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Gunnar Duttge, Sang Won Lee (Hg.)

The Law in the Information and Risk Society

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Preface

The information and risk society poses a new challenge for the law in all its fragments. Modern media communication and technologies increase people's prosperity while stating new risks with not uncommonly devastating crisis-potential: The banking crisis, the safety net for the euro zone and the nuclear incident in Fukushima are only the latest forms of those specific modern common dangers which the law is facing – in many cases due to it's domestically limited validity - not or not sufficiently prepared.

The frequently transboundary and supranatural relevance of these new risks lead to a inevitable international cooperation concerning the efforts of a legal risk limitation; in respect of the different constitutional and cultural circumstances, however, this is a difficult exercise. Initial to all common efforts of dealing with this challenge there is the international and intercultural dialog, even if the implications and the eventually implemented solutions drift apart at national level in the end. In order to promote the international dialog within the jurisprudence there was a conference in October 2010 held by the faculty of law of the Georg-August-Universität, supported by the chair of GAU, together with the faculty of law of the Seoul National University discussing main issues of law in a modern information and risk society. With this volume the results of this convention shall be made accessible to everybody interested. Thereby it illustrates not only the variety of new issues and aspects, but also reveals that this can only be the beginning on the way to a deeper understanding of the complex correlations.

Göttingen/Seoul, May 2011 *The Editors*

Greeting from the Faculty of Law of Georg-August-Universität Göttingen

Gunnar Duttge

My dear colleagues of the respectable and extremely renowned law faculty of the Seoul National University,
my dear colleagues from Göttingen,
ladies and gentlemen, dear guests,

it is my great pleasure to cordially welcome all of you – and a very warm welcome goes to our guests from Seoul who travelled so far to be with us today. I may express this warm welcome in my position as a medical and criminal law professor as well as on behalf of my colleague Prof. Langenfeld, dean of the local law school, who apologizes for not being here due to other commitments. However, she sends her warmest regards.

Last evening, vice president Prof. Münch already greeted and welcomed you in the name of the chairmanship of Georgia Augusta. Göttingen's law faculty and its members are no less cheerful. Some of these members are currently present or will join us in the course of the next hours or by tomorrow.

The immediate reason of our meeting is an invitation by Göttingen's faculty of law which joins in the larger context of Georgia Augusta's endeavors to strengthen the existing international cooperation and to promote as well as extend internationalization of the sciences.

In times of globalization across all areas of life, having been initiated long ago, it should be natural and taken for granted that one's own thoughts in the course of

Law and its scientific adaptation don't end at the national borders. Therefore we need to pursue with great interest the solutions and debates about similar, often identical legal questions of other legal systems. Thereby we are offered the opportunity to critically analyze and confront our own legal system. For criminal law, however, the amazingly well established relationship with our colleagues from South Korea is no news. For decades now, and for hopefully many more, professors as well as doctoral students have vivaciously exchanged ideas. Globalization, nevertheless, reaches all areas of law. It certainly embraces civil and constitutional law and all other interdisciplinary fields, one of which is medical and bio law, a traditional field in Göttingen which has seen an upward trend in recent years. The local center of medical law has strong ties with Ewha University's Institute for Biomedical Law & Ethics in Korea.

With regards to recent developments in Göttingen's relationship to Seoul National University and its law faculty, the meetings and lecture events on the occasion of the opening of a branch of Göttingen University in Seoul are especially worth mentioning.

Just last year we were fortunate to welcome here in Göttingen the president of the Seoul National University, who, during his visit to Göttingen's Center for Medical Law, voiced a strong interest in further communication and exchange of ideas, particularly between both law schools. With this background, we can take it up from here and with this conference further strengthen existing relations.

Besides our vast unified interest in getting to know each other for institutional reasons, we join today chiefly because of our shared pursuit of the exchange of scientific ideas and for the purpose of deepening our knowledge of recent queries of Law in today's forged ahead risk and information society.

As you all know, Law is facing new societal challenges which can no longer be coped with through conventional measures. One example is society's growing heterogeneity regarding its constitution and concomitant problems of integration, another one the exorbitant increase in significance of the media and new forms of communication in all public areas. An especially demanding societal challenge is the – in former times unimaginable – dimension of interconnectedness and all the consequences thereof, such as informational protection of privacy, on one hand, and on the other hand the amendment of responsibilities regarding the legal sanctioning of harm done, through a struggle with incomprehensible complications of causalities. These catchwords are only a few of many. They stand for all the new problems and questions which affect the interdisciplinary fields of legal sciences.

The array of relevant topics is broad and hardly lucid, yet we – and I mean all of us as we are gathered here today – seemingly managed to perfectly single out the most essential questions for this conference which we will go on to discuss in detail later throughout the day.

I am exceptionally thrilled about everything we are going to hear and further deliberate over today and tomorrow. I wish to already thank everyone very much who helped facilitate this conference, and make it possible in the first place, by

contribution within the framework of our discussions. I wish to especially thank my dear colleague Prof. Kuk Cho, who on short notice accepted my offer and within no time set the course for today's conference on track as well as established contacts. It would not have been possible to get together here in Göttingen today without your committed support, dear Prof. Kuk Cho. Thanks again!

Now, I would like not to further prolong the commencement of the scientific part of this conference and therefore wish, on behalf of the dean of Göttingen's faculty of law, for the conference to run smoothly.

One of the most popular German poems includes the following beautiful and apt motto: "Inherent to every new beginning is a special magic".

SECTION 1:
CONSTITUTIONAL PRINCIPLES, DATA PRIVACY AND MEDICAL LAW

Liberal Democracy in State of Emergency: Seen By Standing on the Shoulders of Carl Schmitt*

Hong Sik Cho (趙 弘 植)

I. The Current Global Financial Crisis and Korea's Response

Even though the global financial crisis was deemed to be as severe emergency as the worldwide depression of the 1930s, the Korean government has not yet taken *extra*legal measures. Since basic constitutional norms presuppose a background of social and political stability, at times of emergency, whether it being "military exigencies in the theater of war" or "less grave, but unusual and urgent conditions" such as current financial crisis, the basic constitutional norms are subject to suspension. The Constitution of Korea, in Article 76, provides that in time of a grave financial or economic crisis, the President may take the minimum financial and economic action or issue orders that have the effect of an Act when, and only when there is an urgent need to take measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly. Despite the broad presidential powers prescribed by the Constitution, I would say that the Korean government has responded to the financial crisis with much constitutional care and fully aware of the temptation of over-reactions.

However, aside from the *extra*legal measures, the Korean government did take every means without departing from established principles. Among the measures taken by the Korean government has increased expenditure on research and development, introducing numerous legislative bills, taking various administrative

* This is a revised version of the paper published at *National Taiwan University Law Review* vol. 4, no. 3, 55-84 (Dec., 2009).

options, providing sufficient liquidity and executing budget earlier than scheduled. These means taken by the Korean government seemingly are within the scope of its administrative discretion. However, the Korean Assembly was criticized for impeding governmental efforts by not timely resolving the legislative bills. In particular, because of the deadlock surrounding the controversial media bills, the Korean Assembly could not focus on bills which affect the daily lives of people such as a bill aimed at reviving small-scale shops. In spite of apparent lack of sense of responsibility on the side of the political leaders, the Korean economy is gradually recovering from its downturn.

Such being the case, the governmental reaction to the crisis has not been subject to judicial review. There are a handful of the Constitutional Court cases dealing with the "IMF bailout crisis", a financial crisis the Korean people deem far severer than the current crisis. Even though much more swift and radical measures were taken by the Korean government, none took on the *extra*legal form, and none were declared unconstitutional by either the Supreme Court or the Constitutional Court. Given the lack of *extra*legal actions taken by the government and relevant precedents, I would like to address general issues related to emergency power from theoretical perspectives.

II. Why Carl Schmitt in the State of Crisis?

Carl Schmitt, a jurist with an enormous influence on German political and legal thought, is known not only for his charge that liberalism is nothing but one ideology seeking to impose upon the whole its own partial conception of the good life, but also for association with the Nazis. Surprisingly, the English-speaking world including the United States in the aftermath of September 11 has recently had "a renaissance of interest" in his work. Schmitt's critique captures better than contemporary critics the problematic nature of liberalism at least in some aspects, and I would like to examine Schmitt's well known insights and highlight some lessons for times of crisis by offering my own response to what I regard to be Schmitt's points.

According to Schmitt, the stupidity of parliaments provides the occasions for executives to exercise the sovereign power that always resides in the executive. Schmitt's antiliberalism seems to get more relevant in times of crisis as reflected in the post-911 attention of constitutional theorists. As Sanford Levinson points out, former US President Bush's response to the September 11 attaches presents constitutional theorists with the kind of problem Schmitt seems to have addressed. In this sense, we can take note of lessons from Schmitt.

III. Schmitt's Diagnosis of Liberal Democracy's Weakness

Schmitt's authoritarian theory of law and politics provides that Constitutional democracy is self-contradictory and illusionary, which is revealed in case of crisis. According to Schmitt, to overcome crisis the constitutional principle should give way to unconstrained political sovereignty so that the sovereign can follow the collective will of the people without any constraint. Further, Schmitt criticizes liberalism asserting that the liberalism is illusionary because neutrality, the rule of law, and constitutional democracy rest on contradictory premises. He also argues that the liberalism is hypocritical because liberals hide their particular purposes and selfish economic goals by invoking non-existent universality. To Schmitt, constitutional democracy is a mere amalgam of two contradictory components, namely, the liberal component of constitutionalism and the political component of democracy. While Schmitt regards a genuine democracy as the sovereign authority of the collective unity of the people, constitutionalism does not concretize any political substance. The purported neutrality of the latter, in Schmitt's view, is used as an instrument of the liberal bourgeoisie to defend its private and economic interests. Schmitt states that the individualism inherent in individual human rights can be reduced to the selfish goals of the bourgeois while the separation of powers prevented each constitutional institution from exercising sovereign authority in Schmittian sense. As such, in constitutional democracy, a pure democracy where people express and accomplish their collective will cannot exist. However, it is both practically and conceptually possible to establish a government with two components together. In particular, liberalism is not devoid of political substance in the sense that discrimination and bias, specifically in Kantian liberalism, is the first and foremost enemy of a liberal community where people respect each other's dignity and freedom on the basis of equality.

