Relationship between the Legislature and the Judiciary

Contributions to the 6th Seoul-Freiburg Law Faculties Symposium
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Nomos
Preface

This volume is a collection of edited papers presented at the occasion of the 6th Seoul-Freiburg Law Faculties Symposium held in Freiburg in June 2016. Since its inception in 1996, the cooperation and academic exchange between the Law Faculties of the Seoul National University (SNU) and the Albert-Ludwigs-Universität Freiburg has flourished and substantially contributed to the mutual understanding of legal thinking and research in the two legal cultures and jurisdictions, keeping alive an old and precious tradition of close relationship between Korean and German law. Like prior Symposia, the 2016 Symposium on the "Relationship between the Legislature and the Judiciary" was devoted to a rather broad and abstract subject of fundamental relevance for both countries covering Constitutional Law, Legal Theory, Private Law, Criminal Law, Commercial law, and Administrative law.

We are very much indebted to all participants from both Faculties and all contributors to the various discussions that developed after the presentation of the papers and along the program of the Symposium. Likewise, we would like to express our gratitude to the Publisher for substantial support in the publication of this volume. Last but not least, our thanks go to Fritz Thyssen Foundation, Cologne for generously sponsoring the symposium and its preparation as well as the publication of this volume.

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Of Judicial Justice

Prof. Dr. Un Jong Pak, Seoul National University

Generally in Korea there is more mention of judicial justice or judicial reform rather than legislative justice or legislative reform. What’s the reason behind this? Is it because people are largely disappointed with parliamentary politics, but still have hope towards the judiciary? What is the most certain is that, for ordinary people, the last figure of ‘the rule of law’ is engraved on ‘the rule of judgment’.

In most countries people find the statue of justice inside the courthouses. And for example, at the entrance to the grand courtroom of the Supreme Court in Korea, one finds standing the statue of justice. Beautiful, poised, it represents equality and rationality. But one can also find other statues of Justice outside the courts, the Statue of Justice, expressed tragically, featured as a wounded, bandaged goddess. For example, <Der Henker und die Gerechtigkeit> is a piece by the German artist John Heartfield in 1933, who was prohibited from working on his art and sentenced to exile by the Nazis. This piece was re-enrolled in the list of his artwork in 2012 thereby collecting quite a lot of attention. <Survival of the Fattest> by Danish sculptor Jens Galschiot is a sculpture depicting a quite obese lady justice sitting on top of a famished third world male’s shoulder. It was exhibited in the 2009 Climate Change Summit in Copenhagen. Another piece by Htein Lin, an installation artist from Myanmar in 2010 is called the <Scale of Justice>. The artist is looking at many thousands of hands reaching out, as if begging for justice. In Gustav Klimt’s famous painting <Jurisprudentia> the Goddess of Justice is drawn as a small picture in the upper part, easily missed by the naked eye. His painting of early 20th century seems to show the marginalization of the question of justice during the era of positivism. Actually, the history of marginalization of the question of justice goes far back to almost the last centuries. That history is in line with the flow that starts from the foundation of jurisprudence termed ‘natural law’, and then being re-named ‘legal philosophy’, and then as ‘legal theory’.
The Gap between the Theories of Justice and Judicial Practice

There exists the distance between the theories of justice and the judicial practice as there is the distance between the statue of justice inside the courtroom and outside. How are the theories of justice of great thinkers associated with the judicial institution? In other words, how do these theories contribute to judicial practice? What I find problematic is the gap between the theories of justice and judicial practice. For example the concept of “the veil of ignorance” in Rawls’s theory of justice puzzles me. In deriving the two principles of justice, Rawls uses this conceptual tool whilst conducting a procedural/formalistic thought experiment. In doing so, he suggests hiding all the conflictual situations surrounding various interests, rights and roles in real life, pretending they are unknown, and by going back to the “original position” he tries to draw out the principles of justice that everyone can agree upon. However, a situation of injustice, a situation in which justice is demanded is actually a situation of a conflict of various interests and rights. In such a situation people tend to expect a higher instance that can make a decision amidst the various conflicting interests. This is the idea of justice that is usually seen from an institutional perspective. And the institution that fits this idea is the judicial one.

Hence in a situation which demands justice, those things that Rawls covered up with his “veil of ignorance” inevitably rise to the surface. This is the reason why I found difficulty in connecting the procedural/formalistic conception of justice to the judicial institution. In front of the judges is an actual situation where the “veil of ignorance” has been removed. In this situation the judicial instance is asked to make a right and acceptable decision, and by applying the rules and procedures, according to the principle of justice “giving each his due” by treating the relevant parties in relation to their due differently. And in doing so, to treat unlike cases differently, among many different things some different thing must be taken into more account than others. This cannot be done wearing the “veil of ignorance”.

Through this essay approaching from the position of trying to bridge the gap between the theory of justice and the judicial institution, I will explain the dilemma intrinsic in the idea of justice, and point out that this dilemma is inevitable because we cannot completely rule out the question of ‘the good(value)’ in the question of justice. Based on this I will explain the problem of judicial justice from three points of view: The institutional point of view, the discursive point of view, and the judge’s subjective point of view. From the institutional perspective, while looking at the rela-
The moment of tension that arises from the good and the right is also reflected in the most principles of justice. From Aristotle to Rawls, the principle of justice has a dual structure, that is, not singularly but as a pair: Like should be treated alike and unlike should be treated differently, numerical equality and proportional equality, first principle of justice and second principle of justice. This dual structure inescapably arises from the tension between what is right and what is good. For example, numerical equality is the concept of justice which states that ‘like should be treated alike’. The history of legal justice is also the history of the expansion of numerical equality. Suffrage, personal liberty, freedom of expression
etc…… For the realization of this idea in ancient times public services were even taken in turn by everyone. However to treat everything as the same, the utility of the society would decline. Therefore the request for ‘unlike should be treated differently’ could not help but arise. This is proportional equality. ‘Unlike should be treated unlike’ means that it should be treated differently according to ‘something’. This ‘something’ is what fills the content of when ‘something’ is treated differently. ‘Unlike should be treated differently’ means that a certain conception of equality is selected to be followed. In other words, out of many different things some different thing is taken more into account than others. This is the very problem of ‘the good’ or value. Unlike numerical rules in proportional rules a connecting link to ‘the good’ exists. However, when we take into account the good, we cannot avoid uncertainty regarding what is good or valuable. Aristotle tried to resolve this difficulty by approaching it with the Golden Mean Philosophy. That is to say, one should avoid both too much and too little. Anyhow, Aristotle maintains the justice in connection with the good.

When we maintain a link between the idea of justice and the good, some uncertainty arises. In order to remove this uncertainty, we must follow the complete proceduralism or pure formalism. If we do this, justice then becomes a question of ‘the right’ disconnected from the question of ‘the good’. However the complete proceduralism or pure formalism brings criticism. Firstly, the complete proceduralism is unrealistic. In Kafka’s novel <Prozess> – the title is procedure! – is about how unrealistic proceduralism is, and the inhumaness resulting from it. When a judge interprets legislative provisions, undoubtedly the method of teleological interpretation is applied. And there are several legal concepts that allow the judges to have some space for making value judgment. For example, indeterminate concepts, normative concepts, discretion, general clause. Secondly, the complete proceduralism boils down to legal positivism. For example, according to the categorical imperative Kant’s, one should “act only in accordance with that maxim through which you can at the same time will that it become a universal law.” However rules that can be derived from this kind of abstract categorical imperative are but a few. Therefore the many detailed rules that infer duty in the real world cannot be but made by lawmakers. And it is here that “the radical change” from tran-
scentualism to legal positivism occurs. Secondly, complete proceduralism cannot properly explain the institutional practice. For example within the judicial procedure itself, undoubtedly the method of teleological interpretation is applied when the courts interpret legislative provisions in the light of purpose, values, social and economic goals these provisions aim to achieve. And within laws itself there are several concepts that allow the judges to have some space for making judgment. For example, indeterminate concepts, normative concepts, discretion, general clause…… ‘noise’, ‘dangerous objects’ etc. are some examples of legal concepts that have connotations to certain meanings and its exterior meaning is unclear. Normative concepts also allow the judge to have some space for making judgment. ‘Obscene’, ‘dishonorable’ etc. are concepts which, in comparison to concepts that can be perceived easily, are only grasped when making a judgment based on evaluation and are hence normative. Discretion also allows a certain amount of judgment. And furthermore, ‘general clause’, as the expression itself tells, holds a high amount of generality, and allows the judge to apply the case before him/her to the broad scope of other cases to make the legal effect stick. In such a way these concepts allow the judge to make decisions based on value judgments. The judge also sometimes faces situations where he/she is expected to supplement ‘flaws’ in the law or make revisions in ‘errors’ that are sometimes found in the legal order. ‘The general principle of law’, ‘the spirit of the law’, ‘the average person criteria’, ‘interest-balancing’ etc. are devices of thought that the judge depends on, and when using these devices value judgment is inevitable. This manner of applying the uncertain concept, normative concept, discretion, the general clause, allows the judge to have some space for making judgment, and this judgment is impossible without reference to ‘the good’.

This problem is apparent especially in hard cases. In hard cases the judge is caught between the requirements of the general rules and the requirements of the circumstances. They are required to find a path in such a contradictory situation. That is to say, the commodities considered on neutral terms in the general rules now need to be considered in terms of the

meaning(value) they hold for a particular person or particular stakeholder. In this way the abstract procedural justice diagram no longer is maintained.

In the end the pure proceduralism is not compatible with judicial justice. The conception of justice that fits the judicial institution should be that which stays within the confines of proceduralism, yet at the same time avoids the extremes that can result from it. And it is inevitable that judicial justice, because of its link to the good, holds room for dilemma(uncertainty). We cannot avoid carrying this burden with us.

Division of Justice

From the institutional level, this burden can be dispersed through the division of labor. In other words, the division of justice is possible. This division of justice can be achieved in three instances: legislature, judiciary, civil society. On the very top is the stable instance(legislature) which lays down the content of the big values and its ranking, on the very bottom is the dynamic instance(civil society) in which appraisals are being constantly made concerning the contents and meanings(values) for particular persons or portions. And between these instances there is as procedural instance the judiciary. In this instance, on the relatively independent stage acquired from the political body above and through the mediation of civic dynamism from below, the required condition for realizing procedural justice is qualified.

When the representative democracy is working somewhat successfully and the civil society is healthy, the procedural instance can be a catalyst for the development of democracy and dynamism of society. In Korea during the last two decades or more, the success in upholding rights through the judiciary was due to a continual discussion and participation of civil society. The increase of civil activist groups since the 1990s was apparent in diverse fields such as human rights, consumer rights, gender equality, eradication of corruption, environmental movement, and in all these fields they make the best use of laws to further their actions, with assistance of many pro bono lawyers. 3 Their actions to fight for and uphold rights

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through judiciary captured the public sentiment, and afterwards there formed a consensus that there is need for legislation; thereby many of the proposed legislations prepared passionately by NGOs became reality. Therefore in Korea, the elevation of the status of judiciary was of course in part due to the efforts of the judiciary themselves; but more than anything else, the urging of the NGOs played a role, which surely needs to be acknowledged. In short, the participation of the civil society, as the demonstrations of the energy exuded by democratic autonomy by civil societies continually re-oriented judicialization, urging it towards a more mature social goal.

In the pages afore, I argued that the judiciary as a procedural instance would work properly if it is faithful to the division of justice. Let me apply this argument to the case of the constitutional trial. Judicial Review is spreading worldwide with the growing catalogues of fundamental rights in the constitution. Constitutional trials are active in Korea as much as it is in Germany. Supra-positive values being written down in the fundamental rights under the constitution are no more declarations of programmatic creeds but work as directly effective laws.

When introducing supra-positive values, i.e. fundamental rights into constitution itself, the application of the constitution becomes in itself an act of realizing values. And the interpretation of the constitution becomes a problem of balancing values. The articles of fundamental rights in its form are positive law but by content rooted in a highly mental and social movement. That is, the content of the constitution is filled by the mental and social movement outside of the positive law, and they receive vitality from it. Therefore to apply the constitutional provision debate is essential in the balancing of values. This is the reason why securing a free space for public opinion, sensus communis becomes a premise for successful constitutional trials.

The constitutional problem is not just a problem of the legal but a ‘political-legal problem’. The constitution is basically a structure embodying autonomy of the political process. Therefore although the constitutional trials are held under the legal framework, the insights gained outside the positivism are surely essential. This is the reason why securing a free space for public opinion, sensus communis becomes a premise for successful constitutional trials.

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4 On this see Un Jong Pak, ed., *NGOs and the Rule of Law* (in Korean), PAKYOUNGSA, 2006, Chapter 4.
problem is a legal problem at the same time to resolve this problem, it needs to be backed by the people’s authority. The act of conducting the constitutional trial is an act which combines rule of law and democracy. The political-legal nature of the constitution does not only include the constituent power but also the interpretation and implementation of the constitution. In constitutional politics, the view that confines the participation and role of the people to just the constituent power and states that the interpretation and application of the constitution is a non-political field dominated by legal experts is against the spirit of the constitution. In ordinary courts, there is governmental authority which can forcefully execute their decisions. But in constitutional court, there is no such authority which can enforce its decisions. There is nothing else but for judges of constitutional court to assume that their decisions are respected as being self-evidentiary, there is no other alternative but to depend upon trust. This is the reason why failure of judicial justice can be more dangerous than the failure of legislative justice in the democratic society.

The judges of the lower courts cannot help but cast a furtive glance towards the upper court. This is because it is the judges of the upper courts who can overthrow their decisions. The relationship between the judges of the lower court and the judges of the upper court is in some aspects akin to the relationship between the Supreme Court and the people. In this case the judge’s superior is the people. The judges of the constitutional court, when interpreting the constitution, must study the reaction of the people as they can overturn their decisions.

There is no doubt that in constitutional issues, legislation, administration, judiciary are all subordinated to the national sovereignty, and not one can assert a higher position. Therefore even if the authority to judge whether some laws are unconstitutional or not lies in the constitutional court, this should not be understood that the judiciary has superiority in interpreting the constitution. Rather, once superiority is emphasized, the problem of ‘imperial judiciary’, ‘political judiciary’ arises. Once laws are established by the legislative body, it is the people who grant the judiciary the authority to interpret it. In other words it is the people who have employed the two divisions, the legislative body and judicial body, in order to reveal what the constitution ultimately means, and to make sure all efforts are put towards protection of the rights of the peoples. Therefore one body is in charge of making (i.e. legislating) and the other in charge of interpret-
ing, and by making both continually intervene in the workings of all other divisions, it is making them “compete for loyalty towards the people”.7

In the name of democracy there is in some sense room for judiciary to reconstruct social practices. But the decision-making to protect the interests and rights of the many is still the responsibility of legislature. It is the role of the judiciary to make ‘small reforms’ through additional ‘Rechtsfortbildung’. But if one is to depend upon judicial justice as an alternative to political failure, this is indeed ominous. This is because monopoly of the justice is as dangerous as monopoly of truth. In terms of reform legislative justice is a ‘large justice’ while judicial justice is a ‘small justice’.

It seems to be the general tendency that the idea the job of judge requires creativity. The adjective ‘great’ was until now for legislators, but if the “crown of the creator” could be placed on judges, this adjective would now be reserved for the judge. The increasing speed of social change, the explosive amount of legislations being made, changes in the style of legislation are influencing the legal binding mechanism of judges in a way that is alleviating it. Especially during the past few decades there was expansion of the scope of legislation such as in social welfare, livelihood promotion of health, gender equality, protection of teenagers, protection of the disabled, affirmative action etc. Such ambitious legislation style makes the judge consider what would be desirable policy to implement. This introduces a new interpretive method. In this way, it is moving away from the interpretation in the narrow sense and more towards the direction of formative and creative.8 This tendency can be explained sometimes as the prevailing tendency of ‘judge made law’. Ever since the “Free Law Movement” in the early 20th century that opposes legislative positivism, the view that no laws can fully rule out the creative aspect vested by the judge is prevalent and generalized. The contention that the job of the judge is a creative one should be understood as not “surpassing the boundaries outlined by the law” but “overcoming the knowledge and methods that one is already aware of”.9

If we go as far as to the stage where the laws are not guiding interpretation but the interpretation guiding the laws, the law goes to a “gray area”. And the question of balance of power between the legislative body and

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7 Ibid., p.59.
8 On the roles of the judge due to the social changes, see Un Jong Pak, Why Rule of Law (in Korean), Dolbegae, 2010, Chapter 6.
9 Youngran Kim, Rethink the Judgements (in Korean), Changbi, 2015, p. 295.
law-applying body arises again. This balance of power is in peril, considering the fact that it is mediated solely by individual judges. If the assertion of ‘judge made law’ means that the judge can independently supplement deficiencies in the law and by doing so the law can be perfect, this would surely damage that principle of the division of justice. Even if it can be supplemented by ‘judge made law’, the positive law will never be perfect. The positive law does need to pass the process of declaration and formation through the act of judges, but it does not mean that law itself is translated directly into justice just because it undergoes ‘judge made law’.

In the legal system of Germany and Korea, it cannot be denied that the term ‘judge made law’ creates unnecessary dispute over the problem of that gray area. Professor Matthias Jestaedt tries to use this term (‘Richterrecht’) to describe all legal activities (Spruchtaetigkeit) of the judges from the stance that law is produced and declared individually and specifically. In this way the ‘judge made law’ is not used as a term to describe an exceptional function to supplement or revise the deficiency in laws, but rather as an attribute of law-producing through the normal activities of judging.\(^\text{10}\) If this is so, since the term ‘case law’ already exists, there seems to be no need to continue using the term ‘judge made law’. This term is suspicious of violating the division of justice.

*Justice as a Communicative Procedure*

In judicial procedures the ‘procedure’ is not a formal and unrealistic procedure but a procedure where the laws, courts, litigants, judgment, governmental authorities rule together. The judicial procedure in itself is a long discursive procedure. The sentencing of the judge is not a mark of monopoly of power but a declaration of the close of a discursive procedure. In a situation where fists are ahead, conversation is impossible. The introduction of a judicial procedure means codifying the ‘distancing’ that allows for conversation. The judge leads the “disciplined discussion” through “proper distancing”. Distancing here does not mean indiscriminate distancing. The judge is a person who exercise his “reflective judg-

ment” on someone else’s affairs as an ‘observer’ while at the same time as an ‘actor’ deciding on a legal effect through his judgment (H. Arendt). Therefore distancing cannot be indiscriminate. The ‘proper’ distancing can differ in content according to the legal fields it is applied to.

If judgments are made solely based on evidence, we don’t need to concern ourselves with discourses. However, it is impossible to reply solely on evidence. All legal assertions of the truth serve the principle of assumption. That is, until there is counterevidence, we can only provisionally assert that something is valid and if the situation changes, that assertion can change. Therefore in the court, evidence is importance but also rhetoric is important. The Civil Procedure Act is primary examples of the rules of conversation. According to the relevant legal field, the evidence can be considered more important (for example, in criminal cases) and sometimes rhetoric is more important (such as civil cases). However, what really decides the quality of the judgment is the rhetoric combined with evidence. Rhetoric has risk elements. Rhetoric is that which tries to convince without evidence, and also in principle rhetoric can go on continually. The rule of division of the burden of proof is another rule which terminates the rhetoric. In an ordinary conversation, it is possible to say I don’t know, but the judge cannot say this and so while under the rule of division of the burden of proof, the conversation can successfully come to an end. If the quality of the judgment depends on the quality of the discussion, the fundamental justice is conducting the better conversation. A long conversation or discussion can lead to universality. There is nothing that was universal from the beginning.

The judge, in hard cases, is simultaneously requested to abide the general rules and to consider the special circumstances. This situation is a process of pushing through conflicts that arise from applying the rule of justice itself. From yonder, the wisdom used in this process was ‘equity’. Equity is another expression for the sense of justice. A judge with a sense of justice is one who is skilled at communication. This is because equity, that is ‘phronesis’, is not an individual wisdom but the wisdom of many combined. If the judiciary encourages more discussion-orientated culture internally, and opens itself up to the outside world such as academia’s discussion and criticism, a much more fair judgment, and more favorable interpretative community can be made.
Several years ago I happened to run into professor Johann Braun’s book on legal philosophy, and I was pleasantly surprised. Not only was his legal philosophical perspective familiar to me, but several metaphors he used were in line with those I used to teach in my classes. One of them was comparing justice to a vanishing point (‘Fluchtpunkt’). I would like to introduce this metaphor first before moving on to discuss my idea.

In the picture drawn in perspective, we can find the vanishing point. When we look with our eyes, the two parallel lines run far out into the distance and meet at a certain point, this is the vanishing point. This is the dead-end, in other words when we project the real world onto our eyes it is the image that forms at the very edge of our vision. The judge’s objective to achieve judicial justice through legal decision-making can be seen as a vanishing point of justice. The vanishing point always changes depending on the position the gazer stands at. At the same time, from the viewpoint that it allows for recognition of the direction I am going towards, it is always unchanging. Never is it a starting point of cognition we can be sure of with certainty. But to know and have accepted that the legal decision made is right, we always need to be moving in this direction. If this vanishing point did not exist, he/she would lose direction. If the vanishing point of justice disappears, he/she would focus on an entirely different point, such as the power or what the majority wants…

The vanishing point can be contrasted with the Archimedean point. The Archimedean point forms the most definite starting point of cognition. They say that Archimedes said the following: Tell me the spot where I can lift up the Earth. And give me a large lever. Then I will lift up the Earth. The Archimedean point is a hypothetical point where the researcher is able to perceive the subject of research in a general and objective manner. In addressing the question of justice, Hans Kelsen meant that justice was such a hypothetical point, viz., the absolute justice. This conception of justice creates an illusion that the demands of justice in society can be blocked and free from the academic and practical application of the law by lawyers.

The justice as the vanishing point shows a direction in which the judge should always go forward in the real world. I believe that justice as a vanishing point can be linked to the problem of the ‘Right Answer Thesis’. The judge is unable to assert that his/her interpretation of the law is the absolute truth forevermore, but still he/she cannot help the pursuit of the truth – the right answer. The model which can justify the decision of the judge is the truth model. 12 In today’s world where we explain the law as a language of democracy, it is impossible to justify the authority model. Especially from the perspective of the civilians who abide the law, they can demand for the reason they were sentenced guilty directly to the secular judge who made that decision, and they make this demand as a matter of course. In relation to this, Ronald Dworkin asserts that one best or correct interpretation exists in legal judgments. 13 This argument, well known as the Right Answer Thesis, as many scholars have already pointed out, should not be understood as an assertion on the existence of an right answer, but rather should be understood as a ‘regulatory idea’. That is, Dworkin’s Right Answer Thesis is not an ontological study on that there exist a right answer, but rather a conception that matches the judge’s subjective attitude in practice. The judge should use all methods available at hand, have the belief that there is only one decision for each case which can be justified and must do everything to try and reach that answer. The assertion that a decision should be made based on the best reasoning available under the premise that there is no right answer is self-contradictory. The metaphor of vanishing point best reflects the judges’ belief that there is a right answer which they must try to reach in their practice.

The Constitution Conformant Interpretation – Norm Compatibilisation Through Harmonisation by Way of Interpretation

Matthias Jestaedt

I. An Instrument of Constitutionalisation

The supranationalisation of the national legal order on the one and its constitutionalisation on the other hand possibly mark the two most important realignments of the German legal order after World War II. The latter is characterised by an altered legal role of the constitution whose main promoter is the Federal Constitutional Court (hereinafter FCC). In contrast with the Weimar Constitution, the Basic Law binds all state authority unequivocally; constitutional law becomes “hard” law that is triable and actionable in a court; constitutional norms potentially work in any legal relationship; and constitutional law is to principle superior to all national law by virtue of its primacy; this primacy is guaranteed by a constitutional jurisdiction that is equipped with comprehensive competences also vis-à-vis the ordinary jurisdiction and exercises its powers vigorously.

Constitutionalisation can be spoken of in a formal and in a substantial sense: In its first, formal variant, constitutionalisation is characterised by the augmentation of law of constitutional rank – either through constitutional amendments or through expanding constitutional interpretation. In its second, substantial variant, constitutionalisation is characterised by an increased orientation of other law on the constitution; here, the constitution is thus not the object of the alteration, but is rather its standard or catalyst. Substantial constitutionalisation takes place by means of a constitution-induced alteration of the law itself, of the law’s interpretation or of its application. The so-called constitution conformant interpretation (verfassungskonforme Auslegung) is probably the most important variation of substantial constitutionalisation in both qualitative and quantitative terms, perceiving itself as an interpretive constitutional synchronisation of statutory law.
II. The Concept of Constitution Conformant Interpretation

The FCC has developed the concept of constitution conformant interpretation already very early, namely in a 1953 decision published in the second volume of the official collection.1 Since then, the Court has bestowed some nuances upon it while leaving the main features unchanged. Let us first take a brief look at the derivation, the premises and the mode of action of the constitution conformant interpretation:

1. Derivation, Premises and Mode of Action

“The concept of statutory constitution conformant interpretation requires [every judge] to give priority, amongst several possible interpretations of a norm some of which lead to an unconstitutional result whereas others lead to a result that is compatible with the constitution, to the one in accordance with the Basic Law”.2 Three interrelated aspects are mentioned in support of this concept, namely (1) the principle of maximal norm preservation inherent in any hierarchically structured legal order, (2) the postulate of inner consistency of the legal order and (3) the principle of relieving the legislature if possible. In this reading, the constitution conformant interpretation secures the primacy of the constitution while simultaneously relieving a legislature that would otherwise see its provision annulled by the FCC.

2. Limits

“On principle, the limits of a constitution conformant interpretation [as formulated by the First Senate in a 2014 decision] result from a correct use of the recognised methods of interpretation [...]. A norm may only be declared unconstitutional, if no interpretation is possible that is both permissible according to the recognised principles of interpretation and compatible with the constitution. If the wording, the genesis and the overall context of the provision in question as well as its object and purpose allow for

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1 Cf. BVerfGE [= official collection of the FCC’s decisions] 2 [= volume], 266 et seq. [= page] [1953].
2 BVerfGE 32, 373 (383 s.) [1972].
several interpretations, one of which leads to a constitutional result, this one is required [...]. The possibility of a constitution conformant interpretation meets its limits, however, where it conflicts with the wording or the clear intent of the legislature [...]. Otherwise, the courts could anticipate or circumvent the political decision of a democratically legitimised legislature [...]. Thus, the result of a constitution conformant interpretation must not only be covered by the law’s wording, but also respect the legislature’s general objective [...]. The legislature’s intent must not be missed or distorted in an essential aspect [...].”

III. A Legal Key Concept

Today, the constitution conformant interpretation is practiced just as frequently as quietly by the FCC as well as – which is remarkable – all levels and in all branches of the judiciary. It is, from the point of view of legal scholarship, part of the “canon of acknowledged methods”. There is hardly any categorical opposition; at most, the application of the constitution conformant interpretation in a concrete case is criticised sporadically.

The triumph of the constitution conformant interpretation is flanked and supported by the two other important varieties of conformant interpretation, namely the interpretation of all member state law in conformity with European directives (or more generally: in conformity with EU law) on the one hand, and the interpretation of all national statutory and constitutional law in conformity with public international law, particularly with the European Convention of Human Rights, on the other hand. The first alternative aims at establishing the national law’s conformity with supranational, that is EU law, the second alternative aims at establishing the national law’s conformity with public international law. They will not be considered in detail hereafter, but should be kept in mind.

The constitution conformant interpretation is nothing less than a key concept in understanding the law. With its recognition, important preliminary decisions are made with regard to a whole range of fundamental relationships. To name only the five most important ones: In following the concept of constitution conformant interpretation put forth by the FCC, one positions oneself in a specific way concerning the relationship

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3 BVerfGE 138, 64 (93 s. para. 86) [2014].
IV. Four Questions regarding the Constitution Conformant Interpretation

I intend to question the concept of constitution conformant interpretation in four ways. The questions aim at

(1) whether the constitution conformant interpretation can accurately be characterised as interpretation,

(2) whether the limits constitutive for the concept fulfil their purpose,

(3) whether it can be derived from the primary of the constitution and is thus justified,

(4) and whether or rather how the effects of the constitution conformant interpretation can be reconciled with the requirements of positive (constitutional) law.

1. Is it Interpretation?

Let us begin with the question whether the constitution conformant interpretation is – as is suggested by the name and asserted by the justification – in fact a mere interpretation – nota bene not an interpretation of the constitution, but rather an interpretation of a law below the constitution, typically statute law, orienting itself towards the constitution.

The constitution conformant interpretation presupposes that firstly a norm can be interpreted in several ways according to the state of the art and that secondly at least one of these interpretations is unconstitutional while the other is compatible with the constitution. The legal consequence is that the interpretation excluding the unconstitutional variant is then to be chosen. Two methodological (sub)questions are linked with this reasoning, namely:
(a) How is a plurality of divergent as well as competing interpretations and contents of a norm to be conceived of?
(b) What does it mean to make a – negative, because excluding – choice between interpretations or contents of a norm?

a) Competing Contents of a Norm

On the practical level of interpretation the presence of competing contents of a norm is easily comprehensible: A legal provision can be construed in different and multiple ways, according to the method and topoi of interpretation given priority to in abstracto or in concreto. But the question remains, whether the variants of interpretation thus determined do in fact represent competing contents of the norm whose claims are incompatible with each other. I wish to put a triple question mark behind this reasoning:

Firstly, it seems to me that there are not several contents of a norm available for selection, but that there is a dispute over the “right” content of the norm. The first case would amount to the question, how many competing and incompatible contents of a norm the legislature can state with one norm’s text. The second case aims at the question, which of the possible interpretations can be attributed to the legislature as the one positivized by it.

Secondly, a preliminary decision favouring the interpretation calling itself objective is regularly connected with the assumption of competing (and incompatible) contents of a norm. This method’s core thesis is that a statute which is autonomous vis-à-vis the legislature can be wiser than the legislature itself. The so-called subjective-historical interpretation struggles with the notion that the legislature has simultaneously made two contradictory meanings the content of a norm. A whole range of problems is, however, linked with the so-called objective interpretation. Only the two difficulties relevant to the constitution conformant interpretation will be mentioned here: namely, on the one hand, that a convincing delineation from judicial law-making no longer succeeds – particularly as the “wording” of the norm is unable to fulfil the limiting function intended for it; and, on the other hand, that the division of labour of the law-making process is marginalised or even dissembled by the so-called objective interpretation. Those who follow the so-called subjective interpretation – that is: the content of a norm can only be what the historical norm-maker made it so – will, provided that one does not impute perplex behaviour to the
legislature, never see the requirements of the constitution conformant interpretation as being fulfilled. On this basis, the constitution conformant interpretation is reduced from a real legal presumption to a mere factual, because empirically refutable, presumption: In so far as no contrary indications are available, it is admissible to assume that the legislature enacted a norm that complies with the known constitutional requirements. But with this, it should be borne in mind, a considerable proportion of the cases subsumed by the FCC under the constitution conformant interpretation, cannot be covered. The constitution conformant interpretation is thus reduced to a minimum.

My third question mark behind this conception of competing contents of a norm is the following: The assumption of a plurality of contents of a norm poses the dual positive legal problem that the norm concerned is either perplex due to the contradictory commands or prohibitions or that it is unconstitutional and thus void for the lack of certainty and predictability for those subjected to the norm. It is unclear, how this alternative of Scylla and Charybdis can be avoided.

b) The Character of the Exclusion of Interpretation

Let us now turn to the second sub-question concerning the character of the exclusion of this legal interpretation – nota bene: carried out according to the state of the art – that is not in accordance with the constitution. In the cold light of day, this does not involve a question of the cognition of the law, but rather a question of the application and thus the production of law, which is not a question of cognition and methodology, but a question of authorisation and competence. For the constitution conformant interpretation is about – and this is also what is claimed – a positive legal decision guided by the constitution excluding certain contents of a norm from application. This has nothing to do with interpretation sensu stricto. We will have to return to this.

This much can already be said here: to say that this – the constitution conformant interpretation – is an “interpretation” is at the very least misleading. The main objection is, that no distinction is being made between two questions, namely the question “What did the legislature really want?” on the one hand and the question “What was the legislature allowed to want in light of the constitution?” on the other hand.
2. Do the Constraints Work?

Let us now turn to the second question concerning the limitations of the constitution conformant interpretation. These play a crucial role as a basis as well as a justification of the concept, since the constitution conformant interpretation aims at the conservation of the law as well as relieving the legislature. According to the FCC’s settled case law, the constitution conformant interpretation meets its limits, where it “would miss or distort the legislative objective […] in an essential aspect.” 4 In this case, the preservation of the law is said to turn into its deformation.

The most substantial objection insofar is: Quite frequently, the limits of the constitution conformant interpretation are not observed. The methodological demarcation oftentimes does not work in practice. Our faculty colleague, the President of the FCC, phrases the problem as follows:

„Against all other assertions through the courts, the methodological postulates of demarcation can hardly provide sufficient protection against a reshaping (Überformung) of the legislature’s creative intent (Gestaltungswille). Practice in fact shows that the constitution conformant interpretation is almost always the remoter interpretation that is often artificial and moves further away from the conception of all the parties involved.” 5

Two factors add to the undermining of the legislative intent: Firstly, according to the predominant view, the limits of the constitution conformant interpretation are not transgressed until the legislative intent is disregarded in a qualified, thus particularly drastic way; we need to conclude that simple disregard is therefore irrelevant. Secondly, the constitutional jurisprudence is putting considerable pressure on the ordinary courts to interpret laws in conformity with the Basic Law whenever possible. This becomes particularly clear in the case of the judicial referral according to Article 100 paragraph 1 Basic Law: a concrete review of statutes (konkrete Normenkontrolle) is only admissible, when the referring court has previously examined and eliminated the possibility of interpreting the norm considered unconstitutional in conformity with the Basic Law. Not a few ordinary courts prefer a permissive resort to the constitution conformant inter-

4 BVerfGE 138, 64 (93 s. para. 86) [2014].
pretation over a restrained one already in order to spare themselves the disgrace on an inadmissible judicial referral.

The first senate’s decision of January 27, 2015\(^6\) on a teacher’s Islamic headscarf is particularly suitable for a demonstration of how the FCC itself understands and applies the limits of a constitution conformant interpretation. The Senate interprets one legal provision in conformity with the Basic Law while discarding such an interpretation for another one: It affirms the possibility of an interpretation in conformity with the Basic Law regarding the question whether the prohibition concerned may be understood so as to require a sufficiently concrete danger to the religious and philosophical neutrality or the peace at school (Schulfrieden)\(^7\) while denying such a possibility regarding the question whether the provision privileging the display of Christian and occidental educational and cultural values could be interpreted so as to mean merely secular values.\(^8\)

In this second case, the Senate justifies the rejection of a constitution conformant interpretation—from my point of view quite rightly—arguing that otherwise “the limits of the interpretation of a norm in conformity with the Basic Law [would be transgressed which would be] inconsistent with the principle that the judge is bound by the law (Article 20, paragraph 3)”.\(^9\) For the constitution conformant interpretation that had been favoured by the Federal Labour Court (and already previously by the Federal Administrative Court) would “redefine the normative content [of the privilegium christianum] and therewith [miss] the legislative intent clearly discernible in the legislative procedure”.\(^10\) Even though these lines deserve applause, it is nevertheless irritating (and devaluing previous interpretational attempts), when the Senate at the same time finds the constitution to require a restrictive interpretation of the prohibitive provision: a concrete danger is claimed as necessary instead of an abstract one. For the reduction of the prohibitive provision in conformity with the constitution also leads to a redefinition of the norm’s content contrary to the legislative intent clearly discernible in the legislative procedure. It remains to be justified why the FCC undertakes a constitution conformant interpretation in one case but refuses to do so in the other. This, however, weakens the per-

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\(^{6}\) Cf. BVerfGE 138, 296 et seq. [2015].
\(^{7}\) Cf. BVerfGE 138, 296 (342 et seq. paras 116 et seq.) [2015].
\(^{8}\) Cf. BVerfGE 138, 296 (350 et seq. paras 131 et seq.) [2015].
\(^{9}\) BVerfGE 138, 296 (350 para. 131) [2015].
\(^{10}\) BVerfGE 138, 296 (351 para.135) [2015].
suasiveness of an instrument that appears to be deployable quite flexibly
as a means of statute correction. Incidentally: What is an ordinary court to
make of this handling of the limits of a constitution conformant interpreta-
tion, what is it to learn from this for its own “business”? 

3. Does the Derivation Work?

Let us now turn to the derivation or justification of the constitution confor-
man interpretation. It is based centrally on two interrelated tenets, namely
the unity and consistency of the legal order on the one hand and its hier-
archical structure (*Stufenbau*) providing a stratification of the sources of
law on the other hand. The constitution conformant interpretation repre-
sents an application of the logic of hierarchically induced legal adjustment
and legal unification, according to this thesis. Conformity is established
through the constitutionalisation of the legal order.

It is explicitly not contested that the law *can* stipulate a constitution
conformant interpretation. I do, however, have doubts whether the exis-
tence of a constitution conformant interpretation is the inevitabl result
from the logic inherent to or from the nature of any hierarchically struc-
tured legal order. There seems to be a legal theoretical misconception at
work in this reasoning concerning the meaning of the consistency and hi-
erarchisation of a legal order in light of the concrete and contingent posi-
tive law.

*a) Hierarchically Structured Unity and Consistency of the Legal Order*

Surely, order means unity and consistency. But both concepts – “unity”
and “consistency” – are ambiguous: They can both be understood in a ma-
terial or substantial sense as well as in a merely formal or procedural one.
They thus exist, with other words, in a strong and in a weak variant. In the
first case, the order does in fact not know legal commands that are contra-
dictory in content; collisions of norms, also called normative “contradic-
tions” (*Normwidersprüche*), are dissolved according to the norm that is
stronger in terms of its ability to displace another norm – the lex superior,
the lex specialis or the lex posterior. The underlying notion of unity is axi-
ological or strong. In the second case, in contrast, it suffices that the order
itself contains rules on how to resolve collisions of norms, when and how
they are dissolved and when and with what consequences they persist. The underlying notion of unity is initially merely genealogical or weak. The comparison of unity and consistency in a material and in a formal sense closely resembles the comparison of inner and outer system by Karl Larenz.\textsuperscript{11}

Modern legal orders marked by the differentiation of legal sources, legal actors and legislative procedures often work with the formal-procedural, genealogical conception of unity and consistency for the sake of a higher capacity of problem-solving – one could say: for the sake of higher flexibility in reacting to legal violations – even though they mostly aim at approximating the ideal of unity and consistency in a material-substantial, axiological sense. This means: Though modern legal orders operate with priority rules in order to achieve material consistency, they also know other instruments of organising relationships of norms that may be contradictory in content. Legal theory cannot by itself answer the question, if and in which fields they rely more on the one or on the other. This is rather a question of the concrete positive law.

\textit{b) Legal Capacity and Legal Ability}

To what extent a legal order is being established through hierarchically controlled material consistency depends in particular upon the reactions envisaged for the case of non-compliance with the requirements of lawfulness. Contrary to the legal layperson’s intuition, the consequence of unlawfulness is not always necessarily – and not even predominantly – invalidity. Rather, modern legal orders know a variety of reaction mechanism apart from invalidity, such as – to name only a few – contestability, voidability, curability, ability to be reinterpreted and irrelevance. Legal capacity and legal ability thus diverge when a legal “defect” exists because not all the requirements of lawfulness are met, but this legal defect does not lead to the invalidity of the legal act: Even though the actor is not authorised to legislate by means of the defective legal provision, this does not mean that the legal provision concerned does not enter into force.

The concept of the legal finality of judicial and administrative decisions is expression and consequence of this error calculus (Fehlerkalkül) stipulated by the positive law: once a decision can no longer be appealed, it is no longer possible to assert that not all the requirements of a lawful decision are met. According to German law, the validity of an administrative act does not – in principle – depend upon its lawfulness. This also includes the case in which the command of the administrative act is not in conformity with higher-ranking, possibly constitutional law. Legal force and lawfulness can thus diverge in diverse ways.

In the present context this means: Under the Basic Law, unconstitutional laws are valid when and as far as they have not been repealed (or as long as the time period indicated for the loss of validity has not expired); unconstitutional (Federal) Laws (that are younger than the constitution) endure when and as far as they have not been repealed (typically ex nunc) by the FCC. With regard to the constitution conformant interpretation, this has a triple effect:

• It is, firstly, neither a necessary consequence nor an essential feature of the hierarchy of norms, the consistency of the legal order and the primacy of the constitution, but rather a contingent instrument for the purpose of the adjustment of collisions that needs to be based on the positive law itself.

• The constitution conformant interpretation is, secondly, not an interpretation, but a decision on the content and existence of a norm by avoiding or adjusting a conflict of norms: To call it an “interpretation” disregards the possibilities the law envisages for a divergence of legal capacity and legal ability on the one hand, and confuses the question, what the legislature really intended with the question, what it was constitutionally authorised to intend, on the other hand. The legislative intent is not irrelevant only because the legislature was not authorised to intend a certain thing, for it is the positive law’s error calculus that decides upon the questions of relevance (the authorisation).

• And thirdly: The derivation of the constitution conformant interpretation pretends to be intrinsic to the law – which it is not. A derivation

can thus be provided by the law’s content at most. For this, however, evidence is needed that the constitution conformant interpretation is admitted or even prescribed by the positive law. This is all the more delicate as the FCC has so far refrained from naming a positive legal authorisation.

4. Do the Intended Effects Correspond to the Results?

Thus, the search for the legitimation of the constitution conformant interpretation depends on the positive law. This kind of “interpretation” is, however, not explicitly authorised or even rendered mandatory by German (constitutional) law. First of all, it is worth looking into what happens legally, when a legal provision is interpreted in conformity with the Basic Law. Then the effect described is to be related to explicitly stipulated or at least more easily derivable mechanisms of legal adjustment in the constitutional order.

\textit{a) Reducing a Norm’s Content Without Reducing a Norm’s Shape}

Therefore, what happens to a norm, when it is interpreted in conformity with the constitution? First of all, it is clear that the legal text remains unaltered whereas the law’s contents or its interpretations are reduced by an unconstitutional one. Pointedly put, the constitution conformant interpretation limits a norm’s content (or its interpretations) without limiting the norm’s shape, i.e. the norm’s text. This corresponds structurally – while bearing in mind, that the norm’s text may not be confused with the norm’s content – with a partial annulment putting an end to an infringement of the constitution that is not, however, accompanied by a limitation of the norm’s text (as is regularly the case).

\textit{b) The Constitution Conformant Interpretation by Ordinary Courts}

The concrete review of statutes (also called judicial referral – \textit{konkrete Normenkontrolle}) according to Article 100 paragraph 1 is by far the most important means of judicial legal adjustment under the Basic Law, namely of the removal of unconstitutional contents of norms through courts. It
obliges all courts to review the constitutionality of statutes they apply, while the monopoly to end the validity of statutes (which are younger than the constitution) lies with the FCC.

A judicial referral is only admissible according to the FCC’s settled case-law, when the referring court has previously attempted to interpret the referred legal provision in conformity with the Basic Law and has denied the possibility for good reasons. The FCC holds that, otherwise, either the court lacks the conviction that the referred legal provision is unconstitutional or the question of the provision’s constitutionality lacks relevance to the decision.  

This claim – which is not explicit in the constitution – may be understandable from the point of view of an overburdened FCC. It does, however, lead to a dilemma, for it either leads to the undermining of the FCC’s monopoly to end the validity of statutes or to the inadmissibility of a constitution conformant interpretation through ordinary courts.

The constitution conformant interpretation is, with regard to the fact that it is in effect (even though not nominally) the rejection of a norm’s content without the rejection of the norm’s text, a “minor” review of statutes. To the extent that the ordinary courts are authorised or even obliged to reject such a norm (bear in mind that the FCC exerts considerable pressure on the ordinary courts in order to make them interpret statutory provisions relevant to their decisions in conformity with the Basic Law), the FCC’s monopoly is reduced to a monopoly to end the validity of a norm’s text.

Seen as an unjustifiable limitation of the FCC’s competences, the constitution conformant interpretation by ordinary courts (concerning statutes younger than the constitution) thus appears to be altogether inadmissible, particularly with a view to the pouvoir constituant’s decision in favour of a concentrated system of constitutional jurisdiction. It becomes apparent once again that the constitution conformant interpretation is not an interpretation (and thus merely a means to understanding the law), but rather “negative” legislation, namely the elimination of unconstitutional contents of norms. Just like any other type of legislation, it does, however, require an authorisation the positive law. Such an authorisation is indiscernible; even more: The FCC rightly stresses that the purpose of the monopolisation of the concrete review of statutes is firstly the protection of the legis-

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13 Cf. pars pro toto BVerfGE 85, 329 (333) [1992]; 121, 108 (117) [2008]; 131, 88 (117 s.) [2012].
lature’s authority and secondly the preservation of legal certainty through the avoidance of contradictory decisions concerning the validity of laws by ordinary courts.\textsuperscript{14} With regard to the first-mentioned purpose, the constitution conformant interpretation by ordinary courts stands – elegantly put – in an unresolved competition with the FCC’s review of statutes. With regard to the second-mentioned purpose, it enters into flagrant contradiction with the judicial referral’s telos. It can e contrario be concluded from Article 100 paragraph 1 that an constitution conformant interpretation by ordinary courts for laws younger than the constitution is likely to be inadmissible – contrary to the assertions made by the FCC. It could only be introduced by means of a constitutional amendment, namely by an alteration of Article 100 paragraph 1 Basic Law, amongst others.

An authorisation of ordinary courts to interpret statutes in conformity with the Basic Law can thus only (if at all) be considered for legal provisions not included under Article 100 paragraph 1, namely for laws older than the constitution. Article 123 paragraph 1 could be taken into consideration as a legal basis, here. It determines that “[l]aw in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with this Basic Law”. This order of continued validity could possibly – and cautiously – be read as a positive constitutional authorisation of ordinary courts to interpret in conformity with the constitution.

c) The Constitution Conformant Interpretation by the FCC

With this it remains to be seen, what is to be made of the constitution conformant interpretation through the FCC itself. For a start, the methodological concern regarding the multiple contents of a norm already expressed with regard to the ordinary courts continues to apply. But this concern can be met by a command contained within positive law, for the (constitutional) legislator can (and does occasionally) base his provisions on a distorted or even inappropriate approach to legal theory or methodology. In this case, they “are valid” by virtue of the order, even though one may call them legal fictions or the like.

It thus depends on the question whether an authorisation of the FCC to interpret statutory law in conformity with the constitution can be deduced

\textsuperscript{14} Cf. BVerfGE 97, 117 (122) [1997]; 138, 64 (90 s. para. 78) [2014].
from the Basic Law itself. Because it is not mentioned explicitly, the constitution conformant interpretation could be considered as being included in the explicit competences for review and annulment of statutes granted to the FCC. It could indeed be assumed that the constitution conformant interpretation is – compared with the regular annulment – a lesser measure that is therefore included (*a maiore ad minus*) in the competence as an authority of partial annulment.

But the relationship between the constitution conformant interpretation and the full annulment of a norm is not that clear; in a substantial number of constellations, the all-or-nothing solution of a full annulment can probably be considered the more lenient interference with the legislative powers compared with a hidden annulment by virtue of a constitution conformant interpretation that does not touch upon the norm’s text, for the former is more conducive to the possible reactions of the legislature.

Be that as it may: Two aspects – or rather restrictions – ought to be taken into account. Firstly, a constitution conformant interpretation by the FCC seems to be ruled out to the extent that the FCC is bound by the interpretation of statute law put forward by the ordinary courts “participating” in a concrete review of statute or a constitutional complaint against judicial decision – for which there are good reasons, at least up to the boundary of arbitrariness. In this case, there will not be many of contradictory interpretations or contradictory norm-contents, which is, however, a mandatory requirement for a constitution conformant interpretation. Secondly, the FCC has to take into consideration that the constitution conformant interpretation has but a negative, excluding function; this suggests that the FCC should – in the case of such a need arising – limit the operative part of its judgment to declaring a certain interpretative variant unconstitutional rather than declaring a certain interpretation of the norm that may be discerned from the grounds of the judgment to be constitutional. If both aspects are taken into account, the constitution conformant interpretation through the FCC is reduced to a sub-category of the review of statutes begging the question whether it deserves a special methodology and a special doctrine.

**V. A Preliminary Conclusion**

I have reached the end of my cursory assessment of the constitution conformant interpretation; and I have probably provoked many of you by
voicing serious reservations against a legal concept that enjoys great recognition and popularity in jurisprudence just as well as in legal scholarship.
Legal Construction between Legislation and Interpretation

Ralf Poscher

According to a prevalent distinction in legal scholarship, jurists apply the law either through interpretation or construction. Already in ancient Roman law, jurists made a threefold distinction between *adjudication secundum legem* (following the law), *praeter legem* (beyond the law) and *contra legem* (against the law). The twofold distinction between interpretation and construction merged the last two categories of the threefold model into one and then differentiated internally between legitimate and illegitimate construction. This system probably originates with the methodological writings of Carl-Friedrich von Savigny, the eminent 19th-century German legal scholar and founder not only of the historical school in private law but of modern German doctrinal scholarship in general. Savigny distinguished between interpretation and ‘Fortschreibung des Rechts’, the – doctrinal – ‘development of law’ (1840: § 50, p. 262). In the US, the distinction between interpretation and construction was introduced by Francis Lieber in his famous essay ‘On Political Hermeneutics’ of 1837. Francis Lieber was a German immigrant to the United States, educated at German universities. There is no evidence that Lieber knew of Savigny’s methodological teachings of the early 19th century, first published only three years after Lieber’s famous essay. But Lieber’s general hermeneutical stance probably drew on some of the same sources as Savigny’s, and, in particular, on Friedrich Schleiermacher, the founder of universal hermeneutics, whom both knew and admired. Lieber’s twofold distinction corresponds to Savigny’s in that it links legal interpretation to the intentions of the legislator, though Savigny’s account is enriched by his idea of legal institutions that the legislator can draw upon (1840: §5, pp. 8-9).

Though the distinction between legal interpretation and legal construction is not very clear-cut in the accounts of Savigny and Lieber, the gener-

1 The distinction is occasionally traced to D.1.1.7.1. However, this source seems dubious as it concerns the legislative function of the praetor.
al idea is that legal interpretation aims at a content associated with the law by its creator. By contrast, legal construction is needed when legal interpretation falls short and the law must be amended by the interpreter to make it applicable to a case at hand. This is not to say that legal interpretation and construction form two separate steps in our practice of adjudication, a point that Lieber already noted explicitly (1837: 81). Though they are distinguished in legal methodology, in the practice of adjudication legal interpretation is nested within legal construction in the form of legislative intent or the genetic argument as one of the classical canons of legal hermeneutics. But their nestedness in legal practice does not alter their fundamentally different nature. They are not distinct in purely quantitative terms with one fading into the other, but in a sharp metaphysical sense, with one being an empirical, the other a normative enterprise; one being reconstructive, about finding the preexisting law, the other creative or constructive, about amending the law (Marmor 2005: 24-25).

If legal construction involves amending the law, if it concerns the creation of law, how can it still be characterized as a hermeneutical activity distinct from the creation of a law by legislative bodies such as parliaments, city councils, administrative agencies or presidents, which are not regarded as hermeneutical? My thesis is that legal construction, while it amends the law, is nonetheless a hermeneutical activity because it follows the structural model of legal interpretation. Thus, I will initially offer an account of legal interpretation and of its structures of significance for the explanation of legal construction. Subsequently, I will demonstrate how legal construction mimics legal interpretation though lacking some of its constitutive features. In the course of this analysis, various characteristics of legal construction will become apparent, in particular its relation to rule of law values, its truth aptness and its character as a proper academic discipline. I want to emphasize at the outset that this contribution addresses the theoretical reconstruction of legal construction. As such, it is not concerned with the legitimacy of legal construction. Nor does it discuss the specific forms legal construction may adopt. Suffice it to observe that these are highly contested in some areas of the law, for example within constitutional law (Solum 2010: 116-18; Barnett 2011).
I. Interpretation

1. Interpretation as Intentional Explanation

In the most general sense, interpretation is a form of explanation that relates to intentional phenomena, i.e. to someone’s beliefs, desires, intentions, hopes, wishes, actions etc., and their products such as tools and – in the hermeneutical tradition most prominently – texts. If we see someone picking up an umbrella, we explain his action by his belief that it is going to rain, his desire not to get wet and his intention to go outside; we thus interpret his action. But interpretation is not limited to actions; it applies to any kind of object that is connected to intentions. Thus – to take Heidegger’s famous example (1927: § 15, 68-70) – we interpret a piece of wood connected to a metal bar as a hammer, because someone created it with the intention of fulfilling this purpose. And if we believe in the objective spirit steering the course of history, we can interpret the course of history, because we conceive of the objective spirit as an intentional agent.

As mental phenomena, intentional phenomena supervene on non-intentional phenomena like neurophysiological brain states and ultimately the interplay of sub nuclear particles. Different kinds of explanation address different levels of these supervening phenomena drawing on different regularities at the respective levels. But interpretations as intentional explanations do not just differ from non-intentional ones in the level of explanation – like biological explanations with respect to physics –, but also in the standards involved (Davidson 1991: 215). Interpretation has been characterized as a normalizing type of explanation, because it presupposes rational standards (Pettit 1994: 162-66) like the principle of charity, according to which we must generally interpret beliefs of an agent charitably with respect to their truth (Davidson 1991). When we interpret other intentional beings we rely – special circumstances aside – on the rationality of the agent. Without presupposing a certain degree of rationality it would be impossible for us to reconstruct the intentions of agents other than ourselves. Interpretation as an intentional explanation is thus distinct from other causal explanations because of the standards employed, which are based on rationality.³

³ This might not exclude the ‘interpretation’ of qualia if it is conceded that there can be reasons for feelings. On reasons for feelings, see Skorupski (2010: 370-98).
2. Meaning and Intentions

If interpretation is the specific form of explanation that applies to intentional phenomena and relies on rationality, then linguistic interpretation is a special instance of this more general kind of explanation. The interpretation of linguistic artefacts is simply a special sort of interpretation that shares the intentional and rational features of interpretation as a whole. So it comes as no surprise that the contrast between interpretation and causal explanations that do not rely on rationality is mirrored in Paul Grice’s distinction between natural and non-natural signs. Natural signs have ‘meaning’ because of non-intentional causal relations between an object and its environment. Smoke thus signals fire, because of the chemical reactions between the materials involved. Non-natural signs, by contrast, acquire their meaning through the intentions that a speaker or author connects with an utterance. Shouting the English word ‘fire’ may also signal fire. But it does so, because we infer that the person shouting intends to alert us to a fire and is neither deceived nor deceitful. It does so only because of the intentions of the person shouting, not because of some causal relation between the sound of the shout and the fire.

Meaningful utterances are a special kind of intentional action. They intend to communicate propositional content and we make sense of them by inferring the propositional content that the utterer intends to communicate. As in the case of the umbrella, we explain, i.e. interpret, the shout of ‘fire’ through the intentions, beliefs and desires of the agent. We explain it by the intention of the person shouting to communicate the proposition that there is a fire, based on her belief that there is a fire and her desire to warn us. Non-natural meaning is thus an intentional phenomenon. Meaning is tied to intentions. There is no meaning without at least the presupposition of intentions. The famous lines drawn in the sand by the waves (Knapp and Michaels 1982: 727-28) that resemble letters have no meaning. We can assign meaning to them only by presupposing some kind of hypothetical speaker (Alexander and Prakash 2004: 977, n. 25). If the waves form the signs ‘I love you’, we might suppose some ordinary sort of context like a couple on a romantic walk and one of them stating her or his affection.

