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Recent trend and issues in amending family law in Korea

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Civil law countries generally include family law in their respective civil codes. The Republic of Korea is not the exception under this aspect. The Korean Civil Code which was enacted in 1958 and came into force in 1960 is structured on the base of the Pandekten system. Based on it, Part IV of the Civil Code is the law on relatives. The Korean Civil Code since its coming into effect on January 1, 1960 has been amended twenty nine times, among which thirteen amendments concerned the revision of the law on relatives. Given that general reluctance to amend the Civil Code in Korea, the relative regularity of the revisions show how significant the changes were that took place regarding family relations in the Korean society. A study of the history of amendments show that the factors of amending family law are three-fold. First, family law was amended for the purpose of gradual evolution of the Code by shedding elements of premodern law found therein. The amendments of 1962, 1977, 1990 and 2005 took place due to such a factor. Second, there were those amendments that were the result of the Korean Constitutional Court's decision that determined that particular provisions inheritance were either unconstitutional or non-conformable to the Constitution. Third, family law was also amended in order to reflect the urbanization, industrialization, ageing of the Korean society and the rise of individualism, thereby strengthening the institution of family and affording more protection to the weak within the family. The latest amendment was the result of the latter. Among other things, the article pays some attention to the family legislation of North Korea, its specific features and unique structural differences from both the law of the Republic of Korea and the civilian tradition in general.

Keywords: family law, modernization of law, Civil Code, Constitutional court, law of the Republic of Korea.

Introduction

Civil law countries generally include family law or the law on relatives in their respective civil codes. The Korean Civil Code which follows the Pandekten system is no exception, as Part IV constitutes the law on relatives[1]. From a comparative law standpoint, the

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[1] An English translation of the provisions of the Korean Civil Code is provided by the Korea Law Translation Center at the Korea Legislation Research Institute, which is accessible at the following web page: https://elaw.klri.re.kr/kor_service/lawView.do?hseq=55222&lang=ENG (accessed: 26.08.2021).

inclusion of norms of private law on family relations in the civil code cannot be considered a widespread phenomenon. Common law jurisdictions regulate family relations by means of special legislation, and before the modern era not all countries recognized family law as part of civil law.

Korea and other jurisdictions that were under the influence of Japanese law differentiate between property law and family law, with the law on relatives and the law of inheritance constituting family law. This is mainly due to historical reasons. The Meiji Civil Code[2] of Japan takes the position according to which the succession of family, i. e., inheritance of the headship of a family is the focus of the law of inheritance, whereas the succession of property is largely considered to be auxiliary to this. The law of inheritance was understood as a realm of law that contributed to the maintaining of the institution of family. This meant that the law of inheritance could only be properly understood in its uniform relationship with the law on relatives. Given such circumstances, it was only natural to combine the law on relatives and the law of inheritance and call it family law, although the moniker 'personal law' was generally preferred. Even after World War II, when the institution of the inheritance of headship of family was abolished, the previous terminology continued to be used in Japanese jurisprudence.

The situation in Korea which had been under the colonial rule of Imperial Japan was quite similar, since it was directly influenced by the Japanese Civil Code[3] (through the effect of the General Governor's Civil Decree for Joseon[4]) and Japanese jurisprudence. Part IV (Relatives) and Part V (Inheritance) of the Civil Code of Korea which was enacted in 1958 and came into effect in 1960, place provisions respectively on the head of family and the inheritance of the head of family at the forefront. Naturally, the term 'family law (personal law)' was understood to encompass the whole of the law on relatives and the law of inheritance[5]. Meanwhile, in 1990 The Korea Civil Code was amended. As a result, the inheritance of headship of family was replaced by succession of the headship of family. Along with this, the relevant provisions were moved from Part IV (Relatives) to Part V (Inheritance). This in turn led to the emergence of legal thinking that considered the law of inheritance as part of property law[6]. In 2005 when the institution of the head of family and the succession of headship of family were abolished altogether, some argued that under the system of the revised Civil Code, the essence of the law of inheritance was that of property law[7]. Of course, there are also those who claim that there is little merit in engaging in such a discourse[8].

In stark contrast, after the 1917 Russian Revolution, under war-time communism, family law was separated from civil law and developed into an independent legal system with its own Code, which to the present day continues to be the case in Russia[9]. Is seems

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[2] The Meiji Civil Code is the first modern Japanese Civil Code (1868) that was the result of the Meiji Restoration.

[3] A tentative English translation of the provisions of the Japanese Civil Code is available at the following internet address: http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&id=2252&re=02 (accessed: 26.08.2021).

[4] Joseon (or at times spelled 'Chosun') is the name of the Korean dynastic kingdom that ruled the Korean peninsula for five centuries until 1910 when Imperial Japan annexed the kingdom. Imperial Japan continued to use the name Joseon for its colony until Korea's independence in 1945.

[5] 신영호·김상훈, 『가족법강의』 제3판, 세창출판사, 2018, 3–4 면 [*Shin Y.-H., Kim S.-H.* Lectures on Family Law (3rd ed.). Sechang Publication, 2018. P. 3–4].

[6] 곽윤직, 『상속법』(박영사, 1997), 49면 이하 [*Kwak Y.-J.* Inheritance Law. Seoul: Parkyongsa, 1997. P. 49 et al.].

[7] 송덕수, 『친족상속법』 제3판, 박영사, 2017, 1–2 면 [*Song D.-S.* The law on Relatives and the Law of Inheritance (3rd ed.). Seoul: Parkyongsa, 2017. P. 1–2].

[8] 윤진수, 『친족상속법강의』 제2판, 박영사, 2018, 290면 [*Yoon J.-S.* Lectures on the Law on Relatives and the Law of Inheritance (2nd ed.). Seoul: Parkyongsa, 2018. P. 290].

