). On one hand, this rule would give a guardian candidate a temptation to seize the asset of his/her mentally fragile relative. On the other hand, the task and burden as a guardian for, say, a demented old person were imposed on his/her spouse who, also aged, may also need help from others. Besides, the Civil Code provided that a family council should supervise and control the guardian, but it proved to be totally ineffective in practice. With the family council rarely called up, the guardian got his/her own way.

Fourth, the provisions of the old Civil Code concerning guardianship mainly dealt with the ward's patrimonial relations and scarcely touched the administration of personal matters, e.g. medical decision.

Fifth, the fact of being under interdiction was mentioned in the ward's family register. The now abolished family register included the civil status information of all the family members who were arranged under the family's head, usually its patriarch. This system enabled public knowledge of the interdicted adult's limited capacity, which can result in a stigma.

2. *Process of the Reform*

A call for reform gradually became loud.²⁾ Many scholars advocated a thorough review of the interdiction system. In Parliament, several reform drafts were submitted by its members. At this juncture, the Committee on the Civil Code Reform was organized by the Ministry of Justice and a 2nd subcommittee was then in charge of amending the adult guardianship law. On December 29, 2009, the draft, which was prepared by the subcommittee and approved by the Committee, was submitted to the Parliament by the government. It passed with some minor changes on December 7, 2010, published on March 7, 2011, and took effect on July 1, 2013.

The amendment made further legislations inevitable. Afterwards, the *Family Procedure Act* (April 5, 2013) was thoroughly revised reflecting the new rules of the Civil Code, particularly those provisions which expressively demand the concerned person's will should be taken into account (art. 9 II, 12 II, 14-2 II, 936 IV, 939-3 II, 947, 959-6, 959-12, 959-9 II; if not mentioned otherwise, the articles cited hereafter refer to those of the amended Civil Code). It should be emphasized that in many cases the Act introduces a mandatory hearing of the person in question (cf. art. 45-3, 45-6 of that Act). Then the new *Guardianship Registry Act* (April 5, 2013) was created to regulate the access to the guardianship information. A subcommittee for the new personal register, replacing the family register, was thought to be used for that purpose because it adequately guarantees individual privacy. However, the plan was overturned in Parliament, to my opinion, without any convincing reason. Finally, an *amendment draft of the Code of Civil Procedure*, which rewrites the rules on procedure capacity, was adopted by the Parliament on January 8, 2016 (published on February 3, 2016) and will take effect on February 4, 2017.

2) For reference see Hyoung Seok Kim, *The legal protection of vulnerable adults according to the new draft of the government*, 24-2 GAJOKBEOPYEONGU [KOREAN JOURNAL OF FAMILY LAW], 111-12 (2010) (in Korean)

III. Contents of the Reform

1. Main Structure

The Civil Code offers four types of protective measures for supporting mentally vulnerable adults.³⁾

(1) The *adult guardianship* (full guardianship) will be considered for the mentally fragile adults who are *constantly unable to manage their affairs* (art. 9 I). This measure *limits* the ward's legal capacity: His/her juridical act is in principle avoidable (art. 10 I). The juridical acts of everyday life, whose prices are not excessive, nevertheless are always valid definitely. The family court can determine the scope of unavoidable transactions in view of the concerned person's mental capacity (art. 10 II, IV). The adult guardian as a *legal representative* has an extensive and comprehensive authority on patrimonial matters, whereas the family court can reduce its scope (art. 938 I, II).

(2) There are adults whose mental capacity is diminished to the extent that they have *more or less difficulties managing their affairs*. The *limited guardianship* is introduced for this group. Here, the ward's legal capacity is *not limited* by entering a limited guardianship. Its effect is mainly an appointment of a limited guardian. However, the family court can determine the scope of the ward's juridical acts which are avoidable when lacking his/her guardian's consent (art. 13). The legal capacity is to be limited only insofar as the family court deems it *necessary* for protecting the ward. Following the same logic, the limited guardian as legal representative has a *clearly defined authority* which is individually conferred by the family court. Therefore the limited guardian's representation is allowed only insofar as it is justified by the ward's legal needs and disability.

3) For a more detailed analysis of the new law in English see Inwhan Park, *The new adult guardianship system in the proposed amendment of the Korean Civil Code*, Arai, Becker, and Lipp, *Adult Guardianship Law for the 21st Century*, 311 sqq. (Baden-Baden: Nomos, 2013); Cheol Ung Je, *Korean Guardianship*, Dayton, *Comparative Perspectives on Adult Guardianship*, 191 sqq. (Durham: Carolina Academic Press, 2014).