4 The argument has been applied to law by Alexander and Prakash (2004). See also Fish (2008).
Paul Grice has developed this insight into a model of communication that has been widely accepted despite some arguments over its details (1989). The utterance ‘Please close the window!’ has its meaning because a speaker connected a communicative intention with the utterance, and because its addressee recognizes the utterer’s communicative intention: that she wishes the window to be closed. Interpretation of linguistic artefacts works like reverse engineering. The interpreter develops a hypothesis with respect to the communicative intentions that the utterer connected with the non-natural sign.

The reliance on communicative intentions is neutral with regard to the internalism or externalism of their content. A speaker might well communicate with the intention of deferring to some external standard or authority. If she says ‘I’ll have what you’re having’ in a bar, she might not know what she is ordering, but intends to order whatever her companion has ordered or is about to order. Thus, the reconstruction of meaning on the basis of communicative intentions does not have to take a stance in the debate about semantic realism – its metaphysical viability or its scope. Semantic realism presupposes a certain kind of communicative intentions – indexical, referential and deferential to experts – without which it would not get off the ground (Moore 2007: 252-53; Moore 2016) even if the metaphysical presuppositions were not contested. As will become apparent in the discussion of legal construction, it could even be understood in line with externalist intentions on the part of the legislator, which defers the regulation of fringe, borderline or unforeseen cases to the courts. But the externalist content of the communicative intentions is also in principle an empirical question that is answered by the state of mind of the speaker.

The main clue for inferring what Grice called ‘speaker’s meaning’ is what he termed ‘sentence meaning’, i.e. the semantic meaning of the linguistic expressions used in the utterance (Levinson 1983: 17-21). But semantic meaning, too, rests on the speaker’s meaning – or pragmatic meaning, as linguistics would say. Semantic meaning follows from the intentions that speakers habitually or characteristically connect with an utterance type.

5 For Grice and the history of his reception, see, for example, Neale (1992). For the reception of Grice by the later Davidson, see, for example, Avramides (2001) and Cook (2009). Davidson warns against understanding this approach as a reductive theory of meaning (Cook 2009).
Usually, the speaker’s and the semantic meanings are in harmony. With the utterance ‘Please close the window!’, the speaker connects the intention to communicate that she wants the window – and not the door – to be shut. But in their discussions of pragmatic implicature (Grice 1989: 24-40) and malapropisms (Davidson 1986), Grice and Davidson have shown that this harmony is not a necessary condition for communication. In Grice’s famous example in which a colleague – asked for academic references – writes that the candidate has an ‘excellent command of English’, the context of the utterance reveals that the communicative intention was quite different from the semantic meaning of the expression (Grice 1989: 33). In the same way, we know what is meant when in Thomas Mann’s novel Der Zauberberg (The Magic Mountain), Mrs Stöhr confuses the expression ‘magnet’ with the expression ‘magnate’ (1924 a: 758; 1924 b: I, 698). The same holds in the above example if all the windows in the room are closed but the glass terrace door stands open. Irrespective of the semantics of the expression ‘window’, the context allows us to infer that the request ‘Please close the window!’ refers to the open door.

Communicative interpretation involves developing a hypothesis about an empirical fact, the intention of a speaker supervening upon a mental state. As with any empirical hypothesis, interpretations can be true or false. The speaker either had the intention or not. The interpretative difficulties that may arise are of a purely epistemic nature. It may be difficult or even impossible to infer the communicative intentions of a speaker, but the potential epistemic transcendence of communicative intentions is a property that they share with all other empirical objects and events in the world. Interpretation does not raise any issues other than those that have to be answered by empirical investigations in general. ‘We thus need special sort of activity, distinct from normal descriptive or explanatory activity of science, that requires justification. […] The communicative model thus causes no ripples in the smooth waters of science’ (Moore 1995: 5; see also Fish 2008: 1116).

Nevertheless, the justification for the interpretative empirical hypothesis is of a very specific kind. The justification of an interpretation must connect an utterance, its semantic meaning, and its context to the intentions of a speaker. Not all hypotheses regarding the intentions of a speaker are interpretations. If we had a mindreading machine somehow able to reconstruct the intentional content of the speaker’s mind from mere natural causes such as her brainwaves, the results would not be an interpretation of the mind it monitors. To be an interpretation the hypothesis must be jus-
tified by the utterance, its context, and principles of rationality, not just by any causal explanation.

Usually, this is already possible through our everyday knowledge of the semantic meaning of the expressions employed. Sometimes, however – as in the example of the terrace door referred to as a ‘window’ – more complex justifications are necessary. But the justification must always be directed at a relation between the linguistic expression, the text and the context on the one hand and the communicative intentions on the other. Most importantly in our context, an interpretation of an utterance cannot be justified by the substantive qualities of a proposition; it must be justified by an argument supporting the hypothesis that the utterer wanted to connect a certain communicative intention with his utterance – whatever its quality in substance might be. The substantial adequacy of an interpretation can be circumstantial evidence for the intention of the utterer, but no more than that (Davidson 1973: 137). An interpretation cannot be justified by the substantial adequacy of its content alone. In our example, the hypothesis that the expression ‘window’ referred to the terrace door cannot be justified by the fact that – irrespective of the speaker’s intention – there are good reasons for closing the door.6

3. Legislative Intent

In law, we encounter communicative interpretation with respect to legislative intent (see generally Ekins 2012). In our hermeneutical approaches to the law, communicative interpretation, however, is not particularly prominent. This is due not only to the theoretical difficulties of coming to terms with the idea of a collective intention on the part of the legislator (Hurd 1990; Larenz 1991: 328-29; Waldron 1999: 119-46). As the philosophical literature on collective intentionality shows, there seem to be reductive accounts of collective intentions as overlapping and interconnected intentions of the individuals involved, which make it possible to avoid dubious ontological claims about collective minds and the like (Searle 1990; Bratman 1999: 109-30). Although these accounts must be normatively enriched with rules for the ascription of meaning to individual legis-

lators on the basis of the text and the legislative context to provide for a collective intent of the legislator, the theoretical difficulties of explaining our discourse about legislative intent can in principle be overcome (Poscher forthcoming 2017; cp. already Ekins 2012). This is evident in the pervasive reference to legislative intent across different legal cultures.

The reason why legislative intent does not figure prominently in many hard cases for resolving legal indeterminacy is empirical in nature. The legislator is usually only concerned with the paradigmatic cases covered by his regulations. These paradigmatic cases will also dominate the everyday practice of the law. However, these are not the cases that attract the attention of the hermeneutical doctrinal efforts of higher courts and legal scholars. Legal doctrine develops its concepts, principles, tests and answers against the background of paradigm cases, but it does so with a specific interest in borderline cases and other cases of indeterminacy, which are the only ones that require a deeper hermeneutical engagement with the law. If we had only paradigm cases of free speech, we would not have to develop legal doctrine for it. However, the question of whether the links provided by search engines fall under its protection engages lawyers in legal hermeneutics. But for borderline cases like this no viable hypotheses on the empirical intentions of the legislator are usually available: more often than not the legislator simply has not considered the borderline case at hand or even if he has done so, this might not be documented in the legal materials or the legal materials may remain inconclusive on the matter. Only in very rare cases do the legislative materials provide sufficient substance to justify a communicative interpretation for a borderline case.7 It is for this empirical reason that communicative interpretation is on the one hand essential for the overall practice of the law, but on the other does not play a very important role in the legal hermeneutics that higher courts and doctrinal academics are engaged in.

II. Legal Construction

If the intentions of the legislator run out, letting the case rest at that is no option for the law; it would constitute a denial of justice. Legal hermeneutics has to presuppose that the law holds an answer for every case at hand.

7 For an example in German constitutional law, see Schlink and Poscher (2000).
Thus legal hermeneutics has to go beyond communicative interpretation. To what extent can it still be understood as a hermeneutical activity when the interpreter goes beyond the intentions of the legislator? Beyond the communicative intentions of the legislator, there is no pre-existing meaning to be had. Signs have non-natural meaning only if there are communicative intentions connected to them and only as far as there are communicative intentions connected to them. Without intentions, they are just like the lines resembling letters produced by the ocean waves. Thus, when legal hermeneutics moves beyond the regulatory intentions that the legislator has expressed with a certain norm formulation, it amends the law for a borderline or otherwise indeterminate case and moves into the field of legal construction. Legal construction in the form of adjudication creates new law applicable to cases for which the legislator had no intentions; in the form of academic legal doctrine, it works out respective suggestions. Legal construction is no longer in the business of inferring already existing regulatory intentions but creates a new regulation for the case at hand (Marmor 2005: 25). It is no longer an empirical endeavour aimed at reconstructing a pre-existing intention, but a normative activity aimed at amending a regulation by precisification. This accounts for the metaphysical difference between legal interpretation as an empirical and reconstructive enterprise and legal construction as a normative and creative one.

But how can the creation of law for cases that have not previously been regulated still be regarded a hermeneutical activity? The authors of the Constitution could not have had any intentions with regard to the hyperlinks of search engines and their protection by the freedom of speech. How can a legal construction that includes or excludes search engines and their results from this fundamental right still be a hermeneutical activity? How is it different from the activity of a legislator who becomes aware of the regulatory gap and answers the same question? Aren’t standard positivist and legal realist accounts of legal construction correct in equating it with legislation as e.g. in Hans Kelsen’s frame account of legal interpretation? According to Kelsen, legal interpretation establishes a frame of meaning and legal construction within the framed area of indeterminacy ultimately consists in a creation of law by the interpreter that differs in scale but not in structure from legislation (1960 a: 239-60; 1960 b: 233-56; 1934: 70; see also Larenz 1991: 366). If this was true, legal construction would be no more a hermeneutical enterprise than legislation.
1. Legal Construction as the Interpretation of a Text

Contrary to Kelsen and to similar accounts, legal construction differs from other ways of creating law and specifically from legislation. Moreover, it differs in a way that gives it a hermeneutical character. The aspect in which it differs is the kind of justification that it requires. Other regulatory activities must justify the content of their regulations solely with regard to their adequacy regarding the substantive issue at hand. The legislator who must decide whether to protect search engines and their results as free speech could opt for a solution that protects every search result; or only those featuring politically charged terms; or the data issuing from national, large or small search engines; or whatever he regards as politically appropriate. Irrespective of his decision, he must justify his choice only on the basis of the political or practical appropriateness of the new regulation. If he can account for the new regulation with reasons that testify to its appropriateness, he has done everything required.

Unlike any form of legislation, legal construction cannot be justified solely by its political or practical appropriateness. Even though the legislative intentions do not provide for a regulation in cases in which legal construction becomes necessary, legal construction cannot simply seek out the politically or pragmatically most appropriate decision or consult the social sciences or economics. Instead, legal construction must always be justified as an interpretation of the text. But how can the creation of law be understood as the interpretation of the text, let alone be justified as such an interpretation when its author did not connect any intentions with the text for the case at hand? Hermeneutics is concerned with discovering the meaning of a text. Unlike natural signs, non-natural signs receive their meaning only from intentional subjects connecting communicative intentions with them. But if the author of a text did not connect any intentions with an utterance, where do the intentions that give a text meaning come from?

The semantic meaning of the text seems an obvious candidate as it supervenes upon the intentions that are habitually or characteristically connected with an utterance token that belongs to an utterance type. Independently of the communicative intentions that the legislator will have associated with the text of the law, it seems possible to elicit communicative intentions that are discovered in a quasi-statistical manner as is now done in computer linguistics, which develops semantics on the basis of large linguistic corpora (Vogel and Christensen 2013). But even the electronic en-
hancement of traditional methods of lexicography will hardly help with ascription of meaning in borderline cases and other instances of indeterminacy of the law that legal construction has to address. Borderline cases and other instances of legal indeterminacy are usually also ones where the semantics of the expressions employed are indeterminate. If a zoning law contains regulations on the window surfaces of facades, the semantics of ‘window’ is of little help in deciding whether glass bricks count as a window for the purposes of the zoning regulation.

If semantics cannot assist, the question remains: Where do the intentions that can be connected to the text within the process of legal construction originate? At this stage, the issue of how to justify legal construction as an interpretation of the text seems to become more perplexing. The problem is not the legitimacy of legal construction. Rather, the issue concerns the theoretical conceptualization of it as a form of interpretation even though it creates the law it is supposed to infer from the text and from the text’s context. In other words, the theoretical question precedes the legitimacy issue. How, then, can the creation of a new regulation by means of legal construction be regarded and practiced as a hermeneutical activity if neither its author nor semantics has assigned the required meaning to it?

2. Construction Versus Association

Beyond communicative intentions, there is no pre-existing meaning to be had. Signs have non-natural meaning only if there are communicative intentions connected to them and only as far as there are communicative intentions connected to them. Without the communicative intentions connected to them, they are just like the marks resembling letters produced by ocean waves. In this, legal construction resembles other hermeneutical activities that attribute meaning to objects to which no communicative intentions have been ascribed like cloud formations or dreams (Moore 1995: 7-13; Moore 2005: 24, n. 23). Even if it is irrational to read cloud formations as predictions of the future, these interpretations must be justified by the actual cloud formation and its suggestive Gestalt, density, or colour play, not by their predictive adequacy alone. In the same way, the interpretation of dreams has to be justified with respect to the actual dream sequences and not just by the fact that they adequately describe the psyche of the person under analysis. Psychotherapy has to justify a plausible rela-
tion between the actual dream and its analysis. It must be able to explain why the puppet play in the dream can be interpreted as a text attempting to reveal early abuse or some other childhood trauma. An adequate psychotherapeutic diagnosis alone is no more an interpretation of a dream than an adequate regulation of a case of legal indeterminacy alone is a legal construction. Both must be justified as the interpretation of a text, i.e. according to criteria in their respective disciplines that establish a justified connection between a text and an interpretative hypothesis.

Hermeneutics aims at the justification of a derivative production of meaning. It has to conceptualize the meaning that it supports as a reconstruction of a meaning that predates it, that has already been connected with the text it interprets. This approach distinguishes interpretation from association. In the case of association, the object offers only an opportunity for the production of meaning by the person perceiving it. There is nothing but a causal relation between the object and the association. While the object triggers it, it is not conceptualized as containing the association, or even as containing any meaning at all. The famous madeleine may trigger childhood associations, and these associations can be explained without ascribing these meanings to the madeleine. The madeleine causes the childhood associations, but it does not intend to do so. The same is true of a poem or a song that a mother recited frequently to her child and that triggers memories of childhood whenever the child hears it at a much later date. The poem or song does not have to be about childhood in order to trigger childhood associations. For a hermeneutical justification, a merely associative relation is not sufficient. Rather, the justification of a hermeneutical relation has to pertain to a meaning of the text that predates the act of interpretation. In contrast to association, the meaning connected to a text is not only the trigger but also the measure of the text’s meaning. It is not enough for the connected meaning to cause a text’s meaning, but the text’s meaning must also be intended by the text and its author.

3. The Fiction of an Author

The interpreter has to justify the ascription of meaning to a text as the reconstruction of a meaning that has already been connected to it even in cases like legal construction, cloud or dream interpretation in which no meanings have been connected with the text by an author. Hermeneutical construction must do both: First, it has to newly ascribe a meaning to a
text; second, it has to justify what it first ascribed as the reconstruction of a meaning on the basis of the text and its context. The first element – the connection of intentions with the text – is needed extent the meaning of the text to the case at hand, for which it would otherwise be meaningless. The second element – the reconstruction as intentions already connected with the text – ensures that the ascription of meaning by the interpreter is truly a hermeneutical construction and not merely an association. At least implicitly, the second element presupposes the fiction of an author (Marmor 2005: 23).\(^8\) Meanings can be ascribed to texts only by intentional subjects and meanings can be reconstructed from text and contexts only as intentions of intentional subjects. Since in cases of legal construction the author of a text and semantics, which supervene on a collective practice of meaning ascription by individual language use, must be discarded, the ascription of meaning to an otherwise meaningless text implicitly presupposes the fiction of an author who connected communicative intentions with the utterance and thus gave the utterance the character of a text. The postmodern slogan of the ‘death of the author’ (Barthes 1968; Foucault 1969: 793-96) has its merits with respect to the real authors of a text. For structural reasons, however, the author cannot be discarded from hermeneutics; as interpretation, hermeneutics always relies on an author – albeit a fictive one – for its justification.\(^9\) It is ironical that Hans-Georg Gadamer rightly insisted on the productive element inhering to legal hermeneutics in particular (1986: 321-36), even as the hermeneutic character of this productive element is only secured by a justificatory structure that relies on an intentionalist concept of interpretation in the Romantic tradition, which is precisely what Gadamer set out to fight in the first place (ibid: 175-214).

Sometimes, the fictions involved in construction are made explicit – e.g. in the case of the interpretation of dreams when the subconscious is referred to as their author. For legal construction, the text itself is sometimes put in the position of the author. The famous phrase that a legal text

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8 Even if Moore resists the fiction of an author, he has to admit that interpretation that goes beyond the intentions of the actual author is accompanied by the fiction of intentional content (1995: 16-17). Intentional content, however, implicitly presupposes an author, since only intentional subjects can provide intentions. Implicitly Moore’s fictions thus presuppose the fiction of an author, too.

9 See Marmor (2005: 24), who mentions ‘the grammar of interpretation’.
can be smarter than the legislator\textsuperscript{10} personifies the text and gives it the role of fictive author.\textsuperscript{11} More explicit is the fiction of the author in Ronald Dworkin’s holistic maxim of interpretation according to which the legal system should be understood as a ‘single person’ (1986: 225, 242) which strives for integrity. For Dworkin, the text to which the interpretation relates is not a single law but a legal order as such, which is explicitly personified in the cause of interpretation. But irrespective of how the text that is the measure of legal construction is compartmentalized – a single provision, a whole statute, a distinctive part of the legal order, or the legal order as such – and regardless of whether the fiction is made explicit, legal construction is only justified if it can be shown that the regulatory suggestion is a reconstruction of a meaning that a fictive legislator could have connected with the text. Thus, the dissociation of the interpreter and pre-existing meaning can be achieved: though the interpreter does both, she simulates a previous ascription of meaning by a fictive author and interprets the text as a text by this author.

If legal construction has to be justified as an adequate reconstruction of the communicative intentions of an implicit legislator, the justification of legal construction is a function of the implicit legislator. Depending on the properties attributed to the fictive legislator, different hypotheses of interpretation can be justified. One possibility would be to refer to the historic or present actual legislator. As a consequence, the justification of the ascription of intentions could be supported by political orientations. Especially in totalitarian regimes, which regard the law merely as an instrument to ideologically determined ends, fictionalizations of this kind may figure prominently in the reinterpretation of historic laws or in the preemptive interpretation of new laws. The law is constructed to meet the developing demands of “the movement”, the leader, or a predetermined course of history. Under National Socialist rule in Germany the civil code was reinterpreted to exclude Jews from legal transactions and the new race statutes were dynamically interpreted to support and keep pace with the dynamics of persecution and elimination (Rüthers 2012: 160-61, 166-72).

\textsuperscript{10} See already Bülow (1885: 35). On the history of the idea, see Meder (2004: 106-08).
\textsuperscript{11} The same holds for the so-called objective method of interpretation, which tries to substitute the subjective meaning ascription by the legislator with an objective meaning of the law. For the objectivist tradition in the German methodological tradition, see Poscher (2015: 457).
Legal Construction between Legislation and Interpretation

The implicit fiction aimed at the presumed present will of “the movement” and its leader. In the liberal tradition, however, such overt references to political fictions are not the norm for legal construction. Legal construction does not ask, how the historic or actual majority party would like the law to be amended. Instead, the liberal tradition makes use of rationalizations. Legal construction presupposes a rational standard for the – implicit – fictive legislator.

Since the construction of the intention of a rational legislator must itself be justified rationally, there is a double rational standard at play. Legal construction aims neither at the rational reconstruction of an irrational intention nor at the arational reconstruction of a rational intention – for example, by way of intuition or luck – still less at the irrational reconstruction of an irrational intention. Instead, the justification of a legal construction aims at a – fictive – rational legislator and must be justified as a rational reconstruction of its rational intentions. The double rationality standard can be conceived as distributed among different roles: the rationality of the fictive legislator amending the law and the rationality of the interpreter reconstructing the fictive legislator’s intentions. However, taken Davidson’s point into account that rational speakers cannot intend the impossible (Davidson 1989: 147), rational speakers already have to reflect on the possibility of a rational reconstruction of their intentions. Thus the rational interpreter is also already embedded in the rational implicit legislator. Whether conceived as distributed among different roles or embedded, both rationality standards determine legal construction. The double rationality requirement distinguishes legal construction from legal interpretation on the one side and from legislation on the other.

4. Legal Construction Versus Legal Interpretation

Since the fictive legislator is conceptualized as rational, legal construction must aim at a rational amendment of the law for the borderline or otherwise indeterminate case at hand. Legal construction thus has to amend the law according to substantive and not merely epistemic normative standards. In this, legal construction differs from legal interpretation. Legal interpretation aims only at the reconstruction of an actual legislative intent. It does not concern itself with the substantive rationality of the intentions it tries to reconstruct. The actual legislator can be more or less rational. It
is not the task of legal interpretation to make it as rational as possible. It just has the task of reconstructing it, whatever its merits. The normative standards that apply to legal interpretation are at heart only epistemic. These epistemic norms and rules of attribution, however, only aim at the reconstruction of the actual legislative intent, independently of its merits. For legal interpretation, evaluative and instrumental criteria of rationality only come into play inasmuch as they prove empirically valid with respect to the actual legislator. They only come into play within the framework of an empirical analysis and only in so far as the empirical hypothesis that the actual legislator complied with them is empirically sound. While legal interpretation is a basically empirical endeavour, i.e. reconstructing the intentions of the actual legislator, legal construction is a normative enterprise, since it aims at a fictive fully rational legislator. The rules attributed to the fully rational legislator have to be fully rational in an instrumental and evaluative sense. There is no room for rational imperfection with the fictive legislator, as there is in the muddy waters of actual legislation. Legal constructions cannot be justified only according to epistemic standards; they have to engage in the substantive justification of the amendment to the law they propose. Whereas legal interpretation can result in more or less rational norms, legal construction has to justify its results as a substantively rational amendment to the law to cover the borderline or otherwise indeterminate case at hand. This gives rise to a couple of substantial rationality standards for legal construction.\footnote{Considerations of rationality can be of importance for the reconstruction of the actual legislator’s intent to the extent that the assumption of rationality can support a hypothesis regarding his intention, which means that it must not be defeated by other evidence.}

\textit{a) Generality}

Even though the necessity for legal construction only arises with respect to a specific borderline or otherwise indeterminate case, legal construction does not aim at deciding that specific case alone. Legal construction aims at the intentions of a fictive rational legislator. Its perspective is thus intrinsically one of generality. It aims at a general rule to amend the law and only in the second instance at a specific decision on the basis of the rule it constructs. It constructs the rule in light of the case at hand, but it is not
only concerned with a decision on that case. Since it has to construct an intention of a fictive rational legislator, it must develop a solution that stands the test of generalization. A mere Kadi-decision of the case at hand would not be a legal construction, whatever its merits. Modern legal systems delegate this kind of dispute solution to court settlements and deals. As the fictive intent of a fictive legislator, legal constructions must be justified as generalizable amendments to the law.

b) Consistency

The fiction of a rational author entails further consistency requirements for legal construction. The fictive legislator is conceptualized as a unity to which the regulations created in the process of legal construction can be ascribed as non-contradictory and consistent communicative intentions. Dworkin made this idea explicit with his concept of integrity (1986: 95-96, 216-75). Like a natural person, the fictive legislator is imagined as an author whose integrity relies on the consistency of the regulations created by legal construction. The crucial factor is not the political or practical adequacy of the legal construction, but whether it fits well with the actual regulative intentions of the actual legislator. Even should the whole system of emissions trading prove ineffective, it does not follow that in cases of doubt the scope of the emissions trading system has to be constructed narrowly. Whether an enterprise is included in the system will depend on the consistency of its inclusion in the – possibly ineffective – regulatory concept of the legislator.

The fiction of a unitary and integer legislator explains the importance of both systematic and teleological arguments in legal construction. Irrespective of the political or practical adequacy of a regulation, the concept of an integer legislator entails that its objectives and aims must be consistently followed – even should they prove to be wrong in substance. There is, however, some wiggle room in legal construction, because the text to which the consistency requirements apply can be tailored in different ways. It can be limited to a specific regulation but, especially in a constitutional system, it can also include the constitution. Depending on how the text is tailored, the consistency requirements can play out differently. If the constitution is included, unconstitutional legal constructions can be discarded though they might fit well with the lower level regulation. The
canon of constitutional avoidance\textsuperscript{13} testifies to this overarching consistency requirement.

c) Instrumental Rationality

The presupposition of rationality for the fictive legislator also guarantees the practical soundness of legal construction. A rational legislator would not devise a practically unsound regulation. Within the boundaries of consistency, legal construction must respect the requirements of instrumental rationality\textsuperscript{14} and practical soundness. So, it comes as no surprise that in his seminal study on legal construction in common-law and civil-law systems Josef Esser regards practical soundness as one of the essential characteristics of adjudication (1972: ch. 6, pp. 139-173). In a weaker – and probably excessively weak – version, the same idea is taken up in the absurdity doctrine, which bans legal constructions that are obviously practically unsound.\textsuperscript{15} A legal construction leading to absurd results can be banned not only if the semantics of the regulation so recommends, but equally when it seems to require this prohibition. The demand for instrumental rationality is also interesting because it is a possible entry point for knowledge acquired in other disciplines like the social sciences or economics. Indeed, other disciplines can inform legal construction as regards the practical soundness of a legal construction. They can help to develop a more practically sound doctrinal amendment to the law. This explains how even a hermeneutical understanding of legal construction can call for a stronger interdisciplinary engagement of legal doctrine (Jestaedt 2014: 12).


\textsuperscript{14} On the distinction between epistemic, practical, and evaluative reasons, see Skorupski (2010: 33-55). Even if the three kinds of reasons are not considered irreducible in the way Skorupski suggests, the distinctions nonetheless provide for a useful typology.

d) Evaluative Rationality

If legal construction must be justified as a communicative intention of a fictive rational legislator it must prove not only its instrumental but also its evaluative rationality. Just as a rational legislator would not devise instrumentally unsound regulations, it would not devise normatively unsound regulations that contradict exigencies of fundamental justice. The orientation towards evaluative rationality explains the connection between legal construction and justice. Under conditions of extensive national and international fundamental rights provisions, this orientation can be represented within the hierarchy of norms and be addressed as a matter of consistency in doctrines like constitutional avoidance.

e) “The Fusion of Horizons”

Legal construction is an operation for the present. The law is confronted with a phenomenon, a case, for which no predetermined intention of the legislator is to be had. It has to amend the historical intentions of the legislator to provide a solution for the case at hand – as in the case of the hyperlinks provided by a search engine and the freedom of speech. It has to amend the intentions connected with the provision that guarantees the freedom of speech with intentions that allow deciding the hyperlink case. It thus updates the freedom of speech to our present needs. Through legal construction historic legal texts remain relevant for the present. Legal construction thus enables hermeneutics to accomplish a “fusion of horizons” (Gadamer 1986: 317) for the law.

5. Legal Construction Versus Legislation

Just as the normative character of legal construction sets it apart from legal interpretation, its relation to the text sets it apart from legislation. If the instrumental and evaluative rationality requirements were the only requirements for legal construction it would be akin to legislation. It would only – but also already – be distinguished from legislation by the consis-

16 For Esser, the ‘rightness’ of interpretation always comprised normative rationality in an evaluative sense (1972: 162-71).
tency requirement, since the actual legislator can break with a legislative tradition in ways the fictive legislator embodied in legal construction cannot. The actual legislator who has become doubtful of his emissions trading system might opt to exclude a borderline case even though it would be more consistent to include it.

There is, however, another feature that sets legal construction apart from legislation, which it shares with legal interpretation. For legal construction – as for legal interpretation – specific epistemic criteria have to be met. These specific epistemic justificatory requirements give legal construction its hermeneutical character. Like communicative interpretation, legal construction must be justified as an intention that could have been connected with the text. Since the relation between non-natural signs and their meaning is not determined by the casual relations of a mind-independent reality but by the intentions of the utterer, an utterer can connect any communicative intention with any sign. Rational utterers, however, cannot follow a humpty dumpty approach. Rational speakers and authors can only connect those communicative intentions with an utterance for which they believe that they give the interpreters at least a fair chance of inferring their intentions. It is not rational to attempt the impossible, i.e. to try to communicate an intention that the utterer knows cannot be inferred by the addressee (Davidson 1989).

This is why the intentions of a rational speaker are always reflexively related to the addressee of the utterance in the Gricean model of communication. The speaker does not simply intend to produce a certain representation in the mind of the addressee. Instead, he intends the addressee of the utterance to infer the communicative intention from the utterance and recognize the communicative intention of the speaker as such.  

A rational speaker can have such a complex intention only when he can presuppose that the interpreter of the utterance will be able to infer the communicative intention on the basis of the utterance and its context. Inversely, a rational hermeneutical construction with respect to a fictive rational legislator has to show that and how the text plus its context can lead to the fictive intention that it constructs by rational means.

Usually the connection to the text is provided for by its semantics. Legal constructions have to fall within the indeterminacy range of the semantics and its context. The ascription of intentions to the text can usually be

17 For the so-called ‘Gricean mechanism’, see Grice (1957: 383-86).
rationally supported as long as they fall within the penumbra of the text. Semantics are of such importance, since otherwise the connection with the text would be severed and the hermeneutic character of legal construction lost. The connection to the text, however, can be more indirect in legal construction, too. In cases of legal analogies the connection to the text is established by an argument that holds that a legislator, who has issued a law with such a text and such an intention, would have also had a corresponding intention for the corresponding – analogue – case it overlooked.

The reliance on the text and its semantics also explains why the forms of argument employed in legal construction are the same as in legal interpretation. To justify that a legal construction can be assigned to a text, semantic, systematic, teleological and historical arguments have to be made that relate the communicative intentions of the fictive legislator to the text; just as a hypothesis on the actual intentions of the actual legislator have to be supported by semantic, systematic, teleological and historical arguments. The similarity of the argumentative tools also explains why legal interpretation and legal construction are not neatly distinguished in the practice of adjudication. Once at work with one of the tools the interpreter labours on regardless of whether she is still in the domain of interpretation or already in the domain of construction.

6. Legal Construction and the Rule of Law

The dirty little secret, however, is that the interpreter has a fair amount of leeway over how to delineate the text to which he ascribes the meaning with which he wants to amend the law. It could be the text of a single provision, a statute, the norms of a certain area of the law or even – as in Dworkin’s holistic approach – the whole legal order. This leeway in choosing the relevant text explains the specificity of the *nulla poena sine lege* principle in criminal law. The specificity of the stricter principle of legal determinacy in criminal law consists in restricting the text to a single provision of the criminal code. This distinguishes the criminal-law principle of determinacy from the more general rule-of-law principle of determinacy that allows – within limits – for a broadening of the textual basis. The restriction to the text of a single provision or code is also sometimes taken to distinguish different kinds of legal construction – such as con-
struction *intra legem* \(^{18}\) and construction *praeter legem* or even *contra legem* – even though the latter is considered to be illegitimate most of the time (Neuner 2005: 139-178).

But irrespective of how the textual basis is delineated the necessary connection with the text cannot be explained by rule of law standards of legal predictability. Since legal construction only comes into play in cases where the intentions of the legislator have fallen short, the results of legal construction are more often than not unpredictable not only for the addressees of the regulation but even for legal experts. In light of the hermeneutic unpredictability of legal construction, the addressees of the law might even be better served by amending the law with a regulation that is simply the most politically or pragmatically appropriate one, which does not have to compromise appropriateness out of respect for the text. In cases of legal construction, the requirement that it be related to the text cannot be explained by rule of law considerations of predictability; it can only be explained by the fact that legal construction has to comply with a hermeneutical standard.

The normative reasons for relying on hermeneutical and not simply on pragmatic justifications for amending the law in cases for which the legislator has not developed any intentions are a separate issue. Here I will only mention a general trend of social differentiation. The hermeneutical character of legal construction ensures a certain distance from the substantive issues that are transformed into legal issues by the legal system. Thus, the law can provide for both: on the one hand, it can provide for authoritative decisions; on the other hand, it can keep the social discourse on the substantive issues open. The hermeneutical character of legal construction guarantees that the authoritative legal decision is a purely legal one.

7. Legal Construction and Truth

For legal construction, the fictionalization and rationalization of the regulatory intentions connected to the text ensure the dissipation of a potential tension between the epistemically justified and the true interpretation. In

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\(^{18}\) In traditional methodologies legal construction *intra legem* is sometimes still considered to be interpretation with the typical caveat that there is supposedly a continuum between interpretation and construction, cp. Larenz 1991, 350 – a thesis contrary to the one developed above.
contrast to cases of communicative interpretation, legal construction is not confronted with a potentially epistemic transcendent empirical reality. In cases of communicative interpretation, the empirical fact of the communicative intentions of the actual author decides on the truth of a rational interpretation. In legal construction, however, the epistemically justified reconstruction of the fictive intentions of the fictive rational legislator and these fictive intentions are necessarily identical. Since the fictive rational legislator can only connect communicative intentions with the text that he knows the addressee is able to reconstruct, a rational reconstruction of the fictive intentions will always fit that bill. In the absence of an actual empirical intention on the part of the legislator, the rational reconstruction of the fictive regulatory intentions by the interpreter cannot miss a deviant reality.

This epistemic relativisation of legal construction leads to a potential loss of definiteness. Mere epistemic rationality standards do not provide for definiteness even with respect to empirical facts. The empirical world is definite. Empirical events either obtain or not. This, however, does not mean that different hypotheses with respect to an empirical event cannot all satisfy the epistemic standards equally well. There is no rational privilege between competing epistemic hypotheses under these conditions; it is only the contingency of the world that qualifies one of them as true and all others as false. Thus different rational reconstructions of an empirical communicative intention can all be rational. The semantics of the expressions employed and the context may support the reconstruction of different intentions equally well. In cases of legal interpretation as communicative interpretation, it is the contingent empirical communicative intention of the author that determines the truth of one of several equally well supported epistemic hypotheses. In the case of legal construction, however, there is no empirical intention of an author. The truth equivalent can only be found in the fictive communicative intentions. Because of their reflexive rationality, however, they run parallel to the epistemic rationality that guides the interpreter. They thus cannot privilege one of the possible rational legal constructions like an actual communicative intention.

This might explain why the truth aptness of legal construction seems questionable. As far as epistemic transcendence and definitiveness are connected with the truth predicate, legal construction cannot satisfy these conditions for structural reasons. Further, if science is connected with the truth predicate, this could explain the classic doubts with respect to the
‘scientific’ and scholarly character of doctrinal work, which is at the core of law as an academic discipline (Kirchmann 1848).

The German Federal Constitutional Court, for example, defines science, which is protected as a fundamental right under article 5, paragraph 3 of the German constitution, as a ‘serious, systematic search for truth’. According to this definition, the scientific character of legal construction would have to be denied if the truth predicate in the definition relied on potential epistemic transcendence and definiteness. In light of the large number of traditional academic disciplines, however, that like jurisprudence have a hermeneutical character, it is questionable if such a tight concept of science makes sense. A more adequate concept of science and scholarship might be restricted to the serious, systematic elaboration and rational justification of hypotheses.

III. Résumé

The reconstruction of the hermeneutical character of legal construction rests on the intentional character of non-natural meaning. Any ascription of linguistic meaning must rely on the connection between the communicative intentions of a speaker or author and an utterance. This also holds true for legal construction, which is required in cases where there are no communicative intentions connected to an utterance preceding the act of interpretation. As a hermeneutical discipline, however, legal construction has to presuppose a preceding communicative intention of an author. The rationality requirements connected with the – mostly implicit – presupposition of a fictive legislator explain not only a series of properties of legal construction but also what characterizes legal construction as a hermeneutical discipline and what distinguishes it from legal interpretation on the one hand and legislation on the other.

19 BVerfGE 35, 79 (113); BVerfGE 47, 327 (367); BVerfGE 90, 1 (12-13).
20 There are more recent decisions that do not refer to the truth component of the definition. For example, see BVerfGE 111, 333 (344); BVerfGE 122, 89 (105).
Notes

Bibliography


Tension and Conflict between Laws Made by a Judge and Legislations by the National Assembly in Private Law

Kye Joung Lee

“Law is like a ready-made suit based on designs of diverse expectations for the future. No matter how many sizes we make, there are figures that do not fit in any size. We believe that the court, which ultimately construes and executes legislations enacted by the parliament, also has the duty and right to mend those legislations.”

I. Misunderstanding and Truth of the Civil Law Country

Separation of powers among the executive branch, the legislature and the judiciary can be said to be the key principle of the constitution of the Republic of Korea (hereinafter “the Constitution”). Basically the judiciary is not endowed with power of creating the law but endowed with power of enforcing the law enacted by the legislature in each specific case. The Constitution § 103 states that “Judges shall rule independently according to their conscience and in conformity with the Constitution and laws.”, which can be interpreted that the judge’s decision is bound by the law enacted.

In addition, Korea follows the civil law system, which means that the judge cannot make any binding law and the principle of stare decisis is not effective.

However, the Korean legal system has operated in a different way. The judge has not limited his/her work to mechanically apply the statutes to the cases. Actually the judge has been making judge-made laws, which can be called ‘very influential precedents’. A former Justice manifested his idea regarding the role of a judge in Korea as stated by the following. “The judge does not have to be bound by the text in the interpretation of the law. He must contemplate justice the law pursues and interpret the law for achieving justice. For this purpose, it is permissible for a judge to
make expanded or restrictive interpretation of the law in a decisive manner. This can be called as the actual creation of law by the judge.”¹

His remark vividly reflects the real aspect of the Korean legal system. The precedents (the previous Supreme Court decisions) have such huge influence on solving cases that the attorney at law can confidently predict the winning if he can find the appropriate Supreme Court decisions and a judge usually puts top priority in solving cases upon searching and finding the precedents. It is submitted that the previous Supreme Court decisions are actually regarded almost as the caselaw in the common law country. A German jurist, Josef Esser says that realistic analysis cannot miss the fact that in codified civil law system the proportion of "judicial legislation”is considerable.²

Therefore tension and conflict between laws made by the judges and legislations by the national assembly in Korea is inevitable. First let me explain the civil cases showing tension and conflict, then discuss the cause of tension and conflict and finally propose possible solutions for easing them.

II. Civil Cases showing tension and conflict between judge-made laws and legislations

1. Decisions against the text of the legislations.

1) Ordinary Wage Case(Supreme Court en banc Decision Case No. 2012Da72582 Decided May 16, 2014)

This is a case where regular bonuses are excluded from ordinary wage calculation through the labor-management agreement even though regular bonuses should be included in the ordinary wage calculation. According to the Labor Standards Act (hereinafter the LSA), labor conditions under the LSA serve as the minimum standard and therefore a labor contract violating the standard becomes null and void. Ordinary wage is the instrumental legal concept in order to secure the above labor condition standard. Ordinary wage’s meaning and scope cannot be agreed separately by the collec-

tive agreement. Thus, the labor-management agreement that curtailed the scope of the ordinary wage is invalid. Based on this logic, the plaintiff (the worker) filed a suit against the defendant (employer) for seeking allowances if regular bonuses had been included in ordinary wage calculation.

The majority opinion concluded that the worker’s claim can be unacceptable, since it violates the principle of good faith. The majority opinion held that where regular bonuses were excluded from ordinary wage calculation by the labor-management agreement and allowances were determined upon such agreement, it would be unacceptable for the worker, giving consent to the agreement, to seek unexpected profits, place an unpredictable financial burden on the employer and cause critical management hardship or threaten corporate existence. The most noticeable point is that notwithstanding the mandatory nature of the LSA provision for securing standards for terms and conditions of employment, the majority opinion acknowledged the application of the principle of good faith, which led to the conclusion against the LSA.

With this regard, the dissenting opinion\(^3\) vehemently criticized the majority opinion by holding that “applying the principle of good faith in an attempt to restrict workers’ basic rights that are guaranteed by mandatory provisions, such as the right to claim wages, directly contradicts such constitutional values or the LSA’s mandatory nature.”

2) BMW Case (Supreme Court Decision Case No. 2012Da72582 Decided May 16, 2014)

The summary of facts and cause of action are as stated below.

「Plaintiff purchased a 2010 BMW 520d automobile from Kolong Glotech. Five days after the car was delivered to the Plaintiff, it was discovered that the speedometer on the car’s dashboard was not working, which was confirmed to be mechanical failure of the dashboard upon inspection. The defect was that the speedometer’s needle failed to move. However, the car at issue was equipped with the head-up display function, which shows the car’s speed through the screen on the windshield, allowing the driver to check speed while driving focused on the front, without having to look at the speedometer. Meanwhile, the aforementioned car is designed so that even if the dashboard is partially defective, the entire “dashboard module” may be replaced. Such

\(^3\) Three Justices our of thirteen Justices concurred with the dissenting opinion.
maintenance is not complicated, is relatively cheap, and the entire dashboard would function normally following the maintenance. Kolong Glotech offered a "warranty repair of replacing the dashboard," but the plaintiff refused this offer, and demanded a newly assembled car in exchange for the car that the Plaintiff initially received.

The main issue of this case is whether the plaintiff is entitled to the right of defectless property. Article 581 of the Korean Civil Code (hereinafter the Code) states that if any defect exists regarding sales in which the subject matter has been specified in kind (sales of generic goods), the buyer may claim damages against the seller (and rescind the contract only if the objective of the contract is unattainable due to the defect), or claim a non-defective item without rescinding a contract or claiming damages. Thus, Article 581 textually places no limitation on a buyer’s right to claim a non-defective item unlike German Civil Code. Based on the plain meaning of article 581, the plaintiff could have won the case.

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4 Article 581 of the Civil Code (Sale in Kind and Seller’s Liability for Warranty)

(1) Even where the subject matter of a sale has been specified in kind, if any defects exist in the specified subject matter, the provisions of the preceding Article (Article 580) shall apply mutatis mutandis.

(2) In the cases of the preceding paragraph, the buyer may demand the non-defective item without rescinding a contract or claiming for damages.

Article 580 of the Civil Code (Seller’s Liability for Warranty Against Defect)

(1) If any defects exist in the subject-matter of a sale, the provisions of Article 575 (1) shall apply mutatis mutandis: Provided, That if the buyer was aware of or was not aware of such defects due to his negligence, this shall not apply.

(2) The preceding paragraph shall not apply to the cases of a sale by auction.

Article 575 of the Civil Code (Case Where Restricted Real Rights Exist in Contract and Seller’s Liability for Warranty)

(1) Where the subject matter of a sale is subject to a superficies, servitude, chonsegwon, right of retention, or pledge and the buyer was unaware thereof, the buyer may rescind the contract only if the objective of the contract is not unattainable thereby. In other cases the buyer may only claim damages.

5 439 Nacherfüllung

(1) Der Käufer kann als Nacherfüllung nach seiner Wahl die Beseitigung des Mangels oder die Lieferung einer mangelfreien Sache verlangen.

(2) Der Verkäufer hat die zum Zwecke der Nacherfüllung erforderlichen Aufwendungen, insbesondere Transport-, Wege-, Arbeits- und Materialkosten zu tragen.
However, the Supreme Court denied the plaintiff’s right of defectless property on the ground of fairness. The Supreme Court held that “the Civil Code provisions on defect liability were prepared based on the principle of fairness in order to maintain equivalence relation between the performance and counter performance by the contractual parties. However, when the buyer’s right to claim for defectless property is acknowledged without limits in a sale in kind, the seller might suffer excessive disadvantages and losses, thus destroying the equivalence relation. Therefore, it is reasonable to limit the right to claim for defectless property when exercising the right of defectless property contradicts the principle of fairness, such as cases where excessive disadvantage is caused to the seller compared to other remedies if the seller is burdened with the duty to deliver non-defective goods, because the defect of the subject good is slight enough to the extent that there is little to hinder the contract’s goal from being accomplished with repair and other means.”

(3) Der Verkäufer kann die vom Käufer gewählte Art der Nacherfüllung unbeschadet des § 275 Abs. 2 und 3 verweigern, wenn sie nur mit unverhält- nismäßigen Kosten möglich ist. Dare Art der Nacherfüllung ohne erhebliche Ns Recht des Verkäufers, auch diese unter den Voraussetzungen des Satzes 1 zu verweigern, bleibt unberührt.

(4) Liefer der Verkäufer zum Zwecke der Nacherfüllung eine mangelfreie Sache, so kann er vom Käufer Rückgewähr der mangelhaften Sache nach Maßgabe der §§ 346 bis 348 verlangen.

Section 439 Cure (English version)

(1) As cure the buyer may, at his choice, demand that the defect is remedied or a thing free of defects is supplied.

(2) The seller must bear all expenses required for the purpose of cure, in particular transport, workmen’s travel, work and materials costs.

(3) Without prejudice to section 275 (2) and (3), the seller may refuse to provide the kind of cure chosen by the buyer, if this cure is possible only at disproportionate expense. In this connection, account must be taken in particular, without limitation, of the value of the thing when free of defects, the importance of the defect and the question as to whether recourse could be had to the alternative kind of cure without substantial detriment to the buyer. The claim of the buyer is restricted in this case to the alternative kind of cure; the right of the seller to refuse the alternative kind of cure too, subject to the requirements of sentence 1 above, is unaffected.

(4) If the seller supplies a thing free of defects for the purpose of cure, he may demand the return of the defective thing in accordance with sections 346 to 348.
The Supreme Court, on the basis that the seller’s liability for warranty against defect is based on the principle of fairness, decided that it is reasonable to limit the right to claim for defectless property when the performance of this liability goes against the rule of fairness in individual cases, which gives this case its significance.

The principle of fairness can be construed as a part of the principle of good faith⁶ and this case can be regarded as the case where the principle of good faith changed the meaning of the text of the Code enacted by the legislature.

3) The Beauty of The Golden Field Case (Daejeon High Court Case No. 2006Na1846 Decided Nov. 1, 2006)

The summary of facts and cause of action are as stated below.

「The plaintiff is a public enterprise (The Korea Housing Finance Corporation) which rents homes to non-homeowners and converts the rental housing for sale after a certain lease period. However, Article 15 (1) of the Rental Housing Act states that preferential sale is allowed to “renters who do not possess their own house and reside in the relevant housing during the period ranging from the date on which they occupy them to the time when the parcelling-out conversion is made.” In this case, defendant A is a 75-year old man who has lived in his rental house alone. The renter on the rental agreement, however, was stated as defendant B. Defendant A, insisting that he was the actual renter, demanded he is entitled to preferential sale. The plaintiff refused A’s request and filed this suit against defendant A, claiming the cause of eviction from the said house.」

One of the issues of this case was the interpretation of ‘renter’ of the Rental Housing Act and whether defendant A is qualified as the ‘renter’ above. Daejeon High Court ruled that a ‘de facto renter’ can also be a ‘renter’ of the Rental Housing Act based on the factors that:

1. there was an understandable reason for defendant A to ask defendant B to sign the rental agreement on his behalf, as A had been busy nursing his ill wife,
2. defendant A has actually lived in his rental house until now,

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3. defendant A, an aged man lacking knowledge in legal rights, seemingly made a mistake in using defendant B’s name when signing the agreement, and
4. the protection of defendant A corresponds to the purpose of Rental Housing Act.

The case above attracted public attention as a judgment which saved a vulnerable old man from a troubled situation. However from a legal perspective, this case can be problematic. The case leaves a question whether a judge is allowed to extend the meaning of ‘renter’, which seems not to leaves much room for other interpretation in view of the literal meaning. In principle, legal interpretations must be done within the legal wordings themselves.

To follow principle in this case, the ‘renter’ of the Rental Housing Act should be construed as the renter on the rental agreement. There must be grounds for the judge to extend the construction above. The holdings of this case gave its reasoning by stating that “Even the most considerate and thoughtful person cannot thoroughly expect and prepare for tomorrow. The most delicate and detailed legislations cannot give clear and just guidelines for all the situations that may occur. Law is like a ready-made suit based on designs of diverse expectations for the future. No matter how many sizes we make, there are figures that do not fit in any size. We believe that the court, which ultimately construes and executes legislations enacted by the parliament, also has the duty and right to mend those legislations. This does not mean the court has discretion to manipulate law made by the parliament, but it means to complement the intended concept of the legislations, which is also a part of our constitutional system which the Constitution of the Republic of Korea implies.”

7 The reason this case is named “The Beauty of The Golden Field” is the expressions used in the holdings as below.
“It is a day of harvest. The golden fields are waving in delightful rhythm. Red persimmons are fully ripe in every tree of every house. The farmer is softly humming while getting ready for harvest, and his wife cannot hide her smile while watching her happy husband. Claims to drive out an old tenant living alone from his home make warm tears. As we all hope to live in a world with cool heads but warm hearts, legal construction and execution has to be done with cool heads but warm hearts as well. In this case, we believe that not only warm hearts are on the defendant’s side, but cool hearts are also on his side.”.

8 Supreme Court Case No. 93Da52808 Decided Aug. 12, 1994.
This case can be read this way. Basically the court is obligated to apply law made by the parliament. However, in case the defect inherent in law may result in unjust conclusions, a judge has a right to extend interpretation.

Did the Supreme Court uphold the holdings of this case? The answer to this question is no. The Supreme Court emphasized that interpretation of the law must be made for seeking concrete justice in each specific case without prejudice to legal stability. Furthermore, if the legal wordings are relatively precise, extended interpretations are unnecessary or forbidden. Even in the attempts to construe the written text of the statute distant from its generally understood meanings, there must be limitations, since legal integrity among the law under dispute, the related laws and whole legal system cannot be ignored. As the ‘renter’ of the Rental Housing Act in this case is precise, extended interpretation is forbidden. The Supreme Court ruled that a ‘de facto renter’ cannot be construed as a ‘renter’ of the Rental Housing Act based on the conclusion that such interpretation is contra legem.

This case fully shows the degree of restriction imposed to the court when construing legal terms legislated by the parliament and the limit of freedom in attempts of extended interpretation.

2. Legislations Changing the Precedents

1) The statute regarding the status of the transferee of the security deposit of the lessee

The purpose of the Housing Lease Protection Act (Hereinafter “the HLPA”) is to secure stability in a lessee’s residential life. According to the principles of private law, the right and interest of a lessee are only regarded as personal rights. As a result, there is a limit to securing them. However, the HLPA secures the rights of a lessee by affording them powers of real rights. For example, a lessee has a right to preferential payment of its security deposit upon the auction of the lessee’s residential house. However, in this case, the issue was whether the transferee of the security deposit also had right to preferential payment. The HLPA did not have any

9 Supreme Court Case No. 2006Da81035 Decided Apr. 23, 2009.
rules on such situations. The Supreme Court held that the right to preferential payment cannot be succeeded to the transferee of the deposit, since the HLPA was specially enacted in order to secure rights of the disadvantaged lessees, not the transferee. In view of this case, opportunity for a lessee to earn credit by transferring its security deposit decreases. Even if the transferee intended to loan the lessee money with security deposit as collateral, the transferee would face risk as the right to preferential payment is not succeeded to the transferee. In the light of the Supreme Court’s holdings, trouble may arise in securing the rights of a lessee. A jurist has pointed this problem out as well.

The parliament made a partial amendment to the HLPA on Aug. 13, 2013, adding a provision that the financial institutions succeed right to preferential repayment upon the transfer of the security deposit (Article 3-2, (7) of the HLPA). As a result, the precedent aforementioned lost its meaning within the cases where transferees are one of the financial institutions in the Article above. This shows a valid example of where a holding cannot be upheld anymore due to changes in legislations.

2) The statute regarding Obligee’s Duty to Provide Information and to Give Written Notice

The Supreme Court adhered to holdings denying the obligee’s duty to provide information on the credit status of the principal obligor upon signing a surety agreement, based on the premise that the suretyship system is purposed to place the surety on the position of taking over the risk of obligor’s bankruptcy. The Supreme Court held that it is up to the surety to examine credit status of the obligor and decide whether or not to sign the suretyship agreement, and denied the existence of such duty to the obligee.

However, the Korean social atmosphere made it difficult for people to decline suretyship requests from family, relatives, and friends. Suretyship agreements were signed merely based on relationship and goodwill, without any reasonable consideration over the financial burden it causes. These kinds of suretyship agreements were prevalent among the society, result-

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10 Supreme Court Case No. 2010Da10276 Decided May 27, 2010.
12 Supreme Court Case No. 97Da35276 Decided July 24, 1998.
ing in a series of bankruptcy from the principal obligor to surety, causing not only serious damage to sureties’ property but also to the whole society.\textsuperscript{13}

Claims of necessity for a legal system to protect interests of sureties were brought up, resulting in the parliament to make an amendment on the Civil Code. According to Article 436-2 of the amended Civil Code, at the time of concluding a suretyship agreement, the obligee has duty to notify the surety of credit information concerning the principal obligor's obligations which may affect the decision on whether to conclude a suretyship agreement or any terms and conditions. Furthermore, after concluding the agreement, the obligee continues to be under the duty to give written notice to the surety when the obligee becomes aware of that a significant change has been made to the credit information. In case the obligee violates such duty, the court may grant a reduction of, or exemption from, the surety obligations.\textsuperscript{14} However on the other hand, there are questions whether it is appropriate to explicitly impose obligations on the obligee to provide all the significant credit information the obligee possesses.\textsuperscript{15}

As stated above, Article 436-2 of the Civil Code is an amendment that will alter the holdings of the case aforementioned. Therefore, precedents which deny the obligee's duty to provide the surety with information on the credit status of the principal obligor cannot be upheld anymore.

3. \textit{Influences on the judge-made law by the related legislations}

In a case where the statute under dispute obviously does not state the specific rule with regard to the issue, a judge is likely to refer to other related laws to find the logic for appropriate conclusion.\textsuperscript{16} This means a judge’s decision can be influenced by the related legislations enacted by the parliament.

\textsuperscript{13} \url{http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=038&aid=0000317930} (visited on June 20th, 2016.).

\textsuperscript{14} For more extensive explanation regarding the Article 436-2 of the amended Civil Code, see Jinsu Yune, “A Explanation on the amended Civil Code regarding suretyship agreement”, in the Public Hearing Materials for the Protection of the Right of the Tourist and Improvement of the Suretyship System.

\textsuperscript{15} Hyoung Seok Kim, “The Protection of the Surety and Indemnification relationship”, the 9th Workshop on Legal Matters of the Financing.

\textsuperscript{16} This method of interpretation might be called “systematic interpretation”.

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1) Interest Limitation Case(Supreme Court en banc Decision Case No. 2004Da50426 Decided Feb 15, 2007)

The Interest Limitation Act (hereinafter the ILA) was enacted to contribute a stable economic environment for the public and to realize economic justice by prescribing appropriate limits to interest rate. According to the ILA, any amount exceeding limits to the interest rate prescribed by the ILA shall be void. However, it was abolished during the IMF crisis in 1998.

The loan under dispute was done after the abolition of ILA and thus the limits to the interest rate prescribed by the ILA was not applicable. The issues of the case are (1) if the interest rate was set significantly high beyond the limit permitted by conventional social wisdom, whether the agreement for that portion of interest is invalid, (2) If the borrower pays significantly high interest to the lender based on the agreement, whether the borrower may claim a refund of the interest which he/she has paid voluntarily. The majority opinion answered in the affirmative. The majority opinion held that where an agreement is reached concerning interest as part of an agreement to lend and borrow money, if the interest rate was set significantly high due to a difference in economic power between the parties, such agreement shall be deemed null and void as it is against good custom and other principles of social order. In addition, the majority opinion observed that in such a case illegal cause in this context only exists on the part of the lender, or at least the illegal cause on the part of lender is significantly larger than that of the debtor and therefore it is justified to deem the borrower entitled to a return of that portion of interest.