[9] 명순구·이제우, 『러시아법입문』, 세창출판사, 2009, 200면 [*Myoung S.-K., Lee J.-W.* Introduction to Russian Law. Seoul: Sechang Publications, 2009. P. 200].

that with the completion of socialist theories of civil law, civil law was defined as law regulating the economic relations between independent and equal individuals in a socialist society. Also, it can be said that those who were subject to regulation by civil law formed property and personal relations upon which the effect of the principles of values and the rule of division of labor needed to be considered. No doubt, in a marriage and between family members property relations can be subject to regulation by civil law. However, the approach seems to have been taken, that such property relations presuppose the existence of a personal relationship, either between spouses or other family members, and therefore should be regulated not by civil law but separately by family law. In addition, we need to look at inheritance relations. Generally, socialist countries view inheritance relations as a ground for acquiring individual ownership, and therefore place the relevant provision in the part on ownership. However, the North Korean Family Code[10] which was enacted in 1990 took the position that inheritance relations are family property matters and therefore are subject to family law. In 2002 North Korea introduced a separate piece of legislation by enacting the Law of Inheritance, and this has led to it taking a different approach relative to other socialist countries. Whatever the process or rationale, such a position that family law regulates inheritance relations is on par with the general direction accepted in Korean jurisprudence.

This paper, in departing from general terminology used in Korean jurisprudence, will refer to 'family law' as being limited to Part V (Relatives) of the Civil Code, and based on this, examine the latest trend found in recent legislative amendments.

1. The factors of amendment

The Korean Civil Code since its coming into effect on January 1, 1960 has been amended twenty nine times, starting from the very first amendment (Act No. 1237) of the introduction of the statutory separation of family on December 29, 1962, and the latest being the amendment (Act No. 14965) on the revocation of the presumption of the husband's paternity of the child. Among them, thirteen amendments took place regarding the law on relatives, not including three which were the result of reflecting changes made to other related laws. If one were to disregard amendments that were for amending addenda, reflecting the change of the name of other legal acts and making other corrections, it can even be said that the history of amending the Civil Code was in essence the history of amending family law. This shows how significant the changes were that took place regarding family relations in the Korean society.

Until now, the factors of amending family law are three-fold. First, family law was amended for the purpose of gradual evolution of the Code by shedding elements of premodern law found therein. The amendments of 1962, 1977, 1990 and 2005 took place due to such a factor. Second, there are those that were the result of the Korean Constitutional Court's decision that some provisions on relatives and inheritance were either unconstitutional or non-conformable to the Constitution. The Constitutional Court of Korea decided that the institution of the head of family[11], the principle of succession of the father's surname[12], the prohibition of marriage between those with the same surname and the origin of surname[13],

[10] Unfortunately, there is no English translation of North Korean legislation readily available online.

[11] Constitutional Court, 2001HunGa9–15, 2004HunGa5, February 3, 2005. The resultant amendment was reflected in the 2005 amendment.

[12] Constitutional Court, 2003HunGa5–6, December 22, 2005. The resultant amendment was reflected in the 2005 amendment.

[13] Constitutional Court, 95HunGa6, July 16, 1997. The resultant amendment was reflected in the 2005 amendment.

annulment of bigamy[14], the period of presumption paternity[15], the period of filing an action for denying paternity[16] were unconstitutional or non-conformable to the Constitution and therefore ordered that the Civil Code be amended as to restore its constitutionality. Third, family law was amended in order to reflect the urbanization, industrialization, aging of the Korean society and the rise of individualism, thereby strengthening the institution of family and affording more protection to the weak within the family. The latest amendment was the result of the latter.

2. Amendments for shedding premodern elements of law

2.1. The trend until the 2005 amendment

Starting from the first amendment of 1962 until the amendment of 2005 which revoked the institution of the head of family and the prohibition of marriage between those with the same family name and same family origin, the elimination of elements of family traditions that were once deemed to be 'good and laudable custom' was the essence of amending family law. The amendment of 1962 was the introduction of statutory separation of family by means of inserting a new paragraph in art. 789 of the Civil Code and relocating the original first paragraph on mandatory separation of family to the second paragraph. This was a mere creation of a paragraph, but it contributed greatly to transitioning the family system both legally and in terms of the family register into a small family system.

The family law that was created in February of 1958 was dualistic in nature, bearing the seeds of the need for amendment from the very beginning. In August of 1974 the Association for All Women and Amending Family Law introduced a draft bill and an explanatory note for amending Part IV (Relatives) and Part V (Inheritance), which came to serve as a model for future amendment bills[17]. A draft bill based on the above was introduced in the National Assembly, but there was strong opposition from conservative interest groups led by Confucian organizations. Given such a situation, the National Assembly opted to strike a balance by going easy on the progressive elements of the Amendment bill of December 16, 1977 and including only those parts that were deemed necessary for the growth of rights for women[18]. As a result, many changes took place such as the revocation of parents' right to consent to the marriage of adults. Also, the following were introduced: the institution of attaining majority through marriage; the presumption of co-ownership of property the title of which is uncertain between husband and wife; the system of confirming the will to mutually agreed divorce by the Family Court; the joint exercise of parental authority.

Although the 1977 amendment is regarded as having contributed significantly to the modernization and rationalization of family law, the limited scope of the amendment proved insufficient for doing away with calls for a complete overhaul. This eventually led to a large-scale amendment on January 13, 1990 which reflected the 'complete overhaul' approach, while at the same time partially considering the concerns of con-

[14] Constitutional Court, 2009HunGa8, July 29, 2010. The resultant amendment was reflected in the 2012 amendment.

[15] Constitutional Court, 2013HunMa623, April 30, 2015. The resultant amendment was reflected in the 2017 amendment. For more, see below.

[16] Constitutional Court, 95HunGa14, 96HunGa7, March 27, 1997. The resultant amendment was reflected in the 2005 amendment.

[17] 최달곤, "한국가족법 30년의 회고와 전망", 『한국법학의 회고와 전망』, 법문사, 1991, 456–457면 [*Choi D.-G.* A Reflection on and Prospects for Korean Family Law // Reflections on and Prospects for Korean Jurisprudence. Seoul: Bubmoonsa, 1991. P. 456–457].

