South Korea

THE REFORM OF ADOPTION LAW IN KOREA

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Résumé

En 2011 et 2012, le droit de l'adoption a connu deux réformes majeures. Premièrement, la Loi spéciale sur l'adoption fut adoptée le 4 août 2011. Deuxièmement, le chapitre du Code civil sur l'adoption fut considérablement modifié le 10 février 2012 et les nouvelles dispositions entreront en vigueur le 1er juillet 2013. L'objectif principal de ces changements est de mieux servir l'intérêt de l'enfant et d'harmoniser le droit interne aux principes internationaux, notamment ceux mis de l'avant par la Convention internationale sur les droits de l'enfant. Pour atteindre ce but, l'adoption d'enfants mineurs devra désormais être autorisée par le tribunal de la famille. De plus, le nouveau Code civil abolit la possibilité d'une révocation consensuelle de l'adoption d'un enfant mineur. Ce chapitre explore les points saillants de ces réformes.

I INTRODUCTION

In 2011 and 2012, there were two major changes in Korean Adoption Law. First, the Special Act on Adoption (SAA) was enacted on 4 August 2011. This Act replaced the former Special Act on the Promotion and Procedure of Adoption (SAPPA) and came into force on 5 August 2012. Secondly, the part of the Civil Code regulating adoption was thoroughly revised on 10 February 2012 and will come into force on 1 July 2013. The main aim of these changes was to serve the interests of the child better and match international standards such as the UN Convention on the Rights of the Child (UNCRC).

The chapter discusses the main features of the reform.

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II THE SITUATION BEFORE THE REFORM AND THE NECESSITY OF THE REFORM

(a) The Civil Code

(i) The Simple Adoption

The Korean Civil Code was enacted in 1957 and came into force on 1 January 1960. At that time, the basic idea of adoption law was that the institution of adoption was not for protecting the interests of the child, but rather for the interests of the family itself or, more precisely, the preservation of the family. To understand the notion of 'the preservation of the family', one must understand the *hoju* system. Before 2008, the Korean Civil Code employed the *hoju* (meaning 'master or head of the family') system, which conferred privileges upon each family's respective *hoju*, including certain enumerated powers over members of his family.[1] *Hoju* status itself and its inheritance were reserved for males in principle. The main social function of *hoju* was to hold *jaesa.*[2] For many Koreans, *jaesa* was the symbol of the continuity of the family and regarded as the most important matter in the realm of the family. In recent years, this way of thinking has weakened somewhat, but is still important as a social phenomenon.

So, if a *hoju* had no son to be the next *hoju* and hold *jaesa*, it was an urgent problem. The usual solution for this was for the *hoju* to select a boy among his relatives and adopt him. Not every adoption was used for this purpose, but the preservation of the family was the main concern of the legislator.

This was well illustrated by the recognition of adoption after the adoptive parent's death. There were two kinds of adoption for this purpose. One was posthumous adoption. When a *hoju* had died without an issue, his spouse, (grand)parents or council of relatives, in turn, could adopt a child for the deceased *hoju* (former art 867). The other was testamentary adoption. A testator could prescribe in the will that a child should be adopted for him or her (former art 880).

As formation adoption was possible if there was an agreement between adoptive parents and adopted child, without any intervention of the court or other governmental authority, only when a guardian wanted to adopt his or her ward was the permission of the family court necessary (former art 872). If the child was under 15, the present parent(s) – usually the biological parents – would need to consent to adoption in lieu of the child (former art 869). If no parent was present, the guardian of the child would need to consent to adoption. Moreover, the approval by biological parents or grandparents was always necessary regardless of the child's age (former art 870). Thus, even

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1 See Jinsu Yune 'Tradition and Constitution in the Context of the Korean Family Law' (2005) 5 *Journal of Korean Law* 197.

2 It means the ritual of ancestor worship.

adults required approval by parents or grandparents to become adopted. Finally, a report of adoption to the local mayor was (and still is) necessary for the adoption to be effective (art 878).

