

Hein | Merkt | Meier | Bruns | Bu | Vöneky | Pawlik | Takahashi (eds.)

Relationship between the Legislature and the Judiciary

Contributions to the 6th
Seoul-Freiburg Law Faculties Symposium



Nomos

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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.

Freiburg, November 2017

The Editors

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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-

tionship between the legislature, judiciary, and civil society, I will propose the principle of division of justice. In relation to this, I will shortly visit the problem of constitutional trial and 'judge made law'. From the discursive perspective, on reflecting that the judicial process is also a part of the social communicative process, I will examine judicial justice seeing it as part of the problem of communication. Lastly from the subjective perspective, I will comment what justice could mean for an individual judge who has to find the right answer in hard case, likening justice to a 'vanishing point'.

Dilemma intrinsic in the Concept of Justice

In the idea of justice exists, intrinsically, a dilemma. This dilemma has its roots in the problem surrounding the relationship between the ethics of 'the right' and 'the good'. Looking at the idea of justice from the perspective of 'the good', justice is considered something good or valuable and awakens us to the fact that there is some purpose in our lives that we should all strive for. And this purpose, in the broad sense, is the pursuit of happiness. Aristotle's teleological point of view represents the ethics of the good. From the perspective of 'the right', justice is considered as taking the right action. Here justice is accompanied by the duty to obey to the general rules or procedures guiding our actions. Kant's deontological point of view represents the ethics of the right. Our most social institutions focus upon the allocation of resources, rather than upon the pursuit of happiness. That means most institutions are conceptualized from the deontological perspective rather than teleological. So, where there is conflict between consideration for values that we strive for and the rules/processes that impose a certain duty, it seems that duty prevails.

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 inhumanness 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-

scandalism to legal positivism occurs.¹ 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.² 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

1 Paul Ricoeur, *Vom Text zur Person. Hermeneutische Aufsätze (1970-1999)*, übersetzt. und Hrsg. von Peter Welsen, Felix Meiner Verlag, 2005, S. 278, 280.

2 About uncertain concept, normative concept, discretion, and general clause see in more detail Karl Engisch, *Einführung in das juristische Denken*, 11. Aufl., Kohlhammer, 2010, S. 188.

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

3 Suktæ Lee, Insup Han, eds. et al, *Korean Public Interest Lawsuits on Human Rights* (in Korean), Kyungin Publishing, 2010.

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.⁴ 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.⁵ 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'.⁶ The constitution is basically a structure embodying autonomy of the political process. Therefore although the constitutional

4 On this see Un Jong Pak, ed., *NGOs and the Rule of Law* (in Korean), PAKYOUNGSA, 2006, Chapter 4.

5 Johann Braun, *Einführung in die Rechtsphilosophie*, Mohr Siebeck, 2. Aufl., 2011, S. 55.

6 7 Larry D. Kramer, *The People Themselves. Popular Constitutionalism and Judicial Review*, Oxford University Press, 2004, p. 31.

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 creative⁸ 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

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.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-

10 Matthias Jestaedt, “Richterliche Rechtsetzung statt richterliche Rechtsfortbildung. Methodologische Betrachtungen zum sog. Richterrecht”, *Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung*, Hrsg. von Christian Bumke, Mohr Siebeck, 2012, S. 69.

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.

The Justice as a 'Vanishing Point'

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').¹¹ 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.

11 Johann Braun, *Rechtsphilosophie im 20. Jahrhundert. Die Rückkehr der Gerechtigkeit*, Verlag C. Beck, 2001, S. 314.

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.

12 Ulfrid Neumann, “Wahrheit und Autoritaet im Rechtsdenken”, 2013. 4. 6. Korea University Invited Lecture.

13 Ronald Dworkin, *Justice for Hedgehogs*, Harvard University Press, 2011, p. 126.

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

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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

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 [...]."³

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 onehand, 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

3 BVerfGE 138, 64 (93 s. para. 86) [2014].

- of the constitutional court and the other courts,
- of the constitutional court and the legislature,
- of interpretation and judicial law-making (*Rechtsfortbildung*),
- of objective and subjective elements in interpretation
- and of the annulment and interpretation of norms.

It is thus worth attending to the justification, authorization and application of the constitution conformant interpretation in more detail; I cordially invite you to pursue this task with me during the next twenty-five minutes.

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.