[18] Ibid. P. 460.

servative groups. The restructuring of the institution of relatives, partial amendment of the grounds for rescinding engagement, modification of the place of cohabitation of spouses, sharing of the burden of marital co-living expenses, introduction of visitation rights and the right of claim to division of property, enhancement of the institution of adoption and revocation of the foster relationship for the sake of the family, adjusting the exercise of parental authority were all the result of approving the 'complete overhaul' approach. As opposed to this, consideration of conservative voices led to: 1) the maintenance of the institution of the head of family and the succession of head of family while at the same time formalizing the authority of the head of family, all of which resulted in the continuation of paternal-centricism, and 2) the avoidance of amending the principle of prohibiting marriage between those with the same surname and the same origin of surname[19].

2.2. The amendment of 2005

The year 2005 was a huge turning point in the history of Korean family law. The long history of ideological and even religious nature of family law that was based on paternal-centracism and the principle of exogamy came to an end, at least legally (although maybe not fully in real life and custom). Moreover, the amendment of 2005 strived to bring about meaningful change in numerous areas.

2.2.1. The abolition of the institution of the head of family

Although for a long time the main slogan of amending family law in Korea was the abolition of the institution of the head of family, quite ironically, there had been no explicit legal definition of the institution of the head of family. The Constitutional Court in its decision (2001HunGa9, February 3, 2005) rendering the institution of the head of family non-conformable to the Constitution, decided that "the institution of the head of family can be understood as 'a system where the head of family forms the pinnacle of a family which is a conceptual assembly, and the family is succeeded by a male lineal descendant, and this is in other words, a set of legal instruments through which families are composed around male lineages that are being perpetuated". The Constitutional Court noted that "it is not a system where a representative of the family is chosen and given the title of head of family, around which the family register is formed". Understood in this way, repeal of Chapter 2 (Head of family and family) and Chapter 8 (Succession of the head of family) of Part IV (Relatives), relocation of the provisions on a child's family name and family origin to their relevant place in the Code, and amending all the provisions with the term 'head of family' and 'family' amount to the abolition of the institution of the head of family[20]. The abolition of the institution of the head of family also signified the abrogation of inheriting rights to perform commemorative rites for ancestors which was embodied in the institution of succession of family that in turn was maintained by the authority of the head of family and the institution of the succession of the head of family.

With the repeal of the legal term of head of family, the family system as well as the family register the basis of which was the institution of the head of family could not remain the same. Despite the debate as to how the personal registration and disclosure system

[19] Ibid. P. 461–462.

[20] 신영호, "'호주와 가족' 규정의 정비를 위한 검토", 『가족법연구』 제17권 제1호, 한국가족법학회, 2003, 30면 [*Shin Y.-H.* A Review for Enhancing Provisions on the "head of family and family" // Journal of Family Law. Vol. 17, iss. 1. Association of Korean Family Law, 2003. P. 30].

would incorporate such a change, with the enactment in 2007 of the Act of Registration of Family Relations[21], it was decided that the register would be formed for every individual[22].

2.2.2. The scope of family and the family name and origin of a child

The reason for including in the 2005 amendment the introduction of a provision on the legal concept of family was concern for the collapse of the institution of family that could lead to the abolition of the head of family system. Other than the recognition of the grounds for disqualification as supervisors of guardianship (art. 940-5)[23], the Code does not provide for other legal effect of the legal status of family.

Provisions on a child's family name and family origin are relevant to the effect of the relationship between parents and children. However due to the fact that '(clan)' was the moniker used in Japanese civil law for describing a family group, and that Korean civil law was heavily influenced by Japanese law, provisions on a child's family name and family origin were, prior to the 2005 amendment, placed in the chapter on the 'head of family and family'. In accordance with its long tradition, Korean civil law has strongly abided by the principle of succession of the father's surname, as well as the principle of permanence of surname, with their roots going back further than the that of the institution of the head of state. Initially there was a proposal for allowing the determination of a child's surname by agreement between the parents, but ultimately it was denied (due to calls for maintaining tradition on the one hand, and taking into consideration the need for realizing equality between men and women) in favor of the following approach: maintaining as a rule the principle of succession of the father's surname (main sentence of par. 1 of art. 781)[24] while at the same time allowing as an exception to the rule, for the recognition of the succession of the mother's surname and origin of surname (proviso of par. 1 of art. 781)[25]. Other exceptions in respect of a child born out of wedlock (par. 5 of art. 781)[26] and circumstances where there exists a need to alter the surname and origin of surname of a child for the welfare of the child (par. 6 of art. 781)[27]. The adoption of this new approach that allows for the selection and altering of the surname signifies the weakening of the concept of surname and origin of surname which were accepted as the symbol of paternal centricism[28].

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[21] An English translation of the provisions of the Act on Registration of Family Relations is provided by the Korea Law Translation Center at the Korea Legislation Research Institute, which is accessible at the following web page: https://elaw.klri.re.kr/kor_service/lawView.do?hseq=55222&lang=ENG (accessed: 26.08.2021).

[22] This contrasted with the prior form of registry, which was organized based on not individuals, but family represented by a head of the family.

[23] Article 940-5 (Grounds for Disqualification as Supervisors of Guardianship) None of the family members of a guardian under Article 779 shall become a supervisor of guardianship.

[24] Article 781 (Surname and Origin of Surname of Child) (1) A child shall succeed his or her father's surname and origin of surname: Provided, that when the parents agree to have the child assume his or her mother's surname and origin of surname at the time of filing a report on their marriage, he or she shall succeed the mother's surname and origin of surname.

[25] This was recognized as a result of the Constitutional Court's decision (2003HunGa5–6, December 22, 2005) that the rule of succession of the father's surname without exception was non-conformable to the Constitution.

[26] Article 781 (Surname and Origin of Surname of Child) (5) Where a child born out of wedlock is affiliated, the child may continue to use the previous surname and origin of surname subject to the agreement of the parents: Provided, That if the parents cannot make such an agreement or fail to reach such an agreement, the child may continue to use the previous surname and origin of surname with the approval of the court.

[27] Article 781 (Surname and Origin of Surname of Child) (6) Where there exists a need to alter the surname and origin of surname of a child for the welfare of the child, they may be altered with the approval thereof which the court grants upon a request of the father or mother or the child itself: Provided, That if the child is a minor and its legal representative may not make such a request, the request may be made by the relative provided for in Article 777 or a public prosecutor.