Having told this, while Schmitt raises some disturbing questions, his provocative thesis, I think, may help us to recognize a disturbing aspect of liberalism as evidenced in the current global financial crisis. The first step to scrutinize Schmitt's critiques is to grasp what he means by "the political." Contrary to the liberals' emphasis on universality of all human beings, Schmitt argues that "in the domain of the political, people do not face each other as abstraction but as politically interested and politically determined persons, as citizens, governors or governed, politically allied or opponents." For example, even if the modern democracy established universal human equality, it does not necessarily mean the disappearance of substantive inequalities, because inequality would likely shift in the economic sphere so that this area would "take on a new, disproportionately decisive importance." Schmitt warned that "under the conditions of superficial political equality, another sphere in which substantial inequalities prevail will dominate politics." I think this provides a significant insight for understanding "the current dominance of economics over politics."

Schmitt's reflection sends a wake-up call for those who believe in rational individualism. Rational individualism puts too much emphasis upon rationality and ignores that it is through political discourse in public sphere that democratic citizens rather than rational consumers can introduce questions of values into deliberation. A value is constituted through political action, an action through which political agents create a common value by committing themselves to that value. Without a plurality of competing forces, politics is displaced by mere trade between selfish interest groups or rational calculation by technocrats. The current global financial crisis is a dramatic example of the dangerous consequences that too much emphasis on rationality can brings up. The problem was not a failure of rational analysis but, according to President Obama's diagnosis, was "a collective failure of responsibility in Washington, on Wall Street and across America." More likely, Schmitt would argue that the problem here is the concept of rationality itself. The myopic rationality rewarded "those who try to game the system", instead of "those who compete honestly and vigorously within the system."

I think that Schmitt successfully shows the dangers that the dominance of the rational individualism bring to the democracy. Liberal democracy, as a regime, is much more than a mere form of government given that it concerns the conceptual ordering of social relations. A defining factor of liberal democracy is pluralism, meaning the dissolution of one and only idea of the good life. Pluralism not only secures individual equal liberty for all, but also legitimates conflict and division. However, rational individualism overlooks that the essence of pluralism consists in recognizing that there must be a wide variety of perspectives concerning values and thereby sees objectivity as belonging to the things themselves. My concern is that too much emphasis on rationality would make rationalism dominate modern democracy. This may be a real threat to democracy because it may negate the inevitable conflict of values and aim at a universal rational consensus. But then, I do not advocate an unconstrained extreme pluralism because such value relativism does not recognize that certain differences are constructed as relations of subordination.

Is there any other way to make whole our liberal democracy project than to resort to rationality? Once the pluralism is accepted, there seem to be three options in specifying the terms under which people with different conceptions of the good can live together in political association. First is to find procedures to deal with the differences. However, the creation of a mere modus vivendi that regulates the conflict among different views is not enough because it will weaken the state to such an extent that it reduces to a referee with a purely instrumental function and thus making the unity a mere convergence of interests, not a proper form of unity of a plural society.

The second option would be to emphasize priority of the right over the good. As Rawls points out this is to establish political justice that all "reasonable" citizens would support despite their deep doctrinal disagreement on other matters. However, Rawl's conception of justice, similar to social contract metaphor, appeals

to an individual's idea of rational advantage. In addition, as Schmitt points out, too much emphasis on universal morality would place oneself in the field of ethics instead of the field politics because being blind to dynamic interactions among members, one would deny the need to constitute collective identities.

The third option is to shed a new light on politics. Some of liberal theories of a well-ordered society presuppose that political actors are only driven by what they see as their rational self-advantage and thus the realm of politics is finally reduced to a neutral field of competing interest. However, is it possible that a rational political consensus, a definite solution to the issue of justice, fills a gap between justice and political decision that will constitute concrete content of democracy forever? In particular, the claim of neutrality does not stand in times of crisis. This is because there cannot be neutrality in "the political." The essential part of the concept of the political is such that people constitute their values through political articulation, which in turn constructs the identity of the people. Such an identity can only exist through a very struggle about the multiple and competing identifications of the people. Thus, the best way to keep liberal democracy alive might be to get people to make value articulations. The recognition of dynamic aspect of politics, that is, variability is the condition of existence of democratic politics. Merely seeking a final rational resolution of conflicts puts the democratic project at risk. Instead, in a democratic polity, conflicts and confrontations, far from being a sign of imperfection, indicate that democracy is alive and inhabited by pluralism.

IV. Schmitt's Prescription in Times of Crisis as against the Rule of Law: Emergency Power Without Check

The question of crisis for legal scholars is how to cope with a shock to a political system that is so great that normal rules seem no longer applicable. Exceptional measures for exceptional times are usually deemed to have the effect of undermining both separation of powers and individual rights. However, Schmitt claims that the ability of a ruler to suspend the rule of law is the ultimate act of sovereignty. To Schmitt, "Sovereign is he who decides on the state of exception." I will call this statement as Schmitt's sovereign thesis. In state of exception where the entire legal order is at stake, a sovereign decision is not constrained by any normative principles. The extraordinary powers afforded to the President in times of crisis, coupled with the power to recognize such a crisis essentially by executive fiat, has led to a shocking proliferation of executive orders declaring a "state of emergency." For example, in Weimar Germany, executives gained great powers through declarations of states of emergency which then was not confined to the area which had originally triggered its application. In Schmitt's idea, the sovereign may set aside constitutional rules to act directly to cope with the threat based on its

ultimate responsibility for the continuing existence of the state. As a result, the Weimar Constitution had broken under emergency government.

Is there a way for Schmitt's sovereign thesis to reconcile with the concept of the rule of law? A few options are possible. Firstly, one can claim that the sovereign thesis has its own immanent restraint because sovereign will not keep its power unless it successfully secures homogeneity in substance with the demo. However, there is no controlling mechanism against the sovereign's arbitrary exercise of power in Schmitt's theory because even though a sovereign is dethroned, another sovereign of the same nature will accede to the throne.

The second option can be found in that while under some of the contemporary constitutional theories the Constitution entitles the President to disregard different constitutional construction suggested by the courts, the President's arbitrary exercise of power is subject to restriction because Congress could impeach him. However, I think this is too optimistic in the sense that there is no conceptual resource with which to challenge a decision by the President despite expected impeachment. As a matter of concept, Schmitt's sovereign thesis contradicts with the rule of law because the true Schmitt's position would occur when the President takes actions that he believes to be essential to the state's survival when the Constitution properly construed does not allow it.

Thirdly, the sovereign thesis itself can be construed constitutional. However, it is naïve to regard the Constitution as speaking clearly to the resolution. While the rule of law suggests the primacy of abstract normative principles over concrete political decisions, Schmitt states that normative principles cannot have an effect on human society unless they are interpreted by particular agents and applied to particular circumstances. Further, one may think to substitute courts as sovereign. However, this would not guarantee the rule of law at work because judges also may make arbitrary decisions. In addition, the state of emergency cannot be defined in advance and therefore the unanticipated nature of the emergency calls for the Schmittian sovereign. Given the undefinability of emergency all the law can do is to designate who has the power to act to address the emergency.

In sum, there is no way to conceptually reconcile between the sovereign thesis and the rule of law. Therefore, I conclude that to resolve the dilemma, one must find a practical way to tame the Schmittian sovereign. Hence, the question now is how to survive even exceptional situations without abandoning its liberal constitution.

First, we can consider to rely on "high politics." According to Legal Realist/Critical Legal Studies, the interpretation of legal terms is determined by politics not only in states of exception but also in the normal state of affairs. As long as we are able to develop politics that is 'high', meaning politics involving fundamental political vision about the proper way to organize and steer society, the impossibility of constitutionalism should not trouble us.

Secondly, the precedents set through such high politics can finally build a normative structure which can ultimately constrain the sovereign over time. I

already noted in the above that the purported legal control will be ineffective because, even if emergency is constitutionalized, the interpretation given to such open-ended terms will be determined by politics. However, as cases are accumulated over time, the web of cases will fix the contour to such a large extent that the declaration of an emergency is regulated in a legally meaningful way as well. Therefore, one cannot overemphasize the need to retain the possibility to subject the sovereign's decision to ex post facto review. If no judicial review is available, then legal exceptionalism will arise even when law is most determinate. One might be concerned that normalizing emergencies such as in the second option may result in permanent emergency. However, it seems to me better to normalize emergencies rather than to keep them outside normal governance. In short, bending of the constitutional framework would be preferred over its breaking.

I would like to finish this chapter with a Korean case. Former President Kim Young-sam directed his ruling party to enact a law to prosecute former presidents Chun Doo-hwan and Roh Tae-woo for their respective roles in 1979 coup d'etat and 1980 bloody crackdown on Korean citizens in Kwangju. The legislation raised issues about its retroactivity and whether it is a violation of the Korean Constitution's prohibition against ex post facto laws because the law authorizes prosecution of a past act for which the statute of limitation has already run. The Constitutional Court rendered its decision regarding the foregoing in 1996 and the Act was not struck down. My point here is not about the constitutionality of the Act, but about the fact that both the coup d'etat and the enactment of the law were reviewed in a judicial manner by the Court.

V. Concluding Remarks

Liberal democracy has its own deficiencies. In emergency situations someone, the president, the court or whoever the case may be, has to take decisive action to cope with the emergency. As discussed above, there is inherent risk that any such exercise of sovereign power may lead to its abuse. However, it is impossible to put in place a rule to address such abuse in advance because of the unpredictability of emergencies. For example, it is impossible for one to address all the possible eventualities in a given contract because of the difficulty in predicting the differing possibilities. Therefore, to a certain extent, one has to rely on both parties' good faith and fair dealing to resolve situations not specifically addressed in contract.

This example reminds me of Wittgenstein's insightful statement: "no course of action could be determined by a rule, because every course of action can be made out to accord with the rule." (LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 69 (3d ed., 2001)). If one would accept Wittgenstein's view, one would find that indeterminacy can be seen as inherent in the concept of rule of law itself. (For example, Yasuo Hasebe, *The Rule of Law and Its Predicament*, 17 RATIO

JURIS 489 (2004). Wittgenstein, however, provides an exit out of this paradox: "there is a way of grasping a rule which is not an interpretation." (WITTGENSTEIN, *supra* at 84). Quite often, indeed, one can grasp the meaning of a rule right away without recourse to any interpretation. In this case, the meaning of a rule is determined by conventions widely established in society. In short, Wittgenstein's point is that interpretation is required only when established linguistic rules and conventions underdetermine the meaning of an expression (For example, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY, ch. 2 "Meaning and Interpretation" (Hart Publishing 2d ed. 2005)). I think that Wittgenstein's view implicates a lot for the question this essay seeks to answer. The key to resolving the problem of indeterminacy in rule of law in states of emergency would be to build up conventions, whether legislative or judicial, necessary to control sovereign's exercise of emergency power.