Adoption in the original Civil Code was simple adoption. Adoption did not terminate the former parents–child relationship. Former parents remained as parents. The child gained new parents in addition to the former parents.

The dissolution of an adoption was possible without the intervention of the court, if both parties to the adoption agreed to the dissolution (consensual dissolution, former art 898). Only when there was a disagreement between parents and child would the family court decide whether the adoption was to be dissolved (former art 905).

In 1990, posthumous adoption and testamentary adoption were abolished, and in doing so, the character of adoption for the family was somewhat diminished. The notion of adoption for the interests of the child was not, however, fully accepted.

(b) Introduction of the full adoption

In 2005, the full adoption system was introduced for the first time. This was a major change in the adoption law. It should be noted that the simple adoption system as described previously was retained as well. A full adoption is formed by the order of the court based on a petition, not by the agreement of the parties. Once the full adoption is formed, the parents–child relationship before the adoption is terminated.

Conditions for the formation of a full adoption are as follows. Only a married couple can adopt a child. The marriage must have lasted at least 3 years. However, if one adopts his or her spouse's child, then one year is enough. The prospective adopted child must be younger than 15 years old. The former parents must consent to the adoption, unless their parental authority has been revoked or they are deceased. The court can dismiss the adoption petition if the adoption is contrary to the interests of the child when considering the state of rearing, the motive for the adoption, and the rearing capacity of the prospective adoptive parents (art 908–2).

The dissolution of a full adoption is possible only when adoptive parents act grossly contrary to the interests of the adopted child through abuse, neglect, etc, or when the adopted child's behaviour towards the adoptive parents is so negative as to make it impossible to continue the parents–child relationship. Dissolution is possible only by the court order.

In addition, the *hoju* system was abolished in the same year.[3] On 3 February 2005, the Korean Constitutional Court declared that the *hoju* system was

[3] See Hyunah Yang 'Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the

incompatible with the Constitution.[4] Following the mandate of the Constitutional Court, the National Assembly abolished the *hoju* system on 31 March 2005 at the same time as recognising the full adoption system.[5]

(c) The Special Act on the Promotion and Procedure of Adoption

The SAA is for the adoption of orphans or other children whom the parents or other relatives cannot rear. There were several predecessors of the SAA. The first was the Special Act on the Adoption of Orphans on 30 September 1961. It was superseded by the Special Act on Adoption on 31 December 1976. The last was the SAPPA. I explain the last one.

A child who could be adopted under this Act should be (i) one in a child protection facility as a result of parental desertion or incapacity to rear the child, or (ii) one whose parents, grandparents or guardian had consented to adoption and requested a child protection facility to protect the child or admitted the child to an adoption agency (art 4). The prospective adoptive parents should have assets sufficient to raise the adopted child, be ready to acknowledge the freedom of religion of the child and to rear and educate the child so as to become a member of society, live in a harmonious family, and have no serious mental or physical handicap that would be detrimental to raising the child (art 5).

Moreover, the approval of present parents, grandparents or guardian was necessary (art 6).[6] The permission of the court was no prerequisite to adoption. Only when foreigners living in Korea wanted to adopt a child was the permission of the family court needed (art 16). This Act had a provision concerning intercountry adoption. When a director of the adoption agency received a request for adoption from a foreigner, the director had to seek the permission of the Minister of Health and Welfare for the child to emigrate abroad (art 17). For other matters not regulated by this Act, the provisions of the Civil Code were to be applied.

(d) The necessity of the reform

The regulation of adoption according to the old law was much criticised as inadequate for protecting children's interests. In particular, the absence of

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"Family-Head System" in Family Law' (2006) 5 *Journal of Korean Law* 12; Jinsu Yune 'CEDAW, CRC and the Korean Family Law' (2009) 1 *UT Soft Law Review* 79.