(3) The two guardianship types mentioned above are of a permanent nature. They last until the family court terminates them in view of the ward's recovery. Such permanent measures are, however, not always necessary for people in need. Rather, there are many cases in which a mentally fragile person is well cared for by his/her close relatives while special occasions call for *ad hoc* legal help. For example, a slightly demented person, who lives in peace with his/her family, might confront a situation where he/she has to sell his/her land or participate in a settlement and division between co-heirs. Although his/her power of judgement is not firm, it would be excessive and therefore undesirable to apply for a permanent guardianship. He/she needs only a specific assistance concerning *this* occasion.

The *specific guardianship* is planned to cope with this type of problems. If a mentally vulnerable person needs *an assistance concerning a specific or temporary affair*, the family court in charge is entitled to order a measure necessary to solve it (art. 14-2 I, 959-8). It cannot be imposed upon him/her against will (art. 14-2 II). Furthermore, the family court may, when adequate for the task, appoint a specific guardian (art. 959-9). The specific guardian will be the legal representative only insofar as an authority is deemed necessary and thus conferred by the family court (art. 959-11). The legal capacity of the concerned person is *not limited*.

The three measures mentioned above are to be initiated *by request* and not *ex officio* by the family court. The new rules stipulate who may make such a request: the concerned person himself/herself, his/her close relatives including spouse, guardian, the controlling guardian who is otherwise appointed for him/her, a public prosecutor, or local community's head (art. 9, 12, 14-2). The last two intervene for those adults who have no (known) relatives ready to help him/her.

(4) A person who foresees his/her mental deterioration often considers *regulating his/her affairs while being mentally sound*. In such a case, he/she might want to appoint his/her future guardian for himself/herself. This task may, of course, be solved by the law of mandate and agency. However, a contract type which deals with guardianship could also be useful if its legal relations are clearly codified. The Civil Code adopts this approach providing the rules on *guardianship contract* (art. 959-14 sqq.), by which the contractual guardian's rights and obligations are determined. Depending

on the agreement, the ward's patrimonial and/or personal matters will belong to the guardian's task (art. 959-14 I). The concluded guardianship contract takes effect with the family court appointing a controlling guardian (art. 959-14 III, 959-15 I).

2. Some Important Changes

(1) How will a guardian be *appointed* under the new law? The *ipso jure* appointment is at last abandoned. The *family court* appoints a guardian whom it regards as most fit (art. 936 I, 959-3 I, 959-9 I). He/she might be one of the ward's relatives, of course, but a lawyer or a social worker might be chosen when the task in question would ask for it. Furthermore, appointing more than one guardian is now possible (art. 930 II). A legal person is qualified for guardian, too (art. 930 III).

(2) Who will *supervise* the guardian? The perfunctory family council is abolished. Although there were voices for empowering it, the subcommittee regarded an improvement as hopeless. Instead, the new law entrusts the job to *the controlling guardian (supervisory guardian)* who can be appointed by the family court (art. 940-6).⁴⁾ The appointment is not mandatory in the sense that he/she will be there only when the family court sees a need of supervision (art. 940-4). The non-mandatory rule is based on the assumption that the family court's control will suffice in most cases, thus hoping to reduce the ward's overall costs. This point was however criticized in the legislative process and afterwards: Some suspected such an approach could provide a leeway for abusive guardians.⁵⁾

(3) How does the reformed law address managing the ward's *personal matters*?⁶⁾ The Civil Code starts from the principle that the ward shall *independently* make a decision on his/her personal matters insofar as his/

4) Cf. Hyoung Seok Kim, *Controlling Guardian* (in Korean), 2 *Seongnyeonhugyeon* [Adult Guardianship], 79 sqq. (2014); Jinsu Yune, 2 *Juhae Chinjokbeop*, 1244 sqq. (2015) (in Korean).