On the other hand, if one would take a functionalist definition of the rule of law, one would draw the same conclusion. For example, Friedrich A. Hayek understands the rule of law such that it "make[s] it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." (FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 54 (1944)). If the goal is to reach the state of Hayekian legal system, I would say that politics as constrained by appropriate political practices could accomplish the goal as well.

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Risk Management by the Government and the Constitution

Werner Heun

I. Introduction: Security – Danger – Risk

At first sight risk management by the government is an unfamiliar concept in German constitutional law. Much more common are the concepts of security and its opposition: danger. The three notions security, danger and risk are closely interrelated and risk management has been a governmental function for a long time, although it has not been sufficiently conceptualized as such. Speaking about these different but interrelated concepts in German constitutional theory and law in the English language has to take into account the slightly different meanings and associations of the English and German expressions. At least in legal language for example the German word "Gefahr" means imminent danger in English.

Before turning to the subject of risk management itself it seems useful to clarify the three notions and their relation to each other in a short historical overview.

1. The oldest concept in political and constitutional theory is security.[1] The Roman securitas, where all modern European notions are derived from, originally means plainly the absence of grief or trouble. It soon gained a political sense as an

[1] Historical overviews *Werner Conze*, Sicherheit, Schutz, in: Geschichtliche Grundbegriffe, vol. 5, 1984, p. 831-862; *Andrea Schrimm-Heins*, Gewissheit und Sicherheit. Geschichte und Bedeutungswandel der Begriffe certitudo und securitas, Archiv für Begriffsgeschichte 34 (1991), p. 123-213; 35 (1992), p. 115-213; *Michael Makropoulos*, Historisches Wörterbuch der Philosophie, vol. 9, 1995, col. 745-750.

expression of the Pax Romana but meaning only a subjective feeling. During the Middle Ages securitas became an objective status and then a positive political concept. It is however the rise of the modern state that elevates securitas publica to the foremost goal of the state.[2] In addition this general purpose of government is divided into two different aspects: internal and external security which are guided by different rules and maxims.[3] Thomas Hobbes integrates safety into a coherent political theory by defining it as "not mere survival in any condition but a happy life so far as that is possible".[4] John Locke qualifies security as central element of the integral goal of "peace, safety and publick good of the people"[5] which are the concretization of life, liberty and property as the end of government.[6] In the 18th Century public safety was extended to a comprehensive concept that encompassed the happiness of the people.[7] As a countermovement security was reduced to its core as public safety in a narrow sense as well as the rule of law.[8] At the end of the 19th century a process of extension set in again. The idea of social security became a dominant goal of government[9] even before the invention of the notion by F.D. Roosevelt in the 1930s[10] and increasingly ever since.

2. Security is always threatened by danger. In the English language danger in general means that harm or damage is impending. As a juridical concept danger (Gefahr) is a product of 19th century police law in Germany[11] and in a literal translation means "a situation or condition, in which in case of an unimpeded course of events a condition or a conduct will with sufficient probability lead to an injury of public safety".[12] This traditional definition was developed by Prussian administrative courts during the Empire and is still applied today. Public safety in this context is also legally defined as the whole public legal order, individual life, health and freedom as well as the institutions of government and public goods like

[2] See also *Josef Isensee*, Das Grundrecht auf Sicherheit, 1983, p. 3ss.
[3] *Conze*, Sicherheit (Fn. 1), p. 842s.
[4] *Thomas Hobbes*, De cive (1647), ch. 13, 4. (English ed. by R. Tuck/M. Silverthorne, 1998) p. 143; *idem,* Leviathan (1651), II, 30.
[5] *John Locke*, Two Treatises of Government (1690), II, ch. 9, § 123ss., 131.
[6] *Peter Graf Kielmannsegg*, Volkssouveränität, 1977, p. 143;*Walter Euchner*, Naturrecht und Politik bei John Locke, 1969 (repr. 1979), p. 198ss.
[7] See e.g. *Christian Wolff*, Vernünftige Gedancken von dem Gesellschaftlichen Leben der Menschen und insonderheit dem gemeinen Wesen (4. ed. 1736), II, ch. 1, § 222s., in: C. Wolff, Gesammelte Werke 1. Abt. vol. 5, p. 165s.
[8] *Immanuel Kant*, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis (1793), A 232-270, in: Werke (ed. W. Weischedel), vol. 6, p. 127-172 (143-164); *Wilhelm von Humboldt*, Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staates zu bestimmen (1792); in: Werke (ed. A. Flitner/K. Giel). vol. 1, 1960, p. 56-233.
[9] See *Franz-Xaver Kaufmann*, Sicherheit als soziologisches und sozialpolitisches Problem, 2. ed. 1973, p. 91ss; *Gerhard A. Ritter*, Der Sozialstaat, 2. ed. 1991; for the legal concept of the social state in Germany see *Hans Zacher*, Das soziale Staatsziel, in: Handbuch des Staatsrechts, vol. II, 3. ed. 2004, § 28, p. 659-784.
[10] *Franklin D. Roosevelt*, Speech 30. Sept. 1934, The Public Papers and Addresses of Franklin D. Roosevelt (ed. S.I. Rosenman), vol. 3, 1938, p. 413-425 (421).
[11]Seminal decision: Preußisches Oberverwaltungsgericht 10. June 1880, in: Preuß. Verwaltungsblatt 1879/80, p. 401ss.
[12] See e.g. § 2 I a Nds. SOG; *Franz-Ludwig Knemeyer*, Polizei- und Ordnungsrecht, 11. ed. 2007, p. 62ss.

public utilities. As a consequence any violation of a law that protects public – not only private – interests is qualified as an "injury of public safety".[13] The police and the general administration are authorized to take the necessary measures if the danger is imminent. Imminence is defined by sufficient probability according to general experience of life, so that the injury is considered almost certain from the perspective of the acting officer.[14] The assumed certainty of the realization of the danger is the crucial difference to risk. The prevention of dangers by the government has therefore to be distinguished from risk management.

3. The concept of risk is only a recent development in German jurisprudence. Since especially nuclear plants may lead to catastrophic damages for public safety, although only with a very low probability, the traditional concept of the prevention of imminent danger according to the rules of police law was considered insufficient and therefore supplemented by a new concept of risk prevention. In this context risk is legally defined as a product of the extent of the expected damage and the probability of its occurrence. The defining difference to imminent danger is – solely – the by far lower probability.[15] This legal concept is more or less restricted to the law of technical safety. Even the notion of a "risk society" pertains mainly to these technical risks.[16] Its main applications are the law of nuclear plants as well as genetic technology and now more recently nanotechnology.[17] The concept is the basis for legal prevention measures which should forestall the occurrence of imminent dangers in advance. The precautionary principle authorizes government to take such preventive measures.[18]

Risk and its management is a problem of a wider scope that exceeds by far the narrow limits of the so far described concept of technical risks.[19] A much broader perspective is needed since technical risk is only a very partial aspect of risk. Risk in this broad sense has two elements.[20] It presupposes firstly uncertainty about the

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[13] *Knemeyer*, Ordnungsrecht (Fn. 12), p. 72s.

[14] *B. Drews/G. Wacke/K. Vogel/W. Martens*, Gefahrenabwehr, 9. ed. 1986, p. 224; *R. Poscher*, Gefahrenabwehr, 1999, p. 114-128.

[15] Original definition: BMFT (ed.), Deutsche Risikostudie Kernkraftwerke 1979, Hauptband, p. 10-16; *Jörn Ipsen*, Die Bewältigung der wissenschaftlichen und technischen Entwicklungen durch das Verwaltungsrecht, VVDStRL 48 (1990) p. 177-206. (186s.); *Andreas Reich*, Gefahr – Risiko – Restrisiko, 1989, p. 85-132; *Udo di Fabio*, Risikoentscheidungen im Rechtssaat, 1994, S. 73s.; *Liv Jaeckel*, Gefahrenabwehrrecht und Risikodogmatik, 2010, p. 49-167; critical *Arno Scherzberg*, Risiko als Rechtsproblem, Verwaltungsarchiv 84 (1993), p. 484-513, (497ss).

[16] *Ulrich Beck*, Risikogesellschaft, 1986, p. 25-112; see also *Gotthard Bechmann*, Risiko als Schlüsselkategorie der Gesellschaftstheorie, KritV 1991, p. 212-240, also in: idem (ed.), Risiko und Gesellschaft, 1993, p. 237-276.

[17] Cf. *Jaeckel*, Gefahrenabwehrrecht (Fn. 15), p. 16-48.

[18] For Germany, see *Ulrich K. Preuß*, Risikovorsorge als Staatsaufgabe, in: D. Grimm (ed.), Staatsaufgaben, 1993, p. 523-551; *Wolfgang Köck*, Risikovorsorge als Staatsaufgabe, AöR 121 (1996), p. 1-23; generally on a comparative basis *Cass R. Sunstein*, Laws of Fear. Beyond the Precautionary Principle, 2005, p. 15ss.

[19] Risk management in Germany is understood only in this narrow sense, see e.g. *Eibe Riedel* (ed.), Risikomanagement im öffentlichen Recht, 1997.

[20] See generally *Nicholas Rescher*, Risk. A Philosophical Introduction to the Theory of Risk Evaluation and Management, 1983, p. 5ss; *John Adams*, Risk, 1995; *Otthein Rammstedt*, Risiko, Historisches Wörterbuch der Philosophie vol. 8, 1992, col. 1045-1050; different approach by *Herfried Münkler*,

future and secondly the possibility of harm and loss on one side as well as mostly – if not always – the possibility of gain or other positive developments on the other side. As a general observation bad contingencies cannot exist in the absence of favourable ones.[21] Natural disasters seem prima facie to present a counterexample but only if one neglects the fact that people went the risk of being hit by such a disaster by settling on the coast (in case of floods), in an area that is endangered by earth quakes or living near a volcano.