4 The decision of the Korean Constitutional Court on 3 February 2005, case no 2001 heonga 9 et al, Report of Constitutional Court Decision (*Heonbeopjaepansopanryejip*), vol 17, no 1, 1ff.

5 As a matter of fact, at the time of the Constitutional Court's decision, the parliamentary work of abolishing the *hoju* system was in its last stage, so the decision was only a nail in the coffin of the *hoju* system.

6 The guardian for the child in the child protection facility is the director of the facility or one designated by the governor as a guardian. The director of the adoption agency could perform the role of guardian for the prospective adopted child as well.

intervention by the court or any other governmental authority in the process of adoption was regarded as a major shortcoming. As a result, it was asserted that whether a couple who wanted to adopt were fit for the adoption from the perspective of child's interest could not be checked beforehand. This was all the more problematic, as art 21(a) of the UNCRC requires that the adoption of a child be authorised only by competent authorities who do so in accordance with applicable law and procedures and on the basis of all pertinent and reliable information.

Korea made reservation to art 21(a) at the time of ratifying the UNCRC. This reservation was much criticised. The UN Committee on the Rights of the Child expressed concern that domestic adoptions may be arranged without authorisation or involvement of competent authorities and that such arrangements do not necessarily take into account the best interests of the child or, where appropriate, the views of the child.[7]

The National Human Rights Commission of Korea made a recommendation on 11 April 2005 to the Korean Prime Minister and the Minister of Foreign Affairs and Trade that adoption should be permitted only after review by competent authorities, and the dissolution of adoption should be permitted only for the interests of the child.

Furthermore, the regulation of intercountry adoption in Korea was problematic as well. Article 21 of the UNCRC prescribes that intercountry adoption should be considered as an alternative means of a child's care if the child cannot be cared for in the child's country of origin; a child subject to intercountry adoption should still enjoy the safeguards and standards equivalent to those existing in the case of national adoption. There are many Korean children adopted by foreigners abroad.[8] However, Korea is not a contracting state of the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption ('Hague Adoption Convention'). On this point, The UN Committee on the Rights of the Child urged the ratification of the Hague Adoption Convention[9] and expressed concern about the absence of a clearly mandated central authority to provide

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7 Concluding Observations: Republic of Korea, 18 March 2003, CRC/C/15/Add.197, para 42; Concluding Observations: Republic of Korea, 2 February 2012, CRC/C/Kor/CO/3–4, paras 8, 9.

8 In 2010, there were 1,013 adopted children adopted by foreigners abroad. See www.index.go.kr/egams/stts/jsp/potal/stts/PO_STTS_IdxMain.jsp?idx_cd=2708&bbs=INDX_001 (accessed May 2013). In the same year, the number of reported domestic adoption is 3,570 (simple adoption), 1,251 (full adoption) and 56 (adoption under SAPPA). Source: Judicial Yearbook 2011 (in Korean). How many minors were among simply adopted children is not known exactly, but presumably more than half. One curious thing is that the number of domestic adoptions under the SAPPA was 1,462 according to the statistics of the Ministry of Health and Welfare. This number is much bigger than the officially reported number. This discrepancy can be explained by the so-called 'de facto adoption'. De facto adoption means that the prospective adoptive parents register the births of the adopted children as their own biological children instead of by means of an adoption report. See Part III(b) below.

9 Concluding Observations: Republic of Korea, 18 March 2003, CRC/C/15/Add.197, para 43.

regulatory oversight on adoptions and legislation codifying the obligation of the state party's competent authorities to intervene in intercountry adoption procedures.

Against this backdrop, it can be said that the overall reform of the adoption law was inevitable.

III REFORM OF THE CIVIL CODE

(a) Overview of the reform

The Reform of the Civil Code was initiated by the Korean Ministry of Justice. In November 2010, the Ministry of Justice organised a Special Committee for the Revision of the Family Law for the draft of the new family law. The committee was composed of four family law professors, one senior judge, one attorney and one family law legal aid expert. The author was the chairperson of the committee. One other family law professor was an observer, but acted in a capacity similar to that of a committee member.