The majority reasoning seemed to be influenced by the Enforcement Decree of the Act on Registration of Credit Business, etc. and Protection of Finance Users. The Decree Article 8-3 states that when a debtor pays interest exceeding the interest rate specified in the Decree, an agreement on interest exceeding the interest rate shall be void and the debtor may claim the refund.

This case is a good example how a decision of the judge can be influenced by the related legislation.
2) Divorce Claim Case(Supreme Court en banc Decision 2013Meu568
Decided September 15, 2015)

Traditionally the Supreme Court stuck to the position denying a divorce claim by at-fault spouse. One of the rationales behind the prohibition of divorce claim by at-fault spouse is to guard against any divorce to expel the legal spouse, especially the wife who finds herself in a bigamous relationship.

However, this position has been criticized on the grounds that with rapid economic growth and a shift to a more individualized society, the social perception of divorce has changed and that with women’s increasingly vibrant participation in the workforce, more and more women have come to have as much economic capacity as any man. It is widely suggested that in the case where the marriage relationship has irretrievably broken down, divorce should be allowed regardless of the fact that at-fault spouse filed a suit for divorce.

Seven Justices out of thirteen Justices gave their assent to the established precedents, which means the Supreme Court narrowly succeeded in upholding the position denying a divorce claim by at-fault spouse. The majority opinion presented many reasons for justifying the conclusion and one of the reasons is that there are no legal provisions for the post-divorce spousal support under the Korean legal system.

This case shows that a judge tends to consider the current situation of the related legislation for drawing a reasonable conclusion.

III. Causes bringing about tension and conflict between judge-made law and legislations

1. Intrinsic Constraints of Clarity of Language

No system of law can be so perfectly drafted as to leave no room for dispute. When a dispute arises concerning the meaning of a particular rule, some provision for a resolution of the dispute is necessary. The most apt way to achieve this resolution lies in some form of judicial proceeding.17

17 Lon L. Fuller, The morality of law, p.69.
For the intrinsic nature of language, laws expressed in language can be interpreted in diverse ways. The more general and abstract the language of laws is, the more diverse possibility grows in interpretation.18

In legal interpretation, it is the principle to follow the text of laws.19 It is important to explore what the textual meaning is in the context. Justice Scalia in the U. S. was one of those who emphasized the importance of the principle. His theory of legal interpretation is called textualism. He said “words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible”, defining understanding legal text’s ordinary meaning as the main goal of interpretation of laws.20 However, as mentioned earlier, it is not easy for language to have fixed meaning and legal texts are full of many abstract words. This leads to problems of the penumbra.21

Most of the principles of legal interpretation we are aware of can be said to derive from the assumption of constraints of clarity in language. Generally, the statutes are set to have legal requirements and legal effect, being enacted in the form of language expression, and only extract typical types of the dispute which can arise under the given statutes.22 This inevitably entails diverse arguments on principles of legal interpretation.

In general, the following four principles are discussed for legal interpretation23: the principle of linguistic interpretation,24 to set possible textual meaning of laws as interpretation limit, the principle of historic interpretation, putting priority upon the intention of legislators in the legal interpretation, the principle of teleological interpretation, arguing that purpose of legislation and benefit as well as protection of laws should be considered

18 Seo Hyuk Oh, “Legal Interpretation in Korea-Critical Analysis on Methodology of Legal Interpretation of Korean Courts”, Legal Order and Interpretation in Korea, p.5.
19 Supreme Court Case No. 93 Da 52808 Decided Aug. 12, 1994.
22 Supreme Court Case No. 2009Da44327 Decided May 27, 2010.
24 We might say that the text remains the alpha and omega of interpretation(Mary Ann Glendon, “Comment”, A matter of interpretation, p.106).
to interpret laws and lastly the principle of systematic interpretation, arguing that legal interpretation should be done, based on consideration of relativity with other laws and entire legal framework, seeking logical integrity.

Among them, the principle of historic interpretation, the principle of teleological interpretation and the principle of systematic interpretation can be applied as principles to interpret laws beyond the plain meaning of the laws. For instance, in the *beauty of the golden field case*, the principle of teleological interpretation was applied to expand the meaning of ‘renter’.

In sum, language has intrinsic nature for diverse interpretation and it is common to use abstract words in legal provisions. Therefore, it is more likely that judges are not bound by textual meaning of laws. This means it has much room for tension and conflict between judge-made laws and legislations.

2. *Judges Seeking the Substantive Justice in Each Specific Case*

When a judge makes judgement over a case, he/she needs to decide what comes first between legal stability and substantive justice. It is a question with no clear answer on whether a judge would put the substantive justice ahead of legal stability or undermine the substantive justice, putting priority upon legal stability.

As seen in the *ordinary wages case* and *BMW case*, it is clear how much importance Korean judges put on the substantive justice in each specific case. The key in these cases lies in whether the principle of good faith can incapacitate existing laws.

The principle of good faith serves as a general principle to underpin entire legal order and the substantive justice, when it is clearly required to prevent unfair consequences which are likely to be caused with strict and rigorous application of laws. Thus, the principle of good faith is implemented to avoid unfair results or insincere exercise of rights and it plays a significant role in modifying contents of laws.

*The ordinary wages case and BMW case* are the examples, highlighting the substantive justice, with application of the principle of good faith. However, some might argue that these cases undermine legal stability and caused confusion in legal order by incapacitating the objectives of mandatory provision.
Meanwhile, as a principle of legal interpretation, absurd result principle was introduced in US and UK. The principle explains that the court should not be bound by plain meaning of statutes if the result produced by the application of the textual meaning of the law is explicitly against the common sense since the legislature obviously did not intend such absurd results. This means the legislative granted the court the rights to refuse legal interpretation, that may lead to seemingly absurd legal conclusion. Yet, the view that the legislative granted such right to the court is based on fiction rather than fact. In fact, absurd result principle creates tension and conflict with laws enacted by the legislative given that it allows judges to seek substantive justice against textual meaning of the laws.

The last thing a judge wants in making judgement might be the criticism that it is ‘a ruling against common sense.’ No judge welcomes a criticism that his/her judgement comes against common sense of the public. The judge deeply came to know relevant facts of the case better than anyone during presiding procedure. Under the situation, the judge wants to draw the most reasonable conclusion for the circumstance. It is difficult to make a judge satisfied with his/her judgement if he/she blindly follows the statutes and the precedents of the Supreme Court. Seeking substantive justice, the very source of power and predestined goal of judges, inevitably creates tension and conflict with laws legislated by legislature.

3. Role of the Legislative and Court Ruling Overturned by the Legislative

The legislative has might power. The legislative has the power to incapacitate Supreme Court ruling with legislation of laws. If the textual contents of the law explicitly dictates against the existing Supreme Court ruling, it is not possible for judges to follow the existing Supreme Court ruling, ignoring the plain meaning of the law. As seen in the statutes regarding the status of the transferee of the security deposit of the lessee and regarding obligee’s duty to provide information and give written notice, there were cases where the National Assembly enacted a law to overturn existing ruling.

26 Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 470-471.
One of the top priorities for lawmakers in legislating laws is whether the enactment can attract the voter’s mind. For them, whether the law stays true to legal principle has lower priority as long as it does not draw the voter’s attention. If it can win the hearts of voters, they may propose a bill to legislate a law against judicial precedents.

In reality, after the BMW case, consumers’ complaints sharply increased as imported car dealers refused to replace defected models with new cars when the defect was discovered after purchase. Even a citizen self-demolished his new Mercedes-Benz model as the carmaker did not replace it with a new model, even after a series of defects occurred.27 Driven by a lot of discontent from consumers, lawmakers are preparing a bill to grant a right to a consumer to a replacement car of a new model when the defect is repeatedly emerges within a short period after purchase.

4. Distrust in Legislature

If the legislators made strenuous endeavors in enacting a law by considering every possible dispute likely to happen with regards to the given law, judges would trust the legislature. In this case, it is highly likely that judges would like to interpret the law in the direction of respecting legislative intention.

However, it is not uncommon that laws are legislated without thorough review, being pushed for time and in some cases, the logic of the given statute becomes inconsistent in the process of reflecting diverse opinions. As the budget executed by the administration is being expanded and the power of the administration is growing, the legislative tends to be preoccupied with monitoring and checking the administrative activities. Under the situation, it is not easy for the legislative to take a close look at every possible dispute involved in the process of enacting a law.

In Korea, it is still common to use abstract, sometimes ambiguous legal terminology in legislation at the National Assembly. Since it is not easy to expect possible conflicts likely to happen in details, there is no choice but to describe it with abstract and ambiguous words. It is not always the case

that the legislators try to avoid absurd and irrational conclusion by using carefully selected legal terms and enacting a law with no contradiction.\textsuperscript{28}

The current situation causes distrust of judges in the legislative. This is why the principle of historic interpretation to explore and understand the intention of the legislative in legal interpretation does not earn strong support. For this matter Karl Larenz once keenly pointed out: “When it seems today clear that the pendulum swings very far toward the side of the substantive justice in the specific case, then that is also linked to the loss of authority of the present legislature together who rarely even takes the time and makes the effort to reconsider its formulations carefully and often any scheme at all fails, where it can be expected of him and must.”\textsuperscript{29}

IV. Solutions for easing tension and conflict between judge-made laws and legislations

1. Possible Solutions

If the emphasis is on controlling judges capability through legislation, the focus will be on the skill of legislation. It might be argued that advanced legislative skills will give clear guidance to judges and this will resolve tension and conflict between judge-made laws and legislations. According to the argument, in the process of legislation, it is important to expect all possible conflict and enact law more substantially and specifically. It is also important to leave legislation materials or references to define intention of legislation and clear interpretation guidelines. It is true that the approach can be a meaningful solution to a certain extent.

However, as mentioned earlier, it is not possible to enact a law while expecting and preparing for all possible situations. No law is perfect. Also it is more likely that legislation composed of abstract and rather ambigu-

\textsuperscript{28} Seo Hyuk Oh, p.6.

\textsuperscript{29} Karl Larenz, Methodenlehre der Rechtswissenschaft, Springer-Verlag(1991), S. 350. Original version is “Wenn das Pendel heute offenbar sehr weit nach der Seite der Fallgerechtigkeit hin ausschlägt, dann hängt das auch mit dem Autoritätsverlust des heutigen Gesetzgebers zusammen, der sich nur selten noch die nötige Zeit nimmt und die Mühe macht, seine Formulierungen sorgfältig zu überdenken, und nicht selten eine Regelung überhaupt unterläßt, wo sie von ihm erwartet werden kann und muß.”.
ous wording will be preferred than substantive and specific contents so as to avoid criticism against possible side effects from a new enactment.

Given this situation, it is not very likely that judges’ authority and power over legal interpretation will be reduced. Rather, in the rapidly changing environments, there remains much room for the authority of a judge to further expand as hard cases requiring more than the coverage of existing laws increases.

Then how to control judge’s logic shall be given priority for considering possible solutions to ease conflict between judge-made laws and legislations.

2. How to Control Logic of the Judge

The common mistake made by a judge when he/she focuses on resolving each case is making a judgement based on intuitive sense of justice which has accumulated from his/her extensive experiences as a judge, instead of deep legal reasoning. It is not always wrong to make a judgement based on intuitive sense of justice. Sometimes intuitive sense of justice can serve as strong guidance to the reasonable conclusion. Most of all, it helps them draw a conclusion swiftly. However, too much dependence on intuitive sense of justice is likely to cause mistake of making conclusion first, and then, developing or inventing logic. This leads to shaky logic and failure to justify the conclusion.30

When a judge draws a conclusion based on intuitive sense of justice but cannot find the logic to justify the conclusion, the first that comes to his/her mind is the principle of good faith. That is why there are many cases where application of the principle of good faith becomes an issue.

However, applying the principle of good faith in the name of realizing substantive justice is not only likely to undermine legal stability, but also cause disorder in legal system. In this sense, it is necessary to set restriction on application of the principle of good faith. At least, for the cases of mandatory provisions, application of good faith principle shall be refrained with very limited exception. Application of the principle for

30 One Korean judge said that during his career as a judge he often recollected “decisionism” proposed by Carl Schmitt. I think his remark is to the point in that a judge must stop the ball, which means he must make decision however hard the case is.
mandatory provisions can be said to mean outright disregard to the intention of the mandatory provision. In this sense, it is hard to justify the conclusion in the ordinary wages case. Application of the principle of good faith shall be exceptionally allowed only when it is clear that current laws will lead to intolerably unacceptable, absurd conclusions.

With regard to how to regulate the logic of the judge, Ronald Dworkin provided many meaningful implications by using his peculiar metaphor of writing a chain novel.31

「Suppose that you are a participant in writing a chain novel. Others have written earlier chapters. Now it’s your turn. How shall you proceed? You can’t disregard what has come before. If your predecessors have started to write a romance, you can’t suddenly turn it into a work of science fiction without doing violence to what they have done. You owe a duty of fidelity to their work. But your task is not mechanical. You have to fit the existing materials, and you have to justify them, by writing a new chapter that makes the emerging novel, taken as a whole, the best it can be.」

Dworkin thinks that judging is a lot like that. Precedents are like the existing chapters, and a new case is an opportunity to produce a fresh one. Judges can’t just make the law up. Though at least in hard cases, they can’t merely “follow the law,” because there isn’t anything to “follow.” What they have to do is produce a principle that both fits and justifies the existing legal materials.32

I think that Dworkin put emphasis not only on the creativity of the judge’s profession but also on the consistency of the judge’s logic. The theory and dogmatics cultivated by academia might play an important role in enhancing the consistency of the judge’s logic.33 Therefore it can be submitted that one of the important task of the academia is to develop the theory and dogmatics applicable to solving the hard case, to keep a vigilance over the logical defect of judgment and to contribute to the consistency of judgement. In this respect, academia will be placed in a more significant position in regulating the judge’s interpretation in the future rather than the parliament.

32 This is Dworkin’s conception of law as integrity.
33 Joseph Esser, S. 311, 317.
Judge-made Law beyond the German Civil Code

Frank L. Schäfer

I. Introduction: A Decisive Distinction

In his essay “The Secret Revolution from Constitutional State to Judicial State”¹ Bernd Rüthers, grand inquisitor of German jurisprudence, argues that the German judiciary has shifted the balance of power in favour of the courts to the detriment of democracy. His basic argument is that courts seize political power through the unconstitutional modification of statutes and the invention of fictitious gaps in existing law. Rüthers’ critique reminds us of conservative thinking,² which denies the judicial right to decide cases on a normative basis other than that of blackletter rules. Conservative thinking essentially wants to confine judicial power to statutory interpretation and a very cautious use of analogy and its inverse, the teleological reduction of statutes. The debate on the boundaries of judicial power is so important that it extends to the political level. For instance, the Federal Minister of the Interior asserted in April 2016 that the German Federal Constitutional Court did not have the competence to tie the legislator’s hands when it comes to security.³

From an academic point of view, the debate raises questions about the relationship between the courts and Federal Parliament at the crossroads where judge-made law (Richterrecht) meets the judicial development of

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statutory law (*richterliche Rechtsfortbildung*).\(^4\) First, to what extent are courts allowed to develop law beyond existing statutes? Second, is judge-made law actually an autonomous legal source? These questions arise from the classical distinction between interpretation of statutes (application *intra legem*) and development of these statutes (application *praeter* and *extra legem*). In Germany, methodological doctrine demands that even a wide, creative use of a statute remains an interpretation of that statute as long as the statutory wording covers the result of that exegesis grammatically and semantically.\(^5\) If we follow that presumption, interpretation does not presuppose that the statutory text offers a single meaning. Due to the inherent vagueness of language, interpretation has to start from the assumption of the potential for different meanings in a statute. Only a deviation from statutes beyond the limits of the wording falls into the realm of judicial development of law (*Rechtsfortbildung*).

**II. Types of Judicial Development of Law**

Since the author is not a constitutional but a civilian lawyer, this paper will focus on the judicial development of all law that relates to the German

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Civil Code. This development of law refers to judgements modifying or framing the statutory norms of the Civil Code. A further distinction has to be made within the concept of the judicial development of law. German doctrine distinguishes between judicial development that modifies existing statutes by analogy or teleological reduction (praeter legem, literally “beside the law”, but meaning “following the specifications of statutes”, gesetzesimmanente Rechtsfortbildung) and judicial development not based on specifications in existing statutes, (extra legem, literally “outside the law”, meaning “beyond statutes”, gesetzesübersteigende Rechtsfortbildung). Beyond these two legitimate modes of developing law lies the forbidden realm of correcting statutes contra legem (against or contrary to the law of the land).

Two examples will clarify the difference: First, the rules on direct agency (German Civil Code section 164 and following) are applied even if the agent does not reveal that he or she is acting on behalf of another person (Handeln unter fremden Namen). That case does not fit the wording of the rules on direct agency, which demands disclosure, but it is so close to them that a judge should apply the rules by analogy.7

Second, the judiciary grants compensation for pain and suffering after an infringement of the general right of personality. There is no explicit provision in the Civil Code for such a claim and also no constitutional way to use an already existing rule by analogy. Nevertheless, it is commonly accepted that the courts have the duty to grant compensation in such a case.8 The German Federal Constitutional Court gave its blessing to this in 1973, in the famous Soraya case, where Princess Soraya of Persia sued the press.9 Civil Code section 253(2), a provision in the section on damages, grants compensation only for intangible damage (that is payment for pain and suffering) as the result of injury to body, health, freedom or sexual self-determination. The provision does not mention any personality right other than that of sexual self-determination. Civil Code

9 BVerfGE [Decisions of the Federal Constitutional Court], vol. 34, p. 269.
section 253(2) allows no analogy, because there is no sufficient gap in the provision. When the Federal Parliament reformed the law of damages in 2002, it already had in mind an existing solution to the problem, which is located in the law of delict. If we follow the precise meaning of Civil Code section 823(1) in the law of delict, a person whose right of personality is infringed can claim money for any pecuniary loss. The provision does not include any non-pecuniary loss such as damages for pain and suffering. This lack of perfection does not concern the underlying facts of the norm, but rather the legal consequences. Since analogy only addresses the underlying facts, a juridical method by analogy is inapplicable. Judge-made law beyond statutes remains the proper way to extend section 823(1) to include financial compensation for pain and suffering.

Both forms of judicial development of law alter existing statutory law outside its mere interpretation. However, judicial development beyond statutes is a stronger deviation from the statutes and needs additional justification. It cannot rely on a standardised methodological mechanism with specified schemes, which do not require the weighing of contradictory rights. This study will focus on judge-made law beyond statutes because this, and not the type that relates to matters not clearly addressed by the law (praeter legem), is what is currently under political and academic fire. In other words, judicial development of law beyond statutes is the litmus test for every form of judicial power.

III. Justification for Judicial Development of Law beyond Statutes

When it comes to a restrictive approach towards judicial development of law, we have to concede that the constitutional framework sets the boundaries of juridical methodology and therefore of the judicial development of law. Methodological problems are constitutional problems. Following that assumption, one could be inclined to use the separation of powers in article 20(2) of the Federal Constitution as an argument against judicial development of law beyond statutes. One could advocate that the judiciary must

11 Established at the Federal Court of Justice since BGHZ [Decisions of the Federal Court of Justice], vol. 35, p. 363 (367 f.); BGHZ, vol. 26, p. 349 (356) had used section 847 by analogy.
not develop any law since the creation of new law is the very competence of the legislation. However, such an understanding of the constitution is heavily biased. The separation of powers is not a strict rule, but a flexible principle with room for manoeuvre. Thus, the case for the development of law can be made within the limitations of the constitutional framework. The separation of powers does not draw a strict line between law-making and the application of law. Rather, the judiciary plays its genuine role when it comes to judicial development of law beyond statutes.

Another point against the development of law beyond statutes could derive from article 100(1) of the Federal Constitution. The provision reads as follows: “If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from […] the Federal Constitutional Court where this basic law is held to be violated.” The provision covers the concrete judicial review, namely the relationship between ordinary courts and the Federal Constitutional Court. It assigns the exclusive competence to declare statutory norms null and void to the Federal Constitutional Court. One could argue that the declaration of nullity by the Federal Constitutional Court is simply the strongest form of judicial development of law. The *argumentum a maiore ad minus* could be that courts other than the Federal Constitutional Court lack the power for any judicial development beyond statutes. However, the argumentative weight of article 100 of the Federal Constitution is limited, because it focuses on the competence to judge constitutional issues. On the other hand, Federal Constitution article 20(3) targets the different question of judicial development of law. The norm states, “the legislature shall be bound by the constitutional order, the executive and the judiciary by law [statutes] and justice”. It is widely acknowledged that at least the term “justice” includes customary law and the development of law beyond statutes. Therefore, article 100 of the Federal Constitution is irrelevant in our methodological context.

The statutory law and the verdicts of the Federal Constitutional Court underpin and explain the principles of the judicial right to develop law beyond statutes. For example, section 132(4) of the Courts Constitution Act presupposes that the Federal Constitution allows the Federal Court of Jus-

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12 All translations of statutes are official translations on www.gesetze-im-internet.de.
tice to develop law beyond statutes. The provision orders that the “adjudicating panel may submit an issue of fundamental importance to the Grand Panel for a decision if it deems this necessary for the development of the law or in order to ensure uniform application of the law.” Ironically, the National Socialists had implemented this provision in 1935 to push back the liberal statutory law in favour of new unwritten National Socialist law.14

In line with the Courts Constitution Act, the Federal Constitutional Court reaffirmed the constitutional legitimacy of judicial development of law beyond statutes in the Soraya case:

“In some circumstances there can be law beyond the positive statutes of state authority, which has its source in the constitutional legal system as a whole, being a corrective to the written law. It is the task of the judiciary to find it and to apply it in its decisions. The Federal Constitution does not constrain the judge to apply legislative directives within the limits of the possible literal meaning to the individual case. Such a view would presuppose the fundamental completeness of the positive legal system. Such completeness might be acceptable as a principal postulate for legal certainty, but is virtually unattainable. Judicial activity consists not only in recognising and pronouncing decisions of the legislature.”15

The Soraya case also points out that the argument towards judicial development is growing over time:

“Here the judge is facing the great codification of the Civil Code, which has been in force for over 70 years [now 117 years]. This is important in a double sense: The judicial freedom for creative development of law necessarily grows with the ‘aging of the codifications’ […], with the increasing time interval between the statutory order and the individual judicial decision. […] The statutory norm not only shapes the social relations and the social and political views, but also constantly interacts with these relations and views; under certain conditions, the statutory content can and must change with the change of such relations and views. This is especially true for this century, where living conditions and legal conceptions have profoundly changed between the creation and application of the statute. Hereafter, a judge cannot escape a potential conflict between the statute and the substantive notions of justice in a changing society. He cannot cling to the unchanged text of the statute. He must apply the legal norms in a wider manner, if he does not want to fail in his duty to deliver the ‘right’ judgements.”16

14 Statute 28 June 1935, Reichsgesetzblatt [Imperial Law Gazette], vol. 1, p. 844.
15 BVerfGE [Decisions of the Federal Constitutional Court], vol. 34, p. 269 (287).
16 BVerfGE [Decisions of the Federal Constitutional Court], vol. 34, p. 269 (288 f.).
IV. Boundaries of Judicial Development of Law beyond Statutes

The judicial development of law beyond statutes has inherent limits, specified by the constitutional role of the judiciary.

1. Constitutional Boundaries

In another landmark case, the Federal Constitutional Court had to cope with an ostensible father who was erroneously paying maintenance for a child that he did not realise was not his own.\textsuperscript{17} If the father were to learn of the child’s origin, he might seek recompense from the child’s true father. To do so, the mother would have to reveal the true father’s name to him. The German Federal Court of Justice derived a claim to information from section 242 Civil Code.\textsuperscript{18} The provision copes with “performance in good faith” and states: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.” This paragraph might serve as a basis for duties within a contractual relationship of the law of obligations, but the wording does not include any specific claim. In other words, using section 242 of the Civil Code for a claim to information does not fall within the scope of statutory interpretation, but develops law beyond the statute. The Federal Constitutional Court described the constitutional limits for such development as follows:

“Judgements on private law mainly solve conflicts of interest between private subjects. On the one hand, such judgements burden one party’s legal position and promote the other party’s legal position. If a civil court imposes a duty on a person by means of developing law, this is usually done in order to strengthen the legal position of the second party. The heavier the constitutional content of the reinforced position weighs, the more clearly the constitution prescribes the specific solution to the judiciary and to the legislation and the stronger is the judicial power to implement this position by means of judicial development, even if it is at the expense of the opposing, but weaker position. Conversely, the heavier the burden weighs constitutionally and the weaker the constitutional content of the opposing position is, the narrower are the limits for the development of law and the more strictly the civil court must respect the boundaries of the statutes. The boundaries of judgements require special caution where the legal situation of the citizen deteriorates without constitutional reason. The lesser the plain text of the statutes delivers some starting

\textsuperscript{17} BVerfGE [Decisions of the Federal Constitutional Court], vol. 138, p. 377.
\textsuperscript{18} BGHZ [Decisions of the Federal Court of Justice], vol. 191, p. 259.
point, the less the application of a general clause in private law constitutionally justifies a heavy burden on one party.”

In this specific case, the Federal Constitutional Court attached greater weight to the mother’s right to privacy as an application of the general right of personality than to the father’s mere financial interest. The use of section 242 of the Civil Code in such a creative way is now barred. The judicial power to shape private law is weaker than the legislative power, if we look at the next citation in the same case:

“The constitution does not demand that the legislator corrects his decision to implement a weak right of recourse without right to information. […] The lawmaker has greater discretion in deciding how to balance the mother’s interest in secrecy and the ostensible father’s financial interest in his recourse claim. It is true that the basic rights of the parties also limit legislative discretion. Nevertheless, it is not evident that the lawmaker fell short of constitutional standards when he did not implement a right to information in order to strengthen the recourse claim, since the mother’s right to secrecy has a heavy constitutional weight.”

The Federal Ministry of Justice and Consumer Protection is planning a new section 1607(4) in the Civil Code to implement such a claim.

The verdict of the Federal Constitutional Court does not completely exclude the right to information beyond statutes. If the child wants to know the identity of his biological father, it can rely on section 1618 a of the Civil Code (“Duty of assistance and respect”) as a claim against the mother.

The provision states: “Parents and children owe each other assistance and respect.” As in the case of section 242 of the Civil Code, the application of the norm falls beyond interpretation and develops the law beyond the statute. However, unlike in the case before, the child’s right to know its parentage outweighs the mother’s right to privacy.

The Federal Constitutional Court sets a flexible frame for developing law beyond statutes, which requires the weighing of the conflicting basic rights of the parties. Since every claim and every duty strains a party in a trial, the constitutional framework is not limited to cases where one party explicitly wants to enforce its basic rights. In every case in private law, the

19 BVerfGE [Decisions of the Federal Constitutional Court], vol. 138, p. 377 (392 sq.).
21 See www.bmjv.de, draft 29 August 2016.
22 BVerfGE [Decisions of the Federal Constitutional Court], vol. 96, p. 56 (62).
decision will touch the private autonomy of the parties under Federal Constitution article 2(1). Hence, in every case in private law the limitations on the development of law are, in the end, a constitutional question. Further studies will show that private autonomy could possibly assist in replacing basic rights with autonomous principles of private law on the meta-level of legal theory. The constitutional background also explains that the courts have not only the right but also the duty to develop law. The basic right to access judicial review in article 19(4) of the Federal Constitution reads: “Should any person’s rights be violated by any public authority, he may have recourse to the courts.” If we sum up the constitutional considerations and clarify them for the use in daily legal practice, we get certain conditions where the courts have the competence to develop law. These are as follows.

First, developing law beyond statutes is not limited to the highest courts, such as the federal courts. It is the duty of even the lowest court to develop law. Section 511(4)(1) Code on Civil Procedure orders, the “court of first instance shall admit an appeal in cases in which […] legal matter is of fundamental significance or wherever the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court of appeal”. Therefore, lower courts can develop law, but the higher courts have the task of reviewing this development through the processes of appeal and revision.

Second, there must be a sufficient gap in the law, whether unintended or planned: Either the legislation has overlooked the need for regulation or it has deliberately left the question open for the judiciary to decide. It is also important to remember that such an error and not the opposite case has to be presumed. Next, the gap can mean that there is an imperfect statutory norm or a missing statutory norm, or even that statutes do not cover a whole area such as labour disputes. The courts need to use the principles of historical interpretation to ascertain the legislator’s intention. The need to strengthen one party’s basic rights (constitutional argument) does not allow the courts to override the legislator’s intention. If the legislator does not want any kind of gap-filling in order to restrict a norm and this solution manifests itself somehow in the wording of the statute (so-called deaf-

ening silence, beredtes Schweigen des Gesetzgebers), the courts must not override this decision by developing law beyond statutes. The courts would otherwise act contra legem, contrary to their constitutional rights and duties. The Federal Court of Justice exceeded constitutional boundaries for example, when it applied section 1578(1) of the Civil Code on the amount of maintenance in family law. The Federal Constitutional Court discarded the use of section 1578 of the Civil Code both as interpretation and as development of the law, since the legislator’s intention did not cover such a use of the statute.\(^{24}\) There are only two exceptions were the legislator’s intention is irrelevant: If the legislator’s intention cannot be determined, the courts must examine the statutory system and the objective purpose of the law. The same is true if the economic or social situation has dramatically changed and the statutory norm no longer suits the present circumstances.

Third and finally, the development of law must pass the test of proportionality, which consists of three stages: suitability, necessity and proportionality in the narrow sense. Suitability addresses the question whether developing law can close the gap at all. Necessity demands that the judiciary selects the smallest form of development of law. The development of law beyond statutes is secondary to the development of law following statutes, for example by analogy or through the reduction of statutory norms. Note: In the Soraya case, an analogy to section 253 of the Civil Code was not possible, so development of law beyond statutes was the proper choice. Necessity also requires the solution which is closest to the statutory regulation, even if the methods of development of law as an exception to the statutes are inapplicable.\(^{25}\) As we saw in the verdict of the Constitutional Court before, proportionality in the narrow sense consists of weighing the legal positions of the different parties in their case against each other. Only if the basic rights of the favoured person outweigh the basic rights of the disadvantaged person, the development of law beyond statutes is constitutional and permissible in the methodological sense.

To sum up, the judiciary must not replace but rather supplement Federal Parliament as democratic lawmaker (Ersatzgesetzgeber). Beside these three checkpoints, other topics do not help to confine the boundaries of development of law beyond statutes because they lack any constitutional

\(^{24}\) BVerfGE [Decisions of the Federal Constitutional Court], vol. 128, p. 193 (223).
\(^{25}\) BVerfGE [Decisions of the Federal Constitutional Court], vol. 37, p. 67 (81).
substance. The “nature of things”, which is what German common law calls common sense, is one such unsuitable topic.\textsuperscript{26} The nature of things is nothing other than a magic wand with which to cloak judicial despotism as constitutional methodology. Arbitrary decisions contradict the basic right of equality in article 3(1) of the Federal Constitution. The same applies to the existence of “emergency situations” to justify judicial development. If the circumstances really require a swift decision, Federal Parliament can act faster than any court – i.e. within weeks.

2. The Case of European Law

A quite new application of judicial development of law beyond statutes has arisen in the field of European law. The German legal system must comply with European regulations. Compliance includes both interpreting statutes in favour of European law and developing law to achieve compliance. If we look closely, the case of European law fits neatly into the general scheme of development of law beyond statutes. We can presume that the German legislator wants to draft statutes in full conformity with European law. If there is any national deviation from European Law, the courts can presume, against the general rule, an unintended gap in the law. The following test of proportionality does not present any special challenges.

In the most frequent case of consumer law, a relationship between consumer and trader, the consumer’s rights will regularly outweigh the trader’s rights, because the trader has a superior economic position, which needs less protection.

The development of law in the European context demonstrates that the constitution does not permit every judicial attempt to create judge-made law. The EC-directive on the sale of consumer goods\textsuperscript{27} raises many questions about its proper implementation in section 439 of the Civil Code, which addresses the solution for defective goods. The landmark decision

\textsuperscript{26} In Detail Bernd Rüthers/Christian Fischer/Axel Birk, Rechtstheorie mit Juristischer Methodenlehre [Legal Theory and Juridical Methodology], 8\textsuperscript{th} edition, 2015, recital 913-929; dissenting Karl Larenz/Claus-Wilhelm Canaris, Methodenlehre der Rechtswissenschaft [Methodology of Legal Science], 3\textsuperscript{rd} edition, 1995, pp. 236 ff.

of the European Court of Justice on the buyer’s rights based on this directive covers three aspects: First, “the seller is obliged either to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of the replacement goods.”

The German Federal Court of Justice implemented this part of the judgement through a broad interpretation of the buyer’s rights in section 439(1) of the Civil Code to “demand that the defect is remedied or an item free of defects is supplied”.

Second, the European Court of Justice precluded any “national legislation from granting the seller the right to refuse to replace goods not in conformity, as the only remedy possible, on the ground that […] replacement imposes costs on him which are disproportionate with regard to the value that the goods would have if there were no lack of conformity”. In this regard, the Civil Code did not agree with European Law, since section 439(3) of Civil Code states, “the seller may refuse to provide the kind of cure chosen by the buyer, if this cure is possible only at disproportionate expense.” The implementation of European law demanded a recourse to judicial development of law following statutes by reducing the seller’s right to refuse.

Third, and most important in the present context, the European Court of Justice opened a back door by adding this obiter dictum: “In that context, it must be pointed out that [the EC-directive] aims to establish a fair balance between the interests of the consumer and the seller by guaranteeing the consumer, as the weak party to the contract, complete and effective protection from faulty performance by the seller of his contractual obligations, while enabling account to be taken of economic considerations advanced by the seller. In considering whether, in the case in the main proceedings, it is appropriate to reduce the consumer’s right to reimbursement of the costs of removing the goods not in conformity and of installing the replacement goods, the referring court will therefore have to bear in mind, first, the value the goods would have if there were no lack of conformity and the significance of the lack of conformity, and secondly, the Directive’s purpose of ensuring a high level of protection for consumers. […] Finally, in the event that the right to reimbursement of those costs is reduced, the consumer should be able to request, instead of replacement of
the goods not in conformity, an appropriate price reduction or rescission of
the contract [...].” 31 In other words, the European Court of Justice sug-
ggested a minor form of the seller’s right to refuse.

The German Federal Court of Justice took up the hint and included it in
the teleological reduction of section 439(3) of the German Civil Code. 32
When taking a closer look, however, this provision only grants a right to
refuse the buyer’s claim concerning the solution. It does not mention any
monetary claim on the buyer’s side or the potential for a reduction by pro-
portionate share. Such a monetary claim is also no minor form of refusal,
but quite the opposite. From a methodological point of view, the Federal
Court of Justice left the field of developing law following statutes (by
analogy or teleological reduction) and crossed the border into judicial de-
velopment of law beyond statutes. Does this very creative judgement pass
the constitutional test? Generally, the presumption, that the German legis-
lator wants to draft statutes in full conformity with European law, creates
an unintended gap in German private law, here in section 439 Civil Code.
In the case at hand, however, the EC-directive does not demand a propor-
tionate claim against the seller in any of its provisions. The European
Court of Justice simply led the way for the lawmaker to ease the seller’s
burden outside the regulatory area of the directive at national level. The
assumption that the German Federal Parliament consented to divide the
costs between the parties is a mere fiction beyond any historical argument.
In the end, the Federal Court of Justice lacked any justification for extend-
ing the law governing sales to such an extreme degree. 33 The implemen-
tation of the EU-Directive on Consumer Rights 34 did not change the situa-

31 European Court of Justice, Reports of Cases 2011 I-05257 (para. 75 ff.).
32 BGHZ [Decisions of the Federal Court of Justice], vol. 192, p. 148 (163).
33 Florian Faust, in: Beck’scher Online-Kommentar BGB [Beck’s Online-Commen-
tary on the Civil code], 39th ed. 2014, section 439 recital 57 a; Stefan Lorenz, in:
Münchener Kommentar zum BGB [Munich Commentary on the Civil Code], 7th
edition 2016, Preliminary notes to section 474 recital 3; Lothar Michael/Mehrdad
Payandeh, Richtlinienkonforme Rechtsfortbildung zwischen Unionsrecht und Ver-
fassungsrecht [Development of Law in Conformity with Directives between Euro-
2015, p. 2392 (2398).
tive 1999/44/EC of the European Parliament and of the Council and repealing
tion because the Federal Parliament did not take up the ministerial draft, which had included the key points made by the Federal Court of Justice.35

V. Judge-Made Law as a Legal Source

The unanimous affirmation of judicial development of law (at least in its narrow sense) does not imply a consensus on the existence of case law as an autonomous legal source.

1. Case Law

According to the prevailing conservative view, judge-made law is a mere synonym for the methodological process called judicial development of law, but not a source of law itself.36 This view stems from a narrow understanding of the separation of powers in our constitutional democracy. If one follows this narrow interpretation, the legislator has the exclusive right to create norms. The opposite view grants the judiciary a limited right to create its own law, at least in the case of developing law beyond statutes.37 We have to concede to the prevailing view that the constitutional framework sets the boundaries of juridical methodology and therefore of the content and scope of judge-made law. It is also true that the German legal system is not the offspring of English common law, in which the judges’ position is paramount. However, like their counterparts in common law, German judges are not robots, which apply statutes like pro-

37 Most important Josef Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts [Principle and Norm in Judicial Development of Private Law], 1956, pp. 137-139.
grams (so-called *Subsumtionsautomat*). If a court reverts to the development of law beyond statutes, it still has to act within the constitutional framework. To do so, it takes careful consideration of the parties’ rights in every single case. The court needs to start an independent examination which lies beyond statutory requirements. This process distinguishes this method from interpretation and development of law following statutes, where such considerations are not commonplace but exceptional.

Besides its theoretical value, the categorization has some value for daily legal practice. Judge-made law is open for interpretation like every other legal source. The statutory interpretation, with its grammatical, historical, systematic and teleological aspects, delivers powerful tools with which to decrypt judicial opinions. However, the similarity to statutes does not extend to the abstract binding effect of statutes. In principle, judge-made law does not set a precedent for any other court in the German legal system (*inter omnes*). Judge-made law only binds as many parties as are involved in the proceeding (*inter partes*). Under exceptional circumstances the binding force extends to different degrees. Reliance can prohibit change in settled judge-made law, provided a person had sufficient reason to confide in an unchangeable jurisdiction. Statutory provisions strengthen the binding force in a few cases as well: section 31(1) of the Federal Constitutional Court Act underpins the extraordinary role of the Federal Constitutional Court as a constitutional body: “The decisions of the Federal Constitutional Court shall be binding upon federal constitutional organs and federal states constitutional organs as well as on all courts and public authorities.” Section 17a(1) of the Courts Constitution Act resolves a potential clash between competing jurisdictions of different courts. If a court has ultimately accepted the admissibility of a case, other courts are bound by this decision. The last example is section 563(2) of the Code of Civil Procedure, which regulates the relationship between the court of appeal and the supervisory court: “The court of appeal is to base its decision on the legal assessment on which the reversal of the judgment was based.”

39 *BVerfGE* [Decisions of the Federal Constitutional Court] vol. 18, p. 224 (240); see also *BVerfGE*, vol. 122, p. 248.
40 See *BGH* [Federal Court of Justice], *Neue Juristische Wochenschrift*, vol. 1996, p. 924 (925) for changes in jurisdiction on general terms and conditions.
2. Customary Law

Even if one does reject the possibility of judge-made law as an independent legal source, the permanent ruling of the highest court (e.g. the Federal Court of Justice) can qualify as customary law. This requires a continuous exercise (“consistent case” over several decades) and a corresponding general legal conviction. The consequence is remarkable. In contrast to mere judge-made law, courts cannot legally change their standing practice, since Federal Constitution article 20(3) (“statute and justice”) binds them to the precedents. A change of judgement is only allowed if the customary law expires according to general rules, for example by changes in legislation or alteration of economic and social circumstances.

The ownership and assignment by way of security is the most prominent example for such customary law. Here we have not only more than 100 years of practice, but also a legal conviction of the judiciary and almost all voices in literature.41 In addition, the lawmaker presupposes ownership and assignment by way of security in Civil Code section 216(2)(1): “If a right has been procured for the purpose of securing a claim, the retransfer of the right may not be demanded on the basis of the limitation of the claim.” The reform of the law of obligations in 2002 integrated other customary institutions concerning the law of obligations into the Civil Code: the “interference with the basis of the transaction” (clausula rebus sic stantibus, now section 313 of the Civil Code),42 the “positive breach of obligations” (positive Forderungs- bzw. Vertragsverletzung, now sections 241(2) and 280 of the Civil Code)43 and the fault in conclusion of a contract (culpa in contrahendo, now Civil Code section 311(2)).44 Other customary institutions like the contract with protective effect to the benefit of third parties (Vertrag mit Schutzwirkung zugunsten Dritter)45 or the safety obligations in the law of delict (Verkehrssicherungspflicht)46 were not in-

41 Since RGZ [Decisions of the Imperial Court], vol. 59, p. 146.
42 With variations since RGZ [Decisions of the Imperial Court], vol. 100, p. 129.
43 Since RGZ [Decisions of the Imperial Court], vol. 66, p. 289.
44 Since RGZ [Decisions of the Imperial Court], vol. 78, p. 239; vol. 107, p. 357.
45 In dispute, see Steffen Klumpp, in: Julius von Staudinger (founder), Kommentar zum Bürgerlichen Gesetzbuch [Commentary on the Civil Code], revision 2015, section 328 recital 104, with further references.
46 Since RGZ [Decisions of the Imperial Court], vol. 52, p. 373; vol. 54, p. 53.
cluded in the Civil Code, although they have reached customary status as well.

Money for pain and suffering in violation of the general right of personality is a mixed example. Compensation in these cases has the character of customary law, as far as the two aspects of compensation (in the sense of corrective justice) and satisfaction (in the sense of emotional satisfaction for the victim) are concerned. By contrast, the preventive function, which enables account for profits (Gewinnabschöpfung analogous to Civil Code section 667),\(^\text{47}\) is still so controversial that the judge-made law so far enjoys no customary status. Other examples completely fall out of the scope of customary law. The legal capacity for private companies in section 705 and following of the Civil Code (Gesellschaft bürgerlichen Rechts) is a striking example. The Federal Court of Justice did not change its opinion in favour of the capacity before the beginning of the millennium,\(^\text{48}\) hence the new jurisdiction is too young to serve as customary law. The whole law of labour disputes provides another example. The scope of the rights of employers and unions is subject to permanent social and legal controversy, which blocks any common conviction of law.

VI. **Distinguishing Judge-made Law from Other Types of Law**

Last but not least, our proposed concept will be compared with the classical view of the functions of judge-made law. The classical view distinguishes four types of judge-made law:\(^\text{49}\) first, substantiation of statutes, second, filling gaps in statutes, third, supplementing statutes and fourth, correcting statutes. Although there is no legal definition of judge-made law, not every one of these cases should bear this name. As we will see, only the third case and parts of the second belong to the concept of judge-made law.

\(^{47}\) BGHZ [Decisions of the Federal Court of Justice], vo. 128, p. 1.

\(^{48}\) BGHZ [Decisions of the Federal Court of Justice], vol. 146, p. 341.

1. Substantiation of Statutes

It is true that nearly almost every interpretation of statutes contains some creative element due to the inherent ambiguity of language. However, judge-made law and interpretation of statutes are exclusive concepts. Even the use of indeterminate legal concepts or of general clauses, as in section 138 of the Civil Code on legal transaction contrary to public policy, does not cross the border between statutory interpretation and judge-made law, as long as the judiciary does not cross the boundaries of interpretation, as we saw before in the case of Civil Code section 242.\(^{50}\)

2. Filling Gaps in Statutes

Likewise, filling gaps in statutes by analogy or teleological reduction does not create judge-made law, rather it copies or alters existing statutory concepts. These cases belong to the judicial development of law following statutes (\textit{praeter legem}). Here, the courts have only a limited capacity to correct or amend statutes. Judge-made law is limited to the situation in which judicial development of law beyond statutes (\textit{extra legem}) takes place in order to fill a gap within a single statutory norm or to fill a wider gap for a whole norm in a statute.

3. Supplementing Statutes

The second case of judge-made law, involving judicial development of law beyond statutes, fills gaps in unregulated areas. Here, a gap occurs not within a single statutory norm or as a missing or overregulated statutory norm, but as an unregulated area of law. The law of labour disputes, which supplements the statutory norms in the Civil Code on labour law, is the best example.

\footnote{Dissenting the leading opinion, see for example: \textit{Herbert Wiedemann}, Richterliche Rechtsfortbildung [Judicial Development of Law], Neue Juristische Wochen-schrift, vol. 2014, p. 2407 (2410).}

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4. Correcting Statutes

As we have seen, judicial development beyond statutes presupposes the existence of an unintended or planned gap in a statute. The judiciary lacks the constitutional power to correct a statute if the legislator has chosen a certain solution and his or her intention is clear in the statutory wording. If the judiciary goes beyond these limits, it crosses the line from judge-made law towards forbidden law-making (*contra legem*).

**VII. Conclusions**

1. The German doctrine distinguishes between two forms of judicial application of statutes: interpretation of statutes (*intra legem*) and judicial development of law. The judicial development of law itself is divided into development following statutes (*praeter legem*, mainly analogy and teleological reduction of statutes) and development beyond statutes (*extra legem*), which is the topic of this paper.

2. Since methodological questions are constitutional questions, the constitution sets the boundaries for judicial development beyond statutes. The balance of power in article 20(2) of the Federal Constitution and the judicial commitment to “statutes and justice” in article 20(3) underpin the priority of legislative decisions and the need to respect and weigh the basic rights (mainly private autonomy) of the parties in a civil case. Judicial development beyond statutes has three conditions: First, not only the highest courts but also lower courts have the right and duty to develop the law. Second, there must be an unintended or planned gap within a statute or in a whole area of law. Third, the rights of the party favoured by the judicial development of law must outweigh the rights of the party disadvantaged by this development.

3. Judicial development of law as it relates to European law is not a separate case in legal methodology. Rather, it follows the same test as the general case of judicial development of law beyond statutes.

4. Only judicial development of law beyond statutes creates judge-made law as a legal source. However, this law only binds judges as a precedent if a statute orders it to be so or if judge-made law crystallises into customary law.
The Decision of the Korean Supreme Court on the Contingent Fee Agreement in Criminal Cases – General Clause, Judicial Activism, and Prospective Overruling

Jinsu Yune

I. Introduction

On July 23, 2015, The Korean Supreme Court rendered an important en banc decision about the contingent fee agreement in criminal cases.¹ The Supreme Court declared that the contingent fee agreement between the criminal defendant and the defending attorney is invalid, as it is contrary to the public policy.² This decision aroused a great controversy. The Korean Bar Association vehemently criticized the decision and raised the constitutional complaint (Verfassungsbeschwerde in German) against this decision to the Constitutional Court.³ One more thing to note is that the decision overruled the former decision which recognized the enforceability of the contingent fee agreement in criminal cases, but, at the same time, decided that the new rule of invalidity set up by the decision should be applied only in the future. In other words, the Supreme Court adopted and applied the theory of pure prospective overruling to this case.

In my opinion, this decision is a clear manifestation of judicial activism. The Court set a new rule about the problem bearing a great social importance by resorting to the general clause without an explicit statutory mandate. Furthermore, the theory of the prospective overruling, which the

¹ Case no. 2015da200111, Panryekongbo (Official Bulletin of the Supreme Court Decisions) 2015, 1238 ff. The English translation of the decision can be found at the homepage of the Supreme Court Library(https://library.scourt.go.kr/kor/judgment/eng_judg.jsp).
² Article 103 of the Korean Civil Code (KCC): A juristic act which has for its object such matters as contrary to good morals and other social order shall be null and void. This article corresponds to Article 138 subpara. 1 of the German Civil Code (Bürgerliches Gesetzbuch, BGB).
³ See http://www.koreaherald.com/view.php?ud=20150728000996 (last visit: May 27, 2015). However, the Constitutional Court Act does not permit raising the Constitutional Complaint against decisions of courts.
Supreme Court adopted in this decision, is a clear token of judicial activism. The prospective application of the new rule makes it easier to overrule, as overruling does not give shock to the settled relation of the parties.⁴ This paper analyzes this decision from the perspective of judicial activism. In Part II, I describe the decision and the academic response to the decision. Part III elaborates on the concept of judicial activism in interpretation. In part IV, I try to find out the factors relevant to judicial activism. Part V deals with prospective overruling.

II. The Decision

1. The Situation Before the Decision

Until this decision, there was little debate about the validity of the contingent fee agreement. The precedents acknowledged the validity of the agreement without an explicit explanation both in civil and in criminal cases.⁵ Occasionally, the court reduced the amount of the contingent fee when it found the agreed fee to be too excessive.⁶

However, some doubt was raised on the enforceability of the contingent fee agreement. One commentator asserted that contingent fee agreements in all cases, regardless of civil or criminal cases, should be banned altogether, as it is contrary to the public policy. He opined that permitting the contingent fee may make attorneys defend the interest of the clients only, ignoring social justice. In order to preserve the independence and impartiality of attorneys, the contingent fee agreement should be prohibited.⁷

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⁵ Civil cases: The Supreme Court decision on Nov. 12, 1991, Case No. 91da 7989, Panryekongbo 1992, 85 and more. Criminal Cases: The Supreme Court decision on July 9, 2009, Case No. 2009da21249 (unpublished). The latter was overruled by this decision.
⁶ The Supreme Court decision on Mar. 31, 1992, Case No. 91da29804, Panryekongbo 1992, 1404 and more.
Other writers asserted that the contingent fee in criminal cases should not be allowed. According to them, the contingent fee agreement in itself can be beneficial to the party that cannot afford the attorney’s fee and it gives the attorney the incentive to do her best effort. However, in criminal cases, the contingent fee agreement, on the condition that the arrested defendant is released, for example, should be deemed such that contradicts public policy. There is a concern that attorneys are inclined to use inappropriate means to get the contingent fee. Moreover, it can cause people’s distrust in the criminal justice system.\(^8\)

2. Underlying Facts of the Decision

The Plaintiff’s father was detained on charges of theft. The Plaintiff retained the defendant, an attorney-at-law, as the counsel for the defense of the Plaintiff’s father and paid the initial attorney’s fee of 10 million Korean Won (KRW), with an additional agreement to pay an additional reward, once Plaintiff’s father is released. After the Defendant’s petition for, but before the grant of the Plaintiff’s father’s release on bail, the Plaintiff paid the Defendant an additional KRW 100 million. In the first instance trial, the Plaintiff’s father was sentenced to three years imprisonment with a five-year probation. At the appellate trial, after some of the indicted charges were withdrawn, the Plaintiff’s father was subject to the same sentence, which then became final. The Plaintiff brought a lawsuit against the Defendant demanding the return of the above-mentioned KRW 100 million, on the following grounds: (a) The KRW 100 million was paid to be spent for solicitation of the assigned judge and, as such, the wrongfulness of the Defendant as the beneficiary far outweighs that of the Plaintiff; and (b) Even if the payment was made as a contingent fee, it was voidable for being excessive to the point of contradicting the principle of good faith.

The appellate court found that the payment of KRW 100 million by the Plaintiff was based on the contingency fee agreement. However, the appellate court ordered the Defendant to return KRW 40 million to the Plaintiff,

as the portion in excess of KRW 60 million was unduly excessive, against the principles of good faith and equity, and, hence, invalid.

The Defendant appealed to the Supreme Court.

3. The Decision

The Supreme Court unanimously confirmed the decision of the appellate court. It declared that the contingent fee agreement in criminal cases is invalid; however, this rule of invalidity should be applied only prospectively, that is, to the contingent fee agreement which is entered into after the date of the decision. The reasoning of the Court can be summarized as follows.

The involvement of a contingent fee may lead the attorney to entirely share interests with the client, not merely offer a high quality legal service and, as a result, may endanger the independence and public nature of the attorney’s professional duties, which, in turn, may hinder the adequate realization of the State’s criminal punitive authority. As such, there is a risk that an attorney may be tempted to directly or indirectly exercise influence on those in charge of investigation or trial in order to secure a successful outcome worthy of contingent fees. Thus, it is not inconceivable that even the client would have false expectations of affecting the disposition of a case by agreeing to contingent fees, even if that means that the attorney may have to resort to inappropriate means. For that reason, there is the risk that the integrity of public officials in charge of criminal justice system may be held in suspicion, or worse, that even the most justifiable and reasonable investigation and trial outcome may be misperceived as a distorted result of undue influence, which, in turn, would undermine confidence in criminal justice system as a whole. With the accumulation of the clients’ distrust and complaint about contingent fee arrangements, a negative perception of attorneys as “those who easily profit by means of physical arrest or criminal punishment” may become prevalent in the society. This would threaten the justification of the bar itself, which, in turn, would be a major hurdle to gaining trust in, and submission to, criminal trials.

In civil cases, the outcome can be classified as win or loss. Therefore, allowance of a contingent fee agreement is not problematic. If the client prevails and recovers, then she/he may gain an economic interest out of which to pay the attorney’s fees. Thus, in the sense that even those clients who would not ordinarily have sufficient means to pay the attorney may
have access to assistance of counsel on the condition of paying a contingent fee, the contingent fee agreement can be justified. By contrast, in criminal cases, by no means can the client gain economic gains depending on the outcome of the trial, which she/he may then share with the attorney. Moreover, the court must appoint a public defender, when the defendant is unable to retain a defense counsel for reasons of indigence or for any other reason. Therefore, we cannot simply equate a contingent fee agreement in a criminal case with that in a civil case.

Taking into account various social evils and adverse effects engendered by a contingent fee agreement in criminal cases, the contingent fee agreement in a criminal case relates the outcome of investigation and trial to a pecuniary payment and, thereby, imposes a risk of undermining the public nature of attorney’s profession of which the mission is to advocate for fundamental human rights and to realize social justice; it also significantly weakens the clients and the general public’s confidence in the judicial system and, thus, may be evaluated as contrary to good morals and social order.

In sum, the main reason Supreme Court provided for invalidating the contingent fee agreement in criminal cases was the adverse effect of the contingent fee agreement: namely, that it may generate distrust in the judicial system. The supplementing opinion of four justices stressed that not a few members of the public still believe that the tendency of “acquitting the rich and convicting the poor” persists in the criminal justice system and it cannot be denied that the contingent fee arrangements in criminal cases have thus far played a negative role of aggravating the misunderstanding and distrust about the fairness and integrity of the criminal justice system.

However, the Court ordered the prospective application of the rule, as it feared the retroactive application would endanger legal certainty. The reason is as follows.

The question of which juristic act goes against good morals and other social order and, thus, is void under Article 103 of the Civil Code, should be determined at the time of the juristic act. Meanwhile, the attitude of the Supreme Court precedent thus far was that contingent fee agreements were valid in principle, irrespective of the distinction between the types of case accepted or their features. It is true that attorneys or clients failed to fully grasp those problems attendant on contingent fees in criminal cases and/or the influence such problems may exert on the validity of contingent fee agreements. Consequently, it was not uncommon to draw up even normal fees that ought to be paid between the parties in the manner of contin-
gent fees. Therefore, it is difficult to conclude those fee arrangements already entered into as void merely for the reason that the fee agreement was nominally a contingent fee agreement. However, if ever a contingent fee agreement is entered into in the future, even though the Supreme Court has made it clear through this Decision that contingent fee agreements in criminal cases may be evaluated as contrary to good morals and other social order, then such an agreement should be deemed void.