The formation of such a broad concept of risk can be traced back to the Italian Renaissance when in the 15th century sea insurances were established.[22] Origins of insurances can even be found in the Ancient Near East, Greece and Rome[23] and certain forms of trading in prehistoric societies may be conceptualized as early insurance methods.[24]

The originality of the Renaissance concept of risk is the specific combination of a contingent future with rationality. The defining moment is that risk can be calculated. The basis of risk calculation was the discovery of mathematical probabilities. The first systematic studies were done by Girolamo Cardano in the 16th century, who found out the exact mathematical probability of rolling a particular sum with two dice.[25] This first approach was further developed to the concept of expected value, also called mathematical expectation, over the next hundred years namely by Christiaan Huygens, who determined the expected outcome of a game that was the weighted average of all possible outcomes.[26]

In the 18th century another mathematician of the Bernoulli family came to the conclusion that the price one was willing to pay in the marketplace was not the expected value but rather the expected utility and that individuals derive a

Strategien der Sicherung: Welten der Sicherheit und Kulturen des Risikos. Theoretische Perspektiven, in: idem (ed), Sicherheit und Risiko, 2010, p. 11-33.

[21] *David A. Moss*, When All Else Fails. Government as the Ultimate Risk Manager, 2002, p. 22.

[22] See *Panayotis Perdikas*, Die Entstehung der Versicherung im Mittelalter, Zeitschrift für die gesamte Versicherungswissenschaft 55 (1966), p. 425-509; *Karin Nehlsen-von Stryk*, Die venezianische Seeversicherung im 15. Jahrhundert, 1986; *Karl H. Van D'Elden*, The Development of the Insurance Concept and Insurance Law in the Middle Ages, in: H.J. Johnson (ed.), The Medieval Tradition of Natural Law, 1987, p. 191-199 (196s.); see also *Douglass C. North*, Institutions, Journal of Economic Perpectives 5 (1991), p. 97-112 (106s.).

[23] *C.F. Trennery*, The Origin and Early History of Insurance, 1926, p. 4ss.; on the medieval understanding within the framework of the teachings on usury see *Birger P. Priddat*, Zufall, Schicksal, Irrtum, 1993, p. 25ss.

[24] See *Richard A. Posner*, A Theory of Primitive Society with special Reference to Law, Journal of Law and Economics 23 (1980), p. 1-53.

[25] See *Peter L. Bernstein*, Against the Gods: The Remarkable Story of Risk, 1996, p. 47-53; *L.E. Maistrov*, Probability Theory, A Historical Sketch, 1974, p. 18-25.

[26] See *Ian Hacking*, The Emergence of Probability: A philosophical Study of Early Ideas about Probability, Induction and Statistical Inference, 1975, p. 92-101, who considers the time of around 1660 as the "birthtime of probability" (p. 11); see also *Maistrov*, Theory (Fn. 25), p. 48-55; for the complicated and intertwined relationship between mathematical probability, statistical data and insurance see also *Lorraine J. Daston*, The Domestication of Risk: Mathematical Probability and Insurance 1650-1830, in: L. Krüger et al. (eds.), The Probabilistic Revolution, Vol. 1: Ideas in History, 1987, p. 237-260.

progressively smaller amount of utility from each additional currency unit.[27] This diminishing marginal utility of wealth leads to the psychological and economical phenomenon of risk aversion.[28] Therefore, individuals will place a higher value on losses than on equally sized gains. That favors insurances in general, since people will pay more than the expected value of hazard.[29]

This attitude of individuals to risk is also strongly characterized by the fact that risk acceptance is generally higher if it is taken voluntarily than if the risk is (involuntarily) imposed by a third party.[30] However, this distinction should not be made the basis of a categorical difference between danger and risk, as has been proposed by Niklas Luhmann, who defines danger as imposed and risk as based on human decision.[31]

II. Methods of Risk Management

Since the world is full of risks man has always tried to deal with risk. Essentially there are three different methods to modify and moderate risks.[32]

1. The most common and at first preferable method is risk reduction. People try to minimize risks by eliminating or substantially reducing the expected risk. This perspective dominates especially public law. The prevention of imminent danger is the model for risk reduction. Safety regulations are a prime example for this strategy. Criminal Law is probably the oldest method of risk reduction by regulation.[33] Quite often however, risks and losses are unavoidable. In this case, risk management by risk reduction fails to a great extent. Still, there are other methods which are overlooked quite often.

2. It might be feasible in many cases to reallocate risks. There are two methods of risk reallocation which supplement each other. It is possible to simply shift risks or the risk can be spread.[34] A classical example for shifting risks are liability rules.

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[27] *David Bernoulli*, Specimen theoriae novae de mensura sortis, in: Commentarii academiae scientiarum imperialis Petropolitanae, 6 (1738), p. 175-192; English translation, Econometrica 22 (1954), 23-36; for the modern version of expected utility theory in economics founded by *John von Neumann/Oskar Morgenstern*, Theory of Games and Economic Behavior (1944), 3. ed. 1953, see *Milton Friedman/Leonard J. Savage*, The Expected Utility Hypothesis and the Measurability of Utility, Journal of Political Economy 60 (1952), p. 463-474; but see also already the classical exposition by *Alfred Marshall*, Principles of Economics, 8. ed. 1920 (reset 1949), p. 460s.

[28] See e.g. *Milton Friedman/ Leonard J. Savage*, The Utility Analysis of Choices Involving Risk, Journal of Political Economy 56 (1948), 279-304; *Kenneth J. Arrow*, The Theory of Risk Aversion (1965), in: idem, Essays in the Theory of Risk-Bearing, 1971, p. 90-120; critical *Matthew Rabin/Richard H. Thaler*, Anomalies. Risk Aversion, Journal of Economic Perspectives 15 (2001), p. 219-232.

[29] See below Fn. 53.

[30] Seminal article: *Chauncey Starr*, Social Benefit versus Technological Risk, Science 165 (1969), p. 1232ss.

[31] *Niklas Luhmann*, Soziologie des Risikos, 1991, p. 30s.

[32] See for this differentiation *Moss*, All (Fn. 21), p. 17ss.

[33] See *Pat O'Malley*, The Government of Risks, in: The Blackwell Companion to Law and Society, 2007, p. 292-308 (295-298); *Henning Schmidt-Semisch*, Kriminalität als Risiko. Schadenmanagement zwischen Strafrecht und Versicherung, 2002, p. 19ss, 109ss.

[34] Terminology of *Moss*, All (Fn. 21), p. 17ss.

For instance the liability may be shifted from seller to buyer.[35] This can be determined by contract between private market participants or by law enacted by the government. The underlying purpose of such a regulation might be moral arguments of responsibility as well as ultimately to induce the more powerful to reduce the risk. Another method of shifting risks that has gained prominence in the last financial market crisis are futures and derivatives. They shift and diversify risk in time and to less risk averse investors.[36]

3. Finally it is possible to spread risks. This is especially feasible if risks are at least statistically unavoidable. In this case the risk is usually well known and can be diversified by all kinds of insurances as well as by portfolio diversification.[37] Stocks are another form of spreading risks and profits. The defining element is that this method reduces individual risk but not aggregate or total risk.[38] The strategy of spreading risk between different persons is the principle of all insurances since the already mentioned Renaissance sea insurances. Today insurances are a universal and common form of risk management that is familiar to everyone from car and fire insurances to health insurances. Mostly, this form of risk-spreading is reserved to the market and its participants who offer all kinds of insurances, even against an invasion from Mars. But the government also often provides for insurances starting with the social insurance system by Otto von Bismarck in the 1880s[39] or the social security regulations in the New Deal in the United States.[40]

III. Problems of Risk Management by the Private Sector

In a free democratic state as well as in a market economy, risk management falls into the responsibility of the individual and the market. This is true for all three mentioned methods equally. Everyone by himself tries to reduce risks as far as possible. One takes care of one's own health, is interested in safe driving and avoids financial risks if possible and feasible. Shifting risks is also an essential part of private contracts and insurances are mostly offered by the market.[41] But there are limits for private risk management due to several problems that are specifically risk related.

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[35] See also *Steven Shavell*, Liability for Harm versus Regulation of Safety, Journal of Legal Studies 13 (1984), p. 357-374.

[36] See *Peter H. Huang*, A Normative Analysis of New Financially Engineered Derivatives, Southern California Law Review 73 (2000), p. 471-521.

[37] The classical study is *Harry M. Markovitz*, Portfolio Selection: Efficient Diversification of Investments, 1959; this method can be used by each individual for him- or herself, while insurances spread risks interpersonally.

[38] See *Moss*, All (Fn. 21), p. 29ss.

[39] As an introduction see *Michael Stolleis*, Geschichte des Sozialrechts in Deutschland, 2003, p. 52ss.

[40] See *Moss*, All (Fn. 21), p. 180ss.

[41] The rationale for individual economic actors to sell and buy risks is not only risk diversification but also the fact that different people have different attitudes toward risk, some being more risk averse than others; other reasons are differential risk assessment and portfolio diversification. See *Moss*, All (Fn. 21), p. 34s.

1. Some risk related market failures are well-known since the 19th century and are based on the fact of asymmetric information.[42] The problem of adverse selection was explicitly identified as term and phenomenon in the field of life insurances.[43] Adverse selection occurs when individuals know more than their insurers about their own level of risk. While a person with a terminal disease only he himself knows of may buy a high life insurance, a person with good risks may leave the insurance and save money investing otherwise. This may be countered by health examination and screening but this can be difficult, expensive or impossible in certain respects.[44]

Even more famous in recent discussions is the problem of moral hazard in other contexts. It has been discovered in the area of fire insurance, where insured clients might engage in arson, fraud or interested carelessness.[45] Moral hazard may be defined by the incentive to try to increase the overall riskiness of an activity, that is still controlled by someone while the burden of risks is assigned or shifted to someone else. This is foremost an insurance problem but concerns also any form of (forced) bail-out. Although identified already in the 1860s, its first formalized and systematic treatment in economics occurred only a hundred years later.[46] There are also other information problems that are not based on asymmetric information but nevertheless cause market failures. This is especially the case if neither party or nobody at all can obtain sufficient information about the risk in question and it is not calculable in any way. This concerns catastrophes and disasters which are not predictable and cause extremely high costs. In this case no one will insure the risk in the market because the information does not exist or is too expensive to acquire.