In June 2011, the committee had sent the draft for the revision of the adoption law to the Ministry of Justice, and the Government had proposed the draft as a bill to the National Assembly. With exceptional speed, the National Assembly passed the bill with only slight modifications on 29 December 2011. The law was enacted on 10 February 2012 and will come into force on 1 July 2013.

The main focus of the reform was simple adoption. The most important point was to require the permission of the family court for every minor child adoption. There were other important changes as well. The prospective adoptive parents can be exempted from getting the consent or approval of parents or guardians when the denial of consent or approval is contrary to the interest of the child. The consensual dissolution of adoption was abolished in cases of minor adopted children (as opposed to the adoption of adult children). The rules for full adoption were also modified.

(b) Permission of the family court for adoption

As explained before, the permission of the court for adoption was not necessary in cases of simple adoption except for the guardian–ward adoption. However, regarding cases of simple adoption, there were reports that adoptive parents had abused or neglected their adopted children. To prevent this problem, the revised law requires that the permission of the family court be required in every minor child adoption. The family court can dismiss the adoption petition if the adoption is contrary to the interests of the child considering the state of rearing, the motive for the adoption, and the capacity of the prospective adoptive parents for rearing (art 867). Through this legislation, the Korean adoption law was brought into line with the UNCRC and the withdrawal of the reservation of art 21(a) became possible.

Furthermore, when either party to the adoption is a ward, the permission of the family court is also necessary regardless of the ward's age (art 873).[10]

The pattern of adoption by agreement is still retained in simple adoption. The permission of the family court is an additional condition for simple adoption. For simple adoption to be fully effective, the report of adoption to the mayor is still necessary.

One thing is worth noting. The adoption of minor children without the permission of the family court is not to be annulled, but void ab initio (art 883(2)). This is important in connection with de facto adoption.[11] The Korean Supreme Court had declared that the legal effect of adoption could be conferred on a de facto adoption if other conditions for the adoption except the report to the mayor were fulfilled.[12] This precedent has been much criticised, as this interpretation has no textual basis and is contradictory to the purpose of the report requirement (the purpose being to enhance the legal certainty by ascertaining whether there was a valid formation of adoption). The new law has made it clear that de facto adoption should not be treated as a substitute for proper adoption.

(c) Exemption from consent or approval by parents

As explained before, if the child was under 15,[13] the present parents should consent to adoption in lieu of the child according to the former law (former art 869). Where no parent was present, the guardian of the child should consent to adoption. Moreover, the approval by parents or grandparents was always necessary regardless of a child's age (former art 870). But there were cases where the parents or guardians had denied consent or approval without reasonable cause. For example, in the case of the Constitutional Court decision of 31 May 2012,[14] a woman had divorced her husband and remarried another man. The woman and her new husband had been rearing the children born between the woman and her ex-husband. The ex-husband did not pay the promised child support and there was no meaningful relationship between him and children. The new husband sought full adoption of the children, but the ex-husband denied consent without any reasonable cause. In response, the new husband raised a constitutional complaint to the Constitutional Court against the provision requiring the consent of the present parents.[15]

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[10] The Civil Code revised on 7 March 2011 distinguishes three kinds of ward: full ward (*piseongnyonhugyeonin*), limited ward (*pihanjeonghugyeonin*) and ward on specific occasions (*teugjeonghugyeonin*). The permission of the court is necessary only in the case of full ward.

[11] See n 8 above.

[12] Since the plenary decision of the Supreme Court on 26 July 1977, case no 77da492, Reports of the Supreme Court (*daebeobwonpanryejib*) vol 25, no 2 Min211.

[13] The new law has lowered this age to 13.

[14] Case no 2010 heonba87.