[28] Supreme Court 84Su8, 84Su9, March 31, 1984.

2.2.3. Marriage

Article 809 par. 1[29] of the Korean Civil Code was deemed non-conformable to the Constitution by the Constitutional Court's decision of 95HunGa6, 7, 8, 9, 10, 11, 12, 13 delivered on July 16, 1997. The provision lost its legal force on January 1, 1999. The Supreme Court prepared an established rule[30] in accordance with the decision of the Constitutional Court to accept marriages between those with the same surname and origin of surname, to avoid the applications for registering such marriages from becoming null and void. However, paragraph 2 of the same article which prohibited marriage between 'relatives by marriage' (e.g., between a man and a woman, where the man is the brother of the woman's ex-husband) was left intact, thereby leaving unresolved the issue of its unconstitutionality. By means of the 2005 amendment prohibition of consanguineous marriage became less stringent. Marriage between blood relatives within the eighth degree of relationship, and marriage between parties who are or were such relatives by affinity as the spouses of blood relatives within the sixth degree of relationship, the blood relatives of the spouse within the sixth degree of relationship, and the spouses of blood relatives of the spouse within the fourth degree of relationship were banned. The amendment, despite its improvements, was not free from custom and previous concepts of relatives, which is evident in the somewhat expanded scope of prohibition (from the previous sixth degree of relationship to eighth degree of relationship in respect of marriages between blood relatives). Also, the prohibition of marriage between collateral relatives-in-law and marriage between collateral relatives-in-law resulting from adoption, which is subsequently dissolved, continue to pose the risk of unconstitutionality.

However, overall, the scope of prohibition on marriages was reduced, thereby increasing the freedom of marriage. Also, the freedom of women to remarry was expanded since the period of prohibiting second marriage for six months was abolished. The prohibition that applied only to women existed in order to avoid the conflict of presumption of a husband's paternity of a child. Mathematically, 100 days of prohibiting second marriages is enough to avoid circumstances where the presumption of a husband's paternity of a child may be problematic. However, the prohibition was abolished since it went against equality between men and women, and it contributing to the increase in common-law marriage. Advances in DNA paternity testing also played a role.

2.2.4. Parents and children

2.2.4.1. Period of filing an action of denial of paternity

According to art. 847 (Action of Denial of Paternity), "The action of denial of paternity shall be brought by the husband or wife against the other spouse or the child within two years from the day when he or she becomes aware of the cause of the action". The limitation of the period of filing an action of denial of paternity is the result of the Constitutional Court's decision (95HunGa14, 96HunGa7 decided on March 27, 1997) that not limiting the period of filing such an action is non-conformable to the Constitution and therefore necessitates amendment of the Civil Code. Although the Constitutional Court did not refrain from mentioning legislative examples in other jurisdictions that recognize a five-year period of filing a similar action, the Civil Code was amended to afford just two years from the day when one of

[29] The provision prohibited marriage between those with the same surname and same origin of surname.

[30] An established rule is a type of administrative rule. It is not a legal provision, although they are promulgated in order to provide certainty in respect of administrative affairs.

the parents becomes aware of the cause of the action. The amendment reflects the principle of verism of biological ancestry when it comes to determining paternity.

2.2.4.2. Introduction of plenary adoption

The term 'plenary adoption' is a form of adoption that means the acquisition from the moment of birth of the status of a child of natural parents. It is also known as 'full adoption' or 'special adoption'. Plenary adoption was introduced to discourage parents from hiding the fact of adoption by submitting applications for the birth of a child of natural instead of adoption. The institution of plenary adoption was necessary to improve the welfare of adopted children, as well as promote adoption in general. The purposes of bringing harmony and peace to remarried families and protecting adopted children led to the need for making the necessary legislative changes.

Plenary adoption differs from ordinary adoption in terms of its legal grounds and effects. Ordinary adoption is established by means of agreement and application for adoption, whereas plenary adoption requires the permission of the Family Court (art. 908-2)[31]. As for the legal effects of plenary adoption: 1) the kinship of the adopted child before plenary adoption shall be terminated at the time such plenary adoption (art. 908-3 par. 2)[32]; 2) the child adopted through plenary adoption shall be deemed to be born during the marriage of the adoptive parents (art. 908-3 par. 2); and 3) the adopted child takes after the adoptive parents surname and origin of surname.

2.2.4.3. Parental authority

The 2005 amendments introduced an abstract duty to give priority to the welfare of a child in exercising parental authority (art. 912). In an attempt to achieve the same objective, the Family Court was obligated to designate a custodian upon the request of the parties or ex officio, where a child born out of wedlock is legally recognized and his parents are to be divorced, and no custodian is determined by an agreement between the parents (art. 909 paragraph 4). Also, in order to realize the principle of welfare of children in the law on relatives, the discretionary power of the Family Court was expanded, thereby allowing for more circumstances in which the Court determines the custodian ex officio (art. 909 paragraph 5)[33] and opening the possibility of altering the person of parental authority in certain cases (art. 909 paragraph 6)[34]. Another important change due to the amendment was the abolition of the concept of legal custodian. This was the result of moving away from the notion that 'persons with parental authority' are divided into 'possessor of parental authority' and 'legal custodian'. The problem with this approach was that in the case of divorce or affiliation, where one of the parents who was designated as a legal custodian subsequently dies, the parental authority of the surviving parent is automatically restored. Since this is not always advantageous for the child's welfare, the

[31] Civil Code Article 908-2 (Requisites, etc. for Plenary Adoption) (1) Any person who intends to make the plenary adoption of a child shall make a request to the Family Court for such full adoption <…>.

[32] Civil Code Article 908-2 (Requisites, etc. for Plenary Adoption) (2) The kinship of the adopted child before such full adoption shall be terminated at the time such full adoption is decided upon a request made under Article 908-2 (1): Provided, That where one of husband and wife has made the full adoption of the other spouse's child as his or her one independently, the same shall not apply with respect to the relationship of the child with the other spouse and the other spouse's relatives.

[33] Article 909 (Custodian) (5) In cases of the annulment of marriage, judicial divorce, or action demanding affiliation, the Family Court shall ex officio determine the custodian.