5) Cf. See Kim, *supra* note 4, 80-81. See also Park, *supra* note 5, 319,

6) Cf. Inwhan Park, *Substitution for making a decision regarding personal affairs and limits in the new adult guardianship system of Korea* (in Korean), 25-2 *Gajokbeopyeongu* [Korean Journal of Family Law], 147 sqq. (2011); Hyoung Seok Kim, *Determining personal matters of the adult under guardianship* (in Korean), 28-2 *Gajokbeopyeongu* [Korean Journal of Family Law], 245 sqq. (2014).

her condition permits (art. 947-2 I). Thus, it unequivocally confirms that the ward's autonomy prevails even while he/she, being mentally fragile, is protected under guardianship. The problems start when he/she is no more able to make a decision on his/her own, e.g. in the case when an old ward is in a coma and therefore is not expected to consent to an impending medical operation. For such an occasion, the Civil Code accepts the guardian's intervention, which, however, must be subject to strict preconditions. On the one hand, the guardian has to be beforehand awarded an *authority* for managing relevant personal matters by the family court (art. 938 III). So to speak, only the guardian concretely entitled by the family court can make a decision on behalf of his/her ward. The authorization can be supplemented later (art. 938 IV). Also, the guardian needs to obtain *permission* from the family court when he/she makes a decision which could lead to grave consequences. For example, that's the case when the guardian intends to isolate the ward in a psychiatric hospital to undergo a medical treatment (art. 947-2 II), or when a medical treatment consented by the guardian would cause a risk of the ward's death or disabilities (art. 947-2 III, IV 1; there is an exception for an urgent situation, art. 947-2 IV 2).

IV. After the Reform

1. Defects of the New Law

In my opinion, the new law is certainly a huge improvement over the old one. However, it is far from being perfect. Rather, the amendment has its own *birth defects*.⁷⁾

First, the reform project was carried out under enormous time pressure. The government hoped that the draft would be completed within a short time and quickly passed into law because the reform was one of the President's election campaign promises. The subcommittee was therefore

7) See also Cheol Ung Je, *The main features, drawbacks of the new Korean Guardianship and some proposals for its improvement* (in Korean), 56 *Minsabeophak* [Korean Journal of Civil Law], 277 sqq. (2011).

allowed to work on it for only about one year. These time constraints caused a few minor deficiencies that could have been avoided.

Second, in contrast, preparations *de lege ferenda* in doctrine and practice could not be said to be sufficient to push forward a fast track reform. Concerning the direction the legislation should take, there was still no consensus among lawyers. A number of them didn't even recognize any need to a reform and thus were not impressed by new approaches. Therefore, the subcommittee was overwhelmed by many important but difficult questions to be answered on its own.

Third, to work efficiently in this situation, the subcommittee planned to retain the continuity of the old law's formal system⁸⁾ but to add new rules. In the end, it turned out that too much new wine was added into the old bottle. As a result, the new law looks awkward to observers: On the full guardianship, which should remain marginal as an exceptional measure for severely ill persons, the Civil Code provides detailed rules, and other protective measures are regulated in part by being referred to many of those provisions. Thus, the full guardianship outwardly appears central to the new law, although the contrary is precisely the intention of this reform.⁹⁾ In addition, the use of this referring technique made the law too complicated even for an experienced lawyer.

2. Worrying Trend

How is the new law being received in practice? Of course, many lawyers, particularly family judges, diligently tried to give life to the new rules. Regrettably, a worrying trend is also observed. It is simply shown by statistics: From the cases which have been decided according to the new law, ca. 80% are concerned with the full guardianship,¹⁰⁾ a staggering

8) By the term I mean "äußeres System" in Heck's sense. Cf. Heck, *Begriffsbildung und Interessenjurisprudenz*, 84 (Tübingen: Mohr Siebeck, 1932).

9) In this respect, it is no wonder that the United Nation's Committee on the Rights of Persons with Disabilities censured the new law which seemed to be dominated by the full guardianship. See *Concluding observations on the initial report of the Republic of Korea* (CRPD/C/KOR/CO/1, 29 October 2014), N. 21, 22.

10) Here and after, I rely on the data reported by In-Gu Bae in an international conference organized by the Korean Institute for Guardianship Law and Policy on December 11/12 2015

number considering its marginal role in the new system's concept. Although it is not easy to pin down the circumstances responsible for this tendency, one of the causes probably lies in the fact that the lawyers understand the new law from the old law's perspective. For example, according to the pre-reform Civil Code, the choice of a protective measure depended on the degree of mental impairment, thus judicial interdiction for severely ill persons and limited interdiction for feeble-minded.¹¹⁾ This is not the case in the reformed law. The criterion here is how far a mentally fragile person is hindered to manage his/her affairs. Only when he/she is *constantly* unable to do so, the full guardianship is justified; otherwise limited guardianship or specific guardianship appears to be a more appropriate measure, not least when the concerned person can still manage his/her matters somehow or the assistance needed is of temporary nature. Therefore, there is no need for a full guardianship for a person who, severely demented but well cared for by his/her family, has few patrimonial affairs to be settled. If applications for full guardianship are nevertheless being filed in such cases and the family courts accept them without hesitation, or if the family judge in charge insists that an application for specific guardianship should be replaced with one for full guardianship on the mere reason that the person in question is severely demented, then the explanation would be none other than that the old law still dominates the lawyers' thinking.