[15] The Constitutional Court has rejected the constitutional complaint, but noted that the revised adoption law recognised an exception in such a circumstance.

The new law has introduced exemption provisions for consent or approval. When a guardian denies consent or approval for adoption of children without reasonable cause, the family court can permit the adoption nonetheless. In this case, the family court should hear the reasoning of the guardian or parents (art 869). If parents deny consent to or approval for adoption of minor children, a stricter standard for unreasonableness is adopted. In this case, the denial is deemed unreasonable only when parents did not pay child support for more than 3 years, or abused, neglected or infringed the interest of the child grossly in other ways (art 870).

The same is true of the denial of a guardian or parents for the adoption. Only one condition is a little different. Besides abuse or neglect, the denial by parents is deemed unreasonable if they did not pay child support through their fault and did not visit or contact their children for more than 3 years (art 908–2(2)). This difference can be explained by the fact that the formation of the full adoption carries with it the severe result of terminating the former parent–child relationship.

(d) The abolition of consensual dissolution in cases of minor child and ward adoption

As explained before, the consensual dissolution of adoption was possible regardless of the adopted child's age. This was problematic from the perspective of the interests of the minor child, as the counterpart of the adoptive parents is the adopted minor child. When the child was under 15, one who had consented to the adoption should consent to the dissolution of adoption. When the child was over 15, the approval of the (grand)parents or the guardian was necessary. However, this was insufficient to guarantee the interest of the child. Seeking to remedy this, the National Human Rights Commission of Korea made a recommendation on 11 April 2005 that the dissolution of adoption should be permitted only for the interests of the child.

The new law complied with this recommendation by abolishing consensual dissolution of adoption in cases of the minor child and ward. According to the new art 898, consensual dissolution of the adoption is possible only when the adopted child is not a minor or a ward. In these cases, dissolution of adoption is possible by the order of the family court.

(e) The revision of the full adoption law

There were two changes to the full adoption law. One is the exemption of the consent or approval requirement clause (art 908–2(2)). It is the same as simple adoption.[16] Another change is that all minor children regardless of age can be adopted under the full adoption system (art 908–2(1)). Originally, the government's draft introducing the full adoption system in 2004 had limited the

[16] See Part III(c).

age of adoptable child to under 7. The law of 2005 finally enacted had raised the age limit to 15. It was the result of compromise. However, there was no persuasive reason to prohibit the adoption of minor children over 15. This is a welcome change for the interests of minor children.

IV THE SPECIAL ACT ON ADOPTION

(a) Overview of the legislation

The SAA was based on the draft proposal of assembly-person Yeonghi Choi, supported by others, in 2010. The draft was passed by the National Assembly with important modifications on 29 July 2011 and was enacted on 4 August 2011. This act came into force one year later, on 5 August 2012. One aim of the SAA is to protect the best interest of the child. Article 4 of the SAA declares that an adoption under SAA should serve the best interest of the child. Another aim is to try domestic adoption first and pursue the intercountry adoption if domestic adoption is not feasible (art 7). The reasoning for this is that the government should try to reduce intercountry adoption (art 8). There is still another, albeit implicit, aim, that is to prepare to ratify the Hague Adoption Convention. This aim was not explicitly mentioned through the legislative process. However, assembly-person Choi, who had proposed the bill, had also proposed a resolution urging the ratification of the Hague Adoption Convention on 11 May 2010. This proposal was passed by the National Assembly on 9 March 2011. Moreover, the Hague Adoption Convention was mentioned several times during the legislation process. In particular, it was pointed out that the foundation of the Central Authority was required by the Hague Adoption Convention.[17]

(b) The regulation of adoption under the SAA

The qualifications of the prospective adoptive parents and child (arts 9 and 10) are almost identical as those prescribed by the SAPPA.[18] There are two small changes regarding the qualifications of the prospective adoptive parents: instead of the requirement of living in a harmonious family, and having no serious mental or physical handicaps that would be detrimental to raising the child, the prospective adoptive parents should have no history of crime such as child abuse, domestic violence, sexual assault, narcotic-related crime, or alcohol and drug addiction. Also the prospective adoptive parents should receive instruction beforehand from the adoption agency.