4. The Influence of Foreign Laws

It is apparent that this decision was influenced by foreign laws. The supplementing opinion listed the legal system of the U.S., U.K., Germany, and France as countries that have long prohibited contingent fee arrangements in criminal cases as such that are against public interest, grounded in concerns over infringement upon the independence and public nature of the attorneys’ professional duties or disrupting judicial justice. The press release issued by the press officer of the Supreme Court on the next day after the decision explained the legal situation of other countries and The Code of Conduct for European Lawyers on this matter in detail.9

In Germany, the precedents regarded the contingent fee agreement (Erfolgshonorarvereinabprung) as contrary to public policy and invalid since 1926.10 The decision of the Federal Court of Justice (Bundesgerichtshof) on December 15, 1960, reaffirmed the precedents.11 According to this decision, the attorney has the duty to maintain his independence against the party he represents. This is at risk if he had his own worth its interest in the outputs of the dispute, as, in such a case, he could be induced to strive for success without consideration for the real factual and legal situation, even with dishonest means.

The Federal Attorney Act (Bundesrechtsanwaltsordnung) of 1994 comprehensively prohibited the contingent fee agreement. However, in 2006,

9 http://www.scourt.go.kr/portal/news/NewsViewAction.work?currentPage=&searchWord=성공보수&searchOption=&seqnum=1055&gubun=6 (last visit: June 3, 2016). However, it is not entirely accurate that France prohibits contingent fee agreement altogether. French law does not prohibit contingent fee agreement, only pactum de quota litis is not allowed. See Article 10 of Loi n° 71-1130 du 31 décembre 1971.
11 NJW 1961, 313.
the Federal Constitutional Court (Bundesverfassungsgericht) declared that the prohibition of contingent fees is incompatible with the Constitution to the extent that it allows no exception for the case where with the success-based fee agreement the attorney takes account of special circumstances of the client, which prevent the client to pursue her or his rights.\(^\text{12}\) As a result of this decision, the law was changed. The newly revised Attorney’s Compensation Act (Rechtsanwaltsvergütungsgesetz) article 4a postulates that the contingent fee may be agreed upon only when the client would be kept to pursue the right because of his/her economic circumstances.

In England and Wales, after a long period of the prohibition of contingent fee agreement,\(^\text{13}\) the conditional fee agreement, including the success fee agreement, was legally acknowledged by section 58 of Courts and Legal Services Act 1990.\(^\text{14}\) However, the conditional fee agreements for criminal and family proceedings are not allowed.\(^\text{15}\) At present, only conditional fee agreements for personal injuries proceedings are allowed.\(^\text{16}\)

In the U.S., the contingent fee agreements were considered unethical and illegal in the 19th century both in civil and in criminal cases. While civil contingent fees have been gradually accepted, the treatment of the contingent fees in criminal cases has not been changed.\(^\text{17}\) ABA Model Rules of Professional Conduct (2004) provides that a lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.\(^\text{18}\) It can be said that the ban on formal contingent fees in criminal cases is well established.\(^\text{19}\) For the justifi-
cation of the ban, several arguments are advanced. One of them is that contingent fee agreements lead to conflicts of interest between the attorney and the client. Another argument is that, while a successful plaintiff’s civil suit produces a res (thing) with which to pay the contingent fee, there is no res produced in a successful criminal defense. Still, one more argument is that, while contingent fees make legal services available to a group of litigants who would otherwise be unable to retain counsel, indigent criminal defendants have a guaranteed right to appointed counsel. The final argument asserts that contingent fees create the risk of overzealous and compromised representation. An attorney will have a greater incentive to engage in corrupt practices that enhance his/her prospects of winning.

5. The Response to the Decision

As mentioned above, KBA vehemently criticized the decision and went as far as to raise the constitutional complaint to the Constitutional Court.

The appraisal by scholars was divided. One author welcomed the decision. She stressed that attorneys have the official status to preserve justice and human rights. If people believed that the result of the criminal cases could differ depending on defendants’ economic capacity, this would bring about a great distrust in the judicial system. Therefore, contingent fee agreements in criminal cases should be prohibited. The contingent fee agreement in family court cases should not be allowed either. However, the author was critical of the decision in that the Supreme Court did not allow the retroactive application of the rule. The prospective application of invalidity does not cohere with the concept of invalidity. Other authors regarded the decision as wrong. One asserted that the ban of the contingent fee agreement cannot achieve the aim of preventing the emergence of distrust in the judicial system. Moreover, fresh attorneys will experience more difficulty than the attorneys with the career as a judge or a prosecutor, as the contingent fee system allows fresh attorneys chance to be retained. The contingent fee agreement should be regulated

by the statutory attorney law or ethics code of the Bar Association.\textsuperscript{22} Another author opined that it is difficult to justify denying the validity of contingent fee agreements only for criminal cases. Contingent fee functions as a mechanism for lawyers to pay the appropriate level of efforts. From the point of view of social welfare, the agreement between the defense lawyer and the client in criminal cases will become more rigid than before the judgement. On the other hand, whether this decision would reduce the demand of the former judges and prosecutors remains uncertain. As the contingent fee agreement is ruled as void, defense lawyers’ fees will be temporarily decrease, but the social welfare effect is unclear, since the mechanism that can bring a lawyers’ better effort no longer exists.\textsuperscript{23}

III. Judicial Activism in the Interpretation

1. The Concept of Judicial Activism

There are different definitions of judicial activism in the literature. For example, Canon lists six dimensions of activism: majoritarianism, interpretive stability, interpretive fidelity, substance-democratic process distinction, specificity of policy, and availability of an alternate policymaker.\textsuperscript{24} Kmiec identifies five core meanings of judicial activism: invalidation of the arguably constitutional actions of other branches, failure to adhere to precedent, judicial "legislation," departures from the accepted interpretive methodology, and result-oriented judging.\textsuperscript{25}

In the context of the present paper, I would like to distinguish three dimensions of judicial activism, namely: (1) judicial activism in the judicial


review; (2) judicial activism in the interpretation; and (3) the readiness to overrule the precedents. Judicial activism in the judicial review means that courts are prone to invalidate the act of legislature or executive branch. Judicial activism in the interpretation is that courts extensively interpret the law or use analogy to arrive at their preferred results. The readiness to overrule the precedents denotes the extent to which courts respect the principle of stare decisis. Many literatures include these three dimensions in the concept of judicial activism, although with different languages.\textsuperscript{26}

In particular, the distinction of judicial activism in the judicial review and judicial activism in the interpretation is important in the countries such as Korea or Germany where Constitutional Courts have exclusive competency to invalidate the statute made by the legislature. In countries of this type, ordinary courts other than Constitutional Courts cannot engage in the judicial review of the law made by the legislature. However, the active interpretation by courts has an implication for the judicial review. If courts extensively interpret the law so as not to collide with the Constitution,\textsuperscript{27} the necessity for Constitutional Courts to invalidate the law is diminished.\textsuperscript{28} Therefore, counter-majoritarian difficulty, which is inherent in judicial review, is not a problem in the case of judicial activism in the interpretation. However, the common problem is the definition of the relation between the legislature and the judiciary. In other words, the separation of power principle matters in both cases.

\textsuperscript{26} See, Stephanie A Lindquist and Frank B Cross, Measuring Judicial Activism, 2008, pp. 29 ff.
\textsuperscript{27} The so-called constitution-compatible interpretation (\textit{Verfassungskonforme Auslegung} in German).
\textsuperscript{28} This relation between judicial activism in judicial review and in interpretation is well illustrated in the English case of Bellinger v. Bellinger, [2003] 2 W. L. R. 117 (House of Lords, April 10, 2003). In this case, the House of Lords declined to interpret »female« in sec. 11(c) of the Matrimonial Causes Act 1973 to include a transsexual female, but instead declared that above sec. 11(c) was incompatible with the right to respect for her private life under Art. 8 and with her right to marry under Art. 12 of the European Convention of Human Rights. If the House of Lords interpreted female in the Act to include a transsexual female, there were no need of incompatibility decision. About this decision, see Jinsu Yune, The Role of the Courts in the Protection of Transsexuals’ Human Rights: A Comparison of Korea with Germany and the U. K., in Helms und Zeppernick (Herausgeber), Lebendiges Familienrecht, Festschrift für Rainer Frank, 2008, pp. 415 ff.; Günter Hager, Der Einfluss des Human Rights Act 1998 auf die Rechtsmethode in England, ibid., pp. 27 f.
This and the next parts are dedicated to judicial activism in the interpretation. The readiness to overrule the precedents is dealt with in part V in relation to the prospective overruling.

2. Judicial Activism in the Interpretation

Judicial activism in the interpretation can be better apprehended through the comparison with the notion of judicial restraint in the interpretation. The restraining court declines to accept an interpretation which is not supported by clear word of the statute, even if the result of the interpretation is preferable to the court itself. By contrast, the activist court extensively interprets the law to achieve the preferable result, even though the text of the statute is ambiguous or non-existent. Sometimes, when it is clear that the result cannot be derived from the text of the statute, the active court uses analogy.29

In what follows, several examples from German and Korean precedents are provided. The first is the legal treatment of transsexuals in Germany and Korea.30 A 1978 German Federal Constitutional Court decision31 declared that a female who had undergone a transsexual operation could be treated as a man in the context of the Civil Status Act (Personenstandsrecht). In this case, the transsexual had raised an application for his sex designated in the birth register as a man to be changed to a woman. The Appellate Court of Berlin (Kammergericht) accepted the application by the way of analogy. The court found that the provision of correction of the birth register in the Act did not cover the applicant’s case, because this provision covered only the cases of incorrectness that had existed from the beginning. This gap should be filled by analogy. However, the German Federal Court of Justice (Bundesgerichtshof) did not agree with the Appellate Court. According to it, such an analogy is not permissible. In contrast to these two decisions, the Federal Constitutional Court found that the concept of correction in the Act could be interpreted to denote an ex post

29 Strictly speaking, one can distinguish analogy from interpretation in the original meaning. However, the word ‘interpretation’ is used here extensively to include analogy or even the creation of law by the court (richterliche Rechtsschöpfung).
30 See Jinsu Yune (fn. 28).
31 Decision of the German Federal Constitutional Court on September 11, 1978 (BVerfGE 49, 286).
rectification of a false statement. Therefore, a transsexual should be allowed to apply for the correction of her/his sex designated in the birth register. The Court justified the result by the way of constitution-compatible interpretation.

The majority opinion of the Korean Supreme Court accepted the reasoning of the German Federal Constitutional Court. By contrast, the dissenting opinion understood the majority opinion not as an interpretation of the Family Register Act, but rather as an analogy. It opined that this kind of analogy was beyond the limit established by the legislation and that the legislature, not the court should decide how to solve the problem of transsexuals. In my opinion, the true explanation of the German and Korean case law should be that each court made an analogy, not an interpretation. The Korean and German Courts had filled the gap by analogy under the name of constitution-compatible interpretation. However, the result can be supported. These cases are good examples of judicial activism in the interpretation.

Another example is a Korean case law regarding the retrial of the criminal proceeding. Article 23 of Act on Special cases Concerning Expedition, etc. of Legal Proceedings prescribes that, when it is impossible to find out the whereabouts of a criminal defendant in the trial proceedings at the court of first instance, trials may be held without hearing a statement of that defendant. Article 23-2 deals with the retrial of such a defendant. According to it, any person who has been found guilty under the trial according to Article 23 and has been unable to attend the trial proceedings due to the reasons unattributable to him or her may file a request for a retrial to the court of first instance.

32 Decision on June 22, 2006, Case no. 2004su42, Panryekongbo 2006, 1341 ff. The supplementing opinion to the majority opinion cited to the above decision of the German Federal Constitutional decision.
33 Jinsu Yune (fn. 27), pp. 418 ff.
34 Jinsu Yune, Judicial Activism and the Constitutional Reasoning of the Korean Supreme Court in the Field of Civil Law, in Jiunn-rongYeh (ed.), The Functional Transformation of Courts, Taiwan and Korea in Comparison, 2015, pp. 124 ff.
35 Wiederaufnahme in German.
36 The former Article 23 was declared unconstitutional by the Constitutional Court decision of July 16, 1998, case no. 97heonba22 {Heonbeobjaeponsopanryejib (Reports of Constitutional Court Decisions) Vol. 10-2, 218. The reason was that the extent to which this Article could be applied was too broad. As a result, Article
In the *en banc* decision on June 25, 2015, the opinion of the Supreme Court was divided whether the defendant can file a request for a retrial against the appellate court decision according to Article 23-2 of the Act. In this case, the defendant was sentenced to 5 million Korean Won (KRW) in absentia according to Article 23 of the Act in the first instance. The prosecutor appealed against the decision of first instance. The appellate court reversed the decision and ordered one year imprisonment in the absence of the defendant. After the decision became final, the defendant asserted that there was a ground of retrial according to Article 23-2 of the Act.

The point at issue was whether a defendant may file a request for a retrial against the decision of the appellate court, not against the first instance court decision, as precisely prescribed in Article 23-2. The majority opinion answered in the positive, arguing that Article 23-2 can be applied to the decision of the appellate court by analogy. It reasoned that, in light of the Constitutional provisions, especially, the right of fair trial, the defendant may file a request for a retrial against the decision of the appellate court. By contrast, the dissenting opinion of two justices denied the possibility of analogy. It asserted that the majority opinion went beyond the legitimate power of statutory interpretation. It felt sympathy with the intention of the majority opinion to accord the defendant the right of fair trial by giving him the chance of a retrial. However, there was no such provision and such a defect of the Act should be cured by the legislation of the Assembly, not by the interpretation of the court.

The majority opinion and the dissenting opinion are typical examples of judicial activism and judicial restraint, respectively.

The third example is the recognition of the general personality right (*Allgemeines Persönlichkeitsrecht*) by German courts. As known by all German jurists, Article 253 subpara. 1 of the GERMAN CIVIL CODE specifies that money may be demanded in compensation for any damage that is not pecuniary loss only in the cases stipulated by the law. Nevertheless, German Court of Justice (BGH) had awarded money for the cases of non-pecuniary loss not stipulated by the law in the name of protection of the general personality right. It was controversial whether such precedents went beyond the legitimate sphere of interpretation. However, the

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23 was revised to narrow the applicable extent and Article 23-2 on retrial was newly inserted.


38 BGHZ 26, 349 (Herrenreiter); BGHZ 35, 363 (Ginsengwurzel). *BGHZ 35, 363* –.
German Federal Constitutional Court (Bundesverfassungsgericht) confirmed the precedents of the Court of Justice and expressly acknowledged the competence of the judge to the creative discovery of law (schöpferischer Rechtsfindung). The Constitutional Court opined that, in certain circumstances, more of the law exists beyond the positive statutes of the state power, which has its source in the constitutional legal system and is capable of acting as a corrective against the written law; to find it and to actualize in decisions is the task of the judiciary.

3. General Clauses as a Means of Judicial Activism

General clauses such as good faith and public policy can be convenient means of the activist judge, as shown by this case. General clauses empower the courts to decide in the manner of what courts regard equitable, but they do not indicate how to precisely decide on the cases. General clauses can be channels for general principles, such as guarantee of human rights, to flow into the private law. By this way, the court can play an active role in the sense of judicial activism. Nevertheless, it must be stressed that general clauses are not licenses for the courts to decide on the case according to the subjective evaluation of equity. Rather, they must comply with the objective law.

Two examples from the German case law can be mentioned here as general clauses to be used as a means of judicial activism. One is the so-called revaluation precedent (Aufwertungsrechtsprechung). In the period

39 BVerfGE 34, 269 (Soraya).
40 “Gegenüber den positive Satzungen der Staatsgewalt kann unter Umständen ein Mehr an Recht bestehen, das seine Quelle in der verfassungsmäßigen Rechtsordnung als einem Sinnganzen besitzt und dem geschriebenen Gesetz gegenüber als Korrektiv zu wirken vermag; es zu finden und in Entscheidungen zu verwirklichen, ist Aufgabe der Rechtsprechung.”.
41 Article 2 subpara. 1 of the KCC; Article 242 of the German Civil Code.
42 Article 103 subpara. 1 of the KCC; Article 138 subpara. 1 of the German Civil Code.
44 For example, Münchener Kommentar zum BGB/Schubert, 7. Auflage 2016, § 242 Rdnr. 57 ff.
45 Detailed description of this case in English can be found in Michael L. Hughes, Private Equity, Social Inequity: German Judges React to Inflation, 1914-24, Cen...
of hyperinflation after the First World War, the Imperial Court of Justice (Reichsgericht), then the supreme court in Germany, declared, on November 28, 1923, that the debt one owed to a creditor should be revaluated to adapt the devaluation of the debt due to the inflation. The court had based this decision on good faith provision of Article 242 of German Civil Code. However, the decision was severely criticized as such that interfered with the realm of the legislature.

Another example is the precedent on the invalidity of the suretyship contract made by the close relatives of the debtor. A typical case is that one became surety of the debts which her/his parents or partner owed to banks. In many cases, the amount of the debt was so high, while the earnings of sureties were so low, that sureties became bankrupt. In these situations, the German Court of Justice did not accept the assertion that such a suretyship contract was invalid, as it was contrary to the public policy (Article 138 subpara. 1 of the German Civil Code). However, the German Federal Constitutional Court ruled that civil courts are bound to control the content of contracts which are unusually burdensome for one of the two parties and which result from structurally unequal bargaining power. This decision was very controversial. However, the Federal Court of Justice accepted this ruling. Strictly speaking, this was not a case of conflict between the legislature and the judiciary, but that between the Federal Constitutional Court and ordinary courts. However, it can be a good example of judicial activism in the interpretation.

IV. Factors Relevant to Judicial Activism

I posit that courts should take the following four factors into consideration when making activist decision, and they really do so. These factors are as

46 RGZ, 107, 78-94. In this case, the debt was arose in 1913, and the due date was in 1920. According to the court, the cost of living index had between 1913 and 1920 increased tenfold.
47 Hughes (fn. 43).
48 Decision on November 19, 1993, BVerfGE 89, 214 ff.
49 For example, Zöllner, Regelungsspielräume im Schuldvertragsrecht, AcP 196 (1996), 1 ff.
50 See, Philip Ungan, Sicherheiten durch Angehörige, 2013.
follows: (1) the text of statutes; (2) the compatibility with the existing legal system; (3) the comparative advantage between the legislature and the judiciary; and (4) the magnitude of the impact upon legal relations.

1. The Text of Statute

Interpretation should begin from the text of the statute, in cases when there is a statute. Extensive interpretation is a preferred tool for the activist court. Constitution-compatible interpretation is a good example. When the statute seems to say otherwise than the result the court wants to achieve, it is not always an insurmountable hurdle for an activist court. The court may use teleological reduction, analogy, or teleological extension to circumvent the statute.

In extraordinary situations, courts decide against the clear text of statutes (*contra legem*). An example from the Korean law is the precedent on the statement of the place of issue in a bill of exchange and promissory note. The Korean Bills of Exchange and Promissory Note Act, which is almost a literal translation of the Geneva Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (1930), provides that a bill of exchange should contain a statement of the place where the bill is issued and that any bill issued without that statement is invalid. However, the majority opinion of the Korean Supreme Court on April 23, 1998 declared that a domestic promissory note, issued and payable in Korea, was still valid, even though it did not contain the statement of the place where the bill was issued. The supplementing opinion to the majority opinion insisted that it is the mission of the judiciary to reasonably interpret the statute so that to adapt the archaic law to progressing social phenomena and that it is improper that courts are bound to follow the present law until there is a revision of the law by the legislature, even though courts know that the conventional interpretation and application of the outmoded law should bring about inequitable results.

However, the legitimacy of these interpretations is highly questionable. It is apparent that the majority opinion is based upon the maxim “cessate ratione legis, cessat lex ipsa” (‘the law itself ceases, if the reason of the law ceases’). Such a maxim should not be accepted in principle. The judi-

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ciary has no authority to change the law upon its own finding. Only when the textual interpretation leads to an evidently absurd result, the court may make a correction of the statute. The problem of the lacking statement of the place of issuance in bill of exchange is not such a case.

If there is no relevant statute, as is in this case, then the text of statute cannot be a factor to consider.

2. The Compatibility with the Existing Law System

It is evident that a result of the active interpretation cannot be accepted, if such a result is not compatible with or even contradictory to the existing law system. The following two Korean cases exemplify this.

One is the precedent about the so-called conscientious objector problem. The Korean law does not provide exemption of the mandatory military service for conscientious objectors. However, it prescribes that one who does not muster shall not be punished, when he has a just cause. Therefore, there is a controversy whether one who refused the military service on conscientious grounds may be regarded as having a just cause. The majority opinion of the en banc decision of the Supreme Court on July 15, 2004 denied this. It opined further that no exemption of the military service for conscientious objectors without providing the alternative civilian service to them is not unconstitutional.

In my opinion, it is difficult to acknowledge the refusal of military service on the reason of conscience as having a just cause. If conscientious objectors are exempted from the military service, they should be assigned to the alternative civilian service, as in other countries where the refusal of the military service on the reason of conscience is allowed. In other words, a precondition of the exemption from military service is the possibility of the alternative civilian service. As long as there is no such possibility, it is

54 Case no. 2004do2965, Panryegongbo 2004, 1396.
impossible to regard conscientious objectors as having a just cause on the interpretation level. However, from the perspective of human rights, this situation is very problematic. To require the military service for conscientious objectors without providing the alternative civilian service should be regarded as a violation of the human right of conscience. Regretfully, the decision of the Korean Constitutional Court on August 26, 2004\(^{55}\) declared that this was not unconstitutional. However, the Court recommended to the legislature to consider the introduction of the alternative civilian service or other measures to protect the human rights of conscientious objector.\(^{56}\) The Constitutional Court maintained this position up to now.\(^{57}\) I believe that the Constitutional Court should have decided that the relevant law was not merely unconstitutional, but rather incompatible with the Constitution, as long as there was no possibility of the alternative civilian service.

Another example is the recent first instance decision about same-sex marriage. On May 25, 2016, the Seoul Western District Court decided that same-sex couples cannot marry each other.\(^{58}\) In this case, the judge Taek-jong Lee, president of the court, declared that marriage should be entered into between a man and a woman, not between a man and a man, as, in this case, or a woman and a woman. Besides citing the decisions of the Supreme Court and the Constitutional Court, which understood marriage as the union of a man and a woman, he stressed that Article 36 subpara. I of the Constitution prescribes that marriage and family life shall be entered and sustained on the basis of the dignity of the individual and equality of both sexes. Furthermore, even though the Civil Code does not expressly define marriage as the union of a man and a woman, the Code denotes the partner of marriage as husband or wife. In light of these facts, the judge Lee concluded that marriage prescribed in the present law cannot be interpreted more widely, i.e. as a union of two persons irrespective of their sex.

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55 Case no. 2002heonga1, Heonbeobjaepansopanryejib Vol. 16-2.  
56 The dissenting opinion asserted that not providing the alternative civilian service was unconstitutional.  
58 Case no. 2014hopa1842, not yet officially published.
3. The Comparative Advantage Between the Legislature and the Court

The support of judicial activism becomes fragile, if the legislature is in a better position to resolve a problem. By contrast, if the legislature has no comparative advantage, or is not willing to act, judicial activism can be easily justified.

The legislature has a comparative advantage against courts when special information or knowledge that the court cannot easily get is needed to resolve a problem. In that case, the legislature can acquire necessary information or knowledge from specialists or relevant people in various ways. Then, the role of courts should be limited. The Korean Constitutional Court once declared that the finding of the reasonableness and appropriateness of the fiscal expenditure requires an expertise of the fiscal area; therefore, the review by the court may be difficult.\(^59\)

In other cases when comprehensive and overall reforms or detailed regulations are necessary, courts should refrain from active intervention. For example, the decision of the Seoul Western District Court on same-sex marriage\(^60\) opined that the problems which are expected to arise in case of the protection of same-sex couples will necessitate regulations in various law areas and that these problems cannot be resolved in the scope of the interpretation of the law by courts. Rather, they should be treated in a novel manner by new legislations.

If it is likely that the legislature will react timely to a certain problem, it is reasonable for the court to wait for the decision of the legislature. For example, in Bellinger v. Bellinger, House of Lords denied to interpret female to include a transsexual female, but, instead, declared that the relevant statute was incompatible with the European Convention of Human Rights.\(^61\) One plausible explanation is that, at the time of delivering the decision, the Parliament was about to consider the Gender Recognition

\(^59\) Decision on March 30, 2006, case no. 2005heonma598, Heonbeobjaepansopanyejib vol. 18-1, no. 1, 298.
\(^60\) Above fn. 58.
\(^61\) Above fn. 28.
Bill,\(^{62}\) which aimed to put in place an entirely new scheme for the registration of newly acquired genders.\(^{63}\)

Another example is the *en banc* decision of the Korean Supreme Court about the occupational accident on September 28, 2007.\(^{64}\) In this case, the majority opinion declined to overrule previous precedents that the accidents arising in the course of commute were not occupational accidents in the context of the public occupational accident insurance.\(^{65}\) The supplementing opinion of three justices to the majority opinion cited, alongside with other grounds, that this matter was discussed in depth by the committee of the government and that the bill reflecting this discussion was pending in the Assembly, so the court should refrain from intervening.

On the other hand, if it does not appear plausible that the legislature will act in the near future, then it can be an opportunity for the court to be active. The Korean precedent on the transsexuals, referred to above, is a good example here.\(^{66}\) At the time of the decision in 2006, there was no sign of the legislation. On the contrary, a bill that had been planned to permit the change of sex for transsexuals had been introduced to the Korean Assembly in November 2002. However, without serious discussion, it expired in 2004 as the terms of the members had ended.\(^{67}\) Moreover, during 10 years since the decision in 2006, no relevant law was made. Therefore, the intervention of the Korean Supreme Court seemed justified all the more.\(^{68}\)

4. The Magnitude of the Impact Upon Legal Relations

Finally, the magnitude of the impact of the decision should be a major concern for courts. In general, the result of the active judgment is likely to set up a new rule, overturning the previous rule. The new rule may require

\(^{62}\) The Bill eventually became Gender Recognition Act 2004.


\(^{64}\) Case no.2005du12572, Panryegongbo 2007, 1685.

\(^{65}\) In case of public officials, accidents arising in the course of commute were already treated as occupational accidents.

\(^{66}\) Fn. 32, above.

\(^{67}\) Jinsu Yune (fn. 28), p. 410.

\(^{68}\) Jinsu Yune (fn. 28), pp.419 ff.
the change of people’s behavior. Alternatively, it may create much burden to relevant people or increase the existing burden. As precedents of courts should be retroactive in principle, the disturbance thereupon can be great. This can make the court be reluctant to take an active stance.

The Korean precedent on the occupational accident, mentioned above, can be a good example in this context. The supplementing opinion of three justices to the majority opinion asserted that to include the accident during the commute in the occupational accident would bring about an enormous burden to the finance and result in the deterioration of the public occupational accident insurance finance, increase of the burden of the employer, and hindrance of the efficient distribution of the budget, among other consequences. Therefore, the supplementing opinion concluded that this matter should be decided upon by the legislature, not by the court.

5. Application to This Case

Then, may the Supreme Court decision on the contingent fee agreement be justified in terms of judicial activism? I believe so.

To begin with, there was no statutory law regulating the contingent fee of the lawyer. Therefore, there is neither textual hurdle for the court. Nor is an incompatibility problem with the law system in place.

Secondly, whether the legislature can handle the matter better than the court, as some Korean scholars maintain, is worth pondering on. If the legislature intervenes, it can make a detailed rule. For example, it can prescribe the exact conditions under which lawyers can agree and receive the contingent fee in criminal cases. Alternatively, it can set up a cap of the contingent fee in criminal cases. It should be admitted that such a regulating system can be a better alternative to complete nullifying of contingent fee agreements in criminal cases.

However, it was unlikely that the Korean Assembly would make the law regulating the contingent fee agreement. In fact, there had previously been debates about the legislation of the law regulating the contingent fee. In 2000, The Judiciary Reform Committee, an advisory committee to the President, recommended that the contingency fee agreements in criminal cases should be prohibited, while such agreements in other areas are al-

69 Above Fn. 64.
ollowed. Furthermore, the bills prohibiting the contingent fee agreement were introduced to the Korean Assembly twice, in 2006 and in 2008. However, these bills expired in 2008 and 2012, respectively, as the terms of the members had ended. One reason of the failure of the bills was the opposition of the Korean Bar Association. The press release mentioned above\(^{70}\) emphasized these facts. From this, it can be assumed that justices of the Supreme Court believed that the change of the law by the Assembly was unexpected at the time of the decision.

Finally, it is evident that the impact of the decision upon contingent fee agreements entered into before the decision was a major concern to justices of the Supreme Court. In particular, should contingent fees already paid at the time of the decision be returned? The Supreme Court was concerned that declaring the contingent fee agreements entered into before the decision as void might bring about inequitable result, if the agreed contingent money could be agreed on the non-contingent basis, too. It seemed to justices that it would not be fair if the already agreed fees could not be requested or already paid money should be returned. At that point, the Supreme Court found *tour de force* of prospective overruling. According to the Supreme Court, the overruling by the decision should be only prospective. That is, only contingent fee agreements entered into after this decision are void, while such agreements before the decisions should be deemed still enforceable. The Supreme Court wanted to make it clear that, while contingent fee agreements should not be allowed in the future, at the same time, the impact upon the existing agreements of this type should be minimized. It is similar to killing two birds with one stone.

Can this maneuver of prospective overruling be justified? In what follows, I will consider this matter in more detail.

**V. The Problem of Prospective Overruling**

1. Prospective Overruling

It was a conventional wisdom that “[J]udicial decisions have had retrospective operation for nearly a thousand years.”\(^{71}\) Recently, however,

\(^{70}\) Above fn. 9.
\(^{71}\) Kuhn v. Fairmont Coal Co. 215 US 349, 372(1910) (Holmes, dissenting).
prospective overruling was recognized in several jurisdictions. There are two types of prospective overruling: (1) selective prospective overruling and (2) pure selective overruling. The selective prospective overruling means that the new rule declared by the overruling decision is applied to the case announcing the new rule and, possibly, to some other limited cases, but not applied retroactively to other cases predating the new, overruling decision. The overruled precedent still governs old cases. By contrast, pure prospective overruling denies any retroactivity of the new rule, even to the case announcing the new rule.

The merit of the prospective overruling is that it can protect the legitimate expectation on the overruled precedents. The retroactive application of overruling decisions to the cases prior to these decisions may infringe on the legitimate expectations of the people who have acted in reliance on old precedents. The retroactive application of the new law has the same problem. One difference is that the classic understanding of the role of courts is that judges interpret, not make the law.

Well known is the U.S. experience. Since Great Northern Ry. Co. v. Sunburst Oil & Refining Co., the U. S. Federal Supreme Court acknowledged that prospective overruling might be allowed in some special cases. In 1960s, prospective overruling was more frequently used. The leading cases are Linkletter v. Walker among criminal cases and Chevron Oil Co. v. Huson among civil cases. However, beginning in the 1980s, these precedents of prospective overruling were again overruled by Griffith v. Kentucky among criminal cases and Harper v. Virginia Department of
Taxation\textsuperscript{78} among civil cases. It must be noted, however, that whether pure prospective overruling, apart from selective overruling, should not be allowed remains unclear. Furthermore, state courts may limit the retroactive operation of their own interpretations of the state law.\textsuperscript{79}

In the U.K., 5 out of 7 Law Lords of the House of Lords in National Westminster Bank v. Spectrum Plus Ltd.\textsuperscript{80} agreed that the possibility of prospective overruling cannot be entirely excluded, although the prospective overruling in that case was denied.\textsuperscript{81} Lord Nicholls of Birkenhead said that he would not regard prospective overruling as trespassing outside the functions properly to be discharged by the judiciary under the constitution.\textsuperscript{82}

In Germany, there are also instances when courts declared overruling as prospective.\textsuperscript{83} One recent example is the decision of the grand panel of the Federal Fiscal Court (\textit{Bundesfinanzhof}) on December 17, 2007.\textsuperscript{84} In that decision, the Court held that the overruling of the previous precedents in that case, which would be less favorable to the tax payers, should be applied only to the cases which would happen after the day of the publication of this decision. It reasoned that the principle of the material justice had equal value with the principle of legal certainty and the protection of the legitimate reliance and that these two subprinciples of the rule of law principle (\textit{Rechtsstaatsgebot}) should be balanced in accordance with the principle of the practical concordance (\textit{praktische Konkordanz}). It asserted that the principle of retroactive law may be applied to the overruling of precedents by analogy and, in this case, the grand panel of the Federal Fiscal Court de facto acted like a rule maker.

In Korea, there were two precedents of selective prospective overruling prior to this decision.\textsuperscript{85} One was the precedent about the membership of the \textit{Jongjung}. \textit{Jongjung} is an organized group of descendants of a common male ances-

\textsuperscript{78} 509 U.S. 86 (1993).
\textsuperscript{79} Harper v. Virginia Department of Taxation, 509 U.S. 100 (1993).
\textsuperscript{80} [2005] UKHL 41.
\textsuperscript{82} According to Lord Nicholls, 'Never say never' is a wise judicial precept.
\textsuperscript{83} Felix Maultzsch, Das Zeitelement in der richterlichen Fortbildung des deutschen Rechts, RabelsZeitschrift Vol. 79, pp. 323 ff.
\textsuperscript{84} BeckRS 2007, 24003227.
\textsuperscript{85} About these decisions, see Jinsu Yune (fn. 34),.
According to the customary law, only adult male descendants of a common ancestor could be members of a Jongjung. Female descendants were excluded from Jongjung. However, on July 21, 2005\textsuperscript{86}, the \textit{en banc} decision of the Supreme Court declared that the customary law which had excluded females from Jongjung was no longer valid and that females could also be members of Jongjung. Moreover, this decision declared that the new rule should have only a prospective effect, as its retrospective application would disturb numerous legal relationships which had been formed in reliance on long-held old precedents. The new rule should be retroactively applied only to the present case. The other case was on determining the host or hostess of the ancestor worship ritual (Jesa). According to Article 1008-3 of the Korean Civil Code, the property for the ancestor worship ritual belongs to the host or hostess of the ancestor worship ritual. Traditionally, the eldest legitimate son of the ancestor was the host of the ancestor worship ritual. The precedent of the Supreme Court had confirmed this custom several times. However, the \textit{en banc} decision of the Supreme Court declared, on November 20, 2008\textsuperscript{87}, that the customary rule of deciding the host or hostess of the ancestor worship ritual was no longer valid. It held that the host or hostess must be decided by the agreement between heirs. If no such agreement can be reached, the eldest son (in the case of his being deceased, his eldest son) or, in the case when no son was present, the eldest daughter should be the host or hostess. Furthermore, the Supreme Court adopted the method of the selective prospective overruling again. If this new rule should be applied retroactively, numerous previous instances of the succession of the property for the ancestor worship ritual would be affected and both legal certainty and the protection of the reliance based on the principle of good faith would be endangered. Therefore, the new rule should be applied to the succession of the property after this decision. However, this new rule should be applied to the present case, too, as the aim of the declaring the new rule in this case was to use it as the legal basis of this decision. The decision on the contingent fee agreement differs from the previous Korean precedents, as this decision adopted pure prospective overruling, not selective prospective overruling.

\textsuperscript{86} Case number 2002da1178, Panryekongbo 2005, 1326.  
\textsuperscript{87} Case number 2007da27670, Panryekongbo 2008, 1727.
2. Criticism

In my opinion, the theory of prospective overruling cannot be sustained. I could not find any principled argument in support of the advanced theory, except for the necessity of the protection of the reliance on the previous overruled precedents. Prospective overruling is not compatible with the function of courts. Courts should decide about present cases, not about future cases. The task of courts is to do justice to each litigant on the merits of her/his own case. That is, they should decide on cases based upon the court’s best current understanding of the law. The selective overruling enables the parties of overruling cases to get the benefit of overruling. As a result, it does not remove the incentive of the party to assert overruling. However, it is not possible even for the legislature. Therefore, prospective overruling makes courts a super-legislature. The protection of the legitimate reliance is an important interest, too. However, this should be done by the rules of the substantive law, not by the choice of the law rule. For example, the principle of good faith, abuse of right, laches (Verwirkung) can be used to protect the legitimate reliance. In the contingent fee agreement case, what the Supreme Court was most concerned about was that the agreed contingent fee that could be agreed on the non-contingent basis in the same amount could not be requested, if the prior contingent fee agreement should be regarded as void altogether. However, this result could be avoided by the theory of the supplementary interpretation (ergänzende Auslegung). According to this theory, if there is a gap in the contract which the parties had not reckoned, courts can fill the gap by what the parties would have agreed upon, had they known the gap. The Korean Supreme Court acknowledged and applied the theory of supplementary interpretation. If the supplementary interpretation were applied to the invalid contingency fee agreement, an attorney could request the sum which the parties would have agreed upon on the non-contingent ba-

sis, had they known the invalidity of the contingency fee agreement. If the client has already paid the contingent fee to the lawyer, s/he could not request the return of the payment, as the payment is for an illegal cause. If the Korean Supreme Court took this path in this case, prospective overruling would be unnecessary.

VI. Conclusion

Whether contingent fee agreements in criminal cases should be regarded as contrary to the public policy is an important question in itself. As this question was answered by the court and not by the legislature, it inevitably leads us to the problem of judicial activism. The theory of prospective overruling was a related problem. This decision provided a good opportunity of a case study for judicial activism and prospective overruling.

93 Article 746 of the Korean Civil Code (excluding return of Enrichment arising from a transfer made for an illegal or immoral purpose, condicio ob turpem vel inius-tam causam). This article corresponds to article 817 of the German Civil Code roughly.
The Relationship between the Legislature and the Judiciary in Developing General Principles of Private International Law

Jan von Hein

I. Introduction

When G.C. Cheshire presented the first edition of his eminently influential treatise on English private international law in 1935, he praised the subject as offering “the freest scope to the mere jurist” because “it has been only lightly touched by the paralysing hand of the Parliamentary draftsman”.¹ It is not surprising that Cheshire, being a common lawyer, viewed this lack of codified rules and the resulting flexibility in devising an appropriate judicial solution for the individual case not as a cause for concern, but as a source of “fascination”.² Civil lawyers, on the contrary, who are accustomed to having at least some blackletter law rules as a starting point of further legal analysis, tend to evaluate legal certainty considerably higher than unbridled judicial discretion.³ This preference is reflected by the fact that, in recent decades, a worldwide wave of codification has swept private international law, a development that has been masterfully chronicled and analysed by Symeon C. Symeonides in 2014.⁴ The South Korean Act on Private International Law of 2001⁵ is a particularly well-designed ex-

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¹ This preface has been repeatedly reprinted in the following editions; it is quoted here from Cheshire, North and Fawcett, Private International Law, 14th ed., 2008, p. vii.
² Ibid.
⁴ Symeonides, Codifying Choice of Law Around the World, 2014, with further references.
ample of this global phenomenon. In the European Union, the legislature has passed a significant number of regulations on private international law since the Treaty of Amsterdam gave the European Community (as it then was) a specific competence to legislate in this area in 1999. Today, the field of European private international law (understood here in the narrow sense of the term, i.e. referring only to choice of law and not to international civil procedure as well) covers contractual and non-contractual obligations, maintenance claims, divorce, and successions. Further regulations on matrimonial property and the property of registered partnerships will be applicable from 29 January 2019.

The basic rationale underlying the ongoing Europeanisation of private international law is succinctly captured in Recitals No. 6 of the Rome I and II Regulations, which read as follows:

6 For a positive evaluation of the Korean Act from a German perspective, see Pißler, Einführung in das neue Internationale Privatrecht der Republik Korea, RabelsZ 70 (2006) 279, 339 ("[E]in modernes IPR […], das auf viele der Fragen, die das alte Recht offenließ, eine Antwort bereithält.").


“The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.”

These recitals epitomize the basic tenet of the methodology already developed by Savigny in the 19th century,12 i.e. the goal of an international harmony of decisions.13 Insofar, the Europeanisation of private international law exacerbates the traditional tension between legal certainty and flexibility in choice of law: on the one hand, the overarching goal of creating an international harmony of decisions militates for enacting clear-cut rules in order to achieve a maximum of legal certainty and foreseeability of results; on the other, judges may well need a sufficient amount of discretion in order to do justice in atypical cases as well (cf. Recital No. 14 of the Rome II Regulation). Although this problem existed in the Member States’ legal orders already before 1999, the Europeanisation adds more complex layers to the traditional scenario.

Firstly, private international law is not restricted to specific rules that are only relevant for certain legal relationships (such as rules on the law applicable to contracts, torts or divorce), but consists of general principles as well that affect the determination of the law applicable to various legal relationships. Such devices concern issues such as, e.g., characterisation, escape clauses in favour of a significantly closer connection, determining pervasive connecting factors, particularly habitual residence or nationality, and, last but not least, the question as to whether the applicable law may be disregarded because it violates the forum’s public policy. Whereas domestic codifications usually contain a section that provides guidance on at least some of those issues (e.g. Artt. 3-6 of the German Introductory Act to the Civil Code [EGBGB]14 or Sections 3-10 of the South Korean Act on PIL), each European regulation so far contains its own specific rules on

13 For a monographic treatment of the subject in the context of European PIL, see Nietner, Internationaler Entscheidungseinklang im europäischen Kollisionsrecht, 2016.
such general principles, thus leading to a certain degree of redundancy and inconsistencies. Moreover, some important questions – such as the impact of dual nationality when citizenship is used as a connecting factor – are not answered conclusively by the existing EU regulations (see infra V).

Secondly, the European Union comprises not only Member States belonging to the civil law family, but also Member States rooted at least partially in a common law tradition. This will remain true even after the impending “Brexit”; it suffices to think of Ireland and, although the latter jurisdictions have a decidedly more “mixed”, hybrid character, Cyprus and Malta. Moreover, even some large Member States firmly belonging to the civil law camp lack a coherent codification of private international law, such as France. Against such different backgrounds, perceptions as to whether the lack of codified general principles of private international law really constitutes a serious practical problem may diverge as well. As J.D. McClean already wrote nearly a quarter-century ago, “the common law tradition does not favour the development of systematic codes, so there is no equivalent of the chapter of a Civil Code dealing with general principles of private international law. The development of private international law rules, even in the form of statutes, is fragmented; there is little scope for the wholesale ‘reception’ of new ideas and approaches […]”

is available at http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0009.


In light of the fact that the fragmented structure of European private international law resembles the situation created by scattered statutes and conventions in a common law context, it may seem as a logical hypothesis that, correspondingly, case-law might become more important with regard to developing general principles of European private international law than it was in the context of previously existing domestic choice-of-law codifications.

Thirdly, the traditional tension between legal certainty and flexibility in choice of law has been, so to speak, merely “two-dimensional” within a given domestic legal system. The German legislature, for example, in drafting private international law rules is only interested in the question as to how much discretion should be accorded to German judges in applying the provisions of the EGBGB.\(^{20}\) Within the framework of European private international law, however, the European legislature must anticipate that giving domestic judges too much leeway in handling European rules may undermine the goal of their uniform application across the Member States. In addition, European private international law rules are not only interpreted by Member State judges; on the contrary, the final word on their interpretation rests with the Court of Justice of the European Union (CJEU). Thus, the question of how much discretion should be accorded to judges becomes three- (or even four-?) dimensional in the European judicial area: in developing or applying general principles of private international law, domestic judges must follow the emerging case-law of the CJEU or request further preliminary rulings from the Court of Justice; moreover, they must take into account the case-law of other Member State courts as well, for example when they have to decide whether a certain interpretation of a particular rule constitutes an *acte clair*.\(^{21}\)

\(^{20}\) Although these provisions may also be applied in foreign jurisdictions accepting a *renvoi*, this aspect is hardly the main concern of domestic legislation.

\(^{21}\) Under the established doctrine of *acte clair*, a Member State court may refrain from requesting a preliminary reference ruling from the CJEU if it is convinced that neither a European nor another Member State court would reach a different conclusion, cf. CJEU 6 October 1982, C-283/81, ECLI:EU:C:1982:335 para. 16 – *CILFIT/. Ministry of Health*; for a detailed overview, see Lenarts/Maselis/Gutman, EU Procedural Law, 2014, paras. 3.54 f.; Fenger/Broberg, Finding Light in the Darkness: On the Actual Application of the *acte clair* Doctrine, Yearbook of European Law 30 (2011) 180 ff.; on the application of the doctrine by German courts, see Hüftege, The ECJ and the national courts, EuLF 2010, I-250 ff.
Although there is an ongoing and highly interesting debate on the question of a future comprehensive codification of European private international law\textsuperscript{22} or the comparatively more modest approach of enacting a so-called “Rome 0”-Regulation on general principles of PIL,\textsuperscript{23} I will not reiterate this complex discussion here. Rather, in line with this symposium’s general subject, the “Relationship between the Legislature and the Judiciary”, I will look at how the current \textit{acquis} of European private international law distributes the responsibility for developing general choice-of-law principles between legislators on the one hand and judges on the other. In particular, I will focus on the following issues: characterisation, escape clauses, habitual residence, dual resp. multiple nationalities, and public policy.

\textbf{II. Characterisation}

1. In the domestic context

In order to apply choice-of-law rules properly, a judge has to define to which legal questions they refer, i.e. whether a certain legal question, e.g. liability for a misleading information given in the course of contractual negotiations, is classified as being of a contractual or non-contractual nature. If one adopted the first approach, the Rome I Regulation would apply, whereas under the second approach, it would be the Rome II Regulation. Insofar, there are important differences between domestic and European private international law, both with regard to the underlying methodology and the degree and extent of codifying issues of characterisation.\textsuperscript{24}


\textsuperscript{24} On characterisation, see von Hein, in: Säcker/Rixecker/Oetker (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch (“MüKo”), Vol. 10, 6th ed. 2015, Einleitung IPR, paras. 108-147, with further references.
Under domestic private international law, legal issues are today overwhelmingly characterised pursuant to the doctrinal categories of the *lex fori.*\(^{25}\) In spite of this starting point, one has to take into account that “*lex fori*” in this sense is not restricted to the substantive *lex fori* because choice-of-law rules must have a scope that is sufficiently wide to determine the law applicable even to legal institutes that are unknown to the forum’s substantive law.\(^{26}\) In Germany, for example, a homosexual marriage, which is unknown to the German Civil Code, is not classified as a marriage within the meaning of Art. 13 EGBGB, but characterised as a registered partnership in the sense of Art. 17 b EGBGB for choice-of-law purposes.\(^{27}\) Thus, it is more appropriate to speak of a functional and teleological approach to characterisation.\(^{28}\) In spite of the widespread consensus on using *lex fori* as a starting point for solving the problem of characterisation, there are only few examples for rules that explicitly codify this method;\(^{29}\) Heiss and Kaufmann-Mohi mention the PIL codes of Spain,\(^{30}\) Hungary\(^{31}\) and Romania\(^ {32}\) as rare cases. In Germany and South Korea, on the other hand, both PIL codes lack a general rule on characterisation, although the Korean Act, following the model of Art. 13 of the Swiss PIL

\(^{25}\) MüKo/von Hein (Fn. 24), Einl. IPR, paras. 115-125.

\(^{26}\) MüKo/von Hein (Fn. 24), Einl. IPR, paras. 119-121.

\(^{27}\) BGH NJW 2016, 2322 paras. 31 ff.

\(^{28}\) MüKo/von Hein (Fn. 24), Einl. IPR, paras. 118-125.

\(^{29}\) For a comparative survey, see Heiss/Kaufmann-Mohi, Classification: A Subject Matter for a Rome 0 Regulation?, in: Leible (ed.), General Principles (Fn. 15), p. 87, 96.

\(^{30}\) Art. 12(1) Código Civil de 24 de julio 1889, redactado conforme a la Ley II/1891, de 1 de mayo, reprinted with a German translation in Riering (ed.), IPR-Gesetze in Europa, 1997, No. 9.


\(^{32}\) Heiss/Kaufmann-Mohi (Fn. 29), p. 96 refer to the law of 1992, RabelsZ 58 (1994) 534 ff. (German translation by Tontsch); this has been replaced by the new Romanian Civil Code of 24 July 2009 which now contains the Romanian PIL regime and came into force on 1 October 2011 (a French translation by Avasilencei/Picai rca can be found in Rev crit 101 [2012] 459 ff.): Art. 2.558 of the new Civil Code still stipulates that the *lex fori* should be the starting point of characterisation, but also provides for referrals to the *lex causae* or *lex rei sitae* in cases of renvoi, institutes unknown to the *lex fori* or characterisation of property as movable or immovable.
Act,\textsuperscript{33} at least specifies that the application of a provision of foreign law is not excluded merely by the fact that it is deemed to be of a public nature (Section 6 of the Korean PIL Act). Generally speaking, domestic legislatures seem to trust their own judges to handle the issue of characterisation adequately without further methodological instructions.

2. In the European context

\textit{a) Autonomous characterisation}

In the European judicial area, things are more complicated. Although there are a sizeable number of EU directives and regulations creating a body of substantive European private law, particularly in the field of consumer contracts,\textsuperscript{34} it happens very frequently that, for lack of specific substantive rules, one cannot look to a European substantive \textit{“lex fori”} for purposes of characterisation. On the other hand, the goal of an international harmony of decisions (see supra I.) makes it necessary that Member State courts define terms such as \textit{“contract”} and \textit{“tort”} or \textit{“substance”} and \textit{“procedure”} autonomously and do not simply have recourse to their domestic \textit{lex fori}.	extsuperscript{35} Since this autonomous approach is considerably more complicated to handle for judges than the traditional \textit{lex-fori}-method of characterisation, a better and more precise legislative guidance is needed. Although there is no general rule in any of the European regulations that prescribes the principle of autonomous characterisation,\textsuperscript{36} this method is repeatedly anchored


\footnotesize{\textsuperscript{34} See Reiner Schulze/Fryderyk Zoll, Europäisches Vertragsrecht, 2015.}

\footnotesize{\textsuperscript{35} On autonomous characterisation in European PIL, see CJEU 10 December 2015, C-594/14, ECLI:EU:C:2015:806 para. 14 ff. – Kornhaas (Insolvency Regulation); CJEU 28 July 2016, C-191/15, ECLI:EU:C:2016:612 para. 36 ff. – Verein für Konsumenteninformation./. Amazon (Rome I and II); AG Szpunar 20 April 2016, C-135/15, ECLI:EU:C:2016:281 para. 37 – Nikiforidis (Rome I); for further discussion and references, see MüKo/von Hein (Fn. 24), Einl. IPR, para. 126.}

\footnotesize{\textsuperscript{36} See for a negative assessment of such a rule de lege ferenda Heiss/Kaufmann-Mohi (Fn. 29) p. 99.}
in specific rules dealing with the scope of the respective regulations; moreover, additional guidance is occasionally provided in the recitals (see infra c) on *culpa in contrahendo*). In particular, all European regulations on private international law contain detailed catalogues of which legal questions are covered by the respective regulation and which are not.\(^{37}\) Art. 12(1)(d) Rome I, for example, clarifies that the issue as to whether a claim is barred by prescription or a statute of limitations is, according to the dominant approach in civil law countries, classified as a question of substantive law and not as a procedural question, the latter approach having been preferred traditionally in common law countries.\(^{38}\) Nevertheless, autonomous characterisation may be difficult to apply in practice. This can be shown by two examples: drawing the line between substance and procedure with regard to the calculation of damages and the proper classification of claims based on *culpa in contrahendo*.

**b) Assessment of damages**

With regard to damages, the Rome I and II Regulations adopt a unitary approach, subjecting the assessment and quantification of damages to the substantive law applicable to the tort or contract as a whole (Art. 12(1)(c) Rome I Regulation, Art. 15(c) Rome II Regulation) and not to the procedural law of the court addressed.\(^{39}\) The clear preference of the Rome I and II Regulations for a substantive characterisation of damages does not mean, however, that the *lex fori* has become totally irrelevant. As stated in Art. 1(2) Rome II Regulation, the Regulation does not, generally speaking, apply to matters of evidence and procedure. It remains controversial where the line must be drawn in this regard.\(^{40}\) This is particularly a problem for

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37 See *Heiss/Kaufmann-Mohi* (Fn. 29) p. 90-92.
properly characterising legal figures such as *prima facie* evidence deduced from a typical pattern of events (e.g. that a driver colliding with another car in front must prove lack of negligence). Judge-made rules on such issues may overlap with rules on burden of proof, which are characterised as substantive.\(^{41}\) Another example is provided by procedural rules on the estimation of damages which are difficult to calculate precisely (e.g. § 287 ZPO\(^{42}\)). Such rules raise doubts whether they merely concern factual aspects of the case, leading to a procedural characterisation,\(^{43}\) or whether they concern the assessment of damages within the meaning of Art. 15(c) Rome II, which would lead to a substantive classification.\(^{44}\)

c) *Culpa in contrahendo*

The rules on *culpa in contrahendo* in the Rome II Regulation (Art. 2(1), Art. 12 Rome II) are of particular interest because they highlight the difficulties of creating unionized conflicts rules for institutions of substantive law that are not familiar to all legal systems of the Member States.\(^{45}\) After the CJEU had decided to characterise claims arising from the breakdown of contractual negotiations as being of a non-contractual nature within the context of Art. 5 No. 1 and 3 of the Brussels I Regulation\(^{46}\) (now Art. 7

\(^{41}\) Cf. AG Geldern NJW 2011, 686 (arguing for a substantive characterisation); LG Saarbrücken NJW 2015, 2823, 2824 (favouring a procedural characterisation).


\(^{43}\) LG Saarbrücken NJW-RR 2012, 885; AG Frankenthal NJW-RR 2015, 544, 546.


No. 1 and 2 Brussels Ibis\(^47\),\(^48\) it seemed logical that the line between Rome II (Art. 2(1) Rome II) and Rome I (Art. 1(2)(1) Rome I) would be drawn in the same way.\(^49\) In addition, Recital No. 30 Rome II emphasizes that \textit{culpa in contrahendo} has to be understood as an “autonomous concept” for the purposes of the Rome II Regulation. This Recital also states that this notion should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Nevertheless, a proper characterisation may sometimes be complicated and throw up the question as to whether a consistent classification of \textit{culpa in contrahendo} under Brussels Ibis, on the one hand, and Rome I and II on the other, may actually be achieved.\(^50\)

The German Federal Court of Justice (BGH), for example, extended Art. 13(1) No. 3 of the Lugano Convention of 1988\(^51\) to claims arising from a pre-contractual duty to negotiate in good faith (\textit{culpa in contrahendo}), provided that a contract between the parties had subsequently been concluded.\(^52\) In the light of Art. 2(1) Rome II, however, this contractual classification calls for an explanation. The BGH implicitly tried to distinguish the case at hand from the CJEU’s diverging \textit{Tacconi} decision\(^53\) by emphasising that the case before it did not involve a breaking-off of negotiations, but that an agreement had ultimately been reached by the parties.\(^54\) This argument may be doubted, taking into account that Recital 30

\(^48\) CJEU 17 September 2002, C-334/00, ECLI:EU:C:2002:499 – \textit{Tacconi}./. \textit{Heinr. Wagner}; on the academic reception of this judgment, see the survey by \textit{von Hein} (supra Fn. 45) 58 f., with further references.
\(^49\) \textit{von Hein} (supra Fn. 45) 58 f..
\(^52\) Federal Court of Justice, 31 May 2011, BGHZ 190, 28 = IPRax 2013, 168 with a case note by \textit{S. Arnold}, IPRax 2013, 141.
\(^53\) CJEU 17 September 2002, C-334/00, ECLI:EU:C:2002:499 – \textit{Tacconi}.
of the Rome II-Regulation explicitly states that *culpa in contrahendo* as an autonomous concept should include violations of the duty of disclosure. Moreover, Art. 12(1) Rome II contains a specific choice-of-law rule on *culpa in contrahendo* that applies regardless of whether the contract was actually concluded or not. If claims sounding in *culpa in contrahendo* were from the outset characterised as contractual, the accessory connection provided in the first variant of Art. 12(1) Rome II would never be applicable, because such claims would then fall exclusively under Rome I, a result which is explicitly excluded, however, by Art. 1(2)(i) Rome I (see also Recital 10 Rome I).