3. *Hopeful Sign*

From this last account, one might get the impression that the reform failed to bring a meaningful change. However, concluding so would be too hasty. Despite the worrying trend of predominant full guardianship, a hopeful sign is also to be highlighted. I would like to pay attention to the

at Seoul National University School of Law (still unpublished). For a more recent analysis see also Sung-Woo Kim, "Current Status and Issues of Adult Guardianship" (in Korean), 30-3 *Gajokbeopyeongu* [*Korean Journal of Family Law*], 407 sqq. (2016).

11) See Hyoungh Seok Kim, "Commencing a Guardianship for Adult according to the reformed Civil Code" (in Korean), 55-1 *Beophak* [*Seoul Law Journal*], 446-447, 456-457 (2014). In comparison see also Jürgens, *Betreuungsrecht*, § 1896 BGB, n. 15 sqq. (München; C.H. Beck, 4th ed., 2010).

specific guardianship cases which constitute ca. 10% of all processed ones.¹²⁾ They are largely applied to young people with developmental disorder. Very often, they lack knowledge and skills needed for everyday living and job performance. Because their parents are either overprotective or ashamed of them (or both), the young adults missed chances to be properly educated and trained. The Ministry of Health and Welfare has founded a guardianship program for them after the amendment took effect. Here, local communities usually take the lead in that their heads apply for specific guardianship (art. 14-2 I). The appointed specific guardian is then endowed with a temporary power of organizing the ward's education and job training. The guardianship ends when learning is completed. It is evident that the purpose of introducing the specific guardianship is well achieved in such cases. They should be warmly greeted as first steps in the right direction which show the way in which the practice has to go.

V. Instead of a Summary: Some Reflections on the Legislation Today

South Korea's experience with the reformed guardianship law offers, in my opinion, interesting material for reflecting the obstacles with which the legislation is confronted today: *tendency of hasty legislation* and *reign of the old law in thinking*.

Concerning the former, no further explanation is necessary. Every government has its own agenda and priorities so that, being not convinced to be reelected, it is anxious to complete the reform projects deemed desirable in its own term period. The legislative work, which would consume many years or even decades, is now indeed hardly conceivable. In South Korea, drafting various amendments of the Civil Code required 5 years, still a long time, but it might be rightly said that the spent time is sufficient for reviewing *a large part* of the Civil Code *thoroughly*? Meanwhile,

12) For a detailed analysis see Myung-jin Kim, "Analysis of the achievements and challenges of the 'Public services of adult guardianship for developmental disabilities belonging to vulnerable groups'", *Seongnyeonhugyeon* no. 3 [Adult Guardianship], 233 sqq. (2015).

the next government took over the Civil Code reform, but it seems to me that the Ministry of Justice is not very eager to push the drafts' enactment because it has now its own priorities apart from the predecessor's unfinished project.

For the latter, we might say that such this phenomenon is hardly new. More often than not, the entire libraries thrust themselves upon three words changed by the lawmaker and not, as Kirchmann once insisted,¹³⁾ vice versa.¹⁴⁾ Now it is e.g. well known that many new features of the German Civil Code (BGB) were instantly misunderstood or neglected by the lawyers who were captives of pandectism or the Prussian law.¹⁵⁾ The only problem is that we hardly find a consolation from this knowledge. Knowing it namely doesn't alleviate our frustration of observing the rising number of full guardianship cases.

How should we cope with these obstacles? An easy answer cannot be expected from one or two short case studies. There may be, perhaps, no feasible answer at all. However, I think we should not stop asking the same question again and again. Awareness of the problems itself could make a small but important difference, and such a chance shall not be missed. It is desirable for everyone who is engaged in legislation to come up with their own doubts and answers from his/her experiences. The South Korean experience of the adult guardianship reform compels us to be confronted with this task.

13) Julius von Kirchmann, *Die Werthlosigkeit der Jurisprudenz als Wissenschaft*, 17 (Berlin: Springer, 3rd ed., 1848).

14) Cf. Chang Soo Yang, *MINBEOPYEONGU I* [Studies in Civil Law I], 353 (Seoul: Pakyoungsa, 1991), although in a different context.

15) Cf. for example Martin Josef Schermaier, "Dem Deutschen thut das Studium der Römer noth ...," *Juristenzeitung* 330 sqq. (2006).