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# Judging Capacity in Korean Private Law*#

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**Abstract**

*Most jurisdictions of the civilian tradition assume that a person needs to have a certain degree of mental capacity to take part in legal transactions. The Korean Civil Code also presupposes the capacity to form an intent as a prerequisite of any valid juridical act, although its definition is not expressly given. Doctrine and case law try to understand the concept from a cognitive perspective, concentrating their efforts on scrutinizing the cognitive capabilities of the concerned person. The author disagrees with this approach, whose definition is too vague to handle in practice and has a danger of discrimination. It is instead submitted that volitional elements must be integrated into the concept of capacity. According to this test, the capacity is to be denied only when cognitive disturbances interfere with forming an intent to such a degree that it is impossible to speak of a self-determination. This conclusion is justified by the principle of private autonomy and some convincing examples.*

KEY WORDS: capacity, capacity to form an intent, private autonomy, contract, will, juridical act

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## I. Introduction

Most jurisdictions of the civilian tradition assume that a person needs to have a certain degree of mental capacity in order to conclude a valid contract or to leave an effective last will.[1] Some of them declare the acts by

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those who lack the capacity null and void. For example, one must be of sound mind (sain d'esprit) to make a valid act, says the French Civil Code (art. 414-1). The German Civil Code prescribes in more detail that a person in a state of pathological mental disturbance, which prevents the free exercise of will, is incapable of a juridical act (geschäftsunfähig), unless the state by its nature is a temporary one (§ 104 Nr. 2). His or her declaration of intent is null and void (§ 105 I), and the same is true of the declaration of a person which is made in a state of unconsciousness or temporary mental disturbance (§ 105 II). In those countries, the capacity is presumed; the incapacity has to be proved by a party in legal dispute who calls the other's capacity in question.

The Korean Civil Code is similar, although its expression is somewhat obscure. It approaches this problem by regulating the testamentary capacity: An adult under full guardianship is capable of making a last will only when the "capacity to form an intent" (의사능력)[2] is restored (art. 1063 I). This rule presupposes the Code's unwritten premise that the capacity to form an intent is required for a person to make a valid declaration of intent, and applies this rule to one of important juridical acts, namely the last will.[3] Both doctrine and case law therefore recognize the capacity to form an intent as a prerequisite of any effective juridical act.[4]

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1) For an overview cf. Phillip Hellwege, *Capacity* in The Max Planck Encyclopedia of European Private Law II 137-141 (Basedow, Hopt, Zimmermann & Stier ed., Oxford: Oxford University Press, 2012).

2) The Civil Code's choice of the word is comparable to the concept of Italian legal doctrine, *incapacità di intendere* or *incapacità di volere*, although its effect is not the same as that in Korean law. See Guido Alpa & Vincenzo Zeno-Zencovich, Italian Private Law 34-35 (New York: Routledge-Cavendish 2007).

3) Thus the opinion of some scholars that the Korean Civil Code does not know the concept 'capacity to form an intent' (*See* e.g. Eun Young Lee, Minbeopchongchik [Civil Code: General Part] 155 (5th ed., Seoul: Pakyoungsa 2009); Jin Ki Lee, *A Critical assessment on capacity to act and capacity to form an intent* (in Korean), 46 Minsabeophak [Korean Journal of Civil Law], 281 (2009)) is simply not correct.

4) As representative *see* e.g. Yoon Chick Kwack & Jae Hyung Kim, Minbeopchongchik [Civil Code: General Part], 109-110 (9th ed., Seoul: Pakyoungsa 2013).

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## II. Judging "Capacity to Form an Intent" in Theory and Practice

### *1. Traditional Approach*

As described above, the Korean Civil Code does not give an exact definition of the concept "capacity to form an intent." How is it then understood in doctrine and case law? Following the dominant view since decades,[5] the Supreme Court explains: "The capacity to form an intent refers to the capacity to reasonably judge the meaning and consequences of one's own act based on normal cognitive and predictive ability. Its existence must be identified individually in relation to the concerned juridical act. If a legally special meaning or effect which is difficult to infer from its ordinary meaning is attached to the act, then one has to understand that meaning in order to be capable."[6]

This explanation is somewhat surprising. Though terse, the Korean Civil Code explicitly regulates the capacity from a *volitional* perspective by choosing the word "intent": Who, say, concludes a contract, must be able to form a flawless intent with regard to its contents, as the Code's underlying principle of private autonomy says that a contract binds only because its parties intended to bind themselves. In contrast, doctrine and case law seem to try to understand the concept from a *cognitive* perspective, concentrating their efforts on scrutinizing the cognitive capabilities of the concerned person. The interpretation inexorably leads to the result that people with a certain degree of developmental disorder, mental disability or dementia are normally denied the capacity by the courts.[7] There could be a danger of discrimination based on cognitive abilities.

The Supreme Court for example doubted the capacity to form an intent

5) Cf. Kwack & Kim, *supra* note 4, at 109.

6) *See* e.g. the decision handed down by the Supreme Court [S. Ct.], 2008Da58367, Jan. 15, 2009 (S. Kor.).