[34] Article 909 (Custodian) (6) The Family Court may, if deemed necessary for the welfare of a child, alter the person of the parental authority to the other party upon request of a relative of the child within the fourth degree of relationship.

provision was amended, thereby replacing the term 'person to exercise parental authority' to 'person with parental authority'.

2.2.4.4. Guardianship

The previous system of dismissal of guardian gave way to the system of replacement of guardian, as a result of the amendment (art. 940)[35]. Before the amendment, even where the guardian was inappropriate for the protection of the ward, unless the guardian resigned, one had to request for the dismissal of the guardian. Where the designated or statutory guardian was dismissed, the next in line of statutory guardians became the guardian. This provided insufficient protection to the ward.

3. Later amendments geared towards the modernization of family law

3.1. Amendment for strengthening the family and protecting the weak within families

The 2005 amendment contributed greatly to ridding the Civil Code of its premodern traits, thereby resulting in its modernization. Now we procced to later amendments that took place after 2005.

3.1.1. The amendment of 2007

In 2007 there was meaningful amendment that replaced the previous principle of different age to the principle of same age in respect of the eligible age for matrimonial engagement (art. 801)[36] and matrimony (art. 807)[37]. The 2007 amendment was significant in respect of divorce.

3.1.1.1. The introduction of the 'legal delay before divorce' program

Before the amendment, there was criticism over the ease with which people could end their marriage through divorce by agreement. The legal requirements and procedure were too simple, making it possible to rashly end a marriage, which in turn had the potential to unravel the whole institution of marriage in the Korean society. Therefore in 2007 the Civil Code was amended in order to introduce the system of recommendation by the Family Court to take counsel with a professional counselor before a divorce by agreement (art. 836-2 par. 1)[38], obligatory passage of period before divorce (art. 836-2 par. 2)[39] and

[35] Article 940 (Replacement of Guardians) If the Family Court deems it necessary to replace a guardian for the welfare of the ward, it may replace the guardian either ex officio or upon the application of the ward, any of the ward's relatives, the supervisor of guardianship, a public prosecutor or the head of a local government.

[36] 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.

[37] Article 807 (Marriageable Age) Any person who is eighteen years old or older may enter into matrimony.

[38] Article 836-2 (Procedure of Divorce) (1) Any person who intends to get a divorce by agreement shall have a guidance on divorce provided by the Family Court and, if necessary, the Family Court may recommend to take counsel with a professional counselor who has expertise and experiences in counseling.

[39] Article 836-2 (Procedure of Divorce) (2) The party who filed an application for the confirmation of intention to divorce with the Family Court may have the confirmation of intention to divorce after the periods, prescribed by the following subparagraphs, have passed since the day of having such guidance referred to in paragraph (1):

reduction or exemption of such period (art. 836-2 par. 3)[40, 41]. Although theses changes were made to prevent unnecessary and rash divorces, the ultimate purposes was to provide protection to minor children.

3.1.1.2. The introduction of the duty to submit an agreement on fostering and on the decision on custody

Before the amendment, divorce by agreement was focused primarily on upholding the free will of the parties to the divorce, rather than protecting the welfare of the children and guaranteeing the development of minors. It was possible to finalize the divorce without agreement either on fostering or on the decision of custody. Nor could the state appropriately intervene in the agreement reached by the parents. To resolve this problem where there is child that requires fostering, the parties upon filing to the Family Court the intent to get a divorce by agreement must submit an agreement on fostering and on the decision of custody (art. 836-2 par. 4)[42]. Such an agreement must include the decision on the custodian, child support and visitation rights and methods thereof (art. 837 par. 2). Where the agreement harms the children's welfare, the Family Court shall order correction or decide ex officio matters related to fostering, taking consideration of children's intention and age, each parent's financial status and other circumstances (art. 837 par. 3). Where the agreement on fostering cannot or would not be made, the Family Court shall decide it upon a request of the party or ex officio (art. 837 par. 4).

By limiting the possibility of a divorce by agreement without either the agreement on fostering and decision on custody or approval of the Family Court substituting such an agreement, parents could get a divorce without infringing upon the children's rights regarding fostering.

3.1.1.3. Visitation rights of children

The 1990 amendment only stipulated the rights of the parents. Such an approach was subject to much criticism since this presumed that children were merely the object of visitation, which ran counter to the trend in modern law that recognized the principle of the children's welfare as being critical[43]. The 1989 UN Convention on the Rights of the Child art. 9 par. 3[44] also stipulates visitation rights as a right of the child.

3.1.1.4. The right to revoke fraudulent acts for preserving the claim for division of property

Prior to the amendment, there had been debate as to whether it was possible to recognize the right to revoke fraudulent acts for preserving the claim for division of property

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1. Three months, if the party has any child to take care of (including an unborn child; hereafter the same shall apply in this Article).

2. One month, if not falling under subparagraph 1.

[40] Article 836-2 (Procedure of Divorce) (3) The Family Court may exempt the party from or reduce the period under paragraph (2), when there are such urgent circumstances to proceed a divorce as the party's unbearable suffering may be expected due to domestic violence.

[41] For a detailed analysis, see: *Shin Y.-H., Kim S.-H.* Lectures on Family Law… 116–117.

[42] Article 836-2 (Procedure of Divorce) (4) The party who has any child to take care of shall submit the documents of agreement on fostering under Article 837 and decision of custody under Article 909 (4) or the original copy of adjudication of the Family Court under Articles 837 and 909 (4).

[43] 윤진수(편집대표), 『주해친족법 1』, 박영사, 2015, 357면 [*Yoon J.-S.* (editor in chief). Commentaries on the Law on Relatives. Vol. 1. Seoul: Parkyoungsa, 2015. P. 357].

[44] Article 9:3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

between the parties to the divorce. The claim for division of property is a right that is established upon divorce; therefore, it is merely an abstract and unestablished right before the divorce[45]. Of course, it may be possible to argue (although not without debate) that a future claim can be subject to the right to revoke fraudulent acts if one were to accept the 'theory of probability'[46] adopted by the Supreme Court. Article 893-3 was introduced in order to remove legal uncertainty. However, the efficacy of the provision is still questionable since other provisions regarding the limiting of the disposal of marital property during marriage and matters on the division of property during marriage that had been discussed were not amended.