It is a different question, though, whether jurisdiction for contractual disputes should attract concurring non-contractual claims as well.\textsuperscript{55} At least with regard to *culpa in contrahendo*, such an ancillary jurisdiction could be justified by the fact that Art. 12(1) Rome II provides for an accessory connection of claims arising from *culpa in contrahendo* to the law that applies to the contract. This choice-of-law rule should be mirrored in civil procedure at least in so far as a contract has actually been concluded between the parties because such a solution would significantly enhance procedural economy. If, however, no contract at all has been concluded between the parties, there is arguably no basis for an ancillary jurisdiction for tort claims under Art. 17(1) and not under Art. 7 No. 1 Brussels I\textit{bis} either.\textsuperscript{56}

\textit{d) The relationship between European and domestic judges}

The aforementioned examples have shown that even when European regulations try to give guidance to domestic judges on where to draw the line between aspects of substance and procedure or tort and contract, the application of the principle of autonomous characterisation raises practical difficulties. Yet such ambiguities are hard to avoid; drafting a legal rule that would eliminate all uncertainties is virtually impossible in light of the diversity of national substantive laws. Insofar, it is necessary that domestic

\textsuperscript{55} See Kropholler/von Hein, Europäisches Zivilprozessrecht, 9th ed., 2011, Art. 5 Brussels I para. 79, with further references.

\textsuperscript{56} Cf, on prospectus liability, CJEU 28 January 2015, C-375/13, ECLI:EU:C:2015:37, paras. 26-35 (but see also para. 38) – Kolassa.
judges, where appropriate, refer pertinent questions to the CJEU for a preliminary ruling under Art. 267 TFEU\textsuperscript{57}.

\textbf{III. Escape Clauses}

1. In the domestic context

Modern private international law is, generally speaking, still based on the fundamental principle established by \textit{Savigny}, i.e. asking where a certain legal relationship (\textit{Rechtsverhältnis}) has its seat.\textsuperscript{58} Today, we would rather phrase this question as trying to define the legal order with which the case or a given question is most closely connected. Although blackletter choice-of-law rules enhance legal certainty in general, they may turn out to be counter-productive to determining this legal order in cases which are based on atypical fact patterns. If judges do not possess a necessary degree of discretion to deviate from a rule that fails to achieve justice in the individual case, they might have recourse to well-known “escape devices”\textsuperscript{59} such as generously assuming a “tacit” choice-of-law agreement between the parties, re-characterising claims in order to achieve the desired result under a different choice-of-law rule or by falling back on the public policy clause. The modern and prevailing view is, therefore, that it is wiser to allow for some degree of flexibility in a choice-of-law codification, i.e. that judges should be empowered to correct the results of applying regular choice-of-law rules in atypical cases.\textsuperscript{60} National PIL codes differ, however, with regard to the question as to whether such an escape clause

\begin{flushright}
\textsuperscript{57} Treaty on the Functioning of the European Union.
\textsuperscript{58} \textit{von Savigny} (Fn. 12), p. 70.
\textsuperscript{60} For a monographic, comparative treatment of the issue, see \textit{Hirse}, Die Ausweichklausel im Internationalen Privatrecht, 2006, with numerous further references; see also \textit{Lutz-Chr. Wolff}, Flexible Choice-of-Law Rules: Panacea or Oxymoron, J. Priv. Int. L. 10 (2014) 431.
\end{flushright}
should be codified as a general, overarching principle or whether such clauses should only be employed in a specific context.\textsuperscript{61} The first model has been pioneered by the Swiss PIL Act (Art. 15(1)), which reads:

“The law designated [as applicable] by the present statute is, by way of exception, not to be applied if, from the totality of the circumstances, it is manifest that the particular case has only a very slight connection to that law and has a much closer relationship to another law.”

This approach has been adopted in Section 8(1) of the Korean PIL Act, too.\textsuperscript{62} As a Korean colleague, Professor Suk, explains: “Although it was recognized that the introduction of the exception clause would cause greater legal uncertainty than previously, the drafters of the New Act regarded it as an inevitable means of achieving the paramount goal of applying the law most closely connected with the case at hand.”\textsuperscript{63} In Germany, on the other hand, the principle of the closest connection has not been enshrined in the general part of the EGBGB, but merely codified in context-specific rules, such as the law of non-contractual obligations (Art. 41(1) EGBGB) and property law (Art. 46 EGBGB). Whereas a legislature’s option for a general escape clause may be seen as a sign of a strong degree of trust in its own judiciary, the limited German approach must be characterised as more cautious, valuing legal certainty and predictability of results higher than doing justice in each individual case.

2. In the European context

\textit{a) The tension between flexibility and certainty}

As Recital No. 14 of the Rome II Regulation shows, the reason for the difficulties in drafting escape clauses in European private international law is the tension between “the requirement of legal certainty” on the one hand, and the “need to do justice in individual cases” on the other. This tension is again more problematic in the European judicial area than in the domestic context because an overly generous use of escape clauses by Member State judges might undermine the fundamental goal of European PIL, i.e.

\begin{itemize}
\item \textsuperscript{61} Remien, Closest Connection and Escape Clauses, in: Leible (ed.), General Principles (Fn. 15), p. 211, 214 f.
\item \textsuperscript{62} Which was modelled on the Swiss provision, cf. Suk, YbPIL 5 (2003) 99, 111.
\item \textsuperscript{63} Suk, YbPIL 5 (2003) 99, 111.
\end{itemize}
achieving an international harmony of decisions. Such concerns triggered
the Commission’s proposal for a Rome I Regulation in 2005.64 According
to this draft, the escape clause formerly contained in the Rome Convention
of 198065 should have been abolished completely.66 The Commission jus-
tified this rigid approach by pointing out that the escape clause had been
used too liberally by the courts of the Member States, thus endangering le-
gal certainty.67 The Commission’s proposal met with unanimous academic
criticism on this point, however, and was finally abandoned.68

While the controversy surrounding Rome I concerned the question
whether an escape clause based on traditional Savignian, policy-neutral
and jurisdiction-selecting concepts should be maintained at all, the draft-
ing of the Rome II Regulation faced opposite proposals from those who
wanted to expand the traditional European approach to embrace U.S.-ins-
pired, substantivist and issue-specific methods.69 At the end of the day,
however, the escape clause finally codified in Art. 4(3) Rome II resembles
Art. 41 EGBGB, allowing the court to displace the law designated by
Art. 4(1) or (2) Rome II if the tort is manifestly more closely connected
with another country. There are, however, specific torts which are not
amenable to corrections by the escape clause because they involve general
public interests, such as environmental liability (Art. 7 Rome II) or cartel
damage claims (Art. 6(3) Rome II).70

The subsequently enacted regulations on matters of family and inheri-
tance law differ considerably in their approach to codifying escape claus-
The Rome III Regulation on the law applicable to divorce contains no escape clause at all. One could try to justify this absence by pointing out that this Regulation establishes party autonomy as a fundamental principle of choice of law (Art. 5 Rome III), which is generally regarded as being hostile to corrections by way of an escape clause (cf. Art. 15(2) Swiss PIL Act and Section 8(2) Korean PIL Act). This line of reasoning does not hold, however, because party autonomy is the basic rule in all other European PIL Regulations as well (cf. Art. 3 Rome I, Art. 14 Rome II, Art. 22 Succession Regulation, Art. 22 Matrimonial Property Regulation), which nevertheless contain escape clauses. Apart from that, one could try to argue that the objective conflicts rule in Art. 8 Rome III creates a hierarchy of connecting factors (habitual residence, nationality, lex fori) which ought not to be disturbed by judicial discretion. Yet this argument is not wholly convincing either because the same structure can be observed with regard to the choice-of-law rule on product liability under Rome II (Art. 5(1) Rome II), which is nevertheless open to a correction because of a substantially closer connection (Art. 5(2) Rome II). Moreover, there might be cases in which a recently acquired habitual residence seems to provide only a slight connection compared with the state where the couple had lived during most of their marriage. The real reason for the absence of an escape clause in Rome III seems to be that this Regulation concerns matters of personal status, and that in this regard, the European legislature has valued legal certainty as more important than justice in the individual case.

The escape clause staged a comeback, however, in the Succession Regulation and the recently enacted Matrimonial Property Regulation. While the connecting factor in the basic objective conflicts rule of the Succession Regulation is the habitual residence of the deceased (Art. 21(1) Succession Regulation), the Regulation also allows for a correction by way of the escape clause found in Art. 21(2), which provides that “[w]here, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.”

71 Cf. also Remien (Fn. 61), p. 220.
72 This is noted in passing by Remien (Fn. 61), p. 220 and criticized by Lein, in: Calliess (Fn. 38), Art. 8 Rome III, paras. 57-59.
73 Lein, in: Calliess (Fn. 38), Art. 8 Rome III, para. 59.
Recital 25 of the Succession Regulation explains:

“With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected.”

The legislature was well aware of the potential danger that such an escape clause may create in a field such as the law of succession which is also characterised by strong need for legal certainty and foreseeability of results. Firstly, the escape clause of the Succession Regulation is worded more restrictively than the clauses found in Artt. 4(3) Rome I and II, pointing out the exceptional nature of the clause (“by way of exception”). Secondly, the last sentence of Recital 25 even contains an explicit exhortation to judges not to abuse the escape clause in order to avoid a proper determination of the habitual residence of the deceased: “That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.”

Choice of law in matrimonial property matters is also an area where the tension between legal certainty and justice in the individual case must be solved in an adequate way. In the domestic context, the law applicable to matrimonial property is frequently determined in a fixed, immutable way in order to provide for a stable connecting factor that facilitates the couple’s estate planning. Such a durable connection may, however, lead to questionable results in cases where, after the parties have lived for a long time in another country, the initial connecting factor (usually the first common habitual residence after marriage or the couple’s common nationality at the time of marriage) no longer indicates the most significant relationship of the case at the time when the dispute arises. In domestic legal systems, a certain flexibility has been created by allowing *renvoi* in such constellations or by characterising certain legal questions, such as the

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74 E.g. Germany, Art. 15 EGBGB.
75 Cf. MüKo/von Hein (Fn. 24), Einl. IPR, para. 77.
76 Cf. MüKo/von Hein (Fn. 24), Art. 4 EGBGB, paras. 83-87, with further references on German case-law.
dowery (mahr) under Islamic law, as belonging to the general effects of marriage rather than to the field of matrimonial property – traditional “escape devices” par excellence. Art. 26(3) of the Matrimonial Property Regulation now contains an innovative solution that aims to create a better balance between legal certainty and flexibility. Whereas Art. 26(1)(a) of the Regulation designates the law of the state where the spouses established their first common habitual residence after the conclusion of the marriage, Art. 26(3) provides an exception from this regular connection:

“By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

(a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and

(b) both spouses had relied on the law of that other State in arranging or planning their property relations.

The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1.

This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.”

Compared with the escape clauses already mentioned, this clause is obviously the most restrictive. Firstly, it is not an open-ended clause that merely points to all the circumstances of the case, but it is rather precise in determining the objective (point a) and subjective (point b) requirements that have to be met in order to displace the general conflicts rule. Moreover, a court must not employ the escape clause of its own motion, but only “upon application by either spouse”. Recital 46 explains that “[t]o ensure the legal certainty of transactions and to prevent any change of the law appli-

77 BGHZ 183, 287; MüKo/von Hein (Fn. 24), Einl. IPR, para. 120.
cable to the matrimonial property regime being made without the spouses being notified, no change of law applicable to the matrimonial property regime should be made except at the express request of the parties.”

As the preceding examples have shown, the European legislature has crafted very differentiated solutions concerning the tension between legal certainty and flexibility in the various EU Regulations on PIL. Although none other than Paul Lagarde has suggested that future European legislation should follow the Swiss approach and codify an overarching escape clause as a general principle of private international law,\(^{78}\) it seems that a more modest approach is preferable in the European context.\(^{79}\) Tailor-made escape clauses offer better possibilities to take the particularities of specific legal areas into account and thus to ensure a uniform application of EU Regulations. A general, widely framed escape clause may be appropriate for contracts or torts, but not for problems of divorce and matrimonial property where legal certainty carries a comparatively bigger weight.

\section*{b) The relationship between European and domestic judges}

Although the CJEU has not yet had the opportunity to decide on one of the escape clauses of the European PIL regulations, it already has ruled twice on escape clauses contained in the Rome Convention of 1980, namely Art. 4(5) Rome Convention on all types of contracts (now Art. 4(3) Rome I)\(^{80}\) and Art. 6(2) Rome Convention on individual labour contracts (now Art. 8(4) Rome I).\(^{81}\) In the \textit{Interfrigo} case, the Court decided that the escape clause now found in Art. 4(3) Rome I is not limited to cases where it is evident from the circumstances in their totality that the connecting criteria indicated therein do not have any genuine connecting value.\(^{82}\) The escape clause must rather be construed as meaning that, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the

\begin{footnotes}
78 See Art. 137 of his “embryonic” PIL Act, Lagarde, RabelsZ 75 (2011) 673.
79 Remien (Fn. 61), p. 223.
80 CJEU 6 October 2009, C-133/08, ECLI:EU:C:2009:617 – Intercontainer Interfrigo SC (ICF)/. Balkenende Oosthuizen BV, MIC Operations BV.
81 CJEU 12 September 2013, C-64/12, ECLI:EU:C:2013:551 – Anton Schlecker/. Melitta Josefa Boedeker.
82 CJEU 6 October 2009, C-133/08, ECLI:EU:C:2009:617 paras. 53–64 – Intercontainer Interfrigo SC (ICF)/. Balkenende Oosthuizen BV, MIC Operations BV.
\end{footnotes}
regular criteria, it is for the Member State court to disregard those criteria and apply the law of the country with which the contract is most closely connected.\textsuperscript{83} In the \textit{Schlecker} case, the Court decided that the escape clause for labour contracts must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.\textsuperscript{84} Although the final assessment of the closest connection must be made by the national court, the guidance offered by the CJEU on the legal parameters usually makes clear in which direction the domestic court’s discretion should be exercised. This watchdog function of the CJEU significantly alleviates concerns that escape clauses in European regulations would undermine legal certainty.

\textit{IV. Habitual Residence}

1. In the domestic context

In modern private international law, the traditional connecting factors of nationality (in civil law countries) and domicile (in common law countries) have increasingly been superseded by habitual residence.\textsuperscript{85} A main factor behind this change has been the decisive role that habitual residence plays in the Hague conventions on private international law because this concept is, unlike domicile or “\textit{Wohnsitz}”, detached from domestic legal criteria.\textsuperscript{86} In spite of the importance of habitual residence in the modern

\textsuperscript{83} CJEU 6 October 2009, C-133/08, ECLI:EU:C:2009:617 paras. 53–64 – \textit{Intercontainer Interfrigo SC (ICF)/. Balkenende Oosthuizen BV, MIC Operations BV.}

\textsuperscript{84} CJEU 12 September 2013, C-64/12, ECLI:EU:C:2013:551 para. 44 – \textit{Anton Schlecker/. Melitta Josefa Boedeker.}


\textsuperscript{86} Cf. MüKo/\textit{von Hein} (Fn. 24), Art. 5 EGBGB, para. 115.
Hague conventions, the Hague Conference has deliberately refrained from
drafting a legal definition of this concept because the future development
of this notion should not be hampered by the petrifying effect that might
result from an abstract definition.\(^{87}\) Likewise, most domestic PIL codes do
not contain a general definition of what habitual residence means. This is
the case, for example, in Germany and South Korea.\(^{88}\) Both the German
and the Korean PIL code only contain a specific definition of the habitual
residence of legal persons in the context of tort respectively contract law
(Art. 40(2), 2\(^{nd}\) sentence EGBGB, Section 26(2) Korean PIL Act). Yet,
there are some domestic codifications that have tried to establish a general
definition of the habitual residence of natural persons, namely in Switser-
land (Art. 20(1)(a) Swiss PIL Act), Belgium (Art. 4 § 2 Belgian PIL Act)\(^{89}\)
and Bulgaria (Art. 48(7) Bulgarian PIL Act).\(^ {90}\) The most elaborate provi-
sion is found in the Belgian Act, defining habitual residence as “the place
where a natural person has established his main residence, even in the ab-
sence of registration and independent of a residence or establishment per-
mit; in order to determine this place, the circumstances of personal or pro-
fessional nature that show durable connections with that place or indicate
the will to create such connections are taken into account”. Yet such do-
mestic definitions are of a questionable value because their application is
restricted to the context of the specific statute. Thus, insofar as they mere-
ly repeat the internationally accepted elements of habitual residence, on
the one hand, such definitions are harmless, but also of little practical use;
where they, on the other hand, diverge from the international consensus,
courts have to disregard such definitions when they apply international
conventions.\(^ {91}\) As a result, creating a split concept of habitual residence
may actually infringe rather than increase legal certainty. It was particu-

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87 Cf. MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 134; Pirrung, Gewöhnlicher Aufenthalt bei internationalem Wanderleben und Voraussetzungen für die Zulässigkeit einstweiliger Maßnahmen in Sorgerechtssachen nach der EuEheVO, IPRax 2011, 50, 53.
88 On German law MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 130; on South Korean Law Suk, YbPIL 5 (2003) 99, 108.
91 MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 132.
larily for this reason that the German legislature, in 1986, refrained from introducing a legal definition of habitual residence into the EGBGB.\footnote{BT-Drucks. 10/504, p. 41.}

2. In the European context

Like most domestic PIL codes and the Hague conventions, EU private international law does not contain a general definition of habitual residence. There are, however, two context-specific definitions in the Rome I and II Regulation. In Art. 19 Rome I and Art. 23 Rome II, the notion of habitual residence is only defined for special cases (corporations, businessespeople acting in their professional capacity); for other scenarios (e.g. tourists involved in a traffic accident, consumers placing an order with a professional), the term has to be interpreted in an autonomous way.\footnote{See Baetge, Auf dem Weg zu einem gemeinsamen europäischen Verständnis des gewöhnlichen Aufenthalts, in: Die richtige Ordnung, Festschrift Jan Kropholler, 2008, p. 77.} In the EU Regulations on divorce, successions and matrimonial property, there is no legal definition at all. The Succession Regulation, however, tries to give judges some guidance for applying this concept in Recitals 23 to 25.\footnote{For further details, see Mankowski, Der gewöhnliche Aufenthalt des Erblassers unter Art. 21 Abs. 1 EuErbVO, IPRax 2015, 39.} In defining habitual residence, domestic courts also have to look at the CJEU’s case law on European procedural law, in particular the Brussels II\textit{bis}-Regulation.\footnote{CJEU 2 April 2009, C-523/07, ECLI:EU:C:2009:225 – Re \(A\). and CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 – Mercredi.} Insofar, the Court stressed the independence of habitual residence in the context of conflict of laws from tax and social security law.\footnote{CJEU 2 April 2009, C-523/07, ECLI:EU:C:2009:225 para. 36 – Re \(A\).} It is controversial whether habitual residence should be defined uniformly for all EU Regulations on PIL or whether the content of this notion might vary according to the legal area concerned\footnote{See MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 137; Weller/Rentsch (Fn. 85), p. 183 f.} or even according to the nature of the choice-of-law rule in question.\footnote{Hilbig-Lugani, Divergenz und Transparenz: Der Begriff des gewöhnlichen Aufenthalts der privat handelnden natürlichen Person im jüngeren EuIPR und EuZVR, GPR 2014, 8.} Moreover, the balance between objective and subjective factors determining habitual residence

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\footnote{92 BT-Drucks. 10/504, p. 41.}
\footnote{93 See Baetge, Auf dem Weg zu einem gemeinsamen europäischen Verständnis des gewöhnlichen Aufenthalts, in: Die richtige Ordnung, Festschrift Jan Kropholler, 2008, p. 77.}
\footnote{94 For further details, see Mankowski, Der gewöhnliche Aufenthalt des Erblassers unter Art. 21 Abs. 1 EuErbVO, IPRax 2015, 39.}
\footnote{95 CJEU 2 April 2009, C-523/07, ECLI:EU:C:2009:225 – Re \(A\). and CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 – Mercredi.}
\footnote{96 CJEU 2 April 2009, C-523/07, ECLI:EU:C:2009:225 para. 36 – Re \(A\).}
\footnote{97 See MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 137; Weller/Rentsch (Fn. 85), p. 183 f.}
\footnote{98 Hilbig-Lugani, Divergenz und Transparenz: Der Begriff des gewöhnlichen Aufenthalts der privat handelnden natürlichen Person im jüngeren EuIPR und EuZVR, GPR 2014, 8.}

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has not yet been settled conclusively; whereas the UK Supreme Court has repeatedly stressed that, unlike domicile, habitual residence does not require an *animus manendi*;\(^99\) a new tendency on the continent tries to put more emphasis on a person’s will to establish or maintain a habitual residence, thus assimilating habitual residence to the common law notion of a “domicile of choice”.\(^100\) Since this practical and academic debate is still in flux, an abstract legal definition of habitual residence in matters of family and succession law would at least be premature. Further requests for preliminary rulings will be needed in order to settle remaining doubts, particularly with regard to the Succession Regulation.

\section*{V. Dual and Multiple Nationalities}

1. In the domestic context

Before 1986, German private international law did not contain an explicit rule on solving the problem of dual or multiple nationalities. The traditional approach had been to give preference to the most effective nationality, usually that of the state where the person had his habitual residence, unless one of the nationalities concerned was the German one, which was regarded as being decisive without any further requirement of effectiveness.\(^101\) This special treatment of German dual nationals was given up, however, by the Federal Court of Justice in a groundbreaking judgment of 1979;\(^102\) since then, the German citizenship of a dual national was only considered as the decisive connecting factor if there was no significantly closer connection with the other state. This approach had the merit of fully realising

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\(^99\) In the matter of B (A child) [2016] UKSC 4, para. 56 (per Lord Wilson): “[I]t makes no sense to regard a person’s intention, in this case a parent’s intention, at the moment when the aeroplane leaves the ground as precipitating, at that moment, a loss of habitual residence. At all events, and more importantly, I remain clear that such is not the modern law”; see also In the Matter of A (Children) [2013] UKSC 60 para. 54; AR v. RN [2015] UKSC 35, para. 21: “[P]arental intentions […] are a relevant factor, but they are not the only relevant factor”; see also, from a Korean perspective, Suk, YbPIL 5 (2003) 99, 108 (pointing out the difference between habitual residence and domicile in this regard).

\(^100\) Weller/Rentsch (Fn. 85), p. 171 ff., in particular 187.

\(^101\) RGZ 150, 374, 382; RG JW 1929, 434, 435; RG LZ 1924 Col. 741 No. 9.

\(^102\) BGHZ 75, 32.
the idea of finding the closest connection;\textsuperscript{103} nevertheless, the legislature decided otherwise in 1986 and reverted, mainly for practical reasons, to the automatic primacy of German nationality (Art. 5(1) 2\textsuperscript{nd} sentence EGBGB).\textsuperscript{104} For other cases, the principle of effectiveness was maintained (Art. 5(1) 1\textsuperscript{st} sentence EGBGB). The same solution has been codified in South Korea (Section 3(1) Korean PIL Act).

2. In the European context

Although the preference for the forum’s nationality is still the dominant approach in the Member States’ domestic laws, it is doubtful whether this approach is fitting for European private international law as well because any preferential treatment given to a certain forum’s nationals will inevitably undermine the goal of an international harmony of decisions (see supra I.).\textsuperscript{105} A dual French-German national would be considered as French by a French court, and as German by a German court; thus, the applicable law would change according to the court seized. Nevertheless, there is no explicit rule on this question so far; only in the recitals of the Rome III, Succession and Matrimonial Property Regulations has this problem been addressed.\textsuperscript{106} The most recent position of the European legislature is found in Recital 50 of the Matrimonial Property Regulation, which reads:

“Where this Regulation refers to nationality as a connecting factor, the question of how to consider a person having multiple nationalities is a preliminary question which falls outside the scope of this Regulation and should be left to national law, including, where applicable, international Conventions, in

\begin{itemize}
  \item \textsuperscript{103} See the affirmative case notes by Kropholler, NJW 1979, 2468 and Heldrich, FamRZ 1979, 1006.
  \item \textsuperscript{104} BT-Drucks. 10/504, p. 40 f.; for further details, see MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 62.
  \item \textsuperscript{105} For closer analysis, see Bariatti, Multiple Nationalities and EU Private International Law, YbPIL 13 (2011) 1; Basedow, Das Staatsangehörigkeitsprinzip in der Europäischen Union, IPRax 2011, 109; Jayme, Mehrstaater im Europäischen Kollisionsrecht, IPRax 2014, 89; Kruger/Verhellen, Dual Nationality = Double Trouble?, J. Priv. Int. L. 7 (2011) 601; Mankowski, Dual and Multiple Nationals, Stateless Persons, and Refugees, in: Leible (ed.), General Principles (Fn. 15), p. 189; MüKo/von Hein (Fn. 24), Art. 5 EGBGB, paras. 72-89.
  \item \textsuperscript{106} Recital 22 Rome III, Recital 41 Succession Regulation; Recital 50 Matrimonial Property Regulation.
\end{itemize}
full observance of the general principles of the Union. This consideration should have no effect on the validity of a choice of law made in accordance with this Regulation.”

This Recital clarifies two aspects of the problem. Firstly, one only has to decide between two or more nationalities of a person if citizenship is used as an objective connecting factor; not if it is merely employed as a criterion limiting the range of options that parties have when choosing the applicable law.107 Secondly, there is no autonomous rule on deciding between dual or multiple nationalities, but the question is, in principle, referred to the national laws of the Member States; in particular, the CJEU’s case law on Brussels II bis that places all, even non-effective nationalities on an equal footing as grounds for jurisdiction108 is valid only in a procedural context and not for objective choice-of-law rules.109 However, the application of national rules must be in full compliance with the “general principles of the Union” (Recital 50 Matrimonial Property Regulation). This means that the recourse to domestic laws must not undermine the principle of non-discrimination and the fundamental freedoms under the TFEU. This restriction is, on the one hand, necessary because of the primacy of EU primary law vis-à-vis merely secondary law such as the EU Regulations on PIL; on the other, such an open-ended formula severely undermines the practical utility of the traditional rule in favour of forum’s nationality. In the Bogendorff case, a dual German-British national complained that German authorities had refused to recognize a name change by way of a “deed poll” under English law because, pursuant to Art. 5(1) 2nd sentence EGBGB, they regarded him exclusively as a German.110 While Advocate General Wathelet took the opinion that the German PIL Act’s preference of forum nationality amounted to a forbidden discrimination (Art. 18 TFEU),111 the Court adopted a more cautious approach, having recourse to the status of Union citizenship (Art. 20 TFEU) and a person’s freedom of movement (Art. 21 TFEU), i.e. examining the rule not as

107 For further discussion, see MüKo/von Hein (Fn. 24), Art. 5 EGBGB, paras. 78-81.
109 MüKo/von Hein (Fn. 24), Art. 5 EGBGB, para. 82.
110 CJEU 2 June 2016, C-438/14, ECLI:EU:C:2016:401 – Bogendorff von Wolffersdorff/./ Stadt Karlsruhe.
111 AG Wathelet in Bogendorff (C-438/14, ECLI:EU:C:2016:11), paras. 47 f.
a forbidden discrimination, but as an undue restriction. In another case, the Federal Court of Justice refrained from requesting a preliminary ruling with regard to a German-Bulgarian dual national because the German nationality was also the effective one. However, the CJEU already decided in the Garcia Avello case that even a preference for an effective nationality could, under certain circumstances, constitute an undue restriction; in this case, dual Spanish-Belgian children living in Belgium were barred from carrying a traditional double name under Spanish law, a situation that was, according to the CJEU, incompatible with their fundamental freedoms.

In sum, the absence of a clear-cut rule on dual and multiple nationalities in EU private international law remains a source of considerable legal uncertainties. Thus, it would be a welcome progress if the EU legislature provided judges with a blackletter rule in this regard, even if one takes into account that such a rule of secondary law would of course be subject to the scrutiny of the CJEU as well.

VI. Public Policy

1. In the domestic context

Every codification of private international law contains a public policy clause that allows judges to disregard the otherwise applicable law if it leads to results that are manifestly incompatible with fundamental values of the forum’s law; in Germany, this principle is enshrined in Art. 6 EGBGB, in South Korea, in Section 10 of the PIL Act. In this regard as well, there is a tension between the search for legal certainty and achieving justice in the individual case. Particularly German private international law has frequently given primacy to legal certainty by adding numerous special public policy clauses to the EGBGB, even after the reform of...
1986. This preference must be seen in the context of Germany’s traditional preference for nationality as a connecting factor in matters of family law which leads to a rather frequent application of foreign law in cases involving migrants. A typical example is Art. 17 a EGBGB, which was introduced to protect women from their violent husbands although the marriage in question is governed by a foreign law. Currently, as a reaction towards the wave of refugees from Muslim countries who have entered Germany since 4 September 2015, there have been calls for drafting a new special provision against child marriages, a problem that has hitherto been solved by applying more flexible, general principles of public policy. Apart from family matters, the tort law of the United States in particular has given rise to concerns among German business circles and legislators. In the course of the 1999 reform, Germany passed a special clause on public policy that was designed to fend off U.S.-style punitive and treble damages (Art. 40(3) Nos. 1, 2 EGBGB). The South Korean PIL Act contains a similar provision in Section 32(4), which was actually “modelled on Art. 40(3) of the German PIL”.

2. In the European context

In European private international law, the same tension between legal certainty and flexibility is felt. Public policy clauses in European instruments are particularly dangerous because, if they are framed too widely or used

117 For a survey, see MüKo/von Hein (Fn. 24), Art. 6 EGBGB, paras. 48-72.
118 See Winkler von Mohrenfels, in: Müko (Fn. 24), Art. 17 a EGBGB, para. 1.
120 OLG Bamberg FamRZ 2016, 1270 with a critical note by Mankowski; MüKo/von Hein (Fn. 24), Art. 6 EGBGB, para. 259, with further references.
121 For comprehensive surveys, see, e.g., Hess, Aktuelle Brennpunkte des transatlantischen Justizkonflikts, Die AG 2006, 897-818; Schütze, Die Allzuständigkeit amerikanischer Gerichte, 2003; id., Zum Stand des deutsch-amerikanischen Justizkonflikts, RIW 2004, 162-167; R. Stürner, Why are Europeans afraid to litigate in the United States?, 2001.
too liberally, they create the possibility for domestic judges to frustrate the unifying intentions underlying the respective regulation.\textsuperscript{124} Several drafts of the Rome II Regulation contained rules against punitive and treble damages that were similar to Art. 40(3) Nos. 1, 2 EGBGB and Section 32(4) of the Korean PIL Act.\textsuperscript{125} The idea of defining a “community public policy” on this sensitive issue, which might be of a prejudicial character with regard to the communitarisation of substantive tort law, met with strong opposition from the U.K., however.\textsuperscript{126} At the end of the day, the final Rome II Regulation merely contains a general clause on the public policy “of the forum” (Art. 26 Rome II). Recital No. 32 clarifies that courts remain free to consider non-compensatory exemplary or punitive damages of an excessive nature as being contrary to their public policy.\textsuperscript{127} Likewise, the Rome I Regulation, the Succession Regulation and the Matrimonial Property Regulation confine themselves to general clauses on public policy (Art. 21 Rome I, Art. 35 Succession Regulation, Art. 31 Matrimonial Property Regulation). The Rome III Regulation, in contrast, contains not only a


\textsuperscript{127} For further discussion, see \textit{von Hein}, in: \textit{Calliess} (Fn. 38), Art. 26 Rome II, paras. 20-23.
general provision (Art. 12 Rome III), but also a specific public policy clause in Art. 10, which reads:

“Where the law applicable pursuant to Art. 5 or 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply.”

It is highly controversial whether this provision should be construed as implying an abstract control of a foreign law or whether, in line with the traditional approach to public policy, it is merely designed to prevent discriminatory results.\(^\text{128}\) While legal certainty would favour an abstract control, such an approach would lead to hardly acceptable results in cases where a religious law (e.g. Muslim or Jewish law) applies to a divorce. Even if a Muslim or Jewish wife were to agree with a divorce being declared unilaterally by her husband, an abstract reading of Art. 10 would categorically prevent the application of the foreign law to such a case. As a consequence, a European court would have to pronounce a divorce pursuant to the *lex fori*, resulting in a title that frequently could not be recognized in the home state of the couple.\(^\text{129}\) Although such a counter-productive “forced blessing” is criticized by many academic writers as unjust, not to say islamophobic,\(^\text{130}\) there are also authors who argue that this is precisely what the European legislature had in mind.\(^\text{131}\) Here, the hand of the Parliamentary draftsman (or -woman) seems to have been truly paralysing. Insofar, leaving the matter to judicial discretion under Art. 12 Rome III would have seemed the clearly preferable solution. The Higher Regional

\(^{\text{128}}\) For more comprehensive accounts of this discussion, see Lein, in: Calliess (Fn. 38), Art. 8 Rome III, paras. 23-27; Lena-Maria Möller, No Fear of Talaq: a Reconsideration of Muslim Divorce Laws in Light of the Rome III Regulation, J. Priv. Int. L. 10 (2014) 461 ff., with further references.

\(^{\text{129}}\) See on islamic countries, Rohe, Europäisches Kollisionsrecht und religiöses Recht, in: Arnold (ed.), Grundfragen (Fn. 15), p. 67, 75 f.; see also MüKo/von Hein (Fn. 24), Art. 6 EGBGB, para. 62, with further references.

\(^{\text{130}}\) See, e.g., Rohe (Fn. 129) p. 75 f.; Schurig, Eine hinkende Vereinheitlichung des internationalen Ehescheidungsrechts in Europa, in: Festschrift von Hoffmann, 2011, p. 405, 410; see also MüKo/von Hein (Fn. 24), Art. 6 EGBGB, para. 62, with further references.

Court of Munich recently asked the CJEU for a clarification of this issue, but the Court rejected the request for a preliminary ruling as inadmissible.

**VII. Conclusion**

In order to achieve both just and foreseeable results, European private international law has to strive for a delicate balance: on the one hand, judges must be given sufficient discretion to take into account the particularities of the individual case; on the other, proper legislative guidance is needed in order to achieve an international harmony of decisions in the Member States. The current PIL framework is generally satisfactory but contains some gaps and inconsistencies. The satisfactory bits are the following: Firstly, in spite of some practical difficulties, the principle of autonomous characterisation is firmly established and, generally speaking, requires no further legislative guidance. Secondly, the differentiated codification of escape clauses in contract and tort law, on the one hand, and the more restrictive approach taken in family and succession matters, on the other, is based on a defensible balancing of the interests involved, although one might, as ever, argue about details. Thirdly, any legal definition of habitual residence would cut short an ongoing academic and practical discussion and thus probably do more harm than good. However, there are also areas which deserve to be criticized. In particular, the decision between dual and multiple nationalities should, for the sake of legal certainty, not be left to domestic PIL but be dealt with in the EU Regulations themselves. Moreover, an abstract control of foreign laws that seems to be envisaged by the legislature under Art. 10 Rome III may guarantee a maximum of legal certainty, but reveals an intolerant attitude towards religious laws that contradicts established doctrines on public policy and fails to achieve justice in the individual case. Thus, one can only hope that the CJEU will opt for a more flexible, result-orientated interpretation of this provision. Not only in this respect should European and national judges try to establish a cooper-

132 OLG München IPRax 2016, 158.
133 CJEU 12 May 2016, C-281/15, ECLI:EU:C:2016:343 – Sahyouni = BeckRS 2016, 81033; a new request has been made by OLG München BeckRS 2016, 12020.
ative relationship in order to further develop and refine general principles of European private international law.
The Influence of the Judiciary on the Criminal Legislation and Its Impact on the Transformation of Models: An Analysis of the Korean Experience

Sang Won Lee

I. Introduction

Various kinds of criminal justice systems have appeared and disappeared throughout the world history. At the same time, each country has witnessed not a few systems. So marvelous is the journey of criminal justice system Koreans have been on during the past century, especially for the last three scores and a decade: from a system treading down people to a system protecting people. This transition was made by an organic mixture of the tension and cooperation between the judiciary and the legislature in the midst of the raging waves of political and social changes.

This paper will first introduce a framework for an analysis of criminal justice systems, and then try to find a tendency during the journey with the help of the framework, focusing on the changes of warrant system, especially that of arrest and detention of the body. Upon this discussion, this paper tries to draw a proper way to design and enforce a criminal justice system.

II. Models of Criminal Procedure

A. Models and Structures

An American law professor, Herbert Packer, proposed a wonderful tool to see criminal justice systems in his famous article of 1964, “Two Models of the Criminal Process”: the Crime Control Model and the Due Process Model.\(^1\) Of course, Packer did not postulate a criminal process operating

in any kind of society at all, but he did rather postulate one operating within the framework of contemporary American society. He presented the models as neither corresponding to reality nor representing what the criminal process ought to be. However, his two models well provide us a very useful framework to evaluate real criminal justice systems and help us to figure out which way to go from the current system.

On the other hand, seeing various criminal procedures of past and present, we can also find several different structures from those procedures. Among many analytic proposals, one of the most attractive is the linear and triangle structure theory proposed by Chinese scholars. This view is also very useful to analyze systems together with the models.

B. Two Models of Criminal Process

1. Crime Control Model

Each of the models has its own value system. The Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. It claims that the criminal process is “a positive guarantor of social freedom” and the criminal sanction is necessary for the maintenance of “public order.” It requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime.

The Crime Control Model places heavy reliance on the ability of investigative and prosecutorial officers to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The fact-finding processes, which pursue factual guilt, are informal and nonadjudicative, which, the model believes, will reveal the truth.

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2. Id. at 7.
3. Id. at 5.
4. Id. at 9.
5. Id. at 10.
8. Id. at 14.
9. Id.
cient police investigations and prosecutions can control crimes. Considering the reality of limited law enforcement resources, the criminal process must place a premium on speed and finality. This is achieved by allowing expert administrations, the police and the prosecutors, to screen out the innocent and secure the conviction of the rest as expeditiously as possible. Most fact-finding is conducted by the police in the streets and stations, not by lawyers and judges in the courts.

This model gives the police broad investigative powers regarding search, arrest and questioning, which is often the quickest means to establish if the suspect is factually guilty. Police interrogations can be limited when they might spoil the reliability of the suspect’s statements, but not on the ground it is against due process. For example, the coerced confession is evil because it might lead to false fact finding; it is factual question in each case whether the confession is unreliable. A lawyer’s place is in court and should not enter a criminal case until it is in the court. Detained people are not allowed to contact a lawyer because it will only benefit the guilty, who will follow their lawyers’ advice not to say anything.

In contrast, the trial is not that important because the center of the gravity lies in the early, administrative fact-finding stages. Prosecutors and the police can be trusted not to waste their limited time and resources on the innocent. Pre-trial detention is the rule and it serves not only to ensure the accused’s presence at trial but also to prevent future crime and to persuade the accused to plead guilty at the first opportunity. Guilty pleas are happily welcomed and judges do not inquire into the accuracy of the plea. Because the police and prosecutors have the ability to screen out the factually innocent, judges and jurors should not be haunted by the ghost of the innocent man convicted. Appeals are not encouraged and

11 *Id.* at 677-78.
12 *Id.* at 678.
13 Packer, Sanction, at 177.
14 *Id.* at 178.
15 *Id.* at 203.
16 Roach, Models, at 678.
17 Packer, Sanction, at 162.
18 *Id.* at 211-14.
only allowed when the accused establishes that no reasonable trier could have convicted on the evidence presented.\textsuperscript{21} The prosecutor is also allowed to appeal because the acquittal of a guilty person is as harmful as and more likely to occur than the conviction of an innocent person.\textsuperscript{22}

2. \textit{Due Process Model}

Packer likened the Due Process Model to an obstacle course while the Crime Control Model to an assembly line.\textsuperscript{23} In the Due Process Model, each stage is designed to present formidable impediments to carrying the accused any further along in the process.\textsuperscript{24} It puts high values on the concept of the primacy of the individual and the complementary concept of limitation on official power.\textsuperscript{25} Power is always subject to abuse. Because the state has the potency to subject the individual to the coercive power, the criminal process should be subjected to controls and be safeguards against the abuse of power.\textsuperscript{26} According this ideology, maximal efficiency means maximal tyranny.\textsuperscript{27} And the proponents of the Due Process Model would rather accept a substantial diminution in the efficiency to prevent state oppression of the individual.\textsuperscript{28}

The Due Process Model rejects informal fact-finding processes and insists on formal, adjudicative, adversary fact-finding processes where the case is publicly heard by an impartial tribunal and the accused has a full opportunity to discredit the case against him.\textsuperscript{29} The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.\textsuperscript{30} This model resembles a factory that has to devote a substantial part of its input to quality control, which inevitably reduces quantitative output.\textsuperscript{31} Thus, the Due Process Model is based on antiauthoritarian

\textsuperscript{21} \textit{Id.} at 679.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} Packer, Models, at 13.
\textsuperscript{24} \textit{See Id.}
\textsuperscript{25} \textit{Id.} at 16.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 14.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.} at 15.
liberal values and employs a doctrine of legal guilt. Under this doctrine, an individual is not to be held guilty of crime until the factual determination that he did what he is said to have done is made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is still not to be held guilty, even when the factual determination is adverse to him, if the rules designed to safeguard the integrity of the process are not given effect: jurisdiction, statute of limitation, double jeopardy, etc. According to Packer, only a tribunal that is aware of this guilt-defeating doctrine and is willing to apply it can be viewed as competent to make determination of legal guilt; the police and the prosecutors are ruled out by lack of capacity in the first instance and by lack of willingness in the second; only an impartial tribunal can be trusted to make determination of legal guilt. The court is the “validating authority.”

The Dude Process Model imposes a lot of restraints on the police in order to protect the rights of suspects and minimize informal fact-finding in the streets and station-houses. Arrest or detention is not allowed for the police to develop their case; the accused has the right to be silent, the right to contact counsel and the right against self-incrimination. There is no moment in the criminal process when the disparity in resources between the state and the accused is greater than at the moment of arrest. Because of the presumption of innocence and the harmful effects of pre-trial detention, an accused should be allowed to be detained only when absolutely necessary to ensure attendance at trial.

Differently from the expectation of the Crime Control Model, those subject to police abuse are, in fact, not able to bring separate civil, disciplinary or criminal actions against the police and strong prophylactic exclusionary rules are required. The rationale of exclusion is not that the evidence is untrustworthy but that it infringes the rights of the accused.

32 Id. Roach, Models, at 680.
33 Packer, Models, at 16.
34 Id. at 16-17.
35 Id. at 17.
36 Roach, Models, at 680.
37 Id. at 681.
38 Id.
39 Id.
40 Id. at 682.
41 See Id. at 681.
The trial is concerned not with factual guilt, but with the prosecutor can establish legal guilt beyond a reasonable doubt on the basis of legally obtained evidence.42 Not the police or prosecutors, but only defense lawyers and judges can be relied upon to appreciate the importance of legal guilty.43 The accused should have wide rights of appeal and the appellate courts should reverse convictions whenever trial judges failed to protect the accused’s rights.44 The reversal of a criminal conviction is a small price to pay for proper values.45 The Supreme Court is the most important institution because it defines the legal rights and remedies of the accused.46

C. Arrest and Detention in the Models

Among all the contrasting features of the two models, we will focus on arrest and detention and try to analyze Korean Experience in that respect. Packer divided the criminal process into three stages or periods for purposes of description and analysis: (i) the period from arrest through the decision to charge the suspect, (ii) the period from the decision to charge through the determination of guilt, (iii) and the stage of review and correction of errors during the earlier periods.47 The suspect or the accused might or might not be in custody through the all three stages. In order to contrast the two models in respect of the postures on arrest and detention, we’ll focus on the first and the second stages.

1. Arrest for Investigation

The two models have different answers to the questions: (i) on what basis are the police entitled to make an arrest, and (ii) what consequences, if any, from their illegal arrest?

42 Id. at 682.
43 Id.
44 Id.
47 Packer, Models, at 23.
(1) Crime Control Model

In this model, an arrest is permissible not only upon probable cause but also on other occasions. Stopping a person on the street to ask him questions, or even taking him to the station house for a period of questioning and other investigation is widely justified, as the model sees the accompanying invasion of personal freedom and privacy as slight one.\(^48\) The power of the police to arrest people for the purpose of investigation and prevention is necessary for the police to do their job properly.\(^49\) Because the police have no reason to abuse their power by arresting and holding law-abiding people, the innocent have nothing to fear. The dictates of police efficiency determines under what circumstances and for how long a person may be stopped and held for investigation, and it is an enough check on police discretion.\(^50\) Even if laws are required to limit police discretion, they should either provide very liberal outer limits so as to accommodate all possible cases or should require explicit behavior which is reasonable under all circumstances.\(^51\)

In case of breach of whatever rules to limit police powers, the most appropriate sanction is, according to the Crime Control Model, discipline of the offending policeman by his superiors in the police department because his superiors are best qualified to judge whether his conduct followed professional police standards.\(^52\) Civil remedies, though less preferable, are also possible. However, sanctions in the criminal process itself such as dismissal of prosecution, suppression of evidence, etc. are not admissible because such sanctions simply give the criminal a windfall without affecting the conduct of the erring police.\(^53\)

(2) Due Process Model

This model thinks that no one may be arrested except upon a judicial determination, but in situations of necessity upon a determination by a police

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\(^{48}\) *Id.* at 24.

\(^{49}\) *Id.* at 25.

\(^{50}\) *Id.*

\(^{51}\) *Id.*

\(^{52}\) *Id.*

\(^{53}\) *Id.*
officer subject to subsequent judicial scrutiny and that any less stringent standard opens the door to the probability of grave abuse of police power.\textsuperscript{54} A totally efficient system of crime control would be a totally repressive one and we have to sacrifice some efficiency for human dignity and rights.\textsuperscript{55} There need to be an additional consideration of a practical consequence of enlarging police authority to detain individuals for questioning. The broad power of police is in danger of being applied in a discriminatory fashion, that is to say, being applied mostly to those elements in the population like the poor, the ignorant, the illiterate, the unpopular, whose voice is weakest in the society.\textsuperscript{56}

Sanctions for illegal arrests should be located within the criminal process itself; since it is the efficiency of the process that the arrests seek for and those arrests should be penalized and labeled as inefficient.\textsuperscript{57} Any evidence obtained from an illegal arrest should be suppressed; any criminal prosecution commenced on the basis of an illegal arrest should be dismissed, or, at least, the entire process should be started over again from scratch and all records, working papers, etc. prepared in the first illegal proceeding should be impounded and destroyed.\textsuperscript{58} Not every arrest results in criminal prosecution. Sanctions within the criminal process are not applied to those cases. Here arises the need for other sanctions: an ordinary tort action against the policeman, a statutory action against the government employing the policeman, direct disciplinary measures against the police officer, etc.\textsuperscript{59}

2. Detention and Interrogation after a Lawful Arrest

Once a suspect is arrested, it is to be decided whether or not to hold for the institution of charges and, if so, whether or not to release pending further steps in the process, which decision is made typically at a preliminary hearing before a judicial officer like a magistrate in the US. The meaning and function of this kind of hearings varies from country to country and it

\textsuperscript{54} Id. at 26.
\textsuperscript{55} Id. at 27.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 28.
\textsuperscript{59} Id.
is also possible that there exists no such hearing at all. Packer, as an American scholar, postulated the independent magisterial hearing, and proposed that it must be determined to what extent the accused may be required to cooperate in the post arrest investigation prior to the hearing: (i) May the police hold the accused indefinitely or must they bring him before a magistrate within some particular time limits? (ii) If the latter, what sanctions, if any, should be imposed for failure to comply with the time limits? (iii) May the police interrogate the suspect during this time and, if so, is there any limitation for the interrogation? (iv) If the accused admits his guilt, is this statement admissible as an evidence at his trial and, if so, under what limitations? (v) Is the accused entitled to the assistance of counsel during this period? Even though Packer’s questions were based on the American system, those are applicable to other systems as well, because the questions are about the period between the initial arrest and the judicial review, which is an inevitable period if a country has an official criminal procedure at all however nominal it is.

(1) Crime Control Model

The best source of criminal information is usually the suspect himself. This Model thinks that the police must have a reasonable opportunity to interrogate the suspect in private before the suspect has a chance to fabricate a story or to decide not to cooperate. Any kind of outside interference is likely to diminish the prospect for the suspect to cooperate with the interrogation and, therefore, he should not be allowed to contact his family or friends and, most importantly, to consult a lawyer. Of course, this model does not entitle the police to hold the suspect indefinitely for interrogation, but it thinks that no hard and fast rule can be laid down about how long the police can interrogate the suspect before judicial decision. Even when the police err by holding a suspect too long, good faith mistakes are not penalized; the suspect who has been held too long has no complaint because the police have some basis to believe he committed a

60 Id. at 31.
61 Id. at 31.
62 Id. at 31-32.
63 Id. at 32.
crime; and the redress for the error is intra-departmental discipline and administrative program minimizing such errors.\textsuperscript{64}

(2) Due Process Model

This model says that the police should not arrest unless they have the information in their hands that seems like to result in a conviction, and therefore there is no need to obtain additional evidence form the mouth of the arrestee; he is to be arrested so that he may be held to answer the case against him, not so that a case against him that does not exist at the time of his arrest can be developed.\textsuperscript{65} The arrestee must be brought before a magistrate without unnecessary delay, that is, as soon as the preliminary formalities of recording his arrest are completed,\textsuperscript{66} and the police should not hold a suspect for the purpose of interrogation or investigation.\textsuperscript{67} Anyone who is arrested has the right to test the legality of the arrest; he is entitled to a proceeding where the conditions of his release, for example bail money, are determined; and he is also entitled to the assistance of counsel as soon as he is arrested.\textsuperscript{68}

D. Linear and Triangle Structures

The relations among participants in the criminal procedure give us several different structures. First, we can find the regular triangle structure. The prosecution as plaintiff and the defense attorney together with the defendant stand on each point of the base line of the triangle as opposing parties, and the court sits on the apex of the triangle. The second is the inverted triangle structure. The prosecution and the court sit on each point of the top line of the inverted triangle and the defendant stands on the lowest vertex thereof. The third one is the linear structure. Three participants, police,
prosecution, and the court stand hand in hand in a row. Some say that the police bake bread, the prosecution carries it, and the court eats it.ª This paragraph owes to Jianguang Yang in an international conference of criminal procedure in 2015.

Considering that Packer compared the Crime Control Model to an assembly line, the linear structure has a lot to do with the Crime Control Model. The inverted triangle structure is also deeply related to the control model. If the police has substantial power in fact-finding, then all the remaining institutions including the prosecution, the defendant (attorney) and the court, which are deemed to be the core of the criminal justice system in many democratic countries, are nothing but rubber stamps. This will lead to extreme control model. Even if the police does not stand over the judicial system, the structure is related to the crime control model. However, it will not be so extreme as the structure with powerful police. The Due Process Model is most familiar with the regular triangle structure.

E. Use of Models and Structures

Packer’s analysis is not the final framework and has encountered many criticisms, and Packer himself said that the two models may not be labeled as Good and Bad, nor corresponding to the reality.ªº However, the models provide not only a descriptive guide to judge or classify a subject system but also a normative guide to what values ought to influence the system.ª¹ The models are very useful at least for the countries where the crime control has always been the main purpose of the criminal justice. Because the Crime Control Model and the Due Process Model are located at each opposite pole, those countries at the one end of the polarity have to experience or at least move toward the other end. And, because democratic countries pursue due process of law, a country based on the Crime Control

ª This paragraph owes to Jianguang Yang in an international conference of criminal procedure in 2015.
º Packer said that his models were “not labelled Is and Ought... [they] merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims.” Packer, Sanction, at 153.
¹ See Roach, Models, at 672.
Model should move to the Due Process Model, if it wants to have a better society.

Korea is one of the countries that experienced both of the extreme Crime Control Model and the Due Process Model. Here I present the experience shortly.

III. Korean Experience

A. Tool of Reign (1910-1945)

1. Structure of the Colonial System

Koreans were forced into the colonial ruling by the Japanese annexation in 1910, which deprived Koreans of their five-millennia-old autonomy. Imperialist Japan took over Korean judicial jurisdiction even before the official annexation. In 1909, it began to enforce Japanese law across the Korean peninsula, with which Japanese Criminal Procedure Act began to apply. Then Japanese Criminal Procedure Act was legislated in 1890 during Meiji era, which was influenced by French law having a liberalistic color. According to the Act, compulsory measures necessary for investigation were assigned to preliminary judges’ authority. Investigative agencies, such as the prosecutors or police officers, could not take independent compulsory measures. This provided protection of judicial review over investigatory actions by prosecution or police. However, such protection was not provided to Koreans. Special regulations were applied to Koreans, which vested prosecution and police with power similar to that of a preliminary judge. Police officers were authorized to sentence any criminal to bastinado, detention or fine and could take compulsory measures delegated by prosecutors or even judges. They did not have to get judicial warrants. All those measures were able to be taken upon their investigatory power.

This system was confirmed and even strengthened by the promulgation of Josun Criminal Decree of 1912 and several other decrees. Prosecutors and police officers were authorized to arrest and detain suspects without judicial warrants. In addition, prosecutors even had the power to issue a writ of detention. Prosecutors could detain suspects for up to 20 days.

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72 See Josun Criminal Decree § 12.
without any judicial review until their decision of indictment or information. Police officers could detain suspects up to 14 days though they did not have the power to issue documentary writs. These enormous powers characterized the colonial criminal procedure as an “investigation criminal justice system” (investigatory agency oriented system), together with several other provisions making investigatory agencies almost quasi judges. Statistically, a great portion of cases fell under the category where the police officers were authorized to render final decisions. This colonial procedure could be well described as a “police-oriented criminal justice system.”

Japan amended the Criminal Procedure Act in 1922 producing so called Taishō Act. In 1924, Josun Criminal Decree was amended, too. Although these two amendments came closer, they had little relationship. Taishō Act, influenced by German law, bestowed stronger power of compulsory disposition and broader discretion upon investigation agencies, while the amended Josun Criminal Decree loosened the discipline by shortening the detention limit from 20 days (prosecution) or 14 days (police) to 10 days. This was an amiable reaction of the colonial ruler frightened by the nationwide independence movement of Korean people in 1919. However, the rulers did not forget to find a hidden way to maintain the same power as before. According to the then procedural law, consecutive related crimes were treated as one crime and the detention limit for those crimes was supposed to be 10 days in total. However, they tried to construe those crimes as multiple crimes, summing up all the ‘10 days’ of each crime, and resulting in expansion of detention period. This construction was officially confirmed by a resolution of a legal institution.

2. Power Makes Rule

It is not surprising that the colonial system had little consideration for suspects or ordinary people at risk of becoming suspects. Its sole goal was effective and efficient ruling over Korean people. Because the dynamics formed a relation of the ruler and the ruled, only the ruler’s voice penetrated into the rulemaking process. Neither the voice of the ruled nor even

73 See Josun Criminal Decree §§ 12, 15.
74 See Josun Criminal Decree § 13.
75 Resolution of Legal Association of 1935.
that of those compassionate was reflected in the system. It is notable that
the system was constituted not by statutes but by decrees of the proconsul,
even though it regulated the core of fundamental rights of people. The
ruler did not need to justify or explain constructing the system as they
wanted, which were spoils for the winner of a power game. This shows
how rule-making works among interest groups. Winner takes all out of
naked struggles.

The retreat of 1924 shows another example thereof. The ruler might
have been surprised and realized that too harsh rulings have side effects.
However, it is noteworthy that the change of the ruler’s side was also the
product of another power game.

Power makes the rule. The dominant power got the rule as a trophy.
The colonial rulers regarded law just as a tool of reign.