2. A relatively new field of research that has been neglected by economics for a long time are so-called perception problems which undermine the economic assumptions of rationality and consistency. The groundwork was laid in the early 1920s by Frank Knight who introduced the pivotal distinction between risk and uncertainty. While risk involves measurable probabilities, uncertainty concerns uncalculable and perhaps even unknown probabilities.[47] The distinction was considered irrelevant for quite a long time by economists, since it was argued that precise probabilities were not necessary for an expected utility approach. It was

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[42] See for the problem of asymmetric information in general *George A. Akerlof*, The Markets for Lemons: Quality, Uncertainty and the Market System, Quarterly Journal of Economics 84 (1970), p. 488ss.

[43] *Moss*, All (Fn. 21), p. 36.

[44] See *Michael Rothschild/Joseph Stieglitz*, Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information, Quarterly Journal of Economics 90 (1976), p. 629-649; for the problem of genetic testing in this context see *David J. Christiansen*, Genetic Testing: Risk Classification and Adverse Selection, Journal of Insurance Regulation 15 (1996), p. 75-79.

[45] See *Tom Baker*, On the Genealogy of Moral Hazard, Texas Law Review 75 (1996), p. 237-292 (248s.); see also for even earlier observations *Moss*, All (Fn. 21), p. 38.

[46] *Kenneth J. Arrow*, Uncertainty and the Welfare Economics of Medical Care, American Economic Review 53 (1963), p. 941-973, also in: idem, Essays (Fn. 28), p. 177-211.

[47] *Frank H. Knight*, Risk, Uncertainty, and Profit (1921), repr. 1971, p. 197ss., esp. 233, see also 19s.

assumed that it was sufficient to base probabilities on subjective estimates which could be treated as objective facts.[48] Subjective expected utility theory could even discard if people were completely unaware of objective existing probabilities. This theory was shattered though by the discovery of the Ellsberg-paradox that showed that the actual decision even of learned economists violated the consistency assumption of this subjective theory.[49] Since then all kinds of irrational behaviour concerning perception in decision-making have been discovered.[50] Especially estimation techniques by individuals are biased in several respects. Already the Ellsberg-paradox showed that people try to avoid ambiguous or unknown probabilities even at the price of inconsistency. They are not only risk but also ambiguity averse.[51]

Furthermore, individuals use mostly heuristic techniques in order to estimate probabilities, which produce systematic biases.[52] Four problems are especially striking and common. Firstly as a consequence of general risk aversion people behave differently when confronted with the same risk: They take less risks when choices are framed in terms of gains and more risks when choices are framed in terms of losses, since losses seem more harmful.[53] Secondly people tend to overweight the most available and memorable information regarding the relevant problem. While in some cases availability is useful as a clue for frequency quite often it leads people to rely on memorable but not representative information. The car accident on the road temporarily raises the subjective probability of car

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[48] *Friedman/Savage*, Hypothesis (Fn. 27), p. 463-474; *Leonard J. Savage*, The Foundations of Statistics, 1954 based on *Frank R. Ramsey*, The Foundations of Mathematics, 1931, see for this approach recently *Jack Hirschleifer/John G. Riley*, The Analytics of Uncertainty and Information, 1992, p. 7ss. who deny consequently any difference between risk and uncertainty.

[49] *Daniel Ellsberg*, Risk, Ambiguity, and the Savage Axioms, Quarterly Journal of Economics 75 (1961), p. 643-669; *William Fellner*, Distortion of Subjective Probabilities as a Reaction to Uncertainty, Quarterly Journal of Economics 75 (1961), p. 670-689.

[50] See for an empirical view *Paul J. H. Schoemaker*, The Expected Utility Model: Its Variants, Purpose, Evidence and Limitations, Journal of Economic Literature 20 (1982), p. 529-563, esp. 541-552, general critique *Jens Beckert*, What is Sociological about Economic Sociology? Uncertainty and the Embeddedness of Economic Action, Theory and Society 25 (1996), p. 802-840.

[51] *Ellsberg*, Risk (Fn. 49), p. 659-669.

[52] Seminal article *Amos Tversky/Daniel Kahneman*, Judgment under Uncertainty, Heuristics and Biases, Science 185 (1974), p. 1124-1131; good short overview *Daniel Kahneman/Mark W. Riepe*, Aspects of Investor Psychology: Beliefs, Preferences and Biases Investment Advisors Should Know About, Journal of Portfolio Management 24 (1998), 52-65; for the following see the collections of essays: *Daniel Kahneman/Paul Slovic/Amos Tversky* (eds.), Judgment under Uncertainty: Heuristics and Biases, 1982; and the sequel *Daniel Kahneman/Amos Tversky* (eds.), Choices, Values, and Frames, 2000; *Paul Slovic* (ed.), The Perception of Risk, 2000; *Thomas Gilovich/Dale Griffin/Daniel Kahneman* (eds.), Heuristics and Biases, 2002; see also the influential concept of bounded rationality by *Herbert A. Simon*, Models of Man. Social and Rational, 1957, p. 196-201; *idem*, Administrative Behavior, 3. ed. 1976, p. 80ss.

[53] *Amos Tversky/Daniel Kahneman*, The Framing of Decisions and the Psychology of Choice, Science 211 (1981), p. 453-458, also in: Judgment (Fn. 52) p. 3-20; on loss aversion itself (people value losses more than equal sized gains) see *Amos Tversky/Daniel Kahneman*, Prospect Theory: An Analysis of Decision under Risk, Econometrica 47 (1979), p. 263-291, also in: Choices (Fn. 52), p. 17-43, and by the same authors, Advances in Prospect Theory, Journal of Risk and Uncertainty 5 (1992), p. 297-323, also in: Choices (Fn. 52), p. 44-65.

accidents in general.[54] Thirdly research has also observed an overconfidence and an optimistic bias concerning the estimation of personal risks.[55] So the vast majority of drivers believe that they face lower than average odds of getting into accidents.[56] Similar observations have been made for work accidents or the personal risk of unemployment.[57] Finally extreme probabilities are usually greatly misjudged. Highly unlikely events are either ignored or overweighted, and the difference between high probability and certainty is either neglected or exaggerated.[58] Extremely low-probability but high-consequences events like natural disasters[59] are therefore either not insured at all or heavily overinsured. Furthermore in hindsight past events seem inevitable and therefore people tend to believe that this inevitability was apparent in foresight.[60] A private market exchange therefore in many cases will not be economically optimal.[61] In addition people are focused on different risks, select risks and disagree about desired prospects. Therefore risk perception and management is very much influenced by cultural attitudes and predilections. Risk management decisions therefore often are a political choice.[62]

3. Another category of market failures is a consequence of governmental reactions to certain risks and the specific inability of private actors to commit definitively for the future, which are therefore occasionally termed commitment problems.[63] The losses caused by major natural or other kinds of disasters that affect a substantial number of citizens force (democratic) government regularly to assist and compensate the victims. At the same time the knowledge that government will act correspondingly will discourage people from purchasing insurance against such risks. This constitutes "a dilemma of government responsiveness".[64]

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[54] *Tversky/Kahneman*, Judgment (Fn. 52), p. 1127; see in general several essays in: *Kahneman et al.*, Judgment (Fn. 52), p. 23ss.; *Gilovich et al.* Heuristics (Fn. 52), p. 19ss.

[55] See the several articles in *Kahneman et al.* Judgment (Fn. 52), p. 287ss.; as well as the articles in: *Gilovich et al.* Heuristics (Fn. 52), p. 313ss.; shortly *Kahneman/Riepe*, Aspects (Fn. 52) p. 53s.

[56] *Ola Svenson*, Are We All Less Risky and More Skillful Than Our Fellow Drivers, Acta Psychologica 47 (1981), p. 143-148.

[57] *Neil D. Weinstein*, Optimistic Biases about Personal Risks, Science 246 (1989), p. 1232s.; *idem*, Why it Won't Happen to Me: Perception of Risk Factors and Susceptibility, Health Psychology 3 (1984), p. 431-457; see also *W. Kip Viscusi*, The Value of Risks to Life and Health, Journal of Economic Literature 31 (1993), p. 1912-1946; *idem*, Fatal Tradeoffs, 1992, p. 34-50, 51-74.

[58] *Kahneman/Tversky*, Prospect Theory (Fn. 53), p. 283.

[59] See *Paul Slovic/Howard Kunreuther/Gilbert/ F. White*, Decision Processes, Rationality and Adjustment to Natural Hazards, in: Slovic, Perception (Fn. 52), p. 1-32, see also the four articles by *Paul Slovic/Baruch Fischhoff/Sarah Lichtenstein*, ibid., p. 32-50, 104-120, 121-136, 137-153.

[60] *Baruch Fischhoff*, Hindsight – Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, Journal of Experimental Psychology: Human Perception and Performance 1 (1975), p. 288-299.

[61] See generally *Kenneth Arrow*, Risk Perception in Psychology and Economics, Economic Inquiry 20 (1982), p. 1-9.

[62] See *Mary Douglas/Aaron Wildavsky*, Risk and Culture, 1982, who define risk as a product of knowledge and consent about the most desired prospects (p. 5).

[63] See *Moss*, All (Fn. 21), p. 45ss.

[64] *Dani Rodrik/Richard Zeckhauser*, The Dilemma of Government Responsiveness, Journal of Policy Analysis and Management 7 (1988), p. 601-620; see also *Stephen Coate*, Altruism, the Samaritan's Dilemma, and Government Transfer Policy, American Economic Review 85 (1995), p. 46-57.

It is an implicit market failure that individuals in one generation cannot trade with those of another (not yet born). There is no binding commitment of future generations by current market participants.[65] This concerns especially so-called systematic risks that are defined by the fact that they cannot be diversified at any moment in time. A risk that affects just about everyone at the same time cannot be spread at all.[66] Therefore, a massive nuclear war is not insurable in the private sector and neither the risk of macroeconomic booms and busts. Systematic risk cannot be spread at the point in time it is happening but might be diversifiable across time although not by private market participants. That is why in these cases the government steps in.