7) As pointed by Cheolung Je, *Some Theoretical and Practical Issues arising from Preparation Work for the Implementation of the new adult guardianship system* (in Korean), 27-1 *Gajokbeopyeongu* [Korean Journal of Family Law], 32 (2013).

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for a person who took up a loan from a bank and as a security created a mortgage on his land.[8]Whether the Court judged correctly in that case cannot be examined here, as there is now no access to the submitted evidences. The result would probably be justified. The Court's argument is, however, worrying. It seemingly takes into consideration only the fact that the claimant suffered a developmental disorder with his IQ amounting to 73 and had no formal education and could neither read nor write. This inference does not sufficiently address an insight into forensic psychiatry: Born or early-onset deficits of intelligence are less serious than comparable secondary impairments of intelligence (e.g. by dementia) so that for oligophrenic people, the capacity to form an intent could normally be called into question when their IQ is below 60.[9] Should the Supreme Court have not paid more attention to the question whether such an intelligence deficit had caused impediments to forming a proper intent with regard to the disputed contracts?

### *2. Meaning of "Normal Cognitive and Predictive Ability"*

The interpretation focusing on cognitive abilities in fact equates them with the ability to form a legally relevant intent. Namely, reasonably judging the meaning and consequences of one's own act is regarded as possible only when it is based on one's "normal cognitive and predictive ability." So, the explanation goes, those who do not have "normal cognitive and predictive ability" cannot understand their act's ordinary meaning and consequences so that there is no room for any proper intent.

But this traditional test is still extremely vague,[10] as it does not say what it means by the word "normal." Which group of people are "normal" in view of "cognitive and predictive ability"? One neither receives the answer

8) Cf. Supreme Court [S. Ct.], 2001DA10113, Oct. 11, 2002 (S. Kor.). For a more detailed case analysis see Joon Hyun Lee, *Juridical acts by persons incapable of forming an intent* (in Korean), 404 Ingwongwa Jeongui [Human Rights and Justice], 98 sqq. (2010).

9) Clemens Cording, *Die Begutachtung der 'freien Willensbestimmung' im deutschen Zivilrecht* in Müller/Hajak hrsg., Willensbestimmung Zwischen Recht und Psychiatrie, 45 (Berline: Springer 2005).

10) Cf. Jeung Han Kim & Hak Dong Kim, Minbeopchongchik [Civil Code: General Part] 120 (10th ed., Seoul: Pakyoungsa 2013).

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nor, as I suspect, would not ever. Problem, in my opinion, results from not fully considering the fact that the legal concept of capacity is an indispensable prerequisite to any valid juridical act. Its main concern is, therefore, not to concentrate on a kind of *normal standard* (cf. e.g. duty of care), but, vis-à-vis a certain person, a search for a *concrete minimum* of mental capacity beyond which private autonomy should prevail. That's why "normal cognitive and predictive ability" cannot be decisive at all, no matter what one might mean by the word "normal." The concept of capacity to form an intent should rather ask whether a concrete person, in view of private autonomy, was volitionally active by his or her statements or conducts in a certain situation. Therefore, it must be *ex post* examined what a person could actually have understood and whether he or she could have formed a legally proper intent based on so perceived facts and situations. There is hardly any place for other "ordinary" people with "normal" cognitive abilities. The individual judgement of capacity, as doctrine and case law always demand, is meaningfully possible only in this way. The result would otherwise depend upon the qualities the court (arbitrarily) ascribes to "ordinary" people as "normal."

As seen above, the Civil Code explicitly presupposes that it is quite possible for an adult under full guardianship to be capable of forming a legally proper intent (art. 1063 I). It is pointless here to investigate whether such an adult, making a last will, had "normal cognitive and predictive ability," which nobody could persuasively explain on legal basis. One should rather examine whether the adult showed volitional activities which deserve to be respected as autonomy. To cite a German case, a person who, suffering schizophrenia, had hallucinations of refugees and gypsies threatening her life in her own house, was deemed capable of making a gift to her niece by a last will.[11] Thus it is possible that, despite her mental disturbances, she can intend to make a testamentary gift, at least knowing its main legal effect of gratuitous transfer and the niece's identity. Whether her mental abilities amount to "normal" standards plays no role at all.

11) BayOLG ZEV 2002, 234, 235.

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### *3. Protection or Exclusion?*

It becomes obvious that the approach which only focuses on the cognitive factors risks neglecting the policy of the legal concept of "capacity to form an intent." Its aim is to protect mentally vulnerable people who, suffering from mental disorders, are subject to heteronomy. This protection is only meaningful when such cognitive dysfunctions are the main cause of heteronomy, i.e. in cases where such people are, just because of their cognitive disabilities or dementia, (mis)led to legally want something completely different from what they would otherwise have wanted. Weakened cognitive abilities alone do not signify disturbed self-determination. It is therefore necessary to integrate volitional elements into the concept of capacity and identify them in concrete cases. Otherwise, judging capacity only from a cognitive perspective, not least defined by nobody-knows-normal-qualities, would possibly build a legal barrier which abstractly prevents people with cognitive impediments from participating in legal transactions. The result would be exclusion, not protection.[12)]