B. Introduction of Warrant System (1945-1948)

1. Design of the Interim Government

With the termination of the Second World War, Koreans redeemed their
freedom in 1945. However, they had to wait until they established their
own government. In the meantime, the United States Army Military Gov-
ernment in Korea (USAMGIK) was the official ruling body of the South
Korea. South Korean Interim Government was established under the US
Military Government. The interim government enacted ordinances includ-
ing Ordinance No. 176 (Changes in criminal procedures) on March 20,
1948.\textsuperscript{76}

The Ordinance No. 176 introduced warrant system into Korean Penin-
sula, repealing Articles 12, 13, 14, 15 of Josun Criminal Decree\textsuperscript{77} which
excluded warrant requirement.\textsuperscript{78} Section 3 of the Ordinance manifested
principle of warrant requirement, saying that no person shall suffer re-
straint of body except pursuant to a warrant of arrest (koo sok yung jang)
issued by a court. It acknowledged several exceptions where prompt ac-

\textsuperscript{76} The Ordinance was effective on 1 April 1948.
\textsuperscript{77} The Ordinance called this decree “Korean Criminal Act (Governor General Act).”

However, precisely speaking, this was not an act as legislative body made.
\textsuperscript{78} See SKIG Ordinance No. 176 § 24.
tion is necessary.\textsuperscript{79} The warrant requirement, however, still applied to those exceptions. It provided that, in case a prosecutor or a police has restrained the body of a person without a warrant of arrest under the provisions of sections 3, 4, he shall obtain from a court a warrant of arrest (koo sok yung jang) within 48 hours.\textsuperscript{80}

Even with the warrant the police or the prosecutor were not allowed to detain the suspect more than 10 days unless an order of extension had been obtained from a court before the expiration of such period of 10 days.\textsuperscript{81} The Ordinance also provided a restrained person with a right to apply to a court for inquiry into the legality of the restraint.\textsuperscript{82} With the introduction of the review of legality, “hearing” was introduced, too. If the application shows on its face that the restraint is prima facie illegal, the court shall fix a day for the hearing and shall order the restraining person to bring the restrained before the court and show cause for continuance of the restraint. No person released after hearing shall be restrained on the same facts again, except pursuant to a warrant issued by a court.\textsuperscript{83}

2. \textit{Transplant of US System}

This period was dominated by the US military. The US wanted to establish a Korean government familiar to them, and it was natural for the US military government to try to transplant the US warrant system. Power was at the hands of the US. Anyway, it was a great change and experiment for Korean legal system, which was followed by the change of the society. However, there was a gap between the ideal legal institution and the practical real world, because the change was introduced by external political changes more than by internal social changes.

Within the system established by the military government, there was an issue unsettled by the Ordinance 176. Even though the ordinance promulgated warrant system, it was not clear whether the police may apply for the warrant directly to the court. The government might have intended direct application like in the US. However, being smart and quick enough,

\textsuperscript{79} See SKIG Ordinance No. 176 §§ 3, 4.
\textsuperscript{80} See SKIG Ordinance No. 176 § 6. It allows 5 days where a court is not located.
\textsuperscript{81} See SKIG Ordinance No. 176 §§ 8, 9. This extension was allowed only one time.
\textsuperscript{82} See SKIG Ordinance No. 176 § 17.
\textsuperscript{83} Ibid.
the Prosecution’s Office issued a guidance denying the direct application of the police and indicating that the application authority belongs solely to prosecutors.84 One day before the Ordinance 176 became effective, a supplementary ordinance was promulgated, which became effective on the same day as 176. It was Ordinance No. 180 titled “Ordinance No. 176 Supplemented,” providing that a policeman shall apply to the public prosecutor and the prosecutor shall submit the application to the court.85 This seems to be a trifle procedural issue but it happens to be an incident of tremendous importance, resulting in one of the hot potato issues today. The Ordinance 180 constituted one of the institutional foundations of the supervision power of the prosecution over the police.

C. Intention of the Founders of Korean Criminal Procedure Act (1954)

At last, Korea redeemed its full autonomy with the establishment of the Korean government in 1948. The Constitution of the Republic of Korea was founded and enacted on July 17, 1948. The warrant system was raised to a constitutional level by Article 9 of the Constitution. The Constitution provided the judicial review over the legality of the arrest or detention.86 However, the Ordinance 176 continued to be effective until new codes are enacted. The Criminal Procedure Act of the Republic was first enacted in 1954.

Although warrant system as an institution was introduced, *ex post facto* warrants, i.e. warrants after arrests as prompt action were more general than normal warrants in reality. This was typical while the government was in Busan during the Korean War. According to the statistics, around 95% of the warrants issued were *ex post facto* warrants. This shows that the police and prosecutors took an easy way: to take the body of a suspect first, to interrogate them under custody and then to seek for justification with a warrant. Josun Criminal Decree allowed interrogation under custody without warrant, which was a common practice during the colonial period. Now that the Decree was repealed, one might well expect

85 See SKIG Ordinance No. 176 § 17.
86 See Constitution of 1948 Article 9.
the practice would change. However, it did not change even under the new law.

The founders of the Criminal Procedure Act intended to change this practice and inserted a clear provision that supporting evidences shall be submitted for an application of warrant.87 The actual practice of the time shows that 99.88% of the applications were granted, which may well said to be automatic issuance of warrants. The founders intended to provide “substantial judicial review” in spite of prosecution’s opposition arguing that it would spoil investigation for all the evidences at prosecution’s hands to be submitted.

In the law of the new Republic, extension of the detention period was allowed only for prosecutors and not for the police,88 for which the Ordinance 176 had allowed as well. Additionally, the founders asked prosecutors to submit supporting evidences for the extension.89 This demand was also for the substantial judicial review. Judicial review over the legality of detention was maintained in the Act.90 Commentators interpreted the provision as including review of the validity at the time of decision, which is favorable to the detainees.

D. Formal Judicial Review based on Documents (1948-1995)

1. Ideals and Reality

The founders tried to shake off the fetters of the colonial harsh institution and were eager to establish a system as ideally as possible. They expected the new Act would bring substantial judicial review of warrants. However, the reality turned out to be somewhat different from their expectations. The actual practice did not find any meaningful change. The founders asked for “submission of supporting evidences” in order to realize substantial review but the submission did not serve substantial control, rather
resulted in just formal review based on reading documents prepared by investigation agencies.

The factors in early days of the result might be that public order and security were the primary concern in the unstable social situation after the Korean War, that most practitioners including judges had been educated during the colonial period and lacked strong will to realize substantial review, and that there was a shortage of judges who were actually in charge of the review. Once such a practice formed, it became firm and solid even after the social situation changed.

2. Voluntary Restraint (Accompanying the Police Voluntarily)

Ex post facto warrants would deprive a prosecutor of the opportunity to supervise the investigatory process of the police before warrants are officially applied for. The Prosecutors Office instructed the police to apply for an advance warrant (warrant preceding arrest). Having felt comfortable in the past procedure, the police employed an expedient. Policemen asked the suspects to accompany them to the police station, recording the statements of the suspects, and submitting the records as supporting evidence with the application for the advance warrant. It took a fair amount of time for an application paperwork to travel to a prosecutor, to a judge, again to the prosecutor after judicial decision, and finally back to the police. Meanwhile, the suspect was waiting in the police station. Facially, this procedure seemed to be justifiable, because the suspect agreed to go to the police station at first. “He accompanied the police and waited in the police station voluntarily!” However, this was not genuine voluntariness. It is impractical to expect for a suspect, weak and afraid in front of the police, to say “No!” when asked to accompany the police. The agreement was not a genuine one, rather a pseudo agreement substantially forced. Sometimes, the police used physical force. Even for those caught flagrante delicto, advance warrants were applied for. A statistic data shows that applications for ex post facto warrants comprised only 1.3% of those by the police and

91 This was partly because the Act had no clear provision regulating the procedure after arresting a flagrant offender, until it was amended to provide ex post facto warrants for such cases in 1973.
0.2% of those by the prosecution. This is quite the opposite of what happened around the time of the enactment of the Criminal Procedure Act.\textsuperscript{92}

3. \textit{The Ostrich Court}

The judiciary turned a blind eye to the practice. Judges did not review what really happened, but rather restricted themselves to the documentary evidence provided by the investigation agencies. Few applications were rejected by reason of forced taking to the police station. The Supreme Court was lenient, too. The Court focused on whether the police had reason to ask the suspects to the station, that is, whether there is a reasonable suspect to believe the suspect committed a crime, turning away from whether there was a genuine agreement.\textsuperscript{93} In contrast, the Supreme Court took a strict position about forced restraint in the police station and rendered its illegality in a decision.\textsuperscript{94} However, few cases were heard by the Supreme Court about the issue. The judiciary sat behind like an ostrich burying its head in the sand.

This is not irrelevant to the political situation during that time. The Criminal Procedure Act of 1961 and the Constitution of 1962, which promulgated after the military takeover, made clear that only the prosecution has the authority to apply for a warrant and the police shall request the prosecution for the application.\textsuperscript{95} The Criminal Procedure Act of 1973 after \textit{Yushin}, took the expression “demand” instead of “apply,”\textsuperscript{96} which symbolically shows the power of the prosecution. Judicial review over the legality of detention was repealed by the amendment of 1973. Those days were the time when state power overwhelmed human rights of the people. The criminal justice system was revolving around the prosecution – “prosecution-oriented criminal justice system.”

\textsuperscript{92} See the above C.
\textsuperscript{93} See KSC 70do1391 (1970. 9.17.), KSC 72do2005 (1972. 10. 31.).
\textsuperscript{94} See KSC 70do2406 (1971.3. 9.).
\textsuperscript{95} See Criminal Procedure Act of 1961 Art 201; Constitution of 1962 Art 10 (3).
\textsuperscript{96} See Criminal Procedure Act of 1973 Art 201. The Act of 1980 used the word “apply” again, which continues today.
4. **Wriggling through the Frozen Land**

The constitution of 1980 revitalized the judicial review over the legality of detention.\(^{97}\) However, the Act of 1980, forming a concrete shape, provided a large number of exceptions. As a result, the judicial review was very much restricted. Although the change of the social atmosphere was restricted, the Supreme Court rendered a landmark decision, ruling that the expedient of “voluntary accompaniment and restraint” is an illegal crime.\(^{98}\)

The protest of the people for democracy in 1987 gave birth to the amendment of the Constitution. The Constitution of 1987, which is the current Constitution, is said to be the most human-rights-friendly so far. It provides the judicial review of legality not only for detention but also for arrest.\(^{99}\) With the changes of political and social situations, the Supreme Court of the 1990s reviewed the expedient in many respects. It ruled that it is not a crime to assault a policeman who forces a suspect to the station,\(^{100}\) that it is illegal to get an advance warrant after the police actually arrest a suspect first,\(^{101}\) that restraining a suspect in a station without a warrant is illegal, etc.\(^{102}\)


**1. Amendment of 1995**

The advent of warm atmosphere\(^{103}\) enabled the reform of the warrant system. The Act of 1995 provided hearing process for the issuing of a warrant. Paragraph 1 and 2 of the Article 201-2 stipulated that judges may hold a hearing for a warrant. It was designed to realize substantial judicial review over the investigatory detention. Officially the proposer of the bill

\(^{97}\) See Constitution of 1980 Art 11 (5).

\(^{98}\) See KSC 85mo16 (1985. 7.26.).

\(^{99}\) However, the Criminal Procedure act did not have corresponding provisions until the amendment of 1995.

\(^{100}\) See KSC 91do453 (1991. 5.10.).

\(^{101}\) See KSC 93da35155 (1993.11.23.).

\(^{102}\) See KSC 93do958 (1994.3.11.).

\(^{103}\) Think of the democratization since 1987 protest and the fact that a former leader of the opposition party became the President in 1993.
was the government but actually the judiciary substantially initiated the amendment. The amended provision gave judges the discretion whether to hold hearing or not. The Rule of Criminal Procedure\textsuperscript{104} mandated judges to hold hearings with an exception,\textsuperscript{105} but judges still had discretion of deciding whether the exceptional factor exists.

In any case, the judiciary intended to enlarge and strengthen the judicial review, for “it will protect people including suspects more broadly and effectively” – which was the cause of the judiciary. This was good for people as the judiciary asserted. It was great also for the judges because the new institution gave a possibility for them to control the investigatory detention process. It was also made possible that the substantial weight moves to the judiciary out of the “prosecution criminal justice system.”

2. Amendment of 1997

The Act of 1995 became effective on January 1, 1997. Naturally, the Act was not welcomed by the prosecution. The prosecution argued that suspects have the fundamental rights to decide whether to see a judge and that too many resources were being wasted for the warrant hearings under the 1995 Act. The prosecution initiated a re-amendment. In 1997, 28 members of the National assembly moved a bill reflecting the view of the prosecution. The bill was passed in the same year and became effective on December 13, 1997. The 1997 Act provided that judges may hold a warrant hearing when a suspect asks to do so.\textsuperscript{106}

This seemed to give the suspects more freedom and in accord with human right protection, because it would protect those who do not want to be humiliated in a court during a hearing process. Actually, the number of hearings was strikingly reduced after the 1997 Act was enacted, owing to the lack of suspects’ motions. One might regard this phenomenon as the evidence to say that people do not like hearings. However, we have to note that a suspect expresses his decision regarding his warrant hearing in front of a policeman or a prosecutor while he is under arrest, which means,

\textsuperscript{104} This rule is made by the Supreme Court.
\textsuperscript{105} See Rule of Criminal Procedure of 1995 Art 96-4.
\textsuperscript{106} This provision was for those cases where suspects are arrested and against whom detention warrants are sought for.
while in investigation’s hands. There is strong doubt whether the suspect’s choice not to see a judge was genuinely voluntary. It is not clear whether the 1997 Act served human rights more than the 1995’s as purported. However, it is clear that the pendulum swung back to prosecution’s side with the re-amendment. Anyway, the prosecution became able to control the suspects again!

3. Amendment of 2007

The Criminal Procedure Act experienced extensive amendment in 2007. Political background was a strong motive for the reform. The President at the time was deemed to represent powerless commoners and had a strong eagerness to reform the “prosecution-oriented criminal justice system.” The Presidential Committee on Judicial Reform was established in 2005 and carried forward judicial reform, one of whose products was the amendment of the Criminal Act in 2007. The Act of 2007, which is the current Act, provides that a judge shall, upon receiving an application for a warrant of detention, hold a hearing to examine the suspect. Now, the hearing is mandatory.

Actually, the judiciary had prepared for the amendment since long before the establishment of the presidential committee. The Supreme Court established a Judicial Reform Committee in 2003 and this committee produced a reform proposal in 2004, including establishment of a comprehensive committee for judicial reform. The presidential committee was established according to the proposal. As the history of the committee shows, the amendment of 2007 was highly influenced by the judiciary. In addition, restricting the power of the prosecution was very much welcomed by many groups except the prosecution itself, because it was generally accepted as a good way to protect human rights against the government power. Police officers, prosecutors, lawyers, judges, scholars and leaders of NGOs were sitting at the table, but the hegemony of the discussion for the amendment went far from the prosecution. The pendulum swung to the judiciary. The Act thus amended. This led to the “court-oriented criminal justice system.”
F. Doctrine of Trial-Centered Procedure

Criminal procedure in a broader sense includes investigation, trial and execution. It has been a solid principle since the first enactment of Korean Criminal Procedure Act that it should be decided in the courtroom whether a person has committed a crime and what penalty he deserves.\textsuperscript{107} The Supreme Court ruled in as early as 1955 that an out-of-court statement of a third party does not have probative value if the declarant denies the truth of the statement as a witness in a courtroom.\textsuperscript{108} This shows statements offered in courtrooms outweigh those made outside the courtrooms.

Even though courtroom proceedings were deemed more important theoretically, the reality was somewhat different. In reality, criminal trial system heavily relied on documents, most of which made or gathered by investigatory agencies. Prosecutors submitted all the investigative records when they prosecuted. This allowed judges to be informed of the prosecutor’s side of the story prior to that of the defendant. Thus, judges encountered defendants with some sort of bias from the first stage of the case.

Korean Judiciary tried to overcome this sad reality. The Rules of Criminal Procedure of 1982 stipulated the rule that evidentiary records may not be submitted when presenting the case for prosecution. Several other efforts were made. However, they could not change the long working practice of document-based criminal procedure. Since around 2002, more substantial and practical efforts have been made under the leadership of the Judiciary. Among all these efforts, the amendment of Criminal Procedure Act in 2007 was the most extensive and important so far.

To pick up one of the most distinctive characteristics of the amendment, I would point out without hesitation that it has moved the core of the criminal procedure from substantially closed rooms of police officers, prosecutors, and judges to open courtrooms. This is known as “the doctrine of trial-centered procedure.” Instead of investigatory documents, oral arguments and proving process in courtrooms became crucial to the conclusion, that is, conviction and sentencing. Defendants and their counsels have more opportunities to access the substance of the procedure.

Evidence law played a very important role for the implementation of the doctrine. If most of the evidences amassed by the police or prosecutors

\textsuperscript{107} The Gist of Criminal Procedure Act at the time shows this. \textit{See} Legislation Data, 14. \textit{See also} Shin, How, 3-6.
\textsuperscript{108} \textit{See} KSC 1955. 2. 4. 4287hyungsang17.
are admitted to the court, then the trial will easily end up as a rubber stamp whose function is just to justify what is already substantially decided by investigation. Not only confession rules serve the principle but also hearsay rules do. The doctrine can be fulfilled with all the principles such as open court, hearing in person, original evidence, and oral hearing.

Meanwhile, the amendment of 2007 stipulates several provisions helping victims to participate in the relevant criminal procedure. Presence of persons with reliable relationship, examination of witness through video or other transmission system, notice to the victims, victim’s rights to make statements, victim’s rights for perusal and copying of the trial records are the provisions added or revised by the amendment.

IV. Models and Experience

During the colonial period, the winner of a naked power game took everything. Law was nothing but an effective tool to control the ruled. Even the superficial justification of the ruling was not needed. In this phase, law followed the power. If you want to establish a good law, then take power. This period experienced the harsh and extreme Crime Control Model. It had the inverted triangle structure with the strong police.

The experiment during the Interim Government shows an institution fallen from an external world does not always have effect. Law can change a society as much as the society is prepared. Anyway, this led founders of our own Act to imagine an ideal goal of a system.

However, the real world changed more slowly than the legal institution. Rather, the reality distorted the law, resulting in a superficial warrant system, which constitutes a pillar of “prosecution-oriented system.” In this phase, the system asks human rights to yield to the social order or state interest. The disagreement of the relative importance between the two values can be solved through debate in the political process or sometimes through a power game. If you want to make a good law, then persuade the opposite party or take power from it. The justice system did not effectively

110 See id. at § 165-2.
111 See id. at § 259-2.
112 See id. at § 294-2.
113 See id. at § 294-4.
serve protection of procedural rights of the accused. The Crime Control Model still prevailed during this period. This phase nominally adopted the regular triangle structure but it was substantially the linear structure.

With the introduction of judicial warrant hearing in 1995 and of trial-centered procedure in 2007, Korea at last has the real Due Process Model. The structure changes rapidly from the linear one to the regular triangle. This was possible because Korean people achieved a democratic society, which constitute the base of matured legal institution. Nobody is against the sovereignty of the people and nobody dare to stand against due process of law.

V. Conclusion

From the Korean experience, I could find that a tyrannical, dictatorial or authoritarian regime usually adopts the inverted triangle structure following the Crime Control Model, while the democratic society adopts the regular structure following the Due Process Model. This proposes us that we should take the latter model and system in order to have more desirable society. However, this is partly right. Korean experience says to us that legal reformation alone does not bring us a better world. Society and Law develops together influencing each other.

In addition, I would like to mention that Korea, having realized the Due Process Model to some extent, is now witnessing other challenges Korea did not know before. This seems to suggest that the Due Process Model might not be the final and ideal goal. However, this is clear to me: “Do NOT talk about criminal justice when you don’t know about the due process model and the regular triangle structure.”
Korean and German criminal law sciences and criminology have experienced a long common history of cooperation and exchange. They are visible in German-Korean seminars, a multitude of comparative studies and publications which result from joint conferences. Scientific cooperation between Korea and Germany has been and still is particularly strong in criminal law sciences and criminology. A closer look at criminal policies, unfolding in Germany and Korea over the last decades, reveals that both countries have been affected by a move towards security. Criminal law (and criminal policy) in both countries increasingly is faced with the request to contribute to maintaining and enhancing security and the prevention and preemption of dangers and risks. In both countries preventive detention has played a crucial though different role in shaping policies of security pursued by criminal law. While in Germany between 1998 and 2008 preventive detention has been emphasized and widened, Korea abolished preventive detention and instead raised minimum penalties, introduced electronic monitoring and added other security enhancing measures to the criminal code.

Some 40 years ago, a text was published in Germany which proclaimed the “farewell to Kant and Hegel”\textsuperscript{4}. Farewell was welcomed by most criminal lawyers of the time and was hailed as a further step towards a modern and advanced criminal law. This process of modernization was initiated already by the criminal policy program of Franz v. Liszt presented in 1882\textsuperscript{5} and implemented in Germany through the Comprehensive Criminal Law Reform (Große Strafrechtsreform) at the end of the 1960s. According to this view modern criminal law is not geared towards repression and retaliation anymore, but guided and justified solely by the task of prevention of crime and protection of “legal goods” (Rechtsgüterschutz). Criminal law and punishment are looking forward. The main vehicle of the protection of “legal goods” should be criminal sanctions preventing relapse into crime (rehabilitation) while strictly limited by personal guilt.

Today, however, this farewell to “Kant and Hegel” is remembered with feelings of nostalgia and thoughtfulness. Though criminal law is still geared towards prevention and the protection of legal goods, it was transformed during the last decades into an instrument which is part of a new and comprehensive architecture of security. Containment of risks and maintenance of security internationally have become important goals to be achieved by criminal law. Risk orientation and pursuit of security can be observed in three policy lines emerging during the last decades and affecting criminal law.

(1) The move towards security is visible first in a type of criminal offence statutes which was not yet fully developed at the time of farewell to Kant and Hegel. This type of offence statutes concerns predicate offences which penalize concrete or abstract risks/dangers. Offences of abstract endangerment are significant elements of modern risk criminal law. Such offence statutes shift criminal liability well before effective harm occurs in order to prevent already acts which carry a risk of harming certain legal goods.

(2) Secret and covert investigative measures, which once had been confined to intelligence services, became part of criminal procedural law


\textsuperscript{5} V. Liszt, F.: Der Zweckgedanke im Strafrecht. Marburg 1882.
from the 1970 s on. As (abstract) offences of endangerment overlap widely with so called transaction (and at the same time victimless) crime, proactive and secret gathering of information serves to compensate for the lack of victim reports and information coming from victim-witnesses.

(3) The system of criminal punishment then embraces deterrence and incapacitation as important goals of punishment besides rehabilitation/reintegration. In Germany, for example, measures of security – the second track of criminal sanctions – from the mid 1990 s on are expanded, as a response to dangerous offenders, in particular sexual offenders. Preventive detention serves to incapacitate dangerous criminals and does not depend on personal guilt or responsibility. In other (one-track) criminal justice systems long prison sentences – and in particular life imprisonment – pursue the goal of security. The preventative upgrading of the system of criminal sanctions then can be observed also in the introduction of forfeiture of illicit gains aiming at improving effective control of organized (transaction) crime.

Criminal law thus becomes increasingly part of general security policies which seek to optimize effective protection against dangerous sexual offenders, school shooters, terrorists and mafia organizations. In particular since 9/11 the integration of criminal law and criminal justice into a general architecture of security has gained momentum. Critics of this process point to the significant and adverse changes which come with a criminal law that does not primarily pursue justice and proportional punishment of criminal offenders within the framework of a fair trial but which seeks to maximize security and contain risks. Placing emphasis on security is associated with the widening of criminal law in general, violation of minimum

6 Secret investigations were introduced in Germany the first time end of the 1960 s authorizing wiretaps for domestic intelligence agencies and for law enforcement agencies (selected serious criminal offences, since 1974 also for the investigation of drug trafficking). However, it was in 1992 (Law on Combating Drug Trafficking and other Forms of Organized Crime) that an amendment of the criminal procedural code systematically regulated secret investigation measures which had been practiced in terrorist and drug trafficking cases well before a formal statutory basis had been introduced.

standards when it comes to the creation of new criminal law (harm principle), politicisation and an instrumental use of criminal law (effectiveness) which runs counter the rule of law approach. Political discourses in the field of criminal law reform are dominated by “security gaps” and how to close perceived security gaps through adding new criminal offence statutes, widening police powers in the investigation of threats to security and streamlining the exchange of information and intelligence between police, law enforcement and security/intelligence forces. The persisting emphasis on security gaps is a characteristic of criminal policies which emphasize prevention of extreme violence and therefore are confronted with phenomenon of “high impact” and “low probability” incidents. An incident of high impact and low probability, when occurring, results regularly in the questions: (1) could an act of extreme violence have been prevented, (2) how such an act could have been prevented and (3) who was responsible for not preventing the act.

Placing the emphasis on security, the guiding principal of a liberal criminal law that is to say, the fragmentary character of criminal law and the general appeal to strengthening freedom in the first place are sidelined. The emphasis on security brings with it also a change in perspectives on criminal punishment. With security the victim and in particular the potential victims move to the center of criminal policies. The offender, once at the center of rehabilitative criminal law is sidelined. Criminal law based prevention endorses penalties which provide for incapacitation and deterrence.


The rapid spread of security concerns and requests, that criminal law should be part of a comprehensive architecture of security, is encouraged and justified by the perception that serious crime is increasing and that dangerous criminals cannot be restrained effectively. However, when looking at Germany another picture of crime trends can be drawn. Serious crime, in particular the most serious forms of violent crime, is on the decrease. The crime drop (which is confirmed for many Western countries) started in the mid 1990s and continues to date. It appears that despite opposing projections new birth cohorts entering the age of peak involvement in crime contribute increasingly less to crime rates. The crime drop gained momentum in a time when crime policy discourses zeroed in on dangerous offenders and serious violent crime. In Germany, calls for widening preventive detention, toughening criminal law and strengthening security were triggered by cases of sexual murder of children in the second half of the 1990s and the assumption that children are increasingly at risk of falling prey to sexual predators. However, police statistics (and health statistics) reveal another picture. Graph 1 shows a significant decline in both, total murder rates and the number of sexual murder cases with child victims.

The apparent gap between murder trends and security concerns might be an expression of “post truth” politics on the one hand. On the other hand, however, the gap certainly expresses a public view that there will always be too much crime and the adoption of a “zero-tolerance” approach which is immune against the course of crime rates.

Compared with Germany, the Republic of Korea can be rated as a low crime country. Graph 2 displays police recorded rates for various criminal offences in Germany and Korea. While rates of murder and rape are higher in Korea, rates of volume crime such as burglary, assault and robbery are significantly lower. A corresponding contrast can be drawn from victimization surveys which point for Korea to a victimization rate of some 5% (2012) while German victim surveys have generated victimization rates of 15 – 20%.

Graph 2: Police Recorded Crime in Germany and in the Republic of Korea (per 100,000)

Despite much lower crime rates the response of the Korean criminal justice system to crime is evidently more severe than the German response. Korea has still the death penalty on the criminal code book although Korea today is rated as a de facto abolition country as no executions have been carried out during the last 20 years. But, in Korea, sentences of immediate imprisonment are more common than in Germany (see graph 3). Moreover, while the prisoner rate in Germany amounts to 76 per 100,000 (2016), the Korean prisoner rate is 114 per 100,000 (2016). However, debates on undue leniency in criminal sentencing point to the public’s view that in particular violent crime should be pun-


17 http://www.prisonstudies.org/country.
ished more severely and to the belief that Korean judges are too lenient. The Korean Sentencing Commission in fact has amended sentencing guidelines for sexual offences and has increased minimum and maximum prison sentences in 2010. After the amendment the permissible sentencing range for rape is from one year and six months to seven years, and that of rape of minor (under 13 years) is from 6 years to 13 years. The sentencing range for murder was advanced to a minimum of six years to a maximum of 17 years.

Graph 3: Criminal Convictions and Sentences of Immediate Imprisonment (ratio, 2006)

Source: Court Statistics.

4. Security and Criminal Law Reform: Developments in Germany

In Germany, reforms of criminal law aiming at improving security since the 1990s were focused on the second track of criminal sanctions. Several waves of criminal law amendments have widened the power of criminal courts in imposing preventive detention on criminal offenders deemed to be dangerous and at risk of relapse into serious crimes.

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German criminal law provides for a two-track system of criminal sanctions which consists of criminal punishment and measures of rehabilitation and security. Criminal punishment (in the form of fines and imprisonment) is strictly bound to and limited by individual guilt. Prison sentences in general are restricted to a maximum of 15 years. Only the offence of murder carries a life sentence. Besides criminal punishment German criminal law allows for so-called measures of rehabilitation and protection of public security which can be added to a prison sentence (preventive detention) or replace prison sentences (committal to a psychiatric hospital). These measures do not depend on personal guilt but on the degree of dangerousness (based on assessments of risks by forensic psychologists or psychiatrists) and the need for treatment or preventive detention. Measures of rehabilitation and security are subject to the principle of proportionality (§ 62 German Criminal Code: a measure of rehabilitation and security may not be imposed if that would be out of proportion to the criminal offence committed or future criminal offences and the risk posed by the offender). The two-track approach is based on the conviction that proportional punishment limited by the principle of personal guilt may not be sufficient to respond effectively to habitual offenders or offenders suffering from mental diseases or addicted to alcohol or drugs likely to re-commit serious crimes. German criminal law (as well as other continental European countries, for example Austria and Switzerland) therefore provides a line of criminal sanctions which pursues prevention of serious recidivism alone. Measures of treatment and security address three groups of criminal offenders deemed to be particularly at risk of serious recidivism: the mentally ill, the addicted and the habitual offender.

Before 1998 and the onset of a series of amendments, substantive elements of proportionality, established through § 66 German Criminal Code, concerned the status of a habitual felon and dangerousness (in terms of a high risk of future serious crime). Formal safeguards required at least two prior criminal convictions with sentences each of at least one year imprisonment; furthermore an offender had to have served a minimum of two years imprisonment as a result of prior convictions. Procedural safeguards concern in particular that measures of treatment and security may only be

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imposed if – on the basis of expert evidence – the status of a habitual criminal and dangerousness is established beyond reasonable doubt.

Dangerous offender legislation in Germany started 1997 with the “Law on Combating Sexual Crime”. This law went into force early 1998. It was the result of cases of serious sexual violence committed by recidivists (after release from prison or psychiatric hospitals), it increased penalties for various sexual offences, extended the range of preventive detention, made early release from preventive detention more difficult and introduced mandatory treatment in a socio-therapeutic prison for sexual offenders with a prison sentence of two years and more. Before 1998, the Criminal Code had limited preventive detention to ten years if imposed for the first time. Only with a second imposition preventive detention became indeterminate. The 1998 law abolished the limitation of a first sentence and applied the new rule retroactively also to offenders with a first decision of preventive detention. In 2004 the Federal Constitutional Court held that retroactive abolition of the first time limitation of preventive detention did not infringe the prohibition of retroactive criminal law (decision as of February 10, 2004, 2 BvR 834/02 and 2 BvR 1588/02; decision as of February 5, 2004, 2 BvR 2029/01). The court argued that strict prohibition of “true” retroactivity, enshrined in Art. 103 II Federal Constitutional Law, does not apply to measures of security and treatment. Preventive detention (and other measures of the second track) – according to the Federal Constitutions Courts opinion – lack the lead element of criminal punishment, that is a moral verdict on the wrongfulness of an act. It is based solely on prediction of dangerousness and an assessment of the need to protect society. In the case of preventive detention, according to the judgement of the Federal Constitutional Court, the detainees` interest in preventive detention expiring after the ten years limit (in force when the sentence became final) had to be balanced against the states interest in protecting the public from grave risks posed by a dangerous offender. The Federal Constitutional Court found that the principle of proportionality was not violated and ruled further that the fundamental right to human dignity did not preclude a dangerous offenders` permanent and lifelong detention.

In 2002 the legislator introduced a sentencing option of “reservation of preventive detention” (§ 66a German Criminal Code). The law amend-

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ment responded to situations where criminal courts due to evidence problems as regards criminal habit and dangerousness did not impose preventive detention despite its formal requirements fulfilled. The 2002 law was a response to a perceived loophole in the statutory framework of preventive detention. The lead argument was that dangerous sex offenders possibly could escape incapacitation because dangerousness or criminal habits could not be established beyond the reasonable doubt standard during trial. The demand was therefore to provide for a possibility to detain dangerous sex offenders if dangerousness can only be established after conviction and sentence had become final.

Ensuing reforms of criminal law introduced then in the period 2002 – 2008 a form of conditional preventive detention, preventive detention for young adults (18 – 20 years old, 2003) and juveniles (14 – 17 years old, 2008) as well as a retroactively applicable form of preventive detention (2004). In particular the retroactively applicable form of preventive detention became an issue of constitutional debates. Preventive detention could be imposed if dangerousness was established after the criminal verdict became final, if a prison sentence had not yet been fully served and “newly discovered facts” established dangerousness of the prisoner.

The chronology of legislation in Germany demonstrates the particular course criminal law reforms can take when pursuing security. In Germany, dangerous sexual offender legislation virtually was narrowed down to upgrading (and toughening) the second track of criminal sanctions. Here, Hassemer has convincingly argued that the advances in German sentencing doctrine and sentencing theory as well as corresponding standards of reasoning, transparency and accountability in sentencing decisions on imprisonment, imposed on trial judges by appellate courts, have contributed to concentrate political pursuit of security on the second track of criminal sanctions and preventive detention. A firmly established jurisprudence of the German Federal Constitutional Court giving constitutional status to the principle of individual guilt as a precondition of criminal punishment as well as the magnitude of criminal punishment furthermore strictly lim-

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its the use of prison sentences for purposes of deterrence and incapacitation. The legislation and subsequent court action against dangerous offenders from the very beginning raised a debate on possible infringements of constitutional rights. First, it was argued that extending abolition of the ten years limitation of a first order of preventive detention to detainees serving already for the first time preventive detention would violate prohibition of retroactivity of criminal law. Then, the “ne bis in idem” principle as well as the “in dubio pro reo” standard have been tabled as critical issues. It has been voiced also that wide and retroactive preventive detention laws could be too vague and violate the fundamental principle of proportionality and the right to liberty as enshrined in Art. 5 European Convention of Human Rights. Numerous critics argued that Germany would find itself in violation of the European Convention if introducing retroactively applicable preventive detention and accepting retroactivity in the second track of criminal sanctions.

End of 2009, the European Court of Human Rights in a landmark decision has ruled that preventive detention as provided for in the German second track of criminal sanctions has to be treated as criminal punishment, triggering thus all restrictions and standards foreseen by the European Convention of Human Rights for criminal penalties, in particular the prohibition of retroactive criminal punishment as enshrined in Art. 7 (European Court of Human Rights, Case of M. v. Germany, (Application no. 19359/04), judgment, Strasbourg, 17 December 2009, Final, 10/05/2010). The European Court, unlike the German Federal Constitutional Court, argued that preventive detention which comes in the form of a measure of rehabilitation and security is implemented in a way which is not different from enforcing regular prison sentences. Moreover, the Strasbourg court

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pointed out also that Art. 5 European Convention of Human Rights allows deprivation of liberty only for strictly limited grounds, among them a criminal conviction and a judicial decision to detain a person of unsound mind. Dangerousness alone may not justify deprivation of liberty.

In the hearings before the European Court of Human Rights, an interesting argument was presented by the German Federal Ministry of Justice to the Court. The lawyers argued that this type of security measure (preventive detention for dangerous (habitual) offenders) was contributing to the relatively low imprisonment rate observed for Germany. In fact, prisoner rates have been on the decline in Germany for two decades. The argument brought forward in favour of preventive detention is based on a logic of guilt dependent criminal punishment, restricting not only imposition of a criminal sentence but also its extent in terms of length of a prison sentence. A system of sentencing strictly guided and limited by individual guilt – according to this logic – prevents inflation of prison sentences as a consequence of sidelining incapacitation and the pursuit of security in decision-making on criminal punishment in the criminal courts. With a separate track of measures of rehabilitation and security the system provides for a narrow (safety) valve which very selectively responds to political and public pressure for security and deterrence.

In fact, the course of prisoner rates and the figures on life imprisonment and preventive detention show that despite an increase in the number of preventive detainees and a long-term increase of the number of prisoners serving life sentences, the general prisoner rate is on the decrease since the end of the 1990s.

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The developments on display in graph 4 thus support the hypothesis of preventive detention serving as a “safety valve” which is (1) not affecting the general trend of decreasing prisoner rates and (2) very selectively targeting a small group of offenders assessed to be dangerous.

Germany responded to the ECHR' decisions by amending the rules on preventive detention in 2011 and abolished retroactive preventive detention. Offenders who had to be released after the judgments of the ECHR and offenders who will have to be released fall now under a new law which authorizes preventive detention if a diagnosis of a psychological disorder results in the conclusion that the offender is dangerous (Therapieunterbringungsgesetz (Law on Therapy and Detention of Violent Offenders with a Psychological Disorder)). The German legislator thus sought to bring preventive detention of dangerous offenders in line with Art. 5 European Convention on Human rights (which allows detention of persons of unsound mind). Moreover, the range of criminal offences for which preventive detention may be imposed was restricted, essentially to violent crime (but including now drug trafficking). Electronic monitoring (tracking through GPS) can then be part of post release supervision of offenders with a high risk of recidivism and with either a completed prison sentence of at least 3 years or after release from a measure of rehabilitation and security.

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However, the reform of preventive detention which went into force January 1, 2011 was overturned quickly as the Federal Constitutional Court changed its position about the constitutionality of the provisions on preventive detention in a landmark decision as of May 2011. The Federal Constitutional Court declared all provisions on preventive detention to be in violation of Art. 2 Federal Constitutional Law (right to personal freedom). This move was justified by the argument that preventive detention implies a significant interference with the right to personal freedom which – under the rule of the principle of proportionality – can be tolerated only

(a) under the condition that preventive detention is confined to cases where a high probability of most serious crimes of violence can be established and

(b) under the condition that preventive detention is implemented in a way differing significantly from the implementation of regular prison sentences. A significant distance between regular imprisonment and conditions of preventive detention must be clearly visible in the design of enforcement and implementation which must aim at release at the earliest possible date.

A comprehensive criminal law amendment 2013 then cut back preventive detention significantly (preventive detention has to be imposed by a trial court together with a prison sentence and is restricted to serious violent crime and drug trafficking in case of a high probability of relapse into very serious forms of violent or drug crime) and implemented the requirement of distance between conditions of imprisonment and preventive detention through rules which establish a regime of preventive detention completely governed by treatment and rehabilitation (§ 66 c German Criminal Code).

The Law on Therapy and Detention of Violent Offenders with a Psychological Disorder, mentioned above, however, continues to raise consti-

28 Federal Constitutional Court, 2 BvR 2365/09, judgment as of 4. 5. 2011.
tutional and socio-legal issues. This law aimed at those dangerous offenders who had to be released because of adjustments to the jurisprudence of the European Court of Human Rights (which outlaws retroactive application of preventive detention justified with dangerousness). The Law on Therapy and Detention of Violent offenders with a Psychological Disorder is in conflict with the two-track system of punishment and rehabilitation/security measures which was based on commitment to a forensic psychiatric hospital if an offender suffers from a mental condition which excludes completely or diminishes significantly criminal responsibility on the one hand. On the other hand dangerous habitual offenders fully responsible for their acts can be sentenced to preventive detention. With the Law on Therapy and Detention of Violent Offenders with a Psychological Disorder a third track has been opened: Detention of dangerous offenders diagnosed with a psychological disorder which does not affect criminal responsibility. The Federal Constitutional Court 29 and The European Court of Human Rights 30 have in principle accepted such a third track although critics claim that the concept of “psychological disorder” (not affecting criminal responsibility) is too wide, vague and lends itself to abuse 31.

5. Developments in Korea

In the Republic of Korea criminal policies towards dangerous offenders took a different course. The Korean penal code in force today does not know a two-track system of criminal sanctions 32. However, a draft penal code tabled 2011 seeks to introduce a two-track system separating criminal punishment based on personal guilt from measures based on preven-

30 European Court of Human Rights, case of Bergmann v. Germany (application no. 23279/14), judgment as of 7. 1. 2016.
32 Chel-Ho Jeung: Die Strafzumessung in Deutschland und Korea im Vergleich, insbesondere in Bezug auf die relevanten Strafzumessungstatsachen in § 46 Abs. 2 dStGB und § 51 korStGB. Freiburg 2004, pp. 121-122.
Preventive detention, however, in the past was provided in Korea by a Law on Societal Security (which went into force July 16, 1975 and was evidently triggered by the conflict between the North and the South of Korea and fear of communist insurgencies) as well as by a Law on Social Defence (which went into force December 18, 1980 and authorized preventive detention of habitual criminals, offenders of unsound mind and drug addicted offenders). These laws had been passed under the rule of the military regime and without democratic legitimation. Preventive detention thus was tainted by its origins and practices located in an authoritarian regime as is tainted preventive detention in Germany which went into force under the rule of the National Socialist Party in 1933. Preventive detention, according to the Law on Social Defence, could be imposed if certain substantive and formal conditions (defining essentially a habitual offender) had been fulfilled. Predicate offences had been defined in a catalogue; however, this catalogue was evidently very wide and allowed preventive detention for a broad range of violent and property offences. Duration of preventive detention was restricted to 10 respectively 7 years. This law was repealed in 2005 after having been declared to be in violation of the Korean constitution. Alleged violations concerned infringement of the double jeopardy principle, human dignity and proportionality.

A look at implementation of preventive detention in Korea reveals different practices compared with Germany. In 2003 for example in 1282 cases preventive detention had been imposed in Korea while in Germany 66 cases are listed in Criminal Court Statistics. This results in a significant difference, on display in graph 5. In Germany, the use of preventive detention results in a ratio of 0.08 cases per 100.000, in Korea the ratio amounts to 2.5 cases per 100.000.

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The bulk of cases resulting in preventive detention in Korea concerned property offences (theft, 2003: 77%). It seems that also in Korea the practice of preventive detention emphasized types of criminal offences where high rates of recidivism result in a significant number of offenders fulfilling formal conditions of imposing preventive detention. Crime policies in Korea in recent decades have been driven by concern for serious sexual violence. Allegations of too much leniency in sentencing dangerous offenders and calls for enhancing security through preventive criminal sanctions have resulted in a series of criminal law amendments which seek better protection from dangerous offenders.

Also in Germany, a significant share of preventive detainees concerned property offenders in the 1960s and 1970s, a situation which resulted in criticism that preventive detention was focused on a group of recidivists not displaying real dangers for society (and, moreover, offenders past their peak years of crime participation), see Kaiser, G.: Befinden sich die kriminalrechtlichen Maßregeln in der Krise? Heidelberg 1998.

ventative criminal sanctions have resulted in a series of criminal law amendments which seek better protection from dangerous offenders.

In 2000, the introduction of disclosure of personal data of sexual offenders was justified with improving protection of potential victims of sexual crime. In 2007, the Korean Parliament passed the “Law on the Probation and Electronic Monitoring of Specific Criminal Offenders” which authorizes electronic monitoring (GPS based tracking) as part of probation supervision and in other cases. In 2010, chemical castration of sexual offenders was introduced, in the same year the maximum prison sentence was raised to 50 years (Art. 42 Korean Criminal Code, amended by Act No. 10259, Apr. 15, 2010). The Korean Criminal Code allows for enhanced criminal punishment for recidivists and doubles the maximum prison term foreseen by a criminal offence statute if an offender relapses into comparably serious crime within a period of 3 years after completing a criminal sentence (§ 35 II Korean Criminal Code).

The course of security enhancing criminal law reforms to this day in Korea displays the introduction of instruments which partially (electronic monitoring) have also played a role in recent criminal law amendments in Germany or had been introduced well before the security debates began (castration). But, to date, the Korean legislator has pursued security through extending prison sentences while German legislation had sought the avenue of expanding the second track of criminal sanctions.

The Korean draft criminal law of 2011 considers re-introduction of preventive detention and a second track of criminal sanctions for three groups of recidivists. First, mandatory preventive detention shall be imposed for offenders with three prior convictions for serious criminal offences (listed in a catalogue which emphasizes violent crime and excludes property offences) and prison sentences of a total of 5 years or more if – within 5 years after completion of the last prison sentence – an offender is reconvicted because of a criminal offence falling in the catalogue and sentenced to a minimum of one year. The second group concerns offenders with at least one prior conviction for a catalogue offence and enforcement of a prison sentence of at least one year who after release from prison commit two (or more) corresponding catalogue offences (which allows for con-

37 Min Kyung Han: The effectiveness of electronic monitoring in Korea. Freiburg 2017, p. 4, pp. 53.
firming the status of an habitual offender). The third group is defined through offenders released from preventive detention who commit a type of criminal offence for which preventive detention had been imposed 39. The maximum of preventive detention is set at 7 years.

6. Korean and German Perspectives Compared

When comparing Korean and German criminal policies (and criminal law) responding to important differences show up. The Korean legislator has focused on extending prison sentences and with setting the maximum of a fixed term of imprisonment at 50 years has crossed into the realm of life prison sentences. German legislation, in contrast, has emphasized preventive detention and the second track of criminal sanctions (and leaving the maximum of fixed term imprisonment at 15 years). In both countries electronic monitoring of dangerous offenders plays a certain though different role. While electronic monitoring in Germany is strictly confined to dangerous offenders released from prison (or other forms of detention) after having fully completed a prison term, Korea authorizes electronic monitoring for a much wider group of offenders deemed in need of supervision. It seems, however, that the Korean legislator intends to reintroduce a second track with providing for an incapacitating measure of preventive detention.

German system authorizes the trial court to impose a conditional form of preventive detention (in case an assessment of dangerousness is not possible at the time of sentencing). Predicate offences are comparable (the focus in both systems is on violent crime and property offences are excluded).

When looking on how the principle of proportionality is implemented in legislation (in Germany) and envisaged legislation (in Korea) we find (besides the common approach of restricting predicate offences to serious violent crime) we find significant differences. In Germany proportionality is implemented through requiring valid predictions of dangerousness (in terms of a very high probability of relapse into serious violent crime). Furthermore, strict procedural requirements have been introduced which de-

mand for regular assessment of dangerousness through external (and independent) experts. In general, procedures, enforcement and treatment (related to preventive detention) are aligned with the goal of quickest possible release (significant distance standard).

In Korea proportionality is implemented through establishing strong formal conditions (in terms of prior convictions) and placing a strict maximum of 7 years on preventive detention.

Reforms and developments of preventive detention show for Germany clearly that the focus has moved away from the concept of the habitual felon (in particular through reducing formal conditions in terms of prior convictions and prison time served) and moved towards the dangerous offender. In Korea, the focus (when finally reintroducing preventive detention) will be still on habitual offenders and on the past, placing less emphasis on future crime.
Unintended Effect of Legislation:
Valuation of listed shares when private benefits of control are expected

Ok-Rial Song

Introduction

Although it doesn’t look like a genuine legal issue, valuation of shares has been often seriously disputed in courts. To name a few, (i) when shareholders exercise their appraisal remedy, (ii) when a controlling shareholder ousts minorities by squeeze-out merger or forced purchase of minority shares, (iii) when the validity of merger agreement is challenged for the reason of unfairness of the merger ratio, (iv) when a company is blamed for issuing new shares or convertible bonds to a third party at presumably deeply discounted price, and (v) when transfer of shares between affiliated companies in corporate group is subject to an “unfair intra-group transaction” under the Korean anti-trust law, valuation of shares is in fact a critical issue in determining legal entitlement of each party. Similarly to the advanced jurisdictions over the world, the Korean Commercial Code (hereinafter “KCC”) assigns the courts a difficult task of determining what is the fair price of the shares, although most judges have never been trained on the financial asset pricing theories or empirical methods.

For the analytical purpose, these disputes can be categorized according to the two dimensions. The one is whether the courts are required to find a specific point of the accurate value of shares. Disputes around an appraisal remedy and squeeze-out of minority shareholders are good examples in which a specific number must be decided. A dollar change results in a corresponding wealth transfer between the parties. On the other hand, when the validity of merger agreement is challenged or directors are held liable for issuing new shares to a third party at discounted price, the court does not have to find what the exact number is. Instead, the issue is whether the merger ratio or issuance price deviates significantly from a certain range of fair value. In such cases, estimation error has little impact on the final court decision, and thus courts arguably should be more interested in the
The information process of company’s getting the valuation number concerned.

The other dimension, which is relevant to this paper, is the dichotomy of listed v. non-listed share. In fact, most valuation issues are raised in relation to non-listed shares. Listed shares are traded at daily market price, and it is hardly the case that the parties are able to suggest more convincing alternatives than market price of shares. The market value is accepted in most cases as the fair value. The Korean court, for instance, repeatedly held that, unless evidence strongly indicates that the market price diverges from the fundamental value of the firm, the market price should be deemed as fair value of the shares. It has not necessarily been rare, however, that fairness of the market price of listed shares are challenged in courts. In a recent merger between two listed companies within Samsung Group, for instance, the contending minority shareholder claimed that the merger ratio, which was basically based on the market price of each company, was unfair.

The dispute in such case was raised partly by the fact that the valuation of listed shares in merger transaction has been regulated by the statute. This paper address the valuation problem of listed shares by examining unintended effect of such legislation, which intended to achieve a legitimate goal.

I. Legislation & Court Decision

1. Unique Legislation on Valuation of Shares

The story began with a seemingly unique legislation governing the valuation of shares. In statutory merger contract, it would be common in most jurisdictions that the merger ratio is derived from relative values of a share of each contracting company. The valuation of shares, whether they are listed or non-listed, is in fact a matter of business negotiation. It is not the case in Korea, however, as long as either a merging or merged company is listed on the stock exchange. There is no equivalent rule in Germany.

The Korean Capital Market Law (hereinafter “KCML”) provided for a specific valuation method in determining merger ratio, when a listed com-

1 See infra Part I.
pany is involved in merger transaction either as a merging or merged party. As far as a listed company is concerned, the value of shares should be their market price. The KCML employs three notions of market price, such as monthly average price, weekly average price, and price at the time of merger contracting, and then simply averages these three market prices. Such method of averaging several market prices aims at preventing market manipulation and mitigating the effect of price fluctuation. As for a non-listed company, on the other hand, the value of shares should be calculated by a weighted average of 1.5 times of earning value, which is discounted sum of future earnings, and 1 times of asset value, which is book value of net asset. The formula had put emphasis on objectivity of the number, but recently it was amended to allow firms to choose the “discounted cash flow” method to calculate the earning value. To be sure, valuation of non-listed shares has raised many legal disputes, but they are not covered in this paper.

The most interesting feature of this rule is that it applies mandatorily for any merger transaction when a listed company is an either party. There is no explicit provision stipulating whether this is a default or mandatory rule, but the Financial Supervision Services (hereinafter “FSS”), the Korean financial market regulator, regarded it as a mandatory rule. When a merging company, for instance, issues new shares for merger and thus has to file registration statement with the FSS, registration is very likely to be rejected unless the merger ratio is determined by the above valuation rule. Even if the parties negotiated and finally reached different valuation, such registration statement is not accepted by the FSS because such valuation method was not stipulated by the above KCML rule. As a result, in merger transactions in Korea, any negotiation on merger ratio is neither possible nor in fact needed.

This practice seems to be very odd for legal scholars in most jurisdictions over the world including Germany, and it would be almost impossible for them to figure out what this rule or practice actually aims at. If, however, the ownership structure of Korean companies is taken into account, it is no longer puzzling. First of all, it should be noted that most big companies in Korea are affiliated in corporate groups, which is controlled by controlling families. Although the KCC provides for statutory merger

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2 KCML Enforcement Decree § 176-5 (1); Regulation on Issuance & Disclosure of Securities § 5-13.
as the most fundamental way of business combination, merger is very rarely used, for several reasons, in arm’s length deals outside a corporate group. Stock acquisition or asset transfer is used for acquiring companies in those cases. Meger, which the above valuation rule in the KCML cares about, is instead frequently used in restructuring business within a corporate group, in which both the merging and merged companies are controlled by the same controlling shareholder. Since controlling shareholders are able to decide the deal structure or, more specifically, merger ratio and timing, serious concerns for abusing their control are legitimately raised. Merger ratio changes equity ownership of the combined affiliated companies, and thus controlling shareholders have incentives to, and at the same time are able to, make use of such control and thus end up with having more equity control over the corporate group. This illustration is merely an example of agency problem associated with controlling shareholder ownership structure.

The above valuation rule stipulated by the KCML is an ex-ante solution for such agency problem. It basically tells that merger ratio should not be decided by controlling shareholders. Instead, it should be determined, almost without exception, by market price for listed companies and by objective financial measurement for non-listed companies. Simply put, the very nature of mandatory rule, depriving controlling shareholders of any discretion on share valuation, is in fact the key element to achieve the legislative intention.

2. Court Decisions

Although it is not generally accepted in other jurisdictions over the world, the merger can be held void under the KCC if the merger ratio is significantly unfair. In Korea, significant unfairness of merger ratio does not merely trigger ex-post liability regime, but also may result in nullifying the whole transaction. In practice, however, the court has never announced as yet that the merger ratio is significantly unfair and thus the merger should be nullified. As mentioned above, there were a lot of merger deals within corporate groups, and thus it might not be rare that the merger ratio was unfair to some extent. Nevertheless, no court decision has denied the validity of the deals. One of the reasons, to be sure, is that, in order for the merger transaction to be held void, such deviation from fair price should be significant, which could be hardly recognized by the court. It should be
also equally emphasized that most transactions, as mentioned above, did not help adopting the valuation method stipulated by the KCML.

In fact, the court always endorsed the validity of such merger ratio, since it is the law itself that requires contracting companies to value the shares in such a way. In most cases for listed shares, therefore, the courts held that the market price calculated by the KCML should be deemed as the fair value of shares, unless evidence strongly indicates that the market price is highly likely to diverge from the fundamental value of the company.\(^3\) In the situation, for instance, where most relevant materials were created without proper authorities, or where important estimates were intentionally exaggerated, the merger ratio would not be approved. It has not been the case as yet, however. Almost all of mergers within corporate groups followed the valuation rule of the KCML, and they have been held to be properly executed with fair price. More interestingly, the Korean Supreme Court applied this practice even for distressed or bankrupt companies as well, if they were still listed on the market.\(^4\) The district court in this case held that the market price would not be an adequate estimate for such distressed firms, and thus adopted a different valuation method. The Supreme Court, however, held that there was no convincing reason or proof for denying the prevalence of market price. The primacy of market price was still strongly supported.

II. Samsung Group Merger

Market price prevails in most merger cases, and the KCML mandatorily requires that. In most cases, it would be widely accepted even among financial economists that there is no better estimate for valuation of listed shares. The question raised in this context is whether the market price can necessarily be said as a fair price in terms of distribution of wealth between the shareholders of merging and merged companies. Recent merger within Samsung Group, between Cheil Textile (hereinafter “Cheil”) and Samsung C&T (hereinafter “C&T”), cast some doubt on such conventional belief and raised severe backlash in relation to valuation of listed shares.

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1. Merger

It is well recognized in corporate governance literature that family control over the Samsung Group, as well as other Korean Chaebol groups, has been maintained through complicated circular shareholdings. Cheil was deemed as a holding company of Samsung Group, and related persons owned its 52% equity, including 42% directly owned by the controlling family. On the other hand, C&T was important in different meaning, since it owned 3.5% of Samsung Electronics, which was one of world-level leading companies in the smart-phone and electronics industries. Such ownership of 3.5% should not be ignored, if it was taken into account that the controlling family directly owned merely around 4% of Samsung Electronics. The most important feature relevant to the merger was that the inside control over C&T was quite small. The affiliated persons owned merely 13.6%, among which only 1.7% was directly owned by the controlling family.