Another commitment problem is created by regulation. It is the law in all modern economies that anybody may go bankrupt and file for protection in bankruptcy. Therefore, nobody can commit not to default on its future obligations. In most market transactions, this problem is manageable but may be a specific problem for the individual investment in private pension funds since even low probability of failure stopped people from joining such funds for their complete lifetime savings. It is therefore one of the essential justifications of public social security systems.[67] The right to default is an additional reason for another commitment problem that is called the inalienability of human capital. In modern free market economies, human capital is inalienable because individuals cannot credibly commit to turn over their future income to others since they neither may waive their right to go bankrupt nor sell their working power into slavery. Human capital is therefore a non-tradeable asset and risks regarding human capital are not diversifiable because they cannot be sold or bought. The diversification of human capital risks requires therefore government intervention through social security systems.[68]

4. A further source of risk management problems by the private sector are externalities. Externalities as such are not restricted to risk problems but a general cause of market failures.[69] To a great extent, externalities can be also related to specific risks. In terms of risk, externalities may be seen as a quasi-automatic shift of risks to the general public. In this respect pollution creates risks for communities and the car traffic by anybody heightens the risk of injury and losses

[65] *Joseph E. Stieglitz*, On the Relevance or Irrelevance of Public Financial Policy: Indexation, Price Rigidities and Optimal Monetary Policies, in: Rüdiger Dornbusch/Mario Henrique Simonsen (eds.), Inflation, Debt, and Indexation, 1983, p. 183-222 (186); see also *P.A. Diamond*, A Framework for Social Security Analysis, Journal of Public Economics 8 (1977), p. 275-298 (279-281).

[66] *Moss*, All (Fn. 21), p. 46s.; systematic risk must be differentiated from systemic risk where a complete system is affected by a failure of one single unit: like the banking system may affected by the bankruptcy of one large bank, see *Martin Hellwig*, Risiken im Finanzsektor, Zeitschrift für Wirtschafts- und Sozialwissenschaften, Beiheft 7 (1998), p. 123-151.

[67] *Moss*, All (Fn. 21), p. 47; see also *Diamond*, Framework (Fn. 65), p. 289ss.

[68] *Robert C. Merton*, On the Role of Social Security as a Means for Efficient Risk Sharing in an Economy Where Human Capital is Not Tradeable, NBER Working Paper 743 (Sept. 1981).

[69] As an introduction see classical *Arthur C. Pigou*, Wealth and Welfare, 1912, p. 162-165; *idem*, The Economics of Welfare (1920), 4. ed. 1932, p. 131-135, 172-212.

for other drivers and pedestrians. Making car insurance mandatory means to force drivers to assume responsibility for the risk incurred by using a car[70] which is made transparent by the specific form of car insurance in Germany.

A special source of risks comes into play where individual behavior is to a certain extent rational, but on the collective level leads to irrational results by increasing risks and losses. This is especially true for economic downturns, where a sinking demand reduces supply, which reduces demand again and so forth.[71] In case of a financial panic, fear of losses may become contagious and following bank runs may destroy even sound banks.[72] If nervous depositors withdraw their money abortively, they inflict costs on other depositors, banks and investors and increase the overall level of risk. This process may even result in a systemic risk for the whole financial system as could be observed in the last financial crisis.[73]

The premature and hasty withdrawal of bank deposits can be also conceptualized as externalities imposed on the other depositors. The main aspect though is the collective mania and the circle of feedbacks that aggravates the crisis and heightens the risks.[74] It is almost unmanageable by the private sector itself and requires government action.

IV. The Role of Government as Ultimate Risk Manager

The role of government in a political system depends on the preferred economic system. All Western political systems have opted essentially for a market system. In such a system the government has specific functions in order to compensate for market failures.[75] These functions are based on several specific capabilities of government, which private market participants do not dispose of. The main assets of government are the powers to compel by law and to enforce its decisions with legitimate force as well as its economic powers to tax, to print money and as their consequence the special credit power governments enjoy. Governments are able to mobilise capital to such an extent that even the most rich and powerful private subjects are not capable to achieve. In addition the government has an extensive bureaucratic apparatus that combines specialized knowledge with a high capacity to solve problems of any kind.[76] These capabilites of government in general are the foundation of its role as an ultimate risk manager.[77] Its classical function of risk

[70] *Moss*, All (Fn. 21), p. 48.
[71] See *Werner Heun*, Staatshaushalt und Staatsleitung, 1989, p. 124s.
[72] The risk of bank runs is the justification for central banks as lender of last resort, see *Werner Heun*, Die Zentralbank der USA – das Federal Reserve System, Staatswissenschaft und Staatspraxis 9 (1998), p. 241-281 (248s.).
[73] See *Werner Heun*, Der Staat und die Finanzkrise, Juristenzeitung 2010, p. 53-62.
[74] *Moss*, All (Fn. 21), p. 49 who also observes that in this case an insurance may not only spread risk but even reduce the aggregate risk.
[75] Classical general overview *Richard Musgrave/Peggy B. Musgrave*, Public Finance in Theory and Practice, 4. ed. 1984, p. 7ss.; see also *Karl Homann/Andreas Suchanek*, Ökonomik, 2000, p. 207ss.
[76] See *Renate Mayntz*, Soziologie der Verwaltung, 4. ed. 1987, p. 82ss.
[77] See also *Moss*, All (Fn. 21), p. 49ss.

reduction and prevention by law and its enforcement is mainly part of its traditional police powers and pervades many different governmental activities.[78] The reduction of collective risks is the natural obligation of government. The government has also a major role in shifting and spreading risks. Its regulatory powers can compel current citizens and future generations to participate in insurance programs or establish governmental insurances.[79] The government can fight adverse selection by compelling broad participation and preventing any opting out by good risk participants. Social security systems and obligatory car insurances are a prime example. The government functions to a certain extent as an insurance against major risks like war and natural or man made catastrophes as a consequence of its economic powers and its almost inexhaustible asset base as well as the fact that it can tax into the future. Taxes are sometimes justified by the idea that the state acts as an insurance.[80] The lending facilities of central banks as banks of last resort as well as their power to supply the economy with money also act as a kind of insurance. As a consequence of its investigative and enforcement capabilities, the government may control and monitor moral hazard. The underestimation of risk because of perception problems can be countered by providing information and by compelling people to buy the necessary insurance like a car or fire insurance. The obligatory social insurance against unemployment is another example. Furthermore, the government can internalize externalities that cause risks by liability rules as well as taxes. It may shift risks by liability rules in order to make the more competent or more wealthy responsible for risk reduction. In this perspective of risk management the traditional differentiation between public and private law is almost irrelevant. Liability rules, insurance regulations and even safety rules may be enacted in either form. Only the enforcement by administrative agencies or the government requires a regulation by public law.

Government is not only a necessary complement and counter force to markets but also an important source of failures, however.[81] Regulation by law and its enforcement create costs that may surpass the costs of risk.[82] Perception problems may also affect the bureaucracy. Democratic responsiveness of political actors may transfer the perception problems of the general population into the sphere of government as can be seen in the case of overestimated nuclear risks. The political process often tends to a wrong focus on worst-case scenarios. The perception of risks by the people and the ensuing risk management depends very much on the fragile trust in experts and public authorities.[83] Risk reduction by government is

[78] See *Peter-Tobias Stoll*, Sicherheit als Aufgabe von Staat und Gesellschaft, 2003, p. 13-263; for the general problem of risk regulation in the U.S.A. see *Stephen Breyer*, Breaking the Vicious Circle, 1993.
[79] For this see *Homann/Suchanek*, Ökonomik (Fn. 75), p. 212ss; *Mark R. Greene*, The Government as an Insurer, Journal of Insurance 43 (1976), p. 393-407.
[80] This is maintained by the Assekuranz (insurance) theory of taxes, see *Friedrich Karl Mann*, Steuerpolitische Ideale, 1937 (repr. 1978), p. 106-111.
[81] See *Horst Hanusch* (Ed.), Anatomy of Government Deficiencies, 1983; *Martin Jänicke*, Staatsversagen, 1984, p. 50ss.
[82] See *Richard J. Zeckhauser/W. Kip Viscusi*, Risk within Reason, Science 248 (1990), p. 559-564.
[83] See *Paul Slovic*, Perceived Risk, Trust and Democracy, in: idem, Perception (Fn. 52), p. 316-326.

often inefficient.[84] Liability rules may distort market mechanisms and insurance schemes may promote moral hazard. All these government failures do not make governmental risk management superfluous or generally harmful. On the contrary, a comprehensive risk management by government is an indispensable element of any market system, but one has also always to consider the possibilities of government failure.

V. Constitutional Directions for Governmental Risk Management

At this point it is only possible to give a broad overview and a few sketches of the constitutional framework of risk management by the government in Germany.

1. The fundamental rights of the Basic Law constitute a legal bias[85] for risk bearing and risk management by the individual citizens themselves and by private corporations. They may reduce or reallocate risks especially by private contracts. Risk shifting by contract and risk spreading by all kinds of private insurances is therefore ubiquitous. The government may reduce or reallocate risks by interfering into market processes but each governmental intervention has to be justified by legitimate and plausible reasons and to observe the constitutional requirements as foremost the proportionality principle.[86] Risk reduction and the purposes of risk reallocation are such reasons that justify encroachments into the guaranteed liberties.

2. The Basic Law does not oblige the government to shift or spread risks at all. One may construe one exception for the case of social security which is authorized by several constitutional provisions and also underlined by the general social state principle that entails only a certain guarantee of the institution as such and limits modifications of the social security system but contains no detailed directives.[87] Constitutional obligations, mostly derived from fundamental rights,[88] require at best risk reduction. This corresponds to the focus on risk reduction since the 19th century as exemplified in police law. The Constitution itself neglects risk shifting and spreading in general while the ordinary law entails a substantial amount of risk reallocation regulations, liability rules as well as insurance legislation.