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[17] Review Report of the SSA by the Health and Welfare Committee in April 2011 p 17 (in Korean).
http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_Q1D0F0G5Y1S1G1G8M3P4M3D3J2L3B5 (accessed 16 June 2012).

[18] See Part II(c) above.

Adoption under the SAA requires the permission of the family court, like the revised Civil Code. The requirement of parental approval is almost the same as prescribed by the SAPPA (art 12).[19] There are two additional changes regarding the approval. First, the approval should be given more than one week after the child's birth. Secondly, the approval is freely revocable until permission is granted by the family court.

The adoption becomes effective with the permission of the family court (art 15). This adoption is a full adoption (art 14). It is a major change.

The regulation of intercountry adoption has not changed significantly. Only the power of permission was transferred from the Minister of Health and Welfare to the family court.

(c) The foundation of the Central Adoption Authority

The Hague Adoption Convention has required that a contracting state designate a Central Authority to discharge the duties that are imposed by the Convention upon such authorities (art 6). Various functions have been imposed upon Central Authorities. For example, they shall take appropriate measures to provide information as to the laws of their states concerning adoption and other general information, to collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, to facilitate, follow and expedite proceedings with a view to obtaining the adoption, to promote the development of adoption counselling and post-adoption services in their states, to provide each other with general evaluation reports about experience with intercountry adoption and so on (arts 7, 8, 9). The SAA provides that the Minister of Health and Welfare should found the Central Adoption Authority. Its functions are (i) the operation of the integrated database for the information of adopted children and family, and for finding the blood relatives; (ii) building the database for the adopted children; (iii) study and research of the domestic and international adoption policy and service; (iv) co-operating with other countries in relation to international adoption (art 26).

(d) Disclosure of adoption information

The SAA confers on the child adopted under the SAA the right to know information about the adoption. An adopted child can ask the Central Adoption Authority or the adoption agency to disclose information about the adoption. Upon request, the director of the Central Adoption Authority or adoption agency should disclose the adoption information, provided that the biological parents consent. Without their consent, adoption information except the parents' identities can be disclosed. However, the information including the parents' identities can be disclosed provided that, in addition to reasons to

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[19] See Part II(c) above.

disclose the information (such as medical purposes for the child), the parents cannot give consent because of death or other reasons (art 6).

Article 7(1) of the UNCRC requires state parties to ensure the right of the child to know his or her family. With this disclosure provision, Korea has fulfilled the requirement of the UNCRC.

V CONCLUSION

The reform of adoption law in Korea has made it clear that adoption should serve the best interests of the child, not the interests of the family or parents. In this sense, the reform marked another epoch in the history of Korean family law. At the same time, it can be deemed as a step toward the ratification of the Hague Adoption Convention.

As a final comment, I would like to address the international perception of Korea's intercountry adoption practices over the past several decades. Korea is blamed for 'exporting babies' despite its considerable economic development. This phenomenon is related not so much to economy, but to Korean culture. Traditionally, Korean people have regarded adoption as a means to preserve the continuity of the family. Therefore, the ideal candidate for the prospective adopted child was a blood relative's child. To them, a parent–child relationship not linked by the blood ties seemed unnatural. Many parents who have adopted children would keep the fact a secret from the adopted child, the concern being that the parent–child relationship cannot be sustained if the child knew about the adoption. To maintain this secret, the fact of adoption was also hidden from neighbours as well. In extreme cases, prospective adoptive parents have faked pregnancy to hide the adoption. This prejudice against adoption made many people hesitate to adopt. Fortunately, the attitude toward adoption in Korea is changing for the better. Combined with this change of attitude, the reform of the adoption law will create a friendlier environment for adoption.