Simply put, Cheil and C&T was controlled by the same family, but there was a huge gap in the size of direct ownership by the family; 42% for Cheil and 1.7% for C&T. Both companies were listed on the Korean Stock Exchange. Arguably, public investors might rationally expect that, when any transaction was initiated between Cheil and C&T, the controlling family was likely to do something for pursuing private benefits by transferring wealth from C&T to Cheil. If the level of investor protection is low, then such scenario seems plausible. As a matter of fact, the following figure illustrates the stock price movement before the merger agreement, and it is clearly inferred that such expectation was, at least partly, reflected to stock prices.
Cheil went public in December, 2014, and the merger agreement was disclosed in May, 2015. In the meanwhile, the stock price of Cheil was gradually increased, while that of C&T was decreased. In December, 2014, a share of C&T was valued as 70% of a share of Cheil, but four months later it became just 35% of a share of Cheil. The market price of C&T compared to Cheil tumbled down by half during this period. The merger between Cheil and C&T was approved by the C&T board on May 26th, 2015, and the merger ratio was based on such market price, according to the valuation rule in the KCML mentioned above. The average market price was KRW 55,767 for C&T and KRW 159,294 for Cheil, and therefore surviving Cheil would issue 55,767 / 159,294, or 0.35 shares for merger to each share of disappearing C&T shareholders.

2. Disputes on Valuation of Listed Shares

A U.S. hedge fund, Elliott Associates, L.P. (hereinafter “Elliott”), which recently bought 7.12% of C&T voting shares, claimed that such merger ratio was significantly unfair, and thus announced its opposition to the pro-
posed merger. They argued that the market price of Cheil and C&T did not reflect the fundamental value of each company. Despite the fact that the book value of C&T is three times larger than that of Cheil, its market capitalization is just less than a half of Cheil. In fact, the price-book-ratio, or PBR, was only 0.65 for C&T, while it was 4.8 for Cheil. The stock price movement for a few months before the merger disclosure may accounts for such a huge gap. If the merger would be approved, argument went, it will end up with transferring wealth from C&T shareholders to Cheil shareholders, 42% of which is the controlling family of Samsung Group.

As a qualified minority shareholder, Elliot filed several motions for injunction to prohibit C&T management from calling a shareholders’ meeting to approve the planned merger. In these lawsuits, Elliott argued that the above valuation rule of the KCML is not a mandatory provision, and thus following the rule could not necessarily exempt the merger ratio from being judged as significantly unfair. In such case where the market price was seemingly deviated from fundamental value of the firm, argument went, Cheil and C&T should have considered several other measures such as asset value, earning value, and parallel company’s valuation. Unfortunately, courts did not agree with this argument. Again, they repeated the established legal doctrine that the average market price obtained by the KCML rule should be deemed as fair value of shares, unless significant fraud or false disclosure was involved in estimating the price. Elliott failed to prove manipulative activities by Cheil management or by the controlling family, and the district court finally dismissed the claim on July 1st, 2015. The appellate court rejected the Elliott’s appeal on July 16th, 2015. The merger was finally approved by C&T shareholders’ meeting on July 17th, 2015.

All of the merits of these lawsuits were closely linked to the stock price movement of Cheil and C&T. The sharp increase of Cheil and corresponding decline of C&T might result from unlawful intervention of the controlling shareholder of Samsung Group. Rumors said, for instance, that C&T suddenly stopped applying for new building construction, or C&T managers did not disclose good information. Such story was not proved by evidence, however. Elliott argued that C&T and controlling shareholders en-

5 See supra Part I. 2.
6 Seoul Central District Court 2015 Kahap 80582, decided on July 1, 2015.
7 Seoul High Court 2015 Ra 20485, decided on July 16, 2015.
gaged in several unlawful manipulative activities, but no evidence was submitted.

This paper doesn’t intend to ask whether the stock prices of Cheil and C&T were manipulated or not. Rather, it is assumed that there is no abnormal event or manipulation by the controlling family. Under such assumption, however, the above stock price movement can be still rationally explained, since the merger transaction was anticipated by market investors long before official disclosure, and investors, taking into account the controlling family’s direct ownership of each company, might rationally expect that such controlling shareholder would do something. Investors knew that the merger ratio would be set by the KCML valuation rule, and thus even the controlling shareholder did not have any discretion with regard to the merger ratio. They know at the same time, however, that controlling shareholder still could do something to change stock price. If investors anticipated so, they would adopt the strategy of selling C&T shares and buying Cheil shares. In other words, the above stock price change could be a result of capital market’s pricing mechanism, without any unlawful or immoral intervention by the controlling shareholder. This paper would ask whether, if such story is assumed, then there is no problem at all in terms of fairness of the transaction.

III. Implications

The investors’ expectation would not be surprising at all, since conventional ownership structure theory tells that controlling shareholders are likely to pursue private benefits at the expense of minority shareholders. Such pursuit can be also witnessed at corporage group level, in which the expense belongs to all of the other company’s shareholders. To be sure, such incentive of a controlling shareholder causes social inefficiencies, and thus the market prices of group-affiliated firms are discounted to some extent. From individual shareholders’ perspectives, however, controlling shareholder’s such extracting private benefits could not harm public investors, since they already anticipated such possibility and bought the shares at the discounted price reflecting such investors’ anticipation. The problem in research is that such effect cannot be clearly isolated in daily transactions in stock market. In this regard, the Samsung merger case is in fact very unique in that such investors’ expectation on controlling shareholders’ abusing their control could be clearly reflected to the market price.
of each company. The direction might be obvious, since the controlling family directly owns 42% of Cheil but only 1.7% of C&T.

In many jurisdictions including Korea and Germany, the corporate law restricts controlling shareholders from freely engaging in self-dealing or stealing corporate fund. The securities regulation also bans manipulative activities or disclosure of misleading information. Many attempts by controlling shareholders to pursue private benefits, therefore, are likely to be illegal, but legal protection is in itself far from being perfect. Often, for instance, illegal activities are not detected. Several strategies or by-pass, which are perfectly legal, are still available to extract private benefits. Thus, controlling shareholders are able to pursue their private benefits without being punished at all. In the merger transaction between Cheil and C&T in which illegality has not yet been verified, stock price movement seems to show that investors still took into account such possibility. This understanding of the Samsung Group merger has several implications for assessment of the valuation rule in the KCML.

1. Measuring Value of Control

One of the implications is that the magnitude and speed of the above stock price movement associated with the possibility of controlling shareholders’ pursuing private benefits can provide for another way of measuring the value of control under specific legal environments. Currently, conventional measurement of valuation of control right is to examine the premium paid to selling shareholders in control transfer transactions. In private negotiation with a controlling shareholder, for instance, buyer agrees to purchase control block at substantially higher price than current market price. In tender offer to public shareholders, offerer very often also pays control premium in addition to market value of the company. Current economic theory figures out that the source of such control premium is the possibility for a buyer to pursue private benefits after eventually acquiring control over the target, and thus control premium can measure the magnitude of private benefits associated with corporate control.

In theory, however, such measurement by control premium has several limitations, and therefore potentially under-estimate the size of private benefits of control. First of all, control premium is very likely to measure only the firm-level private benefits, if the target is a stand-alone company. In such case, a controlling shareholder extracts private benefits from the
other minority shareholders of the same target company. The size of private benefits tends to be much larger, however, if a controlling shareholder are able to make use of corporate group structure. The second problem is that such measurement of control premium depends on selling shareholders’ negotiation power and buyer’s *willingness* to pursue private benefits after acquisition. Asymmetry of negotiation power between a seller and a buyer is likely to decrease premium payment. A buyer who is relatively unwilling to abuse his or her control does not have to pay maximum control premium. Again, there might be the problem of under-estimation. The final problem is that, as mentioned above, most control transactions in Korea happens within a corporate group. In such case, paying control premium should be in fact approved by a controlling shareholder. Except for the cases where a controlling shareholder sells his or her control block, therefore, paying large control premium is rarely witnessed in such deals. With all of these problems in mind, it can be argued that the average magnitude of control premium paid in control transfer transactions does not properly report the value of corporate control in terms of pursuing private benefits. It is very likely to under-estimate the true value.

Measuring the size of private benefits by the stock price reaction associated with control transaction can overcome these limitations. The most notable feature of this measurement is that it does not measure the willingness of pursuing private benefits of either a seller or a buyer. Rather, it exactly measures the *market’s expectation* on that. Such estimation has little to do with actual activities or intention of controlling shareholders. In Samsung Group merger case, for instance, the validity of many rumors does not matter. This measurement does not depend on the extent to which the controlling family actually engaged in manipulative activities. It does not matter either whether C&T suddenly stopped its construction business. As long as these events belong to the activities that the controlling family is already expected to commit during that period, such expectation is already reflected to market prices of Cheil and C&T. The controlling shareholder’s actually engaging in those expected activities is less likely to change the market price. This feature is in fact quite desirable for international comparison of the size of private benefits, because it is the potentially maximum magnitude of private benefits that the stock price reaction actually measures. Such ceiling is determined mainly by the legal system of each country, and international comparison is convincing.

Another good feature of this measurement is that it gauges the value of *group-level* private benefits. In this merger case, the controlling family of
Cheil did not harm the minority shareholders of the same company. Rather, such minorities of Cheil participated in enjoying private benefits, since wealth was transferred from other affiliated company, C&T. In such group-level transaction, the size of private benefits tends to be larger than firm-level private benefits, and this stock price movement successfully measure its magnitude. To be sure, this economic effect is similar to intra-group tradings between affiliated companies, but the notable advantage of this merger case is that this effect can easily isolated. It was already reported that the control premium of Korean big companies was relatively high, but the above analysis implies that such huge control premium was not exaggerated. If group-level transactions are taken into account, the size of private benefits may be much larger than current conventional theory understands.

2. Fairness of Merger Ratio

The fairness of merger ratio is currently disputed in court by another shareholder of C&T, although Elliott left the court immediately after defeat in injunctive remedy suits. It is still argued that the above merger ratio is significantly unfair, and the fact that the specific ratio is obtained according to the KCML valuation rule does not necessarily make it fair.

If prediction is only the question on the table, answer is not that difficult. Korean courts have not yet held that a certain merger ratio was significantly unfair, although it is established case law that significantly unfair merger ratio invalidates whole merger process. In Samsung merger case, it is still highly likely that courts would not announce that the merger ratio was significantly unfair. Two aspects can account for such prediction. First of all, the legal impact of recognizing the significantly unfair merger ratio is too huge in Korean corporate law—nullification of merger agreement. The contracting companies already incurred several search and negotiation costs, and many other interests were accumulated after the

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8 As for Korean companies, voting rights of control block is worth 47.7% more than ordinary voting shares. The premium is only 9.5% for German companies. See Tatiana Nenova, The Value of Corporate Voting Rights and Control: A Cross-Country Analysis, Journal of Financial Economics 68:325 (2003), at 336.

9 From the viewpoint of issuing new shares for merger, unfairness of merger ratio is just equivalent to over- or under-valuation of the assets contributed to the company
planned merger is executed. In any event, the merger was approved by more than 2/3 of C&T shareholders. Thus, it is understandable for the court to be extremely reluctant to undo the whole process. The other aspect, on which more emphasis should be placed in this paper, is that the merger ratio is decided *not by the controlling shareholders but by the stock market*. The KCML explicitly mandate it, and legitimate objective of this rule is also minimization of controlling shareholders’ discretion. It is unreasonable and quite exceptional to say that obedience to law eventually results in significantly unfair treatment, although it is admitted that fairness and legality should be distinguished. Arguably, market investors anticipated the controlling shareholder’s improper intervention to some extent, and the following stock price reaction between December 2014 and May 2015 showed that investor protection under Korean corporate law was believed to be low. It did not mean, however, that the controlling shareholder committed illegal activities. With these two aspects in mind, it is highly predicted that courts would not accept the contending minority shareholders’ complaint.

Such prediction, however, does not mean that there is no problem at all from policy perspectives. The court ruling combined with the rule-based KCML valuation provision may cause another problems. From ex post perspective, for instance, several investors were actually harmed. The public investors putting their money on C&T long before the merger proposed might suffer *unexpected* losses, and they are unlikely to escape by selling their shares, since the market price already reflected the harmful effect of the merger. To be sure, it was publicly well-known that family ownership in C&T is quite small, and thus investors should be aware of the possibility of the controlling shareholder’s attempt to extract private benefits. Unfortunately, however, it was almost impossible to predict when and how a specific event take place. From ex ante perspective, on the other hand, such court ruling *cannot deter* controlling families of Korean corporate groups from extracting private benefits at the expense of public investors in general. Interestingly, controlling families do not have to actually en-

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in exchange for new shares. In Korean corporate law, like other major jurisdictions, the issuance of shares is not nullified just for reason of over- or under-valuation of contributed assets. The over- or under-valuation of contributed assets triggers only directors’ liability regime. Thus, invalidation of merger agreement due to unfairness of merger ratio is not consistent with the legal doctrines relating to issuance of shares.
gage in improper activities. Even without these activities, market price may be adjusted as if controlling shareholders did. The court ruling which seemingly depends on market efficiency may in effect reinforce this circular reasoning. It still needs further research, however, to find a way to change the market beliefs, and eventually to give controlling shareholders proper incentives.

3. Effect of Legislation on Valuation of Shares

As stated above, the background of all the problems is that such valuation in this merger was provided or in fact ordered by the specific legislation. This situation is unique in Korea. The KCML provides a bright-line rule for valuation of listed and non-listed shares, and this rule tries to employ objective variables. The traditional rule v. standard debate teaches that such bright-line rule approach tends to have disadvantages of over- and under-regulation problem. In fact, the Samsung Group merger case was a typical example of under-regulation. As long as a player sticks to a certain bright-line rule, no substantial scrutiny could not be made to evaluate its justifiability. Thus, whole legal system cannot help endorsing the validity of the merger contract.

In the Samsung Group merger case, for instance, it can be asked whether it is possible for the court to react differently to the corporate decision which followed the bright-line rule. Arguably, the answer would be negative. Courts could not deny internal consistency of legal system, and thus it is very hard to blame the controlling shareholders for obeying the rule. To be sure, the controlling shareholder and management of C&T could be held liable for the violation of their fiduciary duty even though they obey the KCML valuation rule. In practice, however, it is almost impossible for the court to say so. Even worse, the KCML valuation rule has been regarded by the FSS as mandatory rule, and thus courts may not require the controlling shareholder to decide differently. As a result, the liability regime in corporate law could not be triggered.

Several efficiency-oriented commentators in Korea argue that the KCML valuation rule should be reconsidered or repealed because the rule impede negotiations between contracting parties. A third party—legislative organization—cannot know about the true value of the firm. More skeptically, it is questionable whether such true value ever exists. Thus, it is argued that the proper valuation can be achieved only by the negotiation
between parties, which the KCML prohibits. This argument is absolutely convincing, but it is not the KCML rule that blocks bilateral negotiations. Even if it were not for such rule, Cheil and C&T would not be expected to truly negotiate the merger ratio. They are affiliated companies of Samsung Group, over which the controlling shareholder exercise the control. Thus, it is highly likely that merger ratio would not be a result of independent decision of each company. The lack of negotiation process is absolutely a problem, but it is not directly caused by the KCML rule. On the contrary, this paper argues that the real problem with this valuation rule is a serious impediment to directors’ liability regime. With this valuation rule in place, the whole legal system, including directors’ liability, should be consistent to endorse the validity of the merger contract. Arguably, this effect was never intended by the legislators. It is inevitable, however, that every bright-line rule may create several unintended effects.

Finally, it should be briefly noted that repeal of this rule is not a solution for diminishing such unintended effect. If this rule were abolished, the managerial decision on merger ratio would be subject to traditional ex-post liability regime, and thus minority shareholders of C&T could more rely on this ex-post remedy. In such case, however, controlling shareholders may abuse such lack of regulation. Current Korean ex-post liability regime is not effective in deterring controlling shareholders from pursuing private benefits. After all, all legal rules are complementary for each other, and the KCML valuation rule is regards as a second-best solution in a country with low investor protection.

Concluding Remarks

Valuation of listed shares is simple. Listed shares are traded at daily market price, and such market price in most cases prevails. The problem is that it is stipulated in the law, which is mandatorily applied. Recent Samsung Group merger case casted some doubts on this practice, and raised question of whether the market price can always be said as fair. This paper showed that the investors’ belief on the controlling shareholder’s abusing their control would be reflected to the stock price reaction of Cheil and C&T, and thus the market prices were likely to be deviated from their fundamental value. It is not expected, however, that the courts could nullify the merger transaction, mainly because the merger ratio simply followed the KCML rule. In addition, this paper also argued that such rule has unin-
tended effect of insulating controlling shareholders from corporate law’s liability regime. Every bright-line rule has several unintended effects, which legislators always have to care about. What is the solution for abolishing such unintended effect remains a question for further research.
Regulation of Internet Information Intermediaries: 
Personality Rights and Data Protection Law

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I. Introduction

The great significance of information intermediaries in the modern media and information society is evident. Oftentimes, fundamental rights of the persons affected by information, of the internet information intermediaries, of the recipients and of the issuers come into conflict. Thus, a presentation on internet information intermediaries encompasses fundamental (legal) questions of the digital age. Issues regarding the legal protection of data rights and personality rights arising in the field of internet information intermediaries are characterized by complex and difficult weighing up-considerations within multipolar legal relationships. Furthermore, cross-border implications are linked inevitably to the worldwide accessibility of internet services. On the basis of recent court decisions on the European and on the national level, issues regarding international private and substantive law shall be discussed as well as the implications of the General Data Protection Regulation (hereinafter: GDPR).

II. Jurisdiction

Different criteria have been developed in the case law of the European Court of Justice (hereinafter: ECJ) on the one hand and the German Federal Court of Justice (hereinafter: FCJ) on the other hand upon the question of how to determine the competent court in case of violations of

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the right of personality. This process of diverging criteria shall be examined and evaluated in the following with regard to both the European and German legal framework.

1. European Level

For legal proceedings on tort, art. 7 no. 2 (ex art. 5 no. 3) Brussels I-Regulation provides a special jurisdiction for the place of tort. In 1995, in its Shevill-case, the ECJ took a stance on how to define the scope of the “place of tort” regarding violations of the right of personality in print media.


In the famous Shevill-case, the British citizen Fiona Shevill launched legal proceedings for slander against a French press company which had published the relevant newspaper article. The ECJ confirmed its relevant case law\(^2\) regarding the international jurisdiction by stating that the “place where the harmful event occurred” is either the place where the damage occurred or the place of the event giving rise to the damage.\(^3\)

The court continued by specifying the place of the event giving rise to the damage and the place where the damage occurred for the cases of print publication since defamatory publishing poses a “harmful event”.\(^4\) The former shall only be the place where the publisher of the newspaper in question has its establishment since that shall be the place where the harmful event originates and from which the libel was issued.\(^5\) The latter, however, shall be every place of publication as long as the victim was known there.\(^6\) This results in parallel jurisdictions both for the courts of the state where the editor is based as well as of those states where the publication was distributed and where the victim claims to have suffered injury to its

\(^{2}\) \textit{ECJ, 30.11.1976 – Case No. 21/76 – Mines de Potasse.}
\(^{3}\) \textit{ECJ, 7.3.1995 – Case No. C-68/93 – Shevill, para. 20 et seqq.}
\(^{4}\) \textit{ECJ, 7.3.1995 – Case No. C-68/93 – Shevill, para. 23.}
\(^{5}\) \textit{ECJ, 7.3.1995 – Case No. C-68/93 – Shevill, para. 24.}
\(^{6}\) \textit{ECJ, 7.3.1995 – Case No. C-68/93 – Shevill, para. 28.}
reputation. Furthermore, the ECJ limits the jurisdiction of courts of those states in which the defamatory publication was distributed and in which the victim claims to have suffered injuries to its reputation only to damages which have occurred in the respective state. Hence, there is only jurisdiction in respect of the harm caused in the specific state (so-called “mosaic theory”).

b. ECJ – eDate Advertising (2012)

In the decision eDate-Advertising, the ECJ further developed the above-mentioned principles with regard to the global accessibility of digital content: In principle, the court affirms the named “mosaic theory“. However, the ECJ renounces the pre-condition that the victim must be known at the place of publication. According to the court, the criterion of “relation to distribution” is no longer useful since the scope of distribution of content published online is universal. Moreover, the ECJ finds it hardly possible, not at least on a technical level, to quantify the damage caused exclusively within one member state. Therefore, the ECJ established an additional, third jurisdiction at the place where the victim has its “center of interests“. The court at this place shall be granted full jurisdiction in respect of all damages caused. According to the ECJ, the decisive center of interests generally corresponds to the habitual residence. In the opinion of the court, this approach favors predictability: The editor would be put in the position to know the center of interests of the persons who are subject of the content enabling him to foresee possible jurisdictions. At the same time, victims could easily identify the court in which they may sue for the damages.

7 ECJ, 7.3.1995 – Case No. C-68/93 – Shevill, para. 33.
10 ECJ, 25.10.2011 – Case No. C-509/09 and C-161/10 – eDate Advertising.
11 ECJ, 25.10.2011 – Case No. C-509/09 and C-161/10 – eDate Advertising, para.46.
12 ECJ, 25.10.2011 – Case No. C-509/09 and C-161/10 – eDate Advertising, para. 49 et seqq.
13 ECJ, 25.10.2011 – Case No. C-509/09 and C-161/10 – eDate Advertising, para. 50.
c. Evaluation

Some voices favored this extension of jurisdiction stating that it strengthens legal security as well as setting limits to the possibilities of the so-called “forum shopping”. Yet, for good reasons there has been severe criticism to the ECJ’s decision: Due to the internet’s ubiquity, the scope of damages is not a proper justification for a jurisdiction based on the victim’s “center of interests”. This criterion is no more than an instrument to protect victims and therefore does not constitute a strong and valid basis for a sustainable rule of jurisdiction. Thus, the question whether and to what extent a damage has occurred is answered on the merits of the case, so that the existence of a damage cannot be decided upon when determining a court’s jurisdiction. Also, the “center of interests” will typically be difficult to determine – a weakness which even the ECJ’s proponents have to admit.

Furthermore, the ECJ contradicts its own line of argument when trying to justify the implementation of a jurisdiction based upon the “center of interests” by complaining about the difficulties to quantify partial damages in the different member states while holding up the “mosaic theory” at the same time. If a publisher still needs to reckon to be sued in every Member State where the content is or once has been available, predictability and controllability of jurisdiction are not improved. Hence, the supposed gain of the new, third jurisdiction is rather to be seen as a loss.

Finally, when upholding the “mosaic theory”, criticism regarding the Shevill-decision remains true for the eDate-Advertising-decision as well. The outcome is not only a fragmentation of jurisdiction, but also does the forum lack a close link to the circumstances of the case. There will be no special competence of the local courts in most cases where internet content can be downloaded. After all, the strict distinction between print and online media is no longer up-to-date.

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14 ECJ, 25.10.2011 – Case No. C-509/09 and C-161/10 – eDate Advertising, para. 47.
16 ECJ, 25.10.2011 – Case No. C-509/09 and C-161/10 – eDate Advertising, para. 47.
2. National Level

In 2010 – even before the eDate-Advertising-decision – the FCJ had to rule on the interpretation of the connecting criteria of the place of tort in sec. 32 of the German Civil Procedure Code (ZPO). The plaintiff, who resided in Germany, proceeded against an online article in the *New York Times* in which he had been called a “gold smuggler” and “guilty of embezzlement” as well as brought into connection with corruption of Ukrainian government employees.

a. Objective Domestic Relations

Previously, the FCJ had ruled that – for print media – the “intended distribution in the forum state” was decisive for the determination of jurisdiction. For online publications, the FCJ yet chose a differing approach: Since web content is – contrary to print media – not distributed individually but available on demand, which renders it hard to delimit a distribution range, a direct transfer of the criteria for print publication shall be impossible. Instead, the court found it to be decisive whether the relevant content had “objective domestic relations”. Such “objective domestic relations” shall exist whenever there are or could be domestic conflicts of interests. According to the court, this shall be the case whenever the acknowledgement of the objected notification is more likely on national territory than only because of the mere and general possibility to download the offer.

17 *FCJ*, 2.3.2010 – Case No. VI ZR 23/09, BGHZ 184, 313.
18 *FCJ*, 3.5.1977 – Case No. VI ZR 24/75.
b. Legal Evaluation

The core criticism regarding this ruling rightly concerns the rejection of the former criterion of the “intended distribution in the forum state”.\textsuperscript{22} Assuming that the right of personality was not market-driven fails to address the core problem since media is actually market-based. Also, the possibility of a delimited alignment of websites is shown by European consumer protection law: Without such limitation, service providers under art. 17 (1) (c) regulation (EG) N°44/2001 (Brussels I-Regulation) would constantly be subject to the courts in all member states. In effect, connecting jurisdiction to the place of an actual or potential conflict of interests creates jurisdiction at the plaintiff’s court.

c. Reaction of the FCJ

However, the FCJ’s sixth civil senate did not change its opinion in a subsequent decision:\textsuperscript{23} In that case, a Russian plaintiff residing in Germany took legal action against an internet article that had been published in Cyrillic writing. Again, the court applied the criterion of “objective domestic relations”\textsuperscript{24} and denied its existence in the end: The German place of residence was seen as no sufficient justification for such domestic relations.\textsuperscript{25} Remarkably enough, even after the ECJ’s decision on eDate-Advertising, the German FCJ adhered to the requirement of “objective domestic relations” in its Google-Autocomplete\textsuperscript{26} decision. Hence, this reflects an evident deviation of German national case law from the ECJ rulings.

\textsuperscript{22} FCJ, 2.3.2010 – Case No. VI ZR 23/09, BGHZ 184, 313 – The New York Times.
\textsuperscript{23} FCJ, 29.3.2011 – Case No. VI ZR 111/10 – Sieben Tage in Moskau.
\textsuperscript{24} FCJ, 29.3.2011 – Case No. VI ZR 111/10 – Sieben Tage in Moskau, para. 8 et seqq.
\textsuperscript{25} FCJ, 29.3.2011 – Case No. VI ZR 111/10 – Sieben Tage in Moskau, para. 13 et seqq.
\textsuperscript{26} FCJ, 14.5.2013 – Case No. VI ZR 269/12, BGHZ 197, 213.
3. Interim Conclusion

The relevant jurisdiction does not differ as long as the ECJ and the FCJ refer to the center of interests of the affected person or to the place of the conflict of interests. However, the courts’ approaches are arguable regarding the jurisdictions’ predictability. Moreover, these approaches are alleged both to enforce the protection of victims of personality rights violations and to promote a materialization of jurisdictional rules. Further, the ECJ’s “mosaic theory”, which was not adopted by the FCJ, is subject to even deeper concerns. The ECJ itself rightly points out that web content is generally accessible worldwide. Hence, a publisher may be sued in every member state. Finally, a precise prediction of the damages which have occurred in an individual member state will not be possible.

III. Applicable Law

Since – depending on the legal system – the substantial right of personality provides different scopes of protection, the substantive evaluation of violations of personality rights is dependent on the applicable law. Thus, provisions regarding conflicts of law are of essential importance in the event of infringements. At the same time, the determination of the applicable law in the context of privacy infringements by online publishing is rather complex. As a result of the worldwide accessibility of websites, various conceivable connecting factors are possible and must be taken into account.

The starting point of legal evaluation is the ECJ’s ruling on *Google Spain* of 2014.\footnote{ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain.} Although the judgment concerns data protection, its findings may be transferred upon media and communication law as a whole. After all, data protection is based on the right to informational self-determination which is ultimately a specific manifestation of the general right of personality.\footnote{Federal Constitutional Court of Germany (FCC), 15.12.1983 – Case No. 1 BvR 209/83 – Volkszählung.} The right of personality itself needs to be weighed up against conflicting public information interests and the individual freedom of speech.
1. Right to Data Protection – Google Spain (2014)

The Google Spain-decision concluded a preliminary ruling proceeding submitted by a Spanish court which had to rule on an appeal by Google Spain SL and Google Inc. against an order of the Spanish data protection authority (AEPD): A Spanish citizen had complained before the AEPD about the fact that even in 2010 – when inserting his name – Google Search still displayed two links leading to articles from the online archive of the Spanish daily newspaper La Vanguardia from the year 1998. These articles announced the foreclosure of the claimant’s property due to non-payment of social security contributions. Upon the complaint, the AEPD held that the publication on the website itself was (continuously) lawful, whereas Google Spain SL and Google Inc. were obliged to remove the data from their indexes and to hinder access to these articles. Later, the Spanish court submitted an order on preliminary ruling to the ECJ after the companies challenged the described obligations. The crucial point submitted was the question of whether and under which conditions a person affected by personality right impairments through a lawful publication on a website may turn to the search engine operator by recourse to the right to data protection or, more precisely, whether there is a “right to be forgotten” in the internet.

a. Activity of a Permanent Establishment

However, since Google Inc. is a company based in the United States – thus outside of the European Union – the preliminary question was whether and to what extent European data protection law is applicable at all. In answer to this question, the court referred to art. 4 (1) (a) Data Protection Directive (hereinafter: DPD) which was implemented in Germany through sec. 1 (5) German Data Protection Code (hereinafter: BDSG). According to art. 4 (1) (a) DPD, the data protection law of a member state is applicable if personal data is processed “in the context of activities of an establishment, having its management on the territory of a

29 Agencia Española de Protección de Datos.
member state”. Therefore, the ECJ had to decide whether or not Google Spain, as a Spanish subsidiary company of Google Inc., represented an establishment under that provision and whether or not the data processing happened within “the context of [its] activities”. Such data processing had been denied constantly by Google Spain and Google Inc. since – from their point of view – the Spanish subsidiary itself (only) marketed advertisement spots for Google Inc. in Spain and did not take part in the data-sensitive search engine operation.\textsuperscript{31}

\textit{Decision-Making Rationale}

In its decision, the ECJ widened the scope of application of the DPD by ruling that art. 4 (1) (a) DPD did not demand for “data processing ‘by’ the concerned establishment, but only ‘in the context of the activities’ of the establishment”.\textsuperscript{32} In this respect, it shall (already) be sufficient that the subsidiary has the task to promote the sale of advertising space of the parent, i.e. the search engine operator. Then, the activities of the branch shall be linked inseparably to the data processing company, “since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed”.\textsuperscript{33} Such a wide interpretation was considered necessary in order to ensure the practical effectiveness of the DPD and thereby an effective and comprehensive protection of fundamental freedoms and fundamental rights of individuals regarding the processing of their personal data.\textsuperscript{34}

\textit{Legal Evaluation}

Widening the scope of the DPD is a beneficial development. Hereby, endeavors of providers seated outside the European Union that process large datasets and profit from the European market on the one hand but try to escape the stricter European data protection requirements on the other

\textsuperscript{31} ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 51.
\textsuperscript{32} ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 52.
\textsuperscript{33} ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 55 et seqq.
\textsuperscript{34} ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 53 et seqq.
hand can be effectively responded to. When interpreting sec. 1 (5) sentence 1 BDSG in the light of European data protection law, all providers maintaining data processing activities for the responsible authority are subject to the respective national data protection regime.

Yet, further important aspects associated with the interpretation of art. 4 (1) DPD have not been clarified by the ECJ, e.g. the question whether and to what extent the activities of an establishment suffice to apply the national law under art. 4 (1) lit. a DPD as a complaints’ body for data protection infringements. Furthermore, since the interpretation of the scope of art. 4 (1) lit. a DPD was not relevant for the case, the ECJ has not yet clarified how the expression “the controller [makes use] of equipment (…) situated on the territory of the said Member State” is to be interpreted under art. 4 (1) lit. c DPD. In this regard, it is still unclear whether data access via a server outside the European Union on a terminal device within a member state falls under the scope of the article.

2. Freedom of Speech

Moreover, there is an important distinction between the right to freedom of speech on the European and on the national level.

a. European Level

Provisions for conflicts of law regarding the infringement of personality rights have not yet been harmonized. Although the regulation (EG) N °864/2007 (Rome II-Regulation) for non-contractual obligations has replaced almost all of the national provisions regarding conflicts of law, infringements of the right of privacy or the right of personality have been excluded explicitly from the scope of application by art. 1 (2) lit. g Rome II-Regulation. The relevant exception also encloses infringements of privacy or personality rights committed online. Because a political consensus amongst Member States could not be achieved, the decision was taken to exclude claims based on a violation of personality rights as a whole.

35 ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 61.
Claims arising from the infringements of personality rights thus still fall under national provisions regarding conflicts of law.

b. National Level

Under German law, the qualification of tort claims arising from personality rights violations is evaluated under art. 40 to 42 of the Introductory Act of the Civil Code (hereinafter: EGBGB). The principle is laid down by art. 40 (1) EGBGB according to which jurisdiction depends on the place where the infringement was committed. In this context, the place of infringement may be the place of the act or the place of the result. With regard to personality rights infringements, the place of the act is usually the seat of the media company, and apart from that the place where the information has been published in the internet. In order to prevent a global liability of the violator in the context of worldwide accessible web contents, a restriction is called for that reaches beyond a domestic nexus simply based on accessibility – in accordance with the case law of the FCJ

IV. Current Material Issues

Furthermore, current material issues in the conflict of personality rights, freedom of speech and internet information intermediaries are illustrated by the so-called “right to be forgotten”.

1. ECJ – Google Spain – Right to be forgotten (2014)

In the case Google Spain, the ECJ had to decide on the scope of individual rights granted by the DPD, in particular to the right to oppose and remove data under art. 12 lit. b and art. 14 lit. a DPD. One particularly im-

36 FCJ, 2.3.2010 – Case No. VI ZR 23/09, BGHZ 184, 313 – The New York Times; FCJ, 29.3.2011 – VI ZR 111/10 – Sieben Tage in Moskau; also cf. order for reference FCJ, 10.11.2009 – Case No. VI ZR 217/08, – Vorlage eDate Advertising.
37 ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain.
An important question was whether and to what extent the provision guarantees a right of the person concerned to directly address the search engine operator to delete links in the results list of a search for names, although those links do lead to a lawful publication.

a. Data-Protection Impairments of Personality Rights

With regard to the impairment of the personal elements of data protection, the ECJ stated that the fundamental rights to respect for private life (art. 7 Union’s Charter of Fundamental Rights (hereinafter: ChFR)) and protection of personal data (art. 8 ChFR) are significantly impaired by the activities of search engines. The activities of search engine providers are considered as autonomous data processing under art. 2 lit. d DPD in relation to the activities of the operators of these websites.\(^\text{38}\) Since the search engine operators decide on the purposes and means of data processing, they are to be qualified as a data controller in accordance to art. 2 lit. d DPD.\(^\text{39}\) Hence, the operators need to ensure that their activities meet the requirements of the DPD, so that the guarantees provided therein for the protection of private life can be fully effective.\(^\text{40}\)

The court rightly states that search engines essentially contribute to the worldwide dissemination of data. Moreover, the specific information analysis for name-bound searches provides a structured summary of the person and enables profiling.\(^\text{41}\) This is why the activities of search engines usually have an eminent effect – the impact of which is amplified by the important role of the internet and search engines in modern society.\(^\text{42}\) An impairment by ensuring access to information by search engine operators is not only on top of the impairment caused by publications on websites, but also constitutes – due to the reasons already stated – an interference of high intensity.\(^\text{43}\)

\(^{38}\) ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 33 et seqq.
\(^{39}\) ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain; different view Advocate General Jääskinen, final request from 25.6.2013 – Case No. C-131/12, EC, para. 100, who voted against Google’s responsibility for the relevant search results.
\(^{40}\) ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 38.
\(^{41}\) ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 38.
\(^{42}\) ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 80.
\(^{43}\) ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 87.
The court did not explicitly include in its weighing-up process whether the publication on the website linked to was lawful. Since the activities of the search engine operator and those of the website host represent independent data processing, the striking balance differs in regard to legitimate processing. This is due to the fact that these autonomous handling processes are different in terms of interests supporting the publication and the consequences for the person concerned.\textsuperscript{44} Notable examples of this view of the court are the clarifications to the exception of art. 9 DPD for data processing to journalistic purposes (so-called “media privilege”), that – according to the court – does apply to the website operator, but does not privilege search engine operators.\textsuperscript{45} However, the rights against website and search engine operators are not hierarchically structured; therefore, the claim against the search engine operator is not dependent on whether a claim against the website provider has been raised.\textsuperscript{46}

b. Rights of the Person Concerned and Weighing of Interests

Under art. 12 lit. b DPD, the violated person may claim erasure of their data, if the data processing does not meet the requirements for legal processing set by the regulation. In particular, each processing of personal data has to meet the demands of art. 7 DPD throughout the whole time of processing.\textsuperscript{47} More precisely, Art. 7 lit. f DPD comes into question regarding legitimate processing of personal data by search engines. Art. 7 lit. f DPD stipulates such processing as legal if the interests of the data controller or third parties prevail over the interests of the person concerned, in particular their right to privacy. The directive thereby enables a weighing-up of conflicting fundamental rights. The same applies to the right of objection under art. 14 lit. a DRSL that depends on “compelling legitimate grounds relating to [the violated person’s] particular situation”.\textsuperscript{48}

\textsuperscript{44} \textit{ECJ}, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 86 et seq.
\textsuperscript{45} Cf. \textit{ECJ}, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 85.
\textsuperscript{46} \textit{ECJ}, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 84.
\textsuperscript{47} \textit{ECJ}, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 70, 71, 94.
\textsuperscript{48} \textit{ECJ}, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 74 et seqq; critical to a derivation of a „right to be forgotten“ from art. 12 lit. b) and 14 lit. a) Data Protection Directive, para. 76.
According to the ECJ, three different groups of persons are relevant to the necessary weighing-up of interests: The person concerned with their fundamental rights to respect for private life (art. 7 ChFR) and the protection of personal data (art. 8 ChFR), the search engine operator with its legitimate interest in an economically viable operation of the search engine, and the internet users with their interest in accessibility to information. The court sets out the outcome of its considerations by finding that the rights provided by art. 7 and 8 ChFR “do not [only predominate over] the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject’s name.”49 Only in exceptional cases, a different outcome may be considered; this may be reason to the kind of information, its sensitivity for the private life of the person as well as a particular interest in information of the general public, for instance due to the specific role of the person in public life.

c. Legal Evaluation

From the enumeration in the foregoing alone, the specific interests of the person making the statement along the lines of art. 11 (1) 1 ChFR are not adequately considered. A comprehensive legal assessment has to take into account implications in between not only three, but four parties. This way, the intended enforcement of the data protection regime that is traditionally based on a bipolar confrontation of the person concerned and the data processor puts the freedom of media and speech into an inferior position – creating an imbalance that is unreasonable and disproportionally in favor of data protection. As a (primary) corrective factor, the freedom of speech and media requires an adequate procedural attention to requests for erasure.

Moreover, it is criticized for good reasons that the court only grounds the rights of the violated person within the Charter of Fundamental Rights, but does not recite art. 16 ChFR for the search engine operator’s entrepreneurial freedom and art. 11 (1) 2 ChFR in terms of the internet users’ informational freedom. Furthermore, an inclusion of search engine operators into the scope of art. 11 (1) 1 ChFR as well as an evaluation of the

49 ECJ, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 97.
applicability of the media privilege – maybe only with a reduced scope – would have been desirable.\footnote{However, the court’s references to the economic interests of search engine providers not outweighing an impairment of the person concerned and the denial of the media privilege rather suggest that search engine providers do not fall under art. 11 (1) 1 ChFR in the opinion of the ECJ, cf. \textit{ECJ}, 13.5.2014 – Case No. C-131/12, – Google Spain, para. 81 and 85.}

Apart from the reference of the ECJ to public figures within the weighing-up process, further arguments in favor of the dissemination of data are conceivable, such as legal requirements for the dissemination of information, as state registers, or because the person concerned themselves voluntarily published the data or at least gave their consent. The importance of the decision is based not least on the scope of guaranteed rights of the statutory and a thereto connected so-called “right to be forgotten”. After all, the right to erasure does not demand for damages or factually inaccurate data processing. On the contrary, the fundamental rights of the violated person require that personal data is not infinitely at the disposal of the public by links in the result list of a search made on the basis of that person’s name.\footnote{\textit{ECJ}, 13.5.2014 – Case No. C-131/12 – Google Spain, para. 96 et seqq.}

\textbf{Outlook}

The “right to be forgotten“ provided by art. 17 GDPR is wider than the one developed by the ECJ. Thus, based on and according to art. 17 (1) and (2) GDPR, the responsible party in terms of data protection law may not only be obliged to delete the data in question itself, but also to inform a respective third party respectively. By means of art. 17 (3) lit. a GDPR, the obligation to delete and inform shall not apply to the extent that processing is necessary for exercising the rights of freedom of expression and information – opening the scene for multi-dimensional considerations with respect to fundamental rights. Under German law, the right of blocking and erasure are guaranteed \textit{de lege lata} by sec. 35 BDSG, whereby a basis for a claim against the search engine provider is provided in particular by sec. 35 (5) BDSG that implements art. 14 lit. a DPD, enabling thereby a weighing-up of the conflicting interests. According to the provision, personal data must not be collected, processed or utilized in case the person

\url{https://doi.org/10.5771/9783845280493}
concerned objects the processing at the responsible authority and outlines that his/her legitimate interests in regard to his particular personal situation outweigh the interests of the responsible party. So far, the predominant legal opinion interpreted the provision restrictively. Against the background of the ECJ-decision, legal literature now argues to discard this restrictive interpretation; the term “particular personal situation” – interpreted in conformance with the directive – allegedly needs to include the case that the violated person does not want certain data to be exposed to the internet public after a certain period of time.

2. Assessment

The ECJ-Judgment on *Google Spain* does not contain a concrete statement to the implementation of the self-evident claim for a preservation of fundamental rights by a balancing of interests. Currently, search engine operators rely on individual demands for erasure for which online forms are provided. However, *Google* restricts the delisting of search results on top-level-domains from EU member states (e.g. google.de or google.fr). Furthermore, the company installed an advisory board for erasure of data that, however, could not reach an agreement on all relevant issues. In particular, it is questionable how specific a complaint raised against a search engine operator must be brought forward. The literature rightfully points out the substantial difficulties when it comes to the implementation of auditing duties in practice. As legitimate and important the protection of privacy as well as the right to informational self-determination undoubtedly are, the ECJ in its reasoning for the judgment regrettably leaves

52 Cf. BT-Drs. 14/4329, p. 41.
53 See also the suggestions of the Art. 29-Group, Working Paper (WP) 225 of 11/26/2014, in particular recital 10-16 (Exercise of Rights).
56 See the closing report of the Google erasure-advisory board (available at http://docs.dpaq.de/8527-report_of_the_advisory_committee_to_google_on_the_right_to_be_forget.pdf).
it unclear (in wide parts) how the legitimate right of the public to information shall be assessed, rated and protected when enforcing the claim for erasure.

In order to ensure a plurality of information in the internet, appropriate mechanisms need to be found in view of the danger that search engines (for their own protection) may delete more search results than legally indicated – and therefore cause, so to speak, a “distortion of history or reality” respectively. The issue relates to the danger of (fundamental rights-relevant) overblocking,\(^\text{57}\) that is the submission of legally harmless search results, which more than insignificantly impair the access to information and the variety of information. In question is, moreover, how to deal with search results that were objectionable at first, but have become permitted by law and/or facts because of changing conditions. From the perspective of users, the manual review and influence of search results impair the trustworthiness and (frequently demanded) neutrality of search engines.

Further, it seems at least questionable to impose on a private company the obligation to execute complex constitutional considerations between the freedom of information and the right of personality without any assistance or boundaries. Hereby, the existing (and recurrently complained) market power and influence on public opinion of the Google-search-engine will be even strengthened. In the end, the issuer of the information who is regularly affected in his freedom of distribution may not be sufficiently represented in the relevant consideration and cancellation proceedings.

V. Overall Summary

In light of the above considerations and as a consequence of the digital age, all matters regarding data protection law and personality rights are characterized by difficult factual as well as legal considerations. Meanwhile, there is a large divergence between the rulings of the ECJ („center of interests of the affected person“) on the one hand and FCJ („objective domestic relations“) on the other hand regarding the determination of ju-

\(^{57}\) Such an Overblocking is accepted by jurisprudence in the course of legal back-ups in the context of copyright protection to host provider models, cf. FCJ, 19.4.2012 – Case No. I ZB 80/11 – File-Hosting-Dienst; FCJ, 12.7.2012 – Case No. I ZR 18/11 – Alone in the Dark.
risdiction for cross-border violations of personality rights. With regards to multi-state-torts in a medial context, this threatens the alignment of conflicts of law-rules and rules of jurisdiction.

In contrast, particular difficulties regarding the determination of the applicable law for the right to freedom of speech are not apparent – although a harmonization of conflicts of law-rules on the European level would still be preferable. With respect to data protection law, the ECJ fortunately affirmed a broad territorial scope by means of its Google Spain-ruling which encourages the practical effectiveness of the DPD as well as an extensive protection of fundamental rights. However, data processing “in the context of activities of an establishment” shall already be sufficient. Hereby, the “lex loci solutionis” is established for a great part of data protection law.

Overall, the ECJ holds that necessary considerations in the context of search engines must adequately reflect the multidimensional relationships between the affected person and the users, the search engines and the common welfare interest in obtaining information in the light of freedom of speech and media. The automatization – which is typical in and for the digital age – leads to particular difficulties with regards to data protection and personality rights since both fields of law are – due to complex considerations – not easily accessible by automated information-technology-based processing models. Despite the remaining dogmatic questions and future challenges for jurisprudence, increasingly sound principles for considerations in personal rights and data protection law in multilevel systems have been outlined.

For the further development and in order to sharpen the respective legal regime, it will be decisive to integrate more and more the phenomena of mass and individual communication – which are merging very quickly – into a coherent technology-neutral legal framework. In this context, it has to be pointed out that there have been and still are important challenges regarding the adequate distribution of risk and responsibility which need to be addressed. Thus, there may very soon be a need for an overall readjustment of the legal framework. A general reform approach could open the way for the establishment of eminent components for a sustainable legal framework on modern media.

58 To this context relates last but not least the relevant case-law of the European Court of Human Rights, cf. e.g. ECtHR, 24.6.2004 – Case No. 59320/00 – Caroline von Hannover/Deutschland.
The Legislator’s Fear of the CJEU in the Unified Patent System

Maximilian Haedicke

I. Introduction

We are on the eve of a fundamental change of the European Patent System. After more than 50 years of negotiations it has become very likely that the European Union, from the year 2017 onwards, will have a Unified Patent Court and a Unitary Patent. For many stakeholders this achievement is reason for joy. Others are seriously concerned for various reasons. Many especially take issue with the role of the CJEU in the Unitary Patent System. Some take the view that the European Union abandons its powers in favor of the Member States and in favor of a court system which is not sufficiently controlled by the CJEU. Others on the contrary fear that their valuable patents may be endangered by the CJEU. According to them, the CJEU judges who have no expertise in patent law and the cumbersome proceedings of the CJEU pose a serious threat for the enforcement of patents. The legislator of the Unified Patent System has addressed the criticism of those who fear a too strong influence of the CJEU. The legislator has at least adjourned this issue by finding a compromise which may – or may not – exclude the CJEU from adjudicating issues of material patent law.

In this paper I will first explain why the interested parties (or at least some of them) felt a need to develop a unitary patent system for Europe. I will then give an overview of the troubled relationship between the Unified Patent Court and the CJEU which finally led to a political compromise in which the allocation of tasks and responsibilities between the two courts remained unclear. After this I will try to find an answer to the question whether the division of competencies between the Unified Patent Court and the CJEU was successful and which uncertainties remain. I will finally ask whether the patent stakeholders’ fear of the CJEU is justified.
II. The status quo of the patent system in Europe

In the view of many – but by far not all – stakeholders the current patent system has serious insufficiencies. Although the procedure for granting a European patent is unitary, the European patent breaks down into a bundle of national patents, each governed by the domestic law of the States which the holder of the right has designated. Thus national enforcement is required. In order to enforce a patent within the European Union as a whole, more than one patent infringement law suit may be necessary, as each national court decides independently for its own territory. The outcome of these lawsuits may vary. Until today there is no common appeal court to harmonize differences in the respective judicial practices.

Furthermore, there are significant differences in procedure. Under the “bifurcation” system in Germany, infringement actions and invalidity actions will be heard separately and before different courts. In contrast, before UK Courts infringement and validity will be dealt with together. Another example for differences is the use of witnesses and experts. This is common in the UK, where experts are subject to cross examination. In contrast, experts are rather unusual in Germany. There are also significant differences in procedure. Speed and costs of proceedings vary significantly. In Germany a first instance infringement action takes approximately 6 months until a decision is rendered. In other countries the duration of the proceedings is much longer. While infringing actions in Germany are rather cheap, there are massive costs for patent litigation in several jurisdictions.

III. First unsuccessful attempt: The Draft Agreement on a European and European Union Patents Court (EUPC)

1. Basic features of the EUPC Court

Against this background there have been various efforts within the last 50 years to establish a Union-wide Patent and a Court which could adjudicate patent proceedings in a unitary manner within the entire European Union. These tedious discussions resulted in the “Ministerial Conclusions on an
enhanced patent system in Europe”, which were adopted by the Council of the European Union on December 4th, 2009. The new patent system was intended to be based on two pillars, namely on a unitary European Union Patent (the “EU Patent”) and the European and Community Patents Court (the EUPC Court). The Court was intended to have exclusive supra-national jurisdiction not only over actions relating to the (yet to be enacted) unitary European Union Patents, but also over actions relating to European Patents. The exclusive jurisdiction would have covered both infringement and nullity actions. Most importantly for our topic, the Court would have been established by an international agreement, standing outside the judicial system of the European Union. One of the main reasons for this outsourcing the EUPC Court from the European Union law were the – above-mentioned – reservations of the lawmakers against the CJEU.

2. Dismissal of the EUPC by the CJEU by Opinion 1/09

However, from the perspective of European Union law, such patent system was deemed unsatisfactory because there would have been no way for the control of decisions rendered by the Patents Court by the CJEU. This would have been true even though the patents, which would have been in suit, would have been European Union patents issued under an EU Regulation. In other words the EPC would have been shielded against the European Court of Justice when creating patent law for the European Union.

Accordingly concerns were raised by some Member States as to the whether the EUPC Court was compliant under the EC Treaty. Following these concerns, the European Council requested the opinion of the Court of Justice under Article 218 (11) TFEU. The Opinion of the European Court of Justice (1/09) was issued on 8 March 2011.

The Court concluded that the EUPC system as envisaged would be incompatible with EU law because it would oust the jurisdiction of national courts to apply EU law. The envisaged agreement would confer on an international court which is outside the framework of the EU an exclusive jurisdiction to hear a significant number of actions brought by individuals and apply EU law. This would deprive courts of member States of their

1 Council of the European Union, Conclusions on an enhanced patent system in Europe, 2982nd Competitiveness (Internal market, Industry and Research) Council meeting, 4 December 2009.
powers in relation to the interpretation and application of EU law. Conversely, the ECJU would not have the power to reply, by preliminary ruling, to questions referred by those courts. In its opinion the Court recalled the vital role of the national courts in the EU legal order. Article 267 TFEU aims to ensure that, in all circumstances, European Union law has the same effect in all member States. The system set up by Article 267 TFEU therefore establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of EU law and also in the protection of individual rights conferred by that legal order.

IV. Second (successful) attempt: The unified patent package

1. Basic features of the Unitary Patent and the Unified Patent Court

The then-developed “Unified Patent Package” is a reaction to the ruling of the CJEU. Its sources of law mainly consist in the Unified Patent Court Agreement, which was signed as an intergovernmental treaty in February 2013 and EU-Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

The Unitary Patent is established by the aforementioned EU Regulation. The “classical” European Patent forms its basis. Under the EU Regulation, it is converted into a Unitary Patent unless the patent holder opts out.

The Unified Patent Court (UPC) is not an EU institution but an international court. At the same time it is a national court common to the member states that have acceded to the UPCA. It will have exclusive competence in respect of European patents and Unitary Patents.

The Unified Patent Court mainly consists of a Court of First Instance and a Court of Appeal. The Court of First Instance will have a central division with its seat in Paris and sections in London and Munich. Furthermore, the participating countries will set up multiple local divisions or regional divisions. The Court of Appeal will be located in Luxembourg.

Contrary to the formerly discussed EUPC Court System, in principle, it is possible for the UPC to refer a case to the Court in accordance with Article 267 TFEU. However, as will be explained below, it is yet unclear under which conditions the UPC may make a reference to the Court of Justice.
2. Removal of substantive European patent provisions from the EU-Regulation ("Cameron Rule")

In order to give an answer to this question, it appears necessary to address the issue in which circumstances European Union law has effects on the UPCA. The impact of European Union law to the UPC set of rules is nearly all-encompassing.

a. Primacy of EU Law for the entire UPC system

Article 20 UPCA provides that “the Court shall apply Union law in its entirety and shall respect its primacy” and Article 21 provides that “as a court common to the Contracting Member States and as part of their judicial system, the Court shall cooperate with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, as any national court, in accordance with Article 267 TFEU in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court”.

b. Removal of substantive patent law from the EU Regulation

However, at the same time, the legislator strived to take all provisions relating to substantial patent law out of the EU-Regulation. Initially substantial patent law, especially provisions relating to the scope of a patent, were part of the EU Regulation. However, there was intense pressure from industry and from judges that sought to have substantive patent law removed from EU law. It is said that on the eve of the signing of the Uniform Patent Package, the British Prime Minister Cameron threatened to let the Package fail all together if the provisions relating to substantial patent law were not removed from the EU regulation.

c. Removal of the scope of patent protection from the EU Regulation

In its final version, the Unitary Patent Regulation (Articles 5, 7 and 18) actually refrains from regulating the substantive law of patents with unitary effect. Instead, a compromise has been implemented. Article 5(2) of
the Unitary Patent Regulation does provides that “the scope of that right and its limitations shall be uniform in all participating Member States in which the patent has unitary effect”. According to Art. 5 (3) of the Unitary Patent Regulation the “acts against which the patent provides protection (…) shall be those defined by the law applied to European patents with unitary effect in the participating Member State”. In the Member States the provisions of the UPCA are applied, so that there is an obligation to apply Art. 25 to 27 UPCA for determining the scope of Unified Patents. This constitutes the link to the UPCA. Art. 25 to 27 UPCA lay down rules setting out the scope of European patents by regulating direct and indirect infringement and the limitations on patent rights.

V. Interconnected EU- and Non-EU-Sources of Law under primacy of EU Law

1. Close links between different sources of law lead to an interconnected body of law

However, the intention of the legislator to clearly distinguish between the material patent law which will not be subject to review by the CJEU at one side and EU law subject to CJEU review at the other side will most likely fail. The different sources of the UPC system are closely interconnected. This integrated set of provisions does not only regulate the substantive material patent law but also the law relating to the court structure and the procedural law. For example, the scope of protection of a unitary patent can only be determined by a mutual interpretation of Art. 5 (3) of the Unitary Patent Regulation and Art. 25 et seq. UPCA.

2. Primacy of EU law for the entire UPC body of law

According to Art. 20 and Art. 24 UPCA, primacy of EU law applies not only to the Unitary Patent Regulation, but also to the entire UPCA treaty. Accordingly, wherever Union law exists with relevance to the Unitary Patent Package, there is primacy of application of Union law. Primacy of application of EU law over conflicting UPC law applies irrespective of its sources of law.
3. Primacy of EU law for references to other EU sources law in the UPCA

Primacy of EU Law does not only apply to the UPCA Agreement and the Unitary Patent Regulation, but extends beyond these sources of law. Whenever a UPCA provision makes reference to EU-law deriving from other sources, the Unified Patent Court has to rely on pre-existing EU law when interpreting the provisions referred to. For example, some provisions regarding limitations of the patent right which concern the right to make use of patented products for research refer to EU regulations. The primacy of EU court decisions interpreting these regulations have to be respected.