3.1.2. The amendment of 2009

Before 2009, even where there was an agreement on fostering and the decision on custody or an approval of the Family Court substituting such an agreement, there were numerous cases where the obligor did not fulfil the duty of child support. This was mainly due to the cumbersome and expensive procedure of compulsory execution. Despite the 2007 amendment which made agreement on matters regarding the fostering of children obligatory in the case of divorce by agreement, where the obligor failed to perform the duty of child support, it was necessary to file for compulsory execution by obtaining an irrevocable judgment in respect of the child support obligation. To rectify this, a new provision was inserted in the Civil Code. Article 836-2 par. 5 provided: The Family Court shall establish a child support order to confirm the details of child support agreed between parties. In such cases, with respect to the effect of the child support order, Article 41 of the Family Litigation Act shall apply mutatis mutandis.

In 2009 the Family Litigation Act was amended in order to reflect the changes in the Civil Code. It became obligatory to submit a property list stating the property status of the parties to the divorce (art. 48-2)[47]. Also, a property inquiry system was adopted (art. 48-3)[48]. Moreover, the Family Litigation Act was wholly amended regarding the order for direct payment of child support (art. 63-2), order, etc. for offer of security (art. 63-3), sanctions against non-performance of liability (art. 67 par. 1) and sanctions against special non-performance of liability (art. 68 par. 1).

3.2. Trend of post 2010 amendments

3.2.1. The amendment of 2011

3.2.1.1. The amendment of March 7, 2011

The amendment that took place on March 7, 2011 was a revision of the capacity to act, which amounted to a legal response to the aging of the Korean society. The age of majority was lowered, guardianship of minors was enhanced, and a new form of adult guardianship was introduced.

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[45] Supreme Court 98Da58016, April 9, 1999; Supreme Court 2015Su451, January 25, 2016.

[46] Supreme Court 95Da27905, November 28, 1995.

[47] Article 48-2 (Property Statement) (1) Any family court may, when deeming specifically required for cases claiming division of property, support allowances and child support for minor children, order the relevant party to submit a property list stating his/her property status either ex officio or upon request by the relevant party.

[48] Article 48-3 (Property Inquiry) (1) Any family court may inquire the property under the title of the relevant party, either ex officio or upon request by the relevant party, when deemed difficult to settle cases claiming division of property, support allowances and child support for minor children based only on the property list submitted following property statement procedures under Article 48-2.

Generally, the aging of a person leads to the decline in his/her cognitive abilities. There are also people who due to congenital or acquired disability lack judgment ability. Prior to the amendment of March 7, 2011, the institution of persons of limited legal capacity existed for those who lacked judgment abilities or mental capacity. The institutions of quasi-competent and incompetent persons allowed for the supplement of their legal capacity or the designation of a guardian to act as their agent in conducting juristic acts. However, such institutions did not contribute to the welfare of the elderly and the disabled and ran counter to promoting self-support and leading an ordinary life[49].

The amendment of March 7, 2011 was the result of an effort to enhance the institutions of quasi-competent and incompetent persons, so as to advance the system of guardianship for those adults who are in need of protection. The legislative measures were directed at respecting the dignity and will of these adults. The adult guardianship that was introduced by the amendment of March 7, 2011 is based on three principles: 1) respect of self-determination; 2) realizing the legal capacity to the fullest; 3) normalization of the life of the disabled, so that they can lead an ordinary life similar to those without disabilities[50].

In designing the system of adult guardianship, a pluralistic approach was adopted. This allowed for a more flexible response to the varying nature and degrees of offering protection to different adults in need. At the same time, the introduction of adult guardianship partially contributed to a continuation of the previous institutions of quasi-competent and incompetent persons. It was considered rational to maintain the positive aspects of the previous institutions while improving on their shortcomings, thereby allowing for the development of legal culture. As a result, adult guardianship and limited guardianship were provided for in the Civil Code as continuous and comprehensive types of guardianship which could be implemented in a flexible manner. Also, specific guardianship and voluntary guardianship based on agreement were provided for in order to meet the demands and needs of various persons.

The previous institution of statutory guardianship was abolished since it was deemed inappropriate in verifying the qualifications and ability of the guardian. Also, in addressing criticism over the supervision of guardianship by family organizations, the institution of supervision of guardianship was introduced.

Under the new institution of adult guardianship, the need to make public notice of the initiation of guardianship, the guardian, the scope of authority, as well as the need to protect privacy are still relevant as they were under the previous institutions of quasi-competent and incompetent persons. Numerous methods of public notice were contemplated. However due to the following circumstances, the system of registration of guardianship was adopted: first, there was too much information that necessitated public notice, thereby making it inappropriate to include in the family relationship registry; second, since guardianship is the public notice of the legal capacity, it would be more stable to make the entry in the registry of adult guardianship under the judicial branch, rather than the family relationship registry under the executive branch; third, unlike the previous institutions of quasi-competent and incompetent person, under the adult guardianship complex and complicated content was subject to public notice, which called for a public official with quasi-judicial authority such as a registrar to make the entries into the registry[51]. The system of registration of guardianship and the institution of adult guardianship entered into force on July 1, 2013, as a result of which public notice of guardianship of minors is done

[49] 신영호, "고령화사회에 있어서의 후견제도", 『가족법연구』 제11호, 한국가족법학회, 1997, 365–369면 [*Shin Y.-H.* Guardianship in an Aging Society // Journal of Family Law. Vol. 11. Association of Korean Family Law, 1997. P. 365–369].

[50] *Yoon J.-S.* Lectures on the Law on Relatives and the Law of Inheritance. P. 265.

[51] *Shin Y.-H.* Guardianship in an Aging Society. P. 262–263.

by means of the family relationship registry, thereby creating a separate system of registration of guardianship.