3. The Constitution therefore provides practically no explicit but only indirect obligations. Even public safety as such and the protection against imminent dangers and risks are not explicitly guaranteed by the Basic Law, although their

[84] See *Richard J. Zeckhauser/W. Kip Viscusi*, The Risk Management Dilemma, The Annals of the American Academy of Political and Social Science 445 (1996), p. 144-155.
[85] Cf. *Carl Schmitt*, Verfassungslehre (1928), 5. ed. 1970, p. 126, 158, 164.
[86] Short overview in English by *Werner Heun*, The Constitution of Germany, 2010, p. 192ss.
[87] For details see *Rolf Gröschner*, in: H. Dreier (ed.), GG-Kommentar, vol. 2, 2. ed. 2006, Art. 20 (Sozialstaat), Rn. 44; *Hans Michael Heinig*, Der Sozialstaat im Dienst der Freiheit, 2008, 10ss., 457ss.
[88] Short overview *Heun*, Constitution (Fn. 86), p. 199s.; for details see *Georg Hermes*, Das Grundrecht auf Schutz von Leben und Gesundheit, 1987; *Johannes Dietlein*, Die Lehre von den grundrechtlichen Schutzpflichten, 2. ed. 2005.

provision and safeguard is the essential function of government in the modern state.[89] This function was taken for granted and considered too difficult to guarantee so that it was omitted.[90] The Constitutional Court only in the seventies started to construe a constitutional right to safety (Grundrecht auf Sicherheit) although it does not use this phrase.[91] The governmental duty to protect life and physical integrity is derived from the fundamental right of human dignity in combination with the right to life. However, a duty to protect property against risks has not been derived from Art. 14 B.L. yet.[92]

While the Constitution does not oblige the government to manage risk it authorizes the government to different forms of risk management and gives broad discretion to decide whether and how to deal with risks. This is mainly true even for the obligation to protect the fundamental rights of the citizens against encroachment by (private) third parties since it does not require the government to protect its citizens with definite measures. It obliges to act at all but not how to act. But the individual rights of other individuals as well as general constitutional principles justify far reaching encroachments by governmental regulation. In summary the Basic Law gives broad authorization without obligation. It also authorizes to regulate and establish a social insurance system (Art. 74 No 12 B.L.) and the social state principle correspondingly justifies encroachments into the citizens' individual rights in this respect. This principle protects the established social insurance system against complete abolition but not against fundamental modification although individual entitlements are also protected to a certain extent by the property clause of Art. 14 B.L. against withdrawal.[93] Mostly the protection against encroachments is even weaker. The general authorization to enact civil laws allows for risk shifting by liability rules, either restricting or creating liability for private subjects. The authorization neither obliges the government nor protects the individual. The Constitution also does not substantially limit the reallocation of risks by taxes or insurances but neither obliges the government in this respect.

The overview of the constitutional framework reveals a great discrepancy between the actual role of government in risk management, that is hardly to overestimate, and the reflection of this role in the Constitution. The scarcity of provisions and indeterminacy of the risk management by constitutional directives is not astounding though, if one considers the wide variety of the problems of risk management. There is an almost unlimited discretion for government to reduce

[89] The study by *Stoll*, Sicherheit (Fn. 78) focuses almost only on risk reduction, but at least mentions public accident insurance, p. 31ss.
[90] A few original State constitutions in the USA mention public safety, see e.g. the Virginia Bill of Rights of 1776, § 3.
[91] The term is has been coined by *Isensee*, Grundrecht (Fn. 2), p. 27ss.; see also *Gerhard Robbers*, Sicherheit als Menschenrecht, 1987, p. 121ss.
[92] The omission of a guarantee of safety has not stopped scholars from construing such a constitutional guarantee that is not restricted to the already problematic right to safety, see esp. *Markus Möstl*, Die staatliche Garantie für die öffentliche Sicherheit und Ordnung, 2002, p. 24-28, 37-146.
[93] See *Joachim Wieland*, in: H. Dreier (ed.), GG-Kommentar, vol. 1, 2. ed. 2004, Art. 14 Rn. 61ss.

risks, to regulate risks, to shift risks by liability rules and taxation, to spread risks by establishing state insurances or creating obligations to join certain privately organized insurances. The constitutional determination of the whole field of risk is comparatively weak. This legal situation is justified by the extreme complexity of risk management as well as the fact that the Constitutional Court has no specific capability to assess risks or to give directives for risk management. The feeble determination of governmental risk management by the Constitution is therefore necessary and not a fact that is to deplore.

Information as the Basis of Parliamentary Responsibility for European Integration

Frank Schorkopf

Sixty years after the promulgation of the German constitution, which was underlined by "a visionary openness towards Europe" from the very beginning, the German Federal Constitutional Court reassessed the historic process of European integration on June 30, 2009.[1] The Court reviewed the compatibility of the legal foundations of the European Union with the German Basic Law (*Grundgesetz*). The Treaty of Lisbon is compatible with the Basic Law, the Court's Second Senate ruled, as long as it is applied within the framework outlined by the Federal Constitutional Court. Nevertheless, the German implementation law is inconsistent with the Basic Law.

I will not speak about this landmark judgment that has been complemented a few weeks ago by another remarkable judgment. Although it infuriated large parts of European political elites, sparked discussion among legal scholars, ongoing, and includes many arguments worth being discussed,[2] it is only the background for our general topic. However, the ruling has pointed to a major problem of European as well as international political cooperation, i.e. the parliamentary responsibility for governmental and legislative acts determined by European or international law. Within this context I will focus on information – our common denominator within this conference – as a prerequisite for parliamentary responsibility.

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1 BVerfGE 123, 267 ff. – Lisbon.

2 See the contributions by Möllers/Halbestam, Schönberger, Tomuschat, Niedobitek, Kliver and Schorkopf in German Law Journal, Special Issue, 10 (2009), pp 1201 (www.germanlawjournal.com); as well as Thym, Common Market Law Review 46 (2009), 1795.

I. International Law Making: Keeping Parliaments in Play

The connection between the availability of information and parliamentary responsibility is best illustrated by the classical problem of Treaty ratification. This classical problem stems from public international law, where national parliaments have been and still are being confronted with fully negotiated treaties. A few months ago we saw the Russian und the US President signing a new disarmament agreement in Prague. The ceremony illustrated that international treaties are not only negotiated but also signed by the executives before they are transferred to the legislator. Parliaments are asked by governments to ratify the treaty. It does not need further explanation that these international legal acts cannot be amended in substance at that stage without utmost diplomatic skills and at high political cost.

I speak about the so called ratification situation (*Ratifikationslage*) in which parliaments may only choose between digital categories of "yes" and "no". Some national jurisdictions have ameliorated the situation by involving members of parliament in the negotiation process. This concession made by the executive has the major aim to spread information about the negotiations, its expected outcome and the whole political situation within parliament. It is an unusual step because the realm of governmental negotiations is normally kept free from potential troublemakers.

Another strategy, applied by the US Congress, is the parliamentary adoption of a mandate for the negotiation. The mandate defines a corridor of possible solutions, which Parliament is willing to accept, as long as the executive produces a final result that is situated within the political parameters (fast-track-procedure). In the European Union the problem is different. Of course, the major sources of European primary law, the Treaties of Paris, Rome, Maastricht, Amsterdam, Nice and Lisbon, are treaties governed by public international law. They fall within the scope of the classical problem already mentioned.

European integration, however, adds a second dimension to the problem of disseminating information on international legal activities to parliaments. The European Union is empowered to adopt secondary rules on the basis of its treaty architecture. You all know about the hundreds of regulations on agriculture, custom and trade and competition matters, and about the thousands of directives dealing with the internal market affairs, consumer and environmental protection. The European legal order has its own mechanisms of identifying, discussing and solving social problems and its own machinery of governance. This machinery produces European law under full autonomy from the national legal orders. The executives are participating due to their membership in the Council. Until recently national parliaments had been fully excluded from European law-making – their institutional position being substituted by the European Parliament.

This institutional exclusion is confronted with a strong substantial involvement. National parliaments are obliged to transfer European directives into national legal order and they typically have no substantial leeway within this task.

Moreover, national parliaments are confronted with a comprehensive regulatory body that challenges national competence in addressing social problems. In other words, parliaments have to form an opinion in most issues of European integration regardless of the fact how the competences between the EU and the Member States are allocated.

II. Article 23 Basic Law

In order to form such an opinion, for the purpose either of preparing national legislation or addressing a social problem politically, parliaments need information. In the early days of European integration this subject has almost had no relevance.

European integration was perceived as a mixture of classic intergovernmental cooperation and European foreign affairs in which the prerogative of the executive prevailed. It was not until 1992 when the German *Bundestag*, and the State chamber, the *Bundesrat*, vehemently demanded a more deeper involvement in the European decision making process. Especially the German federal states (*Länder*) made disturbing experiences with European law making when the German Federal Government in 1989 accepted the directive 89/552/EEC on the coordination of certain provisions concerning the pursuit of television broadcasting activities. The directive covered core competences of the *Länder* (Hausgut) and adopted a political stance that wasn't compatible with »the law of the land« at that time. Even worse, the Federal Government was acting in Brussels behind closed doors in a field of competence that belongs to the inner-sanctum of the *Länder*.

A consequence was the amendment of the Grundgesetz in 1993 introducing a new provision for the governance of European integration.[3] Art. 23 GG addressed not only the constitutional preconditions for the continuing participation in the »development of the European Union« but restructured the internal cooperation of *Bundesregierung*, *Bundestag* and *Bundesrat* in European matters.

I will not direct your attention to details of this constitutional provision except one section that is relevant for our academic interest in information as basic resource for parliamentary responsibility. The *Bundestag* received the constitutional right to state its position before the German Government participates in legislative acts of the EU (Art. 23(3) GG). This right, of course, can only be exercised properly if Parliament is in possession of all relevant information beyond what is known to everybody from reading newspapers thoroughly. Hence, according to the Basic Law, the government shall keep the *Bundestag* »informed, comprehensively and at the earliest possible time« (Art. 23(2) GG).

Details of the duty to inform are regulated by a law (*Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der*

[3] For details of the legislative process and the preliminary developments see Schorkopf, in: Dolzer/Waldhoff/Kahl/Graßhoff (eds.), Bonner Kommentar, 2011, Article 23 paras 1.

Europäischen Union).[4] This law states that the Federal Government shall brief the Bundestag on an ongoing basis, normally in writing, on all projects relating to the European Union which could be of interest to Germany. Specifically, the Federal Government shall for this purpose provide the *Bundestag* with the material in its possession concerning drafted regulations and directives.

The briefing includes the decision making process within the cabinet, the statements by the European Parliament, by the European Commission and by other Member States as well as any decisions already made. The Federal Government shall provide the *Bundestag* with the documents at the earliest possible moment, if necessary verbally, and by the shortest possible route. The duty to disseminate information on European integration matters covers almost all measures – the law enlists altogether fourteen positions reaching from initiatives to communication, green and white book to reports. They exclude only measures in the field of foreign and security policy. Information, there is no doubt, is the source for legislative participation in the European integration.

In the past the Government was cautious to deliver comprehensive information in due course in all cases under any circumstances. Because "Parliament" is a category of constitutional law, meaning the legislative body in the machinery of government. Looking through the spectacles of politics "Parliament" does also mean opposition. Any piece of information transferred to Parliament has to be given to all political groups irrespective of their position as governmental party or member of the opposition. This problem of parliamentary democracy has not vanished but lost its impetus. The *Bundestag* became aware across its political spectrum that in many cases the institution as such was moved to the back seat.