4. Primacy of EU law in cases of “autonomous implementation” of EU law into the UPCA

Furthermore, important parts of the UPCA Agreement are identical or near-identical in wording to EU Directives. For example, Art. 67 et seq. of the UPCA which deal with the enforcement of patent rights are almost identical in wording to the Enforcement-Directive. Thus, due to the primacy of EU law, all judgements of the CJEU aiming at the interpretation of the Enforcement-Directive are binding for the interpretation of the respective provisions of the UPC Agreement.

VI. Consequences for the CJEU’s Jurisdiction

1. The CJEU might find itself competent to hear cases in which the primacy of EU law in the UPCA is at issue

This leads to the question whether – contrary to the intention of the legislator of the UPCA – the CJEU may declare itself to be competent to hear cases on issues arising under the UPCA. Evidently, the political intention to keep the CJEU out of the material patent law is not binding for the CJEU. According to Art. 1 (2) UPCA the Unified Patent Court is a Court common to the Contracting Member States and thus subject to the same obligations under Union law as any national court. Thus the rules relating to references to the CJEU which apply to national courts also apply to the Unified Patent Court.
There are good reasons to assume that the CJEU is not only competent to hear cases which focus on the interpretation of the Unitary Patent Regulation. The CJEU might assume jurisdiction for cases in which the primacy of EU law in any other fields of the UPCA is at issue. As previously mentioned, wherever EU law exists in the Unified Patent Package, the provisions of the Unified Patent have to be interpreted in coherence with EU law in the largest possible extent (See Art. 20, 24 UPCA). This legal demand can only be fulfilled if the uniformity of the legal system is ensured by the CJEU. This leads to a far-reaching obligation of the Unified Patent Court to refer questions to the CJEU.

2. CJEU Jurisdiction in cases of “overreaching implementation”

Furthermore, as a general rule, the CJEU finds itself competent to hear cases in which there is an “overreaching implementation” of EU Directives into national law. The CJEU considers itself to be competent both in cases in which EU law only serves as model for national law and in cases in which national law refers to EU law.

According to the Court, in circumstances, where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order (…), it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.2 From this general acceptance of its competence to hear cases it can be derived that the CJEU may find itself competent also to hear cases in which not a national source of law, but a source of law deriving from an international treaty has to be interpreted, especially as the interpretation has to be effected while respecting the primacy of EU law.

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2 EuGH Rs. C-28/95, Leur-Bloem, Slg. 1997, I-416 (Rn. 32); see also Drexl, FS Heldrich, S. 82.
3. The CJEU might find itself competent to hear cases in which the scope of a patent is at issue

As previously mentioned, the scope of the patent is predominantly regulated in the UPC Agreement, but however a provision in the Regulation contains a reference to the respective national laws and thus indirectly to the UPCA. This leads to the most important question whether the CJEU will find itself competent to hear cases which focus on the scope of a patent. This question is of great importance as the scope of the patent in suit is the key issue in most patent cases; furthermore, the determination of the scope of a patent requires claim interpretation. Claim interpretation however requires experience in patent cases and technical skills. These personal qualities can usually not be found in the CJEU’s judges.

It is doubtful whether this only nexus to EU law suffices for the CJEU to recognize its jurisdiction. It can be argued that only the interpretation of Art. 5 (3) of the Unitary Patent Regulation, but not the provisions which are referred to, can be subject of a preliminary ruling of the CJEU. The legislator has expressly limited – and not extended – the applicability of EU law. There is no incorporation of EU law into other sources of law. Also no need for an alignment of the interpretation of the UPCA sources of law can be identified, as insofar there is no reference to EU law. There is also no danger of a differing interpretation of EU rules which would cause harm to a unitary interpretation of European Union law.

In sum the better arguments strive in favor of a limitation of the competency of the CJEU so that the CJEU may not define the scope of a patent. It can be assumed that once the Unitary Patent Package is in force, this issue will be brought before the CJEU immediately.

VII. Conclusion

In sum, the UPC Patent Package shows the clear intention of the legislator to avoid the CJEU to interfere in patent cases to the highest degree possible under current law. However, it remains doubtful whether its goal will actually be achieved. The Unified Patent Package is an integrated body of law which is subject to the primacy of EU law. To a large extent the question whether the CJEU will hear issues of material patent law will be dependent of the discretion on the CJEU and its own evaluation of its competencies.
This leads to the question whether the legislator’s and the stakeholders’ fears are justified. From the beginning of the negotiations, the leading patent countries in Europe insisted – and believed – in the promises that the UPC system will be a system of specialized and experienced judges, of high quality and predictability; these criteria do not describe the CJEU as far as patent law is concerned. There are concerns that a referral to the CJEU would create delays and costs; the main concern is that rulings of the nonspecialist CJEU might likely not be clear or even false. In the view of the critics, the whole point of creating a specialist patent court for Europe would be lost if the CJEU gained too broad competencies. The effect of references to the CJEU or their potentiality would be chilling. The warning of the experts was that stakeholders would simply boycott the new system, if the CJEU became part of the judicial instances of the future Court.

On the other hand, there are also good arguments against specialist courts which may sometimes lose sight of the overall picture. Firstly it is not necessarily true that it is exponentially more difficult for a Judge of the CJEU to understand patent cases than cases stemming from areas with which the CJEU currently deals, including EU citizenship law, competition law, currency law and immigration law. The judges on the CJEU have not, as of yet, dealt with European patent cases, as there have been none, but it is irrational to assume that it would be beyond their judicial capabilities. Furthermore, a generalist court that does not focus solely on patent law thus also might be beneficial for the development of patent law with its public policy discussion about the conflict between intellectual property rights and free access. There are concerns that a centralized patent court without review possible to a general court would be at risk of producing very formal patent law and thus law of a “lower” quality from a policy perspective. The US example shows that the influence of a general court – like the US Supreme Court – is not necessarily detrimental.

In sum, it is the duty of the CJEU also in patent cases arising under the UPC system to develop the law in a way consistent with national policies and to create uniformity in the law – a duty which is overreaching patent law. It will be a major task for the CJEU to strike this balance in carefully

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3 Crowley, NYU Journal of Intellectual Property and Entertainment Law, Vol. 4 No. 2.
4 Leistner/Kleinemenke, ZGE 2010, 273, 310.
5 Leistner/Kleinemenke, ZGE 2010, 273, 310.
designing the scope in which it will accept referrals from the UPC in issues of substantial patent law.
Recent Issues and Trends of Environmental Law and Policy in Korea – Legislature vs. Judiciary

Seongwook Heo

I. Green growth and new climate regime in Korea

In Korea, the “Green Growth” policy was the No. 1 priority policy agenda during the president Lee government from 2008 to 2013.

Following that policy agenda, the Green Growth Committee (GGC) was set up under direct governance of president in 2009 and the GGC took charge of building up the whole scheme of Green Growth policy in Korea.

The Framework Act on Low Carbon Green Growth (FALCGG) was legislated in 2010 and it took the place of basic framework act of both environmental law and energy law. Furthermore, the CO2 Emission Trading Act (ETA) was enacted in 2013 and began to be enforced from 2015.

In sum, during the Lee government, the Green Growth policy had the status of leading policy agenda in Korea and it had produced quite a bit of progress not just in the field of administrative policy but also in the field of legislation.

However, the term “Green Growth” is not commonly used in the incumbent president Park government. Instead, the term “Creative Economy” took the place of leading policy agenda.

The GGC was downgraded to be under the governance of the prime minister rather than the president and its actual influence on policymaking has been diminished.

Even though the term “Green Growth” has lost its status as the main leading policy agenda, that does not mean that the necessity to cope with climate change has reduced at all. On the other hand, the urgency to make out another climate change regime after Kyoto protocol has increased a lot. This urgency leaded the world to the unanimous agreement at the Paris COP21 conference in December 2015.

1 This article was funded by the Korean Public Law Research fund of Seoul National University Law Research Institute.
The INDC (Intended Nationally Determined Contributions) of Korean government was 37% reduction against BAU until 2030.

II. An Overview of CO2 Emission Trading Act in Korea and its insights on judiciary

1. Introduction

The full name of CO2 Emission Trading Act (ETA) of Korea is “Act on the allocation and trading of greenhouse-gas emission permits” and it is delegated from Green Growth Act article 46.

ETA was enacted in 2013 and began to be enforced from 2015.

ETA is composed of 8 chapters and 43 articles, and the 8 chapters are composed as follows.

- Chapter 1 Overview
- Chapter 2 The basic planning of emission trading system
- Chapter 3 The allocation of permits
- Chapter 4 The trading of permits
- Chapter 5 Reporting, verification, and certification of emission amounts
- Chapter 6 The surrender, carryover, borrowing, offset, termination of permits
- Chapter 7 Supplementary rules
- Chapter 8 Penalties

2. Allocation of Permits

The total emission permits of 1st commitment period which is from 2015 to 2017 is 1,640,000,000 (tCO2-eq).

During the 1st commitment period, the ratio of free allocation is 100%, and it will be reduced to 97% for the 2nd commitment period, and it will be separately determined below 90% for the 3rd commitment period.

The allocation of permits for the 1st commitment period was done with the combination of grandfathering (GF) and benchmarking (BM). BM was applied to cement, oil, and airplane industry, and GF was applied to most industries except for the BM industry. It is planned that the scope of BM industry will be enlarged from 2nd period.
GF allocation formula of each compliance year is composed as follows.

$$GF = \left[ \text{Emission of the basic year(average of year 2011-2013)} + \text{Expected increase of emission}\right] \times \text{adjustment factor}$$

At the beginning of ETA, the authority in charge of ETA was Environment Protection Agency(EPA). But after serious dispute between EPA and Ministry of Trade, Industry and Energy(MOTIE) about the enforcement of ETA, the authority was given to Ministry of Strategy and Finance. That was the very example to understand how the Stiglerian struggle between agencies on regulatory power happens in the real world.

3. Trading of Permits

The carbon permits can be traded through Emission Trading Exchange which is placed at KRX(Korea Exchange).

Participants of ETS can trade permits by opening an account at Registry.

The price of permits as of now in December 2016 is approximately KRW 21,000/t. It is on the trend of rise from KRW 10,000/t in September 2015.

It is explained that the industries are reluctant to sell the permits in the market because of the uncertainty surrounding emission trading system(ETS) in the future.

4. Flexible mechanism

The Korean ETS is taking the flexible mechanism like offset, carryover, banking, borrowing, and international linking.

Offset and borrowing is allowed within 10% range of total surrendered permits. Foreign offset is possible within 50% range of total offset, but it is not allowed during the 1\textsuperscript{st} and 2\textsuperscript{nd} commitment period.

5. Market stabilization measures by competent authority

ETA market stabilization measures of competent authority can be executed by use of reserve permits. The competent authority can set the mini-
mum or maximum of permits, and can also set the minimum or maximum price of permits.

6. Penalties

When the participant’s emission exceeds the permits, it will be obliged to pay fines within the range of three times average market price of permits, maximum KRW 100,000/t.

7. ETA litigations

Since the enforcement of ETA in Korea, quite many cases have been raised against the competent authority.

These cases are mainly focused on the legality of the allocation of permits among industry. The scope of companies involved in ETA litigation covers oil and chemical industry, nonferrous metal industry, and cement industry.

One of those cases was recently decided at the court.

In ‘Seoul Administrative Law Court 2015. 12. 17. 2015GUHAP55592 case’ which was between Hyundai Steel Company and EPA, the plaintiff demanded that the allocation decision of EPA should be cancelled on the reason that EPA made mistakes in calculation of average baseline emission and in understanding the concept of direct emission and indirect emission.

Because that case was the first one after the enforcement of ETA, it attracted much attention both from industry and academia.

After quite long debate between plaintiff and defendant, the court decided that EPA did not make mistake in calculation of permits to the plaintiff and rejected the case.

Other than this case, many cases are still on-going.

Legal issues in these cases are mainly about the calculation of allocation among industry and among each company. And the use of adjustment factor is frequently disputed issue in those cases.

After June 2016 when the first surrender of permits happens, legal claims against penalty is expected to be brought about against EPA.
Because the ETA litigation is very new type of administrative law litigation in Korea, many new interesting legal issues will be raised during the litigations.

For example, in the case when the plaintiff wins the litigation, what will be the scope of cancellation of allocation measures? Would that be the whole allocation measure or the deficient part of allocation plaintiff demands? Furthermore, in the case when the plaintiff wins, where does the more permit come from? Is it from the government reserve or from the overall renewal of allocation?

8. “Green Growth” in the judiciary

Following questions should be raised in dealing with ETA litigations.

(1) Would that be still the alive normative guideline concept in ETA cases?
(2) Would that be compromised according to the change of political surroundings?

9. Climate change in the judiciary

Climate change litigation is widely raised all over the world. In the case when the proper measures against climate change are not taken in time, the only way climate change victims can depend upon might be litigation at the court.

Climate change litigation can have direct and indirect impact on mitigation and adaptation.

In these climate change litigations, finding out the intents of legislature will be another interesting legal topic. And the relationship between interpretation and construction in interpreting climate change legislation is another important topic to be studied.
III. Humidifier sterilizer case

1. Introduction

The Humidifier sterilizer case was one of the biggest scandal in Korean society between 2015 and 2016. Compared to other countries, Korean has very cold and dry weather conditions during the winter, which is affecting many Korean people to use in house humidifier machine.

When using the humidifier machine, one of the biggest concern is whether the machine can be maintained sterilized as the machine is generally filled up with water. In this necessity, quite many products of humidifier sterilizer came into the market and were sold out to the consumers.

The problem was that these products were using chemicals like PHMG\(^2\), PGH\(^3\), CMIT/MIT\(^4\) as their components to have cleaning effect, and that these chemicals can give lethal damage on respiratory organ of people who inhaled.

From 1994 to 2011, more than 20 kinds of products were provided to the market and especially in 2010 and 2011, more than 600,000 items of products were sold out to the people.

As of now in 2016, it is reported that more than 1,500 people were damaged their respiratory organ, among them more than 140 people dead.

2. Regulation failure

The chemicals like PHMG were out of the reach of government regulation before 2012 when used in respiratory case. They were regulated only when used in skin exposure case.

In 2011, epidemiological investigation proved the causal relationship between PHMG etc. and respiratory organ damage.

PHMG, CMIT/MIT in 2012, PGH in 2013 was enrolled as ‘toxic substance’ in the Chemical Control Act Article 2. Affected by this accident, Act on Registration, Evaluation, etc. of Chemicals was enacted in May 2013, enforced from January 2015.

2 Polyhexamethylene guanidine.
3 Poly ethxyethyl guanidium hydrochloride.
4 5-Chloro-2-methyl-3(2H)-isothiazolone/2-Methyl-3(2H)-isothiazolone.
3. Risk society and challenges of environmental law

This is a clear example of Risk issues in modern society.

Before the epidemiological investigation in 2011, the risk of chemicals like PHMG to respiratory organ was not scientifically proved. Under that surroundings, it is not easy to expect for the regulatory agency to include PHMG as a regulated chemical.

Regulation in modern Risk society has the aspect of choice under uncertainty.

Even though many textual wordings require agencies to take precautionary principle in dealing with Risk issues, but in the real policy making procedure, it is not possible to take precautionary attitude to every Risk, because taking actions against one Risk always entails cost and raise risks in other parts of people’s lives. In this aspect, the relationship between precautionary principle versus cost benefit analysis is important issue to be delved into.

The output of recent behavioral science research is helpful to understand public people’s behavioral tendency in Risk situations. Why in some cases, people demand the government to take precautionary measures against some specific kinds of risks, even when it is not sustainable in the long run. People’s behavioral tendencies like availability heuristic, social cascade, intuitional toxicology, and hindsight bias sometimes affect people’s choice and that makes gap between the theoretical rational choice and the real social choice of people.

4. Government reactions

After the tragic accident of humidifier sterilizer case, the Korean government made effort to renew the regulation system of chemical materials. Korean EPA is trying to make a separate legislation to regulate harmful chemicals.

In some academic parts, there is voice that Korea need to change tort law system and introduce punitive damages.
**IV. Criminal penalty on environmental crime**

1. Aggravated punishment of environmental offenses

After the serious Nak-dong river phenol leakage accident in 1991, Korean Congress legislated the ‘Act on the control and aggravated punishment of environmental offenses (ACGPEO)’ which is prescribing the aggravated punishment against serious environmental offenses.

ACGPEO is prescribing life imprisonment or at least five years’ imprisonment for environmental offense which result in *killing or injuring* of people.

The act is also prescribing from 3 years to 15 years’ imprisonment for environmental offense which inflict *danger* to life or body of people.

2. Disparity between the norm and the reality

Even though the legislated penalty against environmental offense is very high and strict, the actual enforcement of the act is not effective at all.

After the enactment of ACGPEO, not one person convicted with that act was sentenced to the real imprisonment. Only 6 criminal defendants convicted with that Act were sentenced to relatively light fine or probation.

Abstract requirement of the Article and too high statutory penalty are maybe refraining the prosecutors and judges from punishing environmental offenses with that clause. Most enforcements of environmental crimes are executed with separate regular environmental statutes like Clean Air Act or Clean Water Act.

This case shows that the goal of environmental protection cannot be achieved only through making severe punishment clauses.

In this sense, how to understand the gap between the norm and the reality is another important topic to be studied.

3. Lessons for the humidifier sterilizer case

The effort to clarify the requirement of aggravated punishment of environmental crime and change the criminal penalty into economic penalty is going on inside Korean EPA.
In this sense, the enactment of ACGPEO was evaluated as a failure in achieving the legislative goal.
What lessons should be learned from this ACGPEO case to the recent legislation of chemical material control act?

V. Legislature and judiciary in environmental law

Enforcement gap in norm and reality is an essential part of environmental law and policy. We can easily find out the cases of overshooting, obsolescence, and behavioral biases in environmental law legislation and enforcement.

In this context, the separation of functional role of legislature and judiciary is all around topic to be considered in every aspect of environmental law.

The democratic decision making process in legislature and the judicial decision making process in judiciary is quite different from each other, and this difference in decision making process is making out the difference in decision result in legislative process and judicial process.

Another question is on the difference between the rationality (whether be it instrumental or evaluative) in legislature and in judiciary. Are they same or different each other?

When the rationality of legislature and judiciary are different, which one is the best approach for the judges to address the issue of interpreting the legislation, especially when the legislative wordings have vagueness or obscureness?

How much lessons can Korean jurisprudence get from the Chevron doctrine?

VI. Conclusion

In this short paper, I tried to briefly introduce the recent issues and trends of environmental law and policy from the perspective of the relationship between the legislature and judiciary.

Because the field of environmental law is entailing almost every aspect of human living, it is necessary to use wide range of analytical tools to understand the variety of issues and topics of recent environmental law and policy.
Among them, it is very crucial to capture the exact reasons and mechanisms of the gap between norm and reality in environmental law enforcement and interpretation.

Like in many other advanced countries, Korea is facing with many new environmental law issues including climate change issues. In addition to that, with the increase of income Korean people get more and more interested in environmental quality. This increased interest in environment is often making social pressure to make a new legislation or administrative regulation. Environmental interest combined with energy issues can make out very complicated political agenda in the middle of modern Risk society. Sophisticated understanding of the functioning role of legislature and judiciary from the perspective of modern separation of powers is crucial to make out optimal environmental resources allocation.
A Dynamic between the Legislature and the Judiciary in Korean Health Law: exemplified by End-of-Life Decision-making and Health Care Financing Issues

Dongjin Lee

I. Introduction

When doctors could do little help to patients, the regulation of health care services was neither important nor difficult. Most doctors were independent private practitioners who had their own offices, and they were respected persons who tried to help patients even though they often failed. The standard, quality, and cost of their services were determined by their level of experience, professional ethics and benevolence. Only some serious malpractices were subject to criminal and civil liabilities, and the state did not involve itself in these affairs a great deal.

Things have, however, changed. First, medicine and medical technology has become highly developed, and with that, associated costs have skyrocketed. Now doctors can assist patients with even the most serious disease, extending their lives considerably, even if they cannot cure the disease itself. The cost of such treatments, of course, is extremely high and to be covered somehow. Second, in many jurisdictions, the state has taken on the responsibility of regulating the quality and cost of health care, and to guarantee the provision of decent level of service. Thus, the state becomes responsible for balancing and harmonizing conflicting interests regarding health care. Facing serious moral and political conflicts, however, the Korean legislative body is often reluctant to address these issues in a timely manner. The Korean judiciary often reacts to this legislative lag by bold judicial lawmaking efforts. It, in turn, stimulates or enables the reaction of the Korean legislative body to resolve this conflict.

In this article, I will introduce two Korean examples of such conflicts. First, I will examine the conflict regarding the decision to discontinue life-extending treatments. Second, the conflict regarding treatments uncovered and unauthorized by National Health Insurance (NHI), the compulsory public health plan provided by the public foundation, National Health Insurance Service (NHIS) will be analyzed. In doing so, I will demonstrate
how the Korean legislative body and judiciary interact with one another to resolve these conflicts. It will also contribute to improving our understanding the nature of the political process in a modern democratic society, and the relationship between the legislative body and the judiciary.

II. Discontinuance of Futile Life-Extending Treatments

1. The Boramae Medical Center Case

As is the case in many other countries, a considerable portion of total expenditures for health care services in Korea is related to the treatment of dying patients, specifically to providing life-extending, rather than curative, care. Most of this cost is not covered by either NHI or private health plan. Moreover, some life-extending treatments arguably do not contribute to enhancing quality of life either because they extend intense suffering or because the patient is unconscious.

If a patient is conscious, he can refuse life-extending treatment or request its discontinuance. In that case, doctors must comply, as to not do so would infringe upon the patient’s right to bodily integrity. If a patient is unconscious, neither he nor his family can request to discontinue life-extending treatments, as to do so would hasten the patient’s death, which might constitute the crime of murder (article 250 of Criminal Code).

At this point, a particularly notorious case decided by the Korean courts is relevant. On 4. December 1997 an unconscious male with epidural hemorrhage was transferred to SMG-SNU Boramae Medical Center (hereinafter Boramae Medical Center) and underwent brain surgery which was successful. The next day, the patient’s wife requested that the attending doctor cease further treatments and discharge him. According to a police investigation, the medical costs were too burdensome for her, and the patient’s violence towards his family led her to believe it would be better to let him die. The attending doctor explained to her that releasing the patient would lead to his death, but she insisted. The patient was released from the hospital on 6. December 1997 and died at home. The wife and the attending doctor were charged with complicity (Mittäter) to murder. The courts
found them guilty of murder as principal actor and accessory, respectively.¹

This decision triggered intense debate. The prosecutor who took on the responsibility of investigating and prosecuting this case, as well as many criminal law scholars upheld the decision [and discussed the criminal law issue how to distinguish principal actor (Unmittelbare Täter) from accessory (Beihilfe) and crime by action (Tun) from crime by omission of it (Unterlassung)]. Many ethicists and religious leaders also lent their support for the decision. On the other side of the debate medical doctors, along with their professional association, the Korean Medical Association, manifested concern about the possible repercussions of the decision and criticized it, but their voices did not find much support from the public.

Although the defendant in the Boramae Medical Center case had asked for the release of a patient that had a clear chance of recovery with reprensible motive and that fact might influence the decision, most doctors seemed to regard the decision as an order or a recommendation not to discontinue life-extending treatment even to the patient without any hope to recover and even when their family does not want it except when the patient himself asked to do so, and accordingly refused to discontinue life-extending treatment once commenced. Instead, doctors collected do-not-resuscitate orders (DNR) from patients who were expected to lose consciousness and die in the near future, in order to avoid the commencement of life-extending treatments.

2. The Kim Case

The Boramae Medical Center case blocked ongoing debates on dying with dignity and euthanasia for years. The Korean legislative body did not attempt to address these issues for those years. It was only a civil lawsuit that ushered in change.

On 18. February 2008, Kim, a woman of 76, lost consciousness at Yeonse Severance Hospital, one of the biggest health care service providers in Korea. She then entered a persistent vegetative state (PVS) resulting from blood loss during a biopsy procedure to investigate the pos-

¹ The decision of the Supreme Court rendered on 24. June 2004, case no. 2002-Do995. This case is referred to the Boramae Medical Center case, after the name of the hospital where the patient was treated.
sibility of lung cancer. From then on, she could not breathe without an artificial respirator. One of her family members, as her guardian, brought a civil suit against Foundation of Yeonse University (the legal entity operating the hospital) to disconnect or remove the artificial respirator from Kim. The Supreme Court of Korea ruled for the plaintiff, the patient.2

(1) Requirements of Discontinuance of Life-Extending Treatment

The majority opinion of the Supreme Court, after explaining that patients can refuse medical treatment but the discontinuance of the treatment directly related to preserving their lives should be restricted because “human life is precious and the right to life precedes all other fundamental rights [Grundrechte] under the Constitution,” sets the criteria for discontinuing life-extending treatment as follows:3

Where there is no possibility of recovering consciousness and no more activity as a person is expected, and the irrevocable death stage is reached where the natural death stage had already begun, if a life-extending treatment as medically futile body invasion is forced upon the patient, the human dignity and value (article 10 of the Constitution) are rather harmed. In the above exceptional circumstance, to protect the patient’s dignity, value, and right to pursuit of happiness as a human being by respecting a patient’s decision to face death corresponds to social norms and it does not violate the spirit of the Constitution.

Therefore, if it is determined that, upon reaching the stage of irrevocable death, the patient exercises a right to self-determination to die based on dignity, value, and the right to pursuit of happiness as a human being, life-extending treatment may be discontinued, barring special circumstance. Whether the irrevocable death stage has been reached should be decided by considering the medical opinion of the attending physician and other expert doctors as revealed by fact inquiry, treatment records examination, etc. as a whole.

2 An en banc decision rendered on 21. May 2009, case no. 2009Da17417. This case is known as the “Kim case,” after the name of the patient.
3 For the English translation of this decision provided by the Supreme Court Library of Korea, see https://library.scourt.go.kr/SCLIB_data/decision/6-13%20Supreme%20Court%20en%20banc%20Decision%202009Da17417%20Decided%20May%2021.htm. I made a very slight modification on the translation.

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The majority opinion derives the requirements for, and justification of, the discontinuance of life-extending treatment from the Constitution. The conflict between the fundamental right to life, or rather, the state’s duty to protect life (Grundrechtsschutzpflicht), and the fundamental right to self-determination (even to die), all of which are derived from article 10 of the Constitution, can be resolved by introducing the concept of “futile” life-extending treatments. If not considered futile, the state’s duty to protect life prevails even when running contrary to the patient’s decision. If a life-extending treatment is considered futile, the patient’s decision prevails. It exemplifies one of the typical ways of judicial lawmaking, i.e. inferring rules from the Constitution.

The problem is that this conclusion cannot be necessarily and unequivocally inferred from the Constitution. In fact, two of the thirteen Justices, Justices Hong-hoon Lee and Nung-hwan Kim, expressing dissenting opinions, derived different and more restrictive requirements for discontinuance of life-extending treatment from the same provision of the Constitution. They generally deny the possibility of discontinuance of life-extending treatment because, “[i]n [the] case of the treatment directly connected to the life, a patient’s right to self-determination can be exercised passively such as in rejecting treatment, and it cannot be exercised positively as in discontinuing treatment through removal of a life maintaining device, e.g. artificial respirator which is inserted and installed into patient’s body.” They emphasize that even passive rejection of treatment might not be admitted when there exist special circumstances, for example, when such a decision seems unreasonable from the viewpoint of ordinary persons. They allow for discontinuance of life-extending treatment only when “it is predicted that the patient will die within a very short time such as several hours or days.”

(2) How to Confirm the Patient’s Intent?

The majority opinion goes further in setting criteria for discerning patient’s intent:

In the case where a patient, preparing for his reaching the irrevocable death stage, expressed his opinion as to life-extending treatment rejection or discontinuance to a doctor (hereinafter “Advance Directive”), although a right to self-determination is not exercised at the time of treatment discontinuance, barring special circumstances where a patient’s intention was
changed after the advance directive, an exercise of right to self-determination can be acknowledged. However, such an advance directive should satisfy elements for a genuine exercise of a self-determination right. Thus after a patient capable of decision-making is provided with medical information directly from a doctor, he must decide soberly as to the specific medical treatment based on the medical information and his own values. The above-mentioned decision making process can be found to be valid as an advance directive to the doctor if it is clearly proved at the time when treatment is discontinued that the patient himself either prepared written directive for the doctor, or the treatment records, etc. of the doctor reveal the contents of decision-making made during treatment process.

When a patient enters the irrevocable death stage without providing any advance directive, the patient cannot be expected to express intention to demand change in treatment or discontinuance by exercising a right to self-determination since he has no possibility of regaining consciousness. However, where, given the patient’s usual sense of values or belief, etc., it can be determined that a patient would choose discontinuance of life-extending treatment, where it objectively corresponds to the patient’s best interests if a patient had been given an opportunity to exercise a right to self-determination, his intention to discontinue life-extending treatment can be inferred.

As with many other codifications of civil law, Civil Code prescribes juridical act of patrimonial character (Rechtsgeschäft) but does not address that of personal or non-patrimonial character such as consents to medical treatment. The Supreme Court created the requirements for a valid advance directive. It should be made prudently, based on medical information acquired directly from the doctor and the patient’s own values. The directive should be given to the doctor, and all the requirements must be met and clearly documented. The only legal ground the Supreme Court relied on in creating these requirements is the nature and essence of advance directive as a form of self-determination. Again, these requirements cannot be unequivocally inferred: For example, why should the patient be informed directly from the attending doctor? Moreover, it is also uncertain that the binding force of advance directive upon the patient who became unconscious. In fact, in a constitutional decision, Constitutional Justice Gong-hyun Lee expressed an opinion that an Advance Directive binding the patient who became unconscious cannot be regarded as a self-determi-
nation because it does not express the decision of the unconscious patient but that of the patient who was conscious.\textsuperscript{4}

The decision does not also provide the legal or methodological groundwork for the other alternative: discontinuance of life-extending treatment based on hypothetical consent (\textit{hypothetische Einwilligung}) of the patient and the perceived best interest of the patient (for example, \textit{Geschäftsführung ohne Auftrag}, articles 739 ff. of Civil Code). The dissenting opinion of Justices Dai-hee Ahn and Chang-soo Yang criticized the above-mentioned alternative on the ground that hypothetical consent cannot be regarded as a form of self-determination so that it cannot be justified by the right to self-determination, and stated that it should be substituted with a criterion of objective justification from the perspective of the legal order as a whole (\textit{Gesamtrechtsordnung}). Their opinion also presented other elements to be considered in the discontinuation of life-extending treatment when an advance directive is not present: the patient’s age; occupation; career; beliefs; attitudes towards life; diagnosis and prognosis of the disease; expectation of life extension; medical costs, family situation and suffering; the quality of the health care service provider; and medical opinions of attending doctor. Interestingly, the dissenting opinion emphasizes that the consent of the patient’s family is an important factor or rather independent (mandatory) requirement in deciding whether to discontinue life-extending treatment and infers this requirement from article 18(3) of Act on Organ Transplant Etc., which requires the consent of family of the brain dead to procure his organ and sets the procedure and condition of this consent. It shows another way of judicial lawmaking, i.e. analogy, but it is problematic because the existence of gap (\textit{Lücke}) was not demonstrated.

\textit{(3) Procedural Aspect}

The last issue related to discontinuance of life-extending treatment is a procedural concern.

\textsuperscript{4} A decision of the Constitutional Court rendered on 26. November 2009, case no. 2008Heonma385. This case was brought by Kim’s guardian and Kim’s family, and in this case it was disputed whether it was unconstitutional for the legislative body not to enact a statute on the criteria, process, and way of discontinuing life-extending treatment. The Constitutional Court of Korea dismissed the case.
The case was brought to court by the guardian, in the name of the unconscious patient (all other family members’ claims were dismissed). It was essentially a claim against the hospital to remove the artificial respirator. But what happens if neither the patient, family, nor hospital want to launch a lawsuit?

The majority opinion did comment on this issue: “Unless the patient files a law-suit [sic] directly in court, it is recommendable [sic] that a committee composed of expert doctors, etc. decides whether the patient has reached the irrevocable death stage.” This opinion not only lacks binding force, but also lacks legal ground. It is desirable and arguably necessary but beyond the limits of judicial lawmaking. It must be exactly the reason why the majority opinion just “recommended” it.

The concurring opinion of Justices Ji-hyung Kim and Ill-hoan Park also suggests a procedural requirement specifically for those cases where the patient has entered an irrevocable death stage without providing an advance directive. They state that guardianship of such patients should begin at the exact point when they have entered an end-of-life stage, because it is equivalent to being incompetent. They maintain that the guardian can make medical decisions and give consent for treatment including the consent for discontinuing life-extending treatment. However, they argue that the guardian should be required to get the permission of family court in advance, because discontinuing life-extending treatments typically hastens death. The legal grounds for this are located in article 947(2) of Civil Code, which requires the permission of family court when a guardian is placing or confining an incompetent individual in a private residence or other such facility. Again, the concurring opinion tried to justify their judicial lawmaking by analogy. However, they did not provide the methodological ground of analogy, and the only conceivable ground seems to be the materiality of this kind of decisions.

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5 The cause of action seems to be a claim to exclude the infringement (Beseitigungsanspruch) of the right to self-decision, which can be regarded as a private property acknowledged bases on article 10 of the Constitution.
3. Discussion

(1) The Kim Case’s Flaws and Limitations

As is shown, some part of the ruling in the Kim case arguably appears to go beyond the limits of judicial lawmaking. For example, the concept of irrevocable death stage and futile life-extending treatment cannot be unequivocally justified by the Constitution; The binding force of advance directive and the condition of valid advance directive is not unequivocally inferred from the nature and essence of advance directive; No justification is presented for the alternative of hypothetical consent. All these show that discontinuing life-extending treatment entails some policy issues which should be decided in the political process rather than by the courts.

More importantly, judicial lawmaking could not create procedural requirement and safe harbor.

The decision on whether to discontinue life-extending treatments already commenced needs a process. Discontinuing life-extending treatment hastens a patient’s death. The decision in the Kim case, of course, exempted the attending doctors and family members from criminal and civil liabilities, provided all the requirements were met. The problem is that the application of many of the requirements involves a series of questions difficult for family members and doctors to answer: When do the irrevocable death stage and a genuine exercise of a self-determination right exist? What does it actually mean to “prove clearly”? How can we infer the hypothetical intent of the patient and decide in their best interest?

Doctors might be unable to accurately assess whether the requirements are met, leading them to be sanctioned civilly or criminally. They might have the opportunity to defend themselves using the doctrine of excusable mistake (unvermiedbarer Tatbestands- oder Verbotsirrtum, articles 15, 16 of Criminal Code), but they would not feel it safe to discontinue life-extending treatments just relying on this doctrine. Thus, doctors still would refuse to disconnect artificial respirators and induce the patient’s family bring a lawsuit. It took almost a year from the date of filing for the Supreme Court’s final decision to be issued in the Kim case. During that time, considerable medical costs accrued. In fact, Foundation of Yeonse University launched a civil suit against Kim’s family, as Kims’ inheritors, for those costs. The court decided that a life-extending treatment shall not be allowed from the time when the court’s final decision to order to discontinue it is rendered and so the medical costs for the life-extending
treatment from the final decision cannot be imposed on the patient’s family.\(^6\) It might seem reasonable from the practical perspective. It means, however, that unassured doctors would defer the discontinuance and pass off the costs incurred during the law suit to the patient and their family. This decision is also problematic because an order to discontinue treatment does not transform the legal relationship between the patient and the doctor (not Gestaltungsurteil but Leistungsurteil) so there is no reason that the costs be discharged from the final judgement and not from the time when all the requirements for discontinuance are met and/or the patient’s family requests the discontinuance (if it equivalents “the termination of all or part of medical service contract” as the above-mentioned decision put it).

The decision on the Kim case was not methodologically justifiable and could not make much impact on discontinuing life-extending treatment practice. Then, what is the contribution of this bold judicial lawmaking?

(2) Legislative Reaction: The Enactment of Act on Hospice, Palliative Care and Decision on Life-Extending Treatment for the Patient in Dying Process

Interestingly, the representatives began to submit draft bills regarding dying with dignity/euthanasia around the time of the final decision on the Kim Case. On 9. December 2008, a draft bill entitled Act on Palliative Care and Hospice was submitted to National Assembly. This was followed by a draft bill entitled Act on Death with Dignity, in February 2009, and Act on the Right to Natural Death on the Last Stage of Life, in June 2009. Religious leaders manifested their objections to these bills once again, but public opinion was far more favorable to this new legislation endeavors, in part due to the influence of the decision on the Kim case.

At last, a bill entitled Act on Hospice, Palliative Care and Decision on Life-Extending Treatment for the Patient in Dying Process (hereinafter the “Hospice Act”) was passed and promulgated on 3. February 2016. It comes into effect on 4. August 2017, and the most important features of this law are summarized as follows:

\(^6\) A decision of the Supreme Court rendered on 28. January 2016, case no. 2015-Da9769.
The attending doctor can, and immediately should, discontinue life-extending treatment (a) when the patient is in ‘the process of dying’ and his intent to discontinue care is confirmed by (i) Plan for Life-Extending Treatment, (ii) advance directive, or (iii) family statement, and it is not against the current intent of the patient in ‘dying process,’ or (b) when a decision for discontinuance has been rendered, according to article 18 of Hospice Act [articles 15, 19(1) of Hospice Act]. This new legislation resolves some part of flaws and limitations of the ruling in the Kim case, modifies other part of the ruling, and also supplements the ruling:

First, it introduces the concept of a “patient in the process of dying”, which is equivalent one that of the patient in the irrevocable death stage in the decision of the Kim case (article 2 of Hospice Act). However, it requires that death is considered to be imminent, so the permissibility of discontinuing life-extending treatment might be more restricted under the Hospice Act than under the ruling of the Kim case.

Next, the Hospice Act crystalizes the requirements for discontinuing treatment and provides detailed requirements for valid advance directive, including the duty to inform and detailed methods for confirming the patient’s intent, and also introduces another alternative – Plan for Life-Extending Treatment (articles 10, 12 of Hospice Act). It also outlines the procedure for determining whether a patient is in process of dying (article 16 of Hospice Act), and whether the patient’s intent is to discontinue life-extending treatment (article 17 of Hospice Act).

Finally, the Hospice Act then substitutes the substantive criteria of hypothetical patient intent and their best interests, with the procedural criteria of requiring the consent of minor’s parents, or unanimous consent of all the family members in cases where the patient is unconscious and did not provide an advance directive (article 18 of Hospice Act).

Unfortunately, the legislation does not address the issue of exemption of attending doctor who followed the required process but did not meet the substantive criteria to justify the discontinuance of life-extending treatment by mistake. It does not also address the burden of medical costs incurred during the period wherein efforts are being made to meet all the requirements.

Despite that, it is undeniable that the most important contribution of the Kim case or the bold lawmaking in the Kim case is this legislation.
III. Treatment Uncovered and Unauthorized by National Health Insurance

1. Backgrounds: Health Care Financing System in Korea

Most doctors in Korea are private practitioners who either have their own offices providing primary or secondary care, or who are hired by private hospitals. Some doctors are public servants directly hired by the government, while others are employees hired by the public hospitals established by central or local governments. The proportion of the public doctors is considerably lower when compared to public health care systems in many other countries. Their service and price of it are, however, highly regulated. This is because most medical costs are reimbursed by NHI.

NHIS is a public foundation established by law as the insurer of NHI (articles 13, 40 of National Health Insurance Act). NHIS provides its insured and their dependents with “medical care service” [article 41(1) of National Health Insurance Act].

(1) Compulsory Public Insurance

First, who is insured under NHI? All Korean nationals and their dependents are insured ipso jure, except those who are eligible for Medical Aid or Medical Protection for Veterans, etc. (article 5 of National Health Insurance Act). All insured individuals pay an insurance premium determined primarily by ability to pay (articles 69 ff. of National Health Insurance Act). If the premium is not paid, it may be collected through national tax collection (article 81 of National Health Insurance Act). These features are what classify it as a compulsory public insurance (Sozial- und Pflichtversicherung).

A compulsory insurance system restrains private autonomy, especially negative freedom of contract (also derived from article 10 of the Constitution). Some of the insured have requested a constitutional review of relevant provisions of National Health Insurance Act for this reason. The Constitutional Court of Korea, however, has found repeatedly it to be constitu-

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Compulsory insurance is necessary for public insurance, and public insurance guarantees individuals, especially those who cannot afford it, a decent level of health care service and, incidentally, also contributes to income redistribution, by fixing premium by the income level of the insured. Moreover, there is a premium rate cap so that it does not rise directly in proportion to the income level, and the absolute level of premiums is also low when compared to those in other countries, because NHI does not cover all medical costs, but rather only a considerable portion of it, leaving the rest as deductibles, i.e. out-of-pocket-costs. This does not violate the principle of proportionality [article 37(2) of the Constitution].

(2) Nomination Ipso Jure as a Health Care Service Provider for NHIS

The next issue is more controversial. As is explained previously, NHIS should provide the insured and their dependents medical care services [article 41(1) of National Health Insurance Act, Sachleistungsprinzip]. NHIS, however, owns only a few health care institutions and so it has no choice but to contract with private independent doctors and hospitals.

When NHI system was first introduced in Korea in 1977, the government tried to negotiate contracts with individual health care service providers (Voluntary Contract). It could not, however, attract a sufficient number of providers because the payment levels proposed for services were low. In a 1979 amendment, the government was granted the authority to order private health care service providers to contract with NHIS (Compulsory Contract). This was then substituted with a new regime in 1999 (Nomination Ipso Jure). Now, all health care service providers, including pharmacists, are classified as NHIS health care providers ipso jure, as soon as their offices were opened [article 42(1) of National Health Insurance Act]. If a health care service provider (the ipso jure health care provider for NHIS) is visited by a Korean national who resides in Korea (the ipso jure insured of NHI), then the health care provider cannot refuse to treat the patient (Duty to Treat).8

8 The breach of duty to treat is criminally punished (articles 15, 89 of Medical Service Act).
This system has created serious tensions as regards the freedom of occupation of doctors (Berufsfreiheit, article 15 of the Constitution), and the autonomy of health care service consumers (derived from article 10 of the Constitution). Doctors have challenged the system by requesting a constitutional review of relevant provisions of National Health Insurance Act several times. The first decision was rendered on 31. October 2002.\textsuperscript{9} In that case, a minority opinion of Constitutional Justices Dae-hyun Han and Sung Kwon maintained those provisions of the act was unconstitutional and should be voided because it would damage freedom, creative initiative, and cultural development: “Most uniform control systems are inherently inefficient, and the long-term effectiveness of the system is questionable.” The majority opinion, however, was not in agreement.

The majority opinion argued that the legislative objective of this system was to secure sufficient health care service providers to guarantee the rights of people to access health care services, thus justifying its existence. The problem is whether this system is the least restrictive option for doing so. In this regard, it is important that legislators have broader discretionary powers to enact statutes related to socio-economic issues. In such cases, the Constitutional Court can only review whether predictive judgment or assessment of legislators is clearly erroneous. The majority opinion denied the proposition that the assessment of legislators—it would be impossible to guarantee health care service to all without adopting this system or with introducing some exceptions—was clearly wrong, pointing out the fact that the portion of public health care service is relatively low in Korea (15.5\% in terms of the number of beds, quite low compared to 33.2\% in U.S., 35.8\% in Japan, 43.2\% in Australia, 48.5\% in Germany, 64.8\% in France, 95.8\% in U.K. and 99.4\% in Canada) and only 50~60\% of all the costs are covered by NHI (also quite low compared to near 100\% in most developed countries).

\textit{(3) Standards and Costs of Health Care Service Covered by NHI}

The last issue regarding NHI relates to the standards and costs of health care services provided by NHIS service providers. Health care service

\textsuperscript{9} A decision of the Constitutional Court, case no. 99Heon-ba76, 2000Heon-ba505 (consolidated.).
providers are reimbursed by NHI for their services (article 47 of National Health Insurance Act). As reimbursements have been, and still are, primarily based on a fee-for-service system, a comprehensive schedule stipulating standards and costs of services covered by NHI is needed. The Regulation for Providing Reimbursed Services stipulates those standards and costs (hereinafter “Regulation”). If a doctor wants to be reimbursed for services, he should follow the Regulation.

The Regulation indirectly constrains a doctor’s discretion to choose safe, effective, and economical treatments. Accordingly, some doctors have requested constitutional reviews of the Regulation. The first, and most important, decision was handed down on 30. August 2007. In that case, a pediatrician requested a constitutional review of a part of the Regulation related to allergy testing for the diagnosis of atopic dermatitis. He maintained that current Regulation only allowed a limited scope of tests, thus infringing upon his freedom of occupation, right to property, and the patient’s right to health. The majority opinion ruled against him. The opinion stated that NHI is an insurance system, so it must balance budgets and expenditures. Therefore, the scope of services covered by NHI must inevitably be limited. The standards of the Regulation are set reflecting professional opinion and are reasonable. In addition, articles 10 and 11 of the Regulation provide for the possibility of anyone to request the incorporation of new treatments, drugs etc. into the standards. In this regard, the above-mentioned part of the Regulation cannot be said to be unconstitutional.

2. Treatment Uncovered and Unauthorized by NHI

On the one hand, doctors can choose the best treatments and medications independently and discretionally. Doctors are not liable for malpractice

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10 It is noteworthy, however, that NHIS recently introduced a case-payment system based on the diagnosis-related-group (DRG) and is trying to expand it.
12 Doctor’s discretion to choose treatment is established under the Korean medical malpractice law. See a decision of the Supreme Court rendered on 12. June 1984, case no. 83Do3199 (criminal case) and a decision of the Supreme Court rendered on 14. October 2010, case no. 2007Da3162 (civil case).
13 An en banc decision of the Constitutional Court, case no. 2006Heon-ma417.
simply because they do not follow widely accepted practices, as long as they have reasonable grounds for choosing alternative treatments, and inform their patients of possible benefits and risks of each. On the other hand, however, treatments uncovered by the NHI are not reimbursable by the public system. The question then, is how should doctors be compensated for their services in such cases?

Constitutional Justice Dae-hyun Cho’s concurring opinion in the ruling of the above-mentioned decision addressed this issue. He found that the state’s duty to protect the health of all the people [article 36(3) of the Constitution], the patients’ right to choose a health care service (derived from article 10 of the Constitution), and service providers’ freedom of occupation especially in deciding treatment methods and being compensated properly, are all rights that should be protected maximally. Uniformity in health care services cannot protect all these rights or interests optimally. Thus, the Regulation should be interpreted as prescribing only the scope of treatments covered by NHI and should not be interpreted as forbidding doing uncovered treatments on the out-of-pocket basis (Verfassungskonforme Auslegung).

However, the Regulation lists and prescribes not just treatments and medications covered by NHI but also those uncovered by NHI. It is clear that performing treatments uncovered, but authorized by the Regulation is subject to freedom of contract between the health care service provider and the patient. That is exactly the reason why many doctors prefer to administer treatments uncovered by NHI—they can set their own prices. The problem is that there exist treatments and medications that are not only uncovered by NHI, but are also unlisted and unauthorized in the Regulation.

In fact, according to National Health Insurance Act, the Minister of Health and Welfare has the power to set the standards and fees for health care services covered by NHI and not those uncovered by NHI. Constitutional Justice Cho also pointed out that it would be an administrative rule-making beyond the scope of delegation of the statute if the Regulation was interpreted as also regulating treatments uncovered and unauthorized.

NHIS, however, had a different view upon the Regulation. It considered it illegal to provide uncovered and unauthorized treatments for value from the patient, at least who was also an insured of NHI. Moreover, it attempted to sanction this understanding by itself. National Health Insurance Act empowers NHIS health care service providers to make restitution for “what they received from the insured patients by fraud or any other unjust way.” Such restitution may be deducted directly from future NHIS reimb-

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bursements (article 57 of National Health Insurance Act). In such cases, NHIS will return the funds to the patient. While this provision seems originally to have been intended to prevent providers from receiving payment directly from the patients and not being reimbursed by NHIS for the services covered by NHI, NHIS utilized that power even when treatment uncovered and unauthorized was provided for value, of course, voluntarily agreed by the doctor and the patient.

Some doctors brought lawsuits against NHIS to request the cancellation of the adjudication to order restitution only in vain.\textsuperscript{14} Things changed as a result of an administrative case brought in the Korean courts by the Catholic Education Foundation, a legal entity operating the Catholic Hospital, one of the biggest health care providers in Korea.\textsuperscript{15} The issue in that case was whether the value for uncovered and unauthorized medications prescribed for leukemia should be subject to restitution. All the Supreme Court Justices agreed that at least part of that adjudication should be cancelled and, for it, the precedent should be overruled, but they had different opinions about the scope of cancellation and the reason of it. The dissenting opinion of Justice Su-ahn Jeon was that treatment uncovered and unauthorized does not fall under the hospices of NHIS and its standards. The majority opinion, however, upheld the precedent that even treatment uncovered and unauthorized is under the control of NHIS and the Regulation, and just added an exception that providing treatments uncovered and unauthorized for value would not constitute ‘fraud or any other unjust way’ when (a) a procedure for incorporating that treatment in the standards had not been provided at the time of treatment, or the procedure had not made a dependable resort considering the nature of the treatment, the urgency of it, the period it was expected to take etc. at the time of treatment so that it had not been willful avoidance of the procedure; (b) the treatment was medically safe, effective and necessary; and (c) the insured had been sufficiently informed in advance of those facts and had consented voluntarily to cover the costs. The dissenting opinion of Justices Nung-hwan Kim, Byung-dae Park and Yong-duk Kim agreed on that point, but the majority opinion stated that the burden of proof of all the requirements for the exception should lie with the plaintiff, the health care service

\textsuperscript{14} For example, a decision of the Supreme Court rendered on 15. June 2007, case no. 2006Du10368.
\textsuperscript{15} An en banc decision of the Supreme Court rendered on 18. June 2012, case no. 2010Du27639, 27646 (consolidated).
provider who sought a reversal of the ruling. The dissenting opinion of three Justices stated that the burden of proof should lie with the defendant, the administrative agency (in this case, the Minister of Health and Welfare).

Neither the majority opinion nor the dissenting opinion provides detailed legal justifications for the exception. The only legal argument presented was that “health care service providers have a duty to provide best service (article 4 of Medical Service Act), and the insured patients also have a right to effective and proper health care service and reasonable insurance premium.” The majority opinion seemed to rely on the requirement that the statutory interpretation of one provision should be harmonized with not only the other provisions of the same statute, but also provisions of other statutes: Article 4 of Medical Service Act should be considered when interpreting the concept of “fraud or any other unjust way” in the meaning of article 57 of National Health Insurance Act. This argument however, is flawed because the issue is not just whether NHIS can collect restitution, but rather if the duty to restitute or the unjust enrichment exits at all. That is, what matters is whether the Regulation can govern the validity of medical service contract on the treatments uncovered and unauthorized, which is the prerequisite for the restitution. The article is relevant only to the former issue, and not the latter. In this regard, and when considering all the detailed requirements which the majority opinion sets out, this exception should be classified as a judicial lawmaking rather than statutory interpretation.

3. Discussion

It seems obvious that both the Constitutional Court and the Supreme Court were not fully satisfied with the current NHI system. It restrains freedom of occupation, freedom of contract, and self-determination of consumer too much. The Constitutional Court, however, could not make any change. It is probably because there existed a few alternatives to resolve this problem, e.g. reintroducing contract system between NHIS and health care service providers, or allowing contract on the treatment uncovered and unauthorized, and choosing one among them is a policy question that should be decided by the legislative body and not by the judiciary including the Constitutional Court. The problem was that health care financing issue is very controversial and burdensome for the legislative body, also. Thus, the le-
Legislative body did not make any change for years. Again, it was the Supreme Court that made a change. More importantly, the requirements of the exception are too strict. Health care providers could provide the treatments in question when funded by a third party, for example, a pharmaceutical company, without this exception. If health care providers can establish the medical safety, effectiveness, and necessity of a treatment, they are typically able to find third-party funding or follow the requisite procedures. With this exception, health care providers can hardly provide services when they cannot establish the medical safety, effectiveness, and necessity of the treatment so that they cannot find third-party funding. In fact, the practical impact of the decision seems to be marginal. Then, what is the contribution of this decision?

Again, it is probably to stimulate or enable the legislative reaction. Relying on the legal authority of the Supreme Court, the legislative body could open a door to incorporate more treatments with imposing more financial burden on the patients. First, article 41-3 was added to National Health Insurance Act through an amendment on 3. February 2016. Article 41-3 imposes a duty on health care service providers, pharmaceutical companies, drug importers, and medical equipment manufacturers and their importers, to file a request to review new treatments, drugs or medical equipment not yet covered or authorized on who want to utilize them and also imposed a duty to decide upon the request within the determined period on the Minister of Health and Welfare. This provision will come into effect on 4. August 2016. And second, article 41-4 was added to National Health Insurance Act through an amendment on 22. March 2016. Article 41-4 created a new category called “selective health care services.” Such services do not need to be proven economical or effective. When it is not economical, but is potentially beneficial, it can be incorporated into the standards as a selective health care service. NHIS can set different levels of coverage and deductibles for these services, which might imply that most of the medical costs for selective services will not be covered by NHI. Thus, this category is not designed to cover new treatments, but to subordinate new treatments to the control of NHI system. This provision will come into effect on 23. March 2017.

Both amendments reflect the ruling of the Supreme Court’s decision, of course, not by allowing private autonomy but by subordinating even the exception to the administrative control. More importantly, it shifts the burden of health care provider and the patient when choosing the treatment
uncovered and unauthorized to pharmaceutical companies, drug importers, medical equipment manufacturers, their importers, and NHIS.

**IV. Conclusion**

Both issues were highly controversial. There were people who supported discontinuing life-extending treatments based on their ethical or socio-economic views, while there were people who strongly opposed it based on moral, ethical, or religious beliefs. Some thought uncovered and unauthorized treatments should be governed by voluntary agreement between health care service provider and the patient based on their belief in freedom of occupation of health care service provider, freedom of consumer choice, freedom of contract, free economy and need for development of medicine and medical industry. Others concerned about the socio-political risk that it might collapse the National Health Insurance system which has provides people health care service with relatively low financial burden for dozens of years.

Facing such complex and controversial issues, Korean legislators have been reluctant to involve themselves, out of fear it might cost them political support. In these situations, the Korean judiciary has empowered legislators through bold judicial lawmaking. In doing so, the Korean judiciary sometimes went beyond the limit of judicial lawmaking, and could not resolve all the problems by judicial lawmaking either. Despite that, this kind of lawmaking was, to a certain extent, successful, not because it resolved the actual cases, but because it opened the way for legislative reaction. Relying upon the legal, moral, and intellectual authority of the highest court, legislators could now make reasonable compromises in this highly contested realm.

There exists some difference between two examples, though. The judicial intervention was not as successful in dealing with end-of-life issues as they related to the health care financing system. In fact, the Supreme Court could have adopted the dissenting opinion of Justice Su-ahn Jeon about the latter issue and avoided making such a complex and poorly-grounded exception. However, the majority opinion went in a different direction, and the legislative reaction was also to reincorporate new treatments and control them instead of allowing voluntary contract. It is probably because, in the former issue, only or mainly moral and religious resistance of some people against an end-of-life decision mattered. In the latter
issue, on the contrary, not only political and socio-economic resistance of some people against pricing an equal right to health care for allowing freedom of doctors and rich patients but also the material risk to collapse the NHI system which had been successful for decades of years mattered. What the legislative body and judiciary feared and could not address successfully in the end was this material risk.
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