3.2.1.2. The amendment of May 19, 2011

The amendment of May 19, 2011 was a reaction to the social debate surrounding the issue of whether guardianship of minors should be initiated or the surviving parent should ipso facto obtain parental authority, where a parent designated as the sole person of parental authority after divorce had died. This debate was triggered after the death of a famous Korean actress on October 2, 2008. The amendment of 2005 had removed the legal grounds for the principle of the person with parental authority. Nevertheless, Established Rule No. 177 on the Registration of Family Relationship enacted in October of 2007 provided for the basis of the principle of the person with parental authority. Such an approach was not without merit, since it did have the benefit of filling the legal vacuum that could arise in respect of a minor. However, such an approach was not free from the argument that the surviving parent may not be ideal for the minor since he/she had originally not been designated as the person with parental authority. Therefore, the approach could run counter to the welfare of minors. The amendment of May 19, 2011 was a direct response to such criticism. Instead of the surviving mother or father ipso facto obtaining parental authority, it became possible for certain persons to request the Family Court to evaluate the suitability of the surviving parent in terms of the welfare of the minor, and if the Court deemed the parent unsuitable, it could designate a guardian (art. 909-2)[52]. The need to evaluate the suitability of the surviving parent arises not only in the case of a divorce, but also the annulment of marriage, affiliation, annulment or dissolution of adoption or the death of plenary adoptive parents, adjudgment of loss of parental authority or other circumstances in which parental authority is limited (art. 927-2)[53].

A parent who exercises parental authority over a minor may designate by will a guardian of the minor (art. 931 par. 1 main sentence), although the Family Court may, if necessary for the welfare of the minor, terminate the guardianship upon the application of the surviving father or mother or the minor and designate the surviving father or mother as a person of parental authority (art. 931 par. 2). In designating a person of parental authority, the Family Court must give priority to the welfare of a child, for which it may seek counsel from experts in the related fields or social welfare agencies (art. 912 par. 2).

3.2.2. The amendment of 2012

By means of the amendment of 2012, lineal ascendants were included in the scope of persons who could make a claim to the court for the annulment of a marriage, if it was

[52] Article 909-2 (Designation, etc. of Person of Parental Authority) (1) If a parent designated as the sole person of parental authority under Article 909 (4) through (6) has died, the surviving father or mother, the minor, or any of the minor's relatives may request the Family Court to designate the surviving father or mother as a person of parental authority, within one month after becoming aware of such fact or within six months from the date of death.

[…]

(3) If no request for designation of a person of parental authority has been made within the period prescribed in paragraph (1) or (2), the Family Court may appoint a guardian of the minor either ex officio or upon the application of the minor, any of the minor's relatives, an interested person, a public prosecutor or the head of a local government. In such cases, he/she shall be given an opportunity to state his/her opinions unless the whereabouts of the surviving father or mother or one or both natural parents are unknown or where he/she fails to respond to a summon without any justifiable ground.

[53] The provision governing this is article 927-2 (Loss, Temporary Suspension, or Partial Restriction of Parental Authority and Designation, etc. of Person with Parental Authority).

in violation of the prohibition of bigamy (art. 818)[54]. The amendment of 2012 also abolished the institution of revoking marital agreement (art. 828). However, the focus of the amendment was the improvement of the institution of adoption. As mentioned earlier, the amendment of 2005 introduced the institution of plenary adoption, which led to the modernization of the law on adoption. Plenary adoption was introduced in addition to the existing form of adoption, so those who wanted to adopt could choose between ordinary adoption and plenary adoption. The amendment of 2012 improved ordinary adoption to guarantee the welfare of the adoptee by strengthening the state (court)'s role. Thus, permission[55] from the Family Court was necessary for adoption of a minor (art. 867). Dissolution of adoption was now only possible in court (art. 898) and other measures were taken to enhance the institution of adoption, such as allowing for the possibility of permitting adoption even where consent of the minor's legal representative and other persons whose consent is necessary has not been obtained (art. 869 par. 3, art. 870, 872, 908-2 par. 2). Also, art. 869 par. 2 provides that if a person to be adopted is a minor under 13 years of age, his/her legal representative shall permit the adoption on his/her behalf. Previously it had 15 years of age. Finally, the age limit was increased from 15 to 18 years old in respect of plenary adoption (art. 908-2 par. 1 subparagraph 2).

3.2.3. The amendment of 2014

The amendment of October 15, 2014 introduced trial substitution of consent from persons with parental authority (art. 922-2)[56], temporary suspension and partial restriction of parental authority (art. 924, 924-2, 927-2). The amendment can be characterized as bringing flexibility to the institution of parental authority.

The provision on the substitution of trial for the consent of persons with parental authority was inserted in the Civil Code to refrain from completely limiting the right to consent of the person with parental authority. Rather, it was deemed more appropriate to substitute trial for consent of persons with parental authority, where the person with parental authority's failure to consent to an act that requires his/her consent, without any justifiable ground, is at risk of causing serious harm to the life, body, or property of a child.

The flexibility of the institution of parental authority is important, given that previously in cases of undesirable exercise of parental authority and the resultant infringement of the welfare of minors, the court fully or partially limited such parental authority. The amendment allows for the minimization of restricting parental authority and thereby laying the groundwork for the eventual recovery of parent-child relationships and improvement of the welfare of minors. The institution of such public intervention into matters regarding the exercise of parental authority is subsidiary to the need to restrict parental authority[57]. It is

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[54] The amendment of article 818 was the result of the decision delivered by the Constitutional Court (2009HunGa8, July 29, 2010). The Constitutional Court decided that the exclusion of lineal ascendents from article 818 in providing for persons who could make a claim to the court for the annulment of a marriage, if it was in violation of the prohibition of bigamy was non-conformable to the Constitution since it violated the principle of equality. This was a case that was filed regarding the recovery of inheritance by a North Korean defector whose marriage in South Korea was recognized as bigamy.

[55] Here permission is, in essence, a preliminary review of the adoption by the court, rather than a declaration of adoption by the state, such as in the case of plenary adoption.

[56] Article 922-2 (Trial Substituting for Consent from Person with Parental Authority) Where the person with parental authority's failure to consent to an act that requires his/her consent, without any justifiable ground, is at risk of causing serious harm to the life, body, or property of a child, the Family Court may conduct a trial substituting for the consent from the person with parental authority, upon the application of the relevant child, the relatives of the child, a public prosecutor, or the head of a local government.