## III. A New Approach Suggested

### *1. Volitional Elements Redeemed*

As it becomes evident above, the cognitive capabilities may not easily be equated with the capability to form an intent. Rather, the capacity is composed of cognitive as well as volitional elements. The former is (just) a precondition for the latter as, say, an informational basis, since a volitional decision by nature refers to perceived facts and situations. It is therefore true that there are cases where severe cognitive disturbances alone disable to form an intent. It is, however, not always the case. A person can be legally capable if his or her cognitive impediments in concrete have no

12) Cf. Andreas Thier, *Entmündigung, Betreuung und Handlungsfähigkeit: Rechtshistorische Perspektiven* in Schmoeckel hrsg., Demenz und Recht, 75-76 (Baden-Baden: Nomos 2010).

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material influence on forming a legally proper intent. It is enough that the remaining cognitive abilities, although weak, enable the person to form a proper intent which deserves the name of autonomy (see, again, art. 1063 I of the Korean Civil Code). In this context it should be warned about the danger that the courts, allegedly by judging capacity, might invalidate contracts concluded by mentally vulnerable people in view of reasonableness.[13] The capacity is to be denied, therefore, only when cognitive disturbances interfere with forming an intent to such a degree that it is impossible to speak of a self-determination. It means that the causal link between cognitive and volitional elements has to be concretely proved in order to reject the capacity. To use a phrase from the Dutch Civil Code, a declaration of intent was "made under influence of a mental disturbances" (art. 3:34 I).

### 2. *Volition Disturbed*

To identify the volitional dysfunctions, it helps to know their manifestations which occur in reality. But how such disturbances appear is already well described by the Civil Code itself in its rules on declaration of intent. It could be that a person is unconscious of acting itself,[14] misunderstands own act's meaning, cannot express the intent correctly, or the intent is formed based on a decisive but mistaken motive (artt. 109, 110). The capacity to form an intent may be therefore denied when these incidents are mainly caused by the cognitive impediments of the concerned person. There is of course a difference between two forms of intentional defects. With mistake or fraud, the defects in intent are brought about by people related to legal transactions and could normally have been

13) It should be noted that one can in daily life observe countless cases in which "ordinary" people conclude contracts, while not fully understanding its social context and economic consequences – albeit not by lacking, but by not exercising their "normal" cognitive abilities. Why are there otherwise many rules concerning consumer protection? Their contracts are nevertheless treated completely valid. Contracts bind only because their effects are intended by the parties, regardless of whose subjective ideas and expectations (cf. Hein Kötz, European Contract Law 159-160 (2nd ed., Oxford: Oxford University Press 2017)). The same is true of people whose cognitive capabilities are weakened. See also Their, *supra* note 12, at 76.

14) Cf. Kwack & Kim, *supra* note 4, at 257, 258.

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prevented by themselves. With lacking capacity, the flawed intent is caused by normally inescapable mental illness; its correction is usually not to be expected. Despite this difference, both forms of intentional defects share the fact that forming a proper intent was interfered with. Private autonomy is harmed in any case. In the latter, the harm is of course more serious, so the more serious effect follows – i.e. null and void.

From this point of view,[15] a patient suffering a severe disorder of consciousness would be generally be denied the capacity to form an intent, because there would be hardly an awareness of his or her acting. The same is true of people who, due to attention deficit or memory impairment, are not able to identify situations or persons related to their legal transactions: They are so to speak in a constant mistake about the meaning of their intent. It is not different for those who are not able to express their intents correctly owing to their impaired language ability. With the intelligence deficit resulting from developmental disorders, however, a more cautious approach is advisable for the reason already mentioned (see above II. 1.). Likewise, the validity of a contract may not be called into question on the mere ground that a party has a mental illness causing hallucinations or delusions. Rather, one must ask whether such symptoms seriously influenced his or her motives. The capacity can be dismissed only if the party would reasonably not have concluded the contract without the morbid hallucinations or delusions: One may not reject every daily purchase or housing rent made by a person who suffers from paranoiac delusions.[16]

## III. Conclusion

Till now, the traditional approach which only focuses on cognitive abilities has been criticized and a volitional approach is submitted that the

15) *See* Cording, *supra* note 9, 45-47. Cf. in more detail Cording/Nedopil hrsg., Psychiatrische Begutachtungen im Zivilrecht, 44 sqq. (3. Aufl., Lengerich: Pabst 2017).

16) Cf. the German case on will, supra note 11 in comparison with BayOLGZ 2004, 237 and Kostic v Chaplin [2007] EWHC (Ch) 2920 (Eng.), in which the testators' motives were decisively influenced by delusion.

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capacity should be dismissed only when a legally relevant intent is compromised under cognitive disturbances. In many cases, the test suggested here might possibly lead to the same results as the courts have decided so far. However, in my opinion, its explanation seems to be more logically consistent with the Civil Code's principle of private autonomy and the policy of the concept "capacity to form an intent" than the now dominant view. Furthermore, it is expected to provide the court with more concrete criteria to handle. It is hoped that a lively discussion will take place among lawyers interested in this important theme.

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