[57] Article 925-2 (Criteria for Determination, Including Adjudication on Loss of Parental Authority) (1) The adjudication on the loss of parental authority under Article 924 shall be made only where it is impossible to protect a child's welfare sufficiently by means of temporary suspension of parental authority under

important to state that the loss, suspension, or partial restriction of parental authority or on the loss of the rights to represent and to manager property do not change any of the rights and obligations of a parent to his/her child (art. 925-3).

3.2.4. The amendment of 2016

The amendment of December 2, 2016 resulted in the recognition of visitation rights of grandparents in respect of their grandchildren. It was acknowledged that grandparents play a vital role in the normal upbringing of children. The lineal ascendants of a parent who does not foster children may request the Family Court to grant visitation with the children, where the parent is unable to visit the children due to death or any other extenuating circumstance such as illness and residency abroad (art. 837-2 par. 2 sentence 1). It was noted that a lopsided relationship with the grandparents of only one the parents could adversely affect the mental well-being of the children. There was a lower court case in which the visitation rights of siblings were recognized[58].

3.2.5. The amendment of 2017

A child born within three hundred days from the day when the matrimonial relation was terminated, can be registered as the child of one's spouse if the mother submits such an application to the registrar of family relationship. This is so despite the existence of grounds that exclude the possibility of presuming paternity since the registrar lacks the substantive authority to review applications. In such a case, aside from filing an action for outright denial of paternity, it is possible to either file an action demanding confirmation of denial or existence of paternity. This could lead to the correction of entry in the Family Relationship Registry and subsequent affiliation, or a claim of affiliation towards the natural parents[59]. It is interesting to note that there was a case where a mother of a child, for the purposes of avoiding the presumption of paternity, submitted an application of birth by falsely filling out the date of birth of her child, thereby reporting extra-marital birth of the child, only to apply afterwards for a correction of the date of birth in the Family Relationship Registry[60].

The decision of the Constitutional Court[61] of non-conformity to the Constitution of the sentence ("a child born within three hundred days from the day when the matrimonial relation") in art. 844 (2) of the Civil Code resulted in the amendment that made possible the establishment of paternity through the application for permission to deny paternity (art. 854-2) and application of permission for affiliation (art. 855-2).

Conclusion

Throughout the years, Korea was focused on modernizing family law through the elimination of provisions reflecting premodern aspects of law. Such an effort did not allow for much attention to be placed on addressing new challenges of our time, such as industrialization, urbanization, digitization, and the aging of our society. However, through the latest legislative amendments and the development of legal doctrine and case law, it was possible to take meaningful steps in advancing the welfare of children and protecting

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the same Article, partial restriction of parental authority under Article 924-2, adjudication on the loss of rights to represent and to manage property under Article 925 or any other measure.

[58] Suwon district court, 2013Bu33. June 28, 2013.

[59] Supreme Court, 99Mu1817. January 28, 2000.

[60] Supreme Court 2011Su160. April 13, 2012.

[61] Constitutional Court 2013HunMa623. April 30, 2015.

the weak within the family. In moving forward from this point, Korea faces significant challenges of the aging and super aging of our society.

It is not difficult to predict that our society will need to address the problems arising from the aging of society, relevant to the elderly, such as divorce and remarriage, common-law marriage, division of marital property, domestic violence, and support of elderly parents[62]. All these problems necessitate not only better interpretation of existing law but legislative changes. Also, protecting the rights of minorities such as questions regarding same-sex marriage will require our attention. In addressing these issues and planning relevant policies, we need to ponder upon the function and role of the family in our society, and what the state can and should do in supervising the process.

We cannot afford to forget that Korea is still a divided nation, and therefore there will be numerous matters regarding reunification. We will need to be prepared to deal with problems arising from differences in the laws and legal institutions between South and North Korea.

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Последние тенденции и проблемы изменения семейного права в Корее

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Страны семьи континентального права нередко включают семейное право в свои гражданские кодексы. Гражданский кодекс Республики Корея, который был создан в 1958 г., не составляет исключения. Основанный на пандектной системе, он включает часть IV,

[62] On January 26, 2021, the Civil Code was amended, as a result of which article 915 (which was misperceived as being a provision allowing for persons of parental authority to take disciplinary action towards their children) was abolished. The same amendment also led to the revision of articles 924-2 (Adjudication on Partial Restriction of Parental Authority) and 945 (Rights and Duties of Guardians on Status of Minors).

регулирующую брачно-семейные отношения. В Гражданский кодекс Республики Корея, который действует с 1 января 1960 г., всего 29 раз вносились изменения и дополнения, 13 из которых были напрямую связаны с брачно-семейными отношениями. Хотя наблюдается нежелание корейского законодателя менять нормы Гражданского кодекса, сравнительная регулярность внесения в него изменений, затрагивающих семейные отношения, показывает степень и масштабы перемен в целом, касающихся брачно-семейных отношений в корейском обществе. Обзор законодательной истории Гражданского кодекса показывает, что семейное право в Корее претерпевало значительные изменения по трем основным причинам. Во-первых, этот Кодекс подвергался модификациям, чтобы избавить его от архаичных элементов, ранее составлявших основу семейного права. Имеются в виду поправки, внесенные в 1962, 1977, 1990 и 2005 гг. Во-вторых, имели место изменения в результате решений Конституционного суда Республики Корея, согласно которым отдельные нормы Гражданского кодекса были признаны не соответствующими Конституции. В-третьих, иные внесенные в Кодекс дополнения, целью которых были укрепление семьи и предоставление большей защиты слабым членам в семье, явились реакцией на урбанизацию, индустриализацию, старение общества и подъем индивидуализма. Помимо прочего, в статье уделяется определенное внимание семейному законодательству Северной Кореи, его специфическим чертам и уникальным структурным отличиям как от права Республики Корея, так и от цивилистической традиции в целом, наличие которых определяется влиянием советского права, а также собственными оригинальными чертами развития данного правопорядка.

Ключевые слова: семейное право, модернизация права, Гражданский кодекс, Конституционный суд, право Республики Корея.

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