III. Responsibility for Integration

From 1993 the *Bundestag* has constantly tightened the rules aiming to be provided with information on European matters. Nevertheless, the Federal Constitutional Court assessed parts of the so called Extending Act, intended to ratify the Lisbon Treaty, as unconstitutional. By reviewing the Extending Act the Court had to deal with the machinery of government (*Staatsorganisation*). It came to the conclusion that the *Bundestag* needs further opportunities to draw consequences from the experiences gathered from ongoing integration process. The Court introduced in this respect a new concept of responsibility for integration (*Integrationsverantwortung*) into constitutional law.

The responsibility for integration deals with the classical problem I mentioned earlier. Treaties under international law can create a dynamic system of rules by authorising the contractual bodies to enact secondary law or by legitimising

[4] Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union, BGBl. 1993 I, 311 - as amended by law of 22 September 2009, BGBl. I, 3026.

political decisions interpreting and advancing the treaty provisions. Keeping the parliament involved in the evolutionary process the lack in predictability of such treaty-based developments should be compensated. If the legitimization of supranational secondary acts cannot be constructed directly, at least the institution with the greatest base of legitimacy should be involved indirectly to a maximum.

The responsibility for integration takes up the thought of democratic responsiveness. The delegates are elected directly by the people and are answerable to the people in the political process and in elections.

The *Lisbon Case* introduced the responsibility for integration into Germany's foreign relations law that is focussed on Europe. Every constitutional body, including the Federal Constitutional Court, has the responsibility to assume its own institutionally specific responsibility in the integration process. The Court explained: "It is aimed to ensure, regarding the transfer of sovereign powers and the elaboration of the European decision-making procedures, that in an overall view, the political system of the Federal Republic of Germany as well as that of the European Union comply with democratic principles under the Basic Law."

In the centre of the Court's reasoning is the *Bundestag*. The Court declared the implementation law to the Treaty of Lisbon incompatible with the Basic Law because the envisioned parliamentary participation did not provide a sufficient level of responsibility. The legislative bodies can only actualize their competences with a law or a constituent decision. The legislative organs must decide whether the level of democratic authentication is sufficient or whether the primary law must be changed accordingly, or whether it is not possible at all to act on a European level.

The responsibility for integration lies with the constitutional bodies, which must pursue it in line with their competence in supra-national affairs. The *Bundestag* is substantially strengthened by additional reservations in decision-making. And it looks as if the *Lisbon Case* has strengthened the position of the *Bundestag* at the expense of the Federal Government. It will certainly be noticed with concern in the Chancellery and in particular in the Foreign Office, that the prerogative of the executive in foreign affairs, therefore also the cooperation at European Union level has lost ground relative to its traditional position. After the *Lisbon Case* the *Bundestag* will be able to give the Federal Government directives concerning the voting behaviour of the German representative in the Council.

Basically the Federal Constitutional Court drew only the conclusions from a development that changed the standard way of policy-making and legislation. Initially, the Basic Law expected supranational and international decision-making as limited exceptions in comparison to national acts and regulations – nowadays cross-border regulation has become an alternative measure of shaping policy. The stronger involvement of the *Bundestag* in European legislation compensates for the decreasing possibility of parliamentary fine-tuning. The political responsibility remains constitutionally with the directly elected Parliament that must stand up to its citizen and to the public for its actions.

Taking into regard the paramount position of the government, the fear is unfounded that foreign power will become a matter of concerted actions of parliament and government. It is uncertain whether this path will result in different decisions or in a higher acceptance of European actions. The outcome depends on whether the members of the *Bundestag* will venture and demand what is constitutionally possible. The parliamentary system of government – with its structural combination of government and parliamentary majority – has the ability to counteract parliamentary self-confidence and independence.

What did Parliament do after the Lisbon judgment? The *Bundestag* has adopted a new accompanying law at once. In September 2009 it enacted – almost without governmental support, as was mentioned with some pride – a new Act on Responsibility for Integration (*Integrationsverantwortungsgesetz*).[5] The law implemented the Court's findings in detail. Legal and political responsibility of Parliament is not restricted to a single act of approval but extends to its further execution. Silence on the part of the *Bundestag* and the *Bundesrat* is therefore not sufficient for exercising this responsibility. Nevertheless, the precondition to assume Parliament's responsibility is rapid and comprehensive information on European affairs.

IV. National Parliaments in EU Machinery of Government

A second major new instrument, that is constructed by EU law itself, is the involvement of national parliaments in the control of how European competences are executed. The national parliaments »contribute actively to the good functioning of the Union« (Art. 12 TEU).

Draft legislative acts of the European Union must be made available to the national parliaments eight weeks before they are placed on the Council's agenda (Art. 4 of Protocol no. 1 on the Role of National Parliaments in the EU). In the context of what is known as the early warning system provided for by so called Subsidiarity Protocol to the Lisbon Treaty, any national parliament or any chamber of a national parliament may, within this eight-week period, state in a reasoned opinion why it considers that the drafts in question do not comply with the principle of subsidiarity (Art. 6 Subsidiarity Prot.).[6]

Such reasoned opinions, however, only establish an obligation to review the drafts where they represent a certain proportion of all the votes allocated to the national parliaments. Furthermore, any national parliament (or a chamber) thereof

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5 Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, BGBl. 2009 I, 3022 - as amended by law of 1 December 2009, BGBl. I, 3822.

6 von Danwitz, Der Mehrwert des gemeinsamen Handelns, Frankfurter Allgemeine Zeitung, 23 October 2008, 8; Uerpmann-Wittzack, Frühwarnsystem und Subsidiaritätsklage im deutschen Verfassungssystem, Europäische Grundrechtezeitschrift 2009, 461; Schütze, Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?, The Cambridge Law Journal 68 (2009), 525.

may bring an action to have declared an act void via their Member States if they deem a legislative act incompatible with the principle of subsidiarity.

This procedure gained some attention in autumn 2010. The Bundestag decided to trigger the early warning mechanism for the first time. The Commission put forward a proposal for harmonising the deposit protection. The planned law would diminish the level of protection as provided by the German scheme in force. The political groups in the Bundestag were not able to organise the required number of critical voices and terminated the procedure.[7]

Moreover, the national parliaments are involved in the political monitoring of the European Bureau of Investigation (Europol) and the European Judicial Cooperation Body (Eurojust) (Art. 12 lit c TEU; Art. 88.2(2), Art. 85.1(3) TFEU). They are also entitled in what is known as the bridging procedure, a treaty amendment procedure generally introduced by the Treaty of Lisbon, to make known their opposition to the treaty amendment proposed by the Commission within six months after their being notified of it (Art. 48.7(3) TEU Lisbon; Art. 81.3(3) TFEU). Opposition by a single national parliament is sufficient for making the proposed treaty amendment fail.

V. Evaluating Information

The central problem of information as basis for parliamentary responsibility is its classification. Not in the sense that the information given by the Federal Government to the *Bundestag* should be kept more or less secret. The problem is the mere quantity of the pieces of data that are transferred day by day to the members of Parliament.

The Government sends all pieces of information available at the executive branch and Parliament has to find its way through the piles of paper. A clerk reported that the daily received documents average to the length of one meter. This general rule is the result of bad experiences in the past when the executive decided what documents were relevant for the legislature. It also reflects the uneasiness with a political process on another institutional level of public power. You never know for sure if a certain green paper or a specific communication is a key document.

The heavy workload from Brussels is added to the classical obligations of a national parliament. The law-making did not diminish because the *Bundestag* has to keep pace with European integration. On the contrary, parliaments of EU Member States have to fulfil the duty to implement European directives within a general climate of accelerated law making in the age of information society. To put it in other words: the *Bundestag* – as well as other national parliaments – is structurally

[7] Deutscher Bundestag, Drucksache 17/3239; Financial Times Deutschland, 22 October 2010, http://www.ftd.de/politik/europa/:eu-kommission-ruege-wegen-spareinlagen-scheitert/50185476.html.

over-burdened. A constitutional lawyer might – at this point of my argument – draw our attention to the fact that parliaments are able to organise their work independently. Parliaments do not need to ask the government or anybody else to establish new committees, to heir additional staff or to reshape the procedures of decision making. Beeing the master of the budget they are even entitled to allocate the necessary financial means.

The German *Bundestag* has acted respectively. The House introduced a Committee on the European Union (Art. 45 GG) that can be authorised to exercise the rights of the *Bundestag* under Art. 23 vis-à-vis the Federal Government. But the plenary has not decided in this direction yet. The traditional committees on the one hand seek to maintain their political position, on the other hand they are required to engage as many bodies as possible in order to divide workload and to provide the legislative process with well-informed political characters. In the past, I was told, the European Committee was more or less the reservoir of Europeanised talkative backbenchers. I think the self-perception of institutionalised European politics has already changed.

The *Bundestag* also established a bureau at Brussels staffed with clerks from the parliamentary administration in order to collect information at the source, to deliberate, to administer the European political landscape.[8] For many public commentators this step was irritating because it made obvious that the formal mechanism of disseminating information from Brussels to the capitals of Member States is not sufficient in political day-to-day business. The time factor might play an important role, as you need insight into the thinking of the Commission and the European Parliament before a document is drafted. The information mechanisms are all based on paper information and therefore tend to be behind time, causing problems as in the evaluation of information, to mention only one.

What is or should be important to a national parliament is a political question depending on the current state of affairs and depending on a respective decision by members of parliament. These members are located at home, back in Berlin, Paris, Warsaw or London, involved in national politics and responding to the demands of predominantly national media. The classification of information is carried out by clerks i.e. civil servants that have to be neutral. Their functioning as agents rather than as personal assistants leads to a rising tide of documents coming on top of the pieces already distributed by the government.

[8] For further information about the establishment of the bureau see Deutscher Bundestag, Bundestag und Europa, p. 26, available at https://www.btg-bestellservice.de/pdf/10090000.pdf.

VI. Conclusion

Information as the Basis of parliamentary responsibility for European integration has been disregarded for decades. Since the foundation of the European Union in 1993 the problem has been spotted and solutions have been undertaken.

An abundance of constitutional law has been created, namely the *Grundgesetz* amendment of 1993 that introduced Art. 23 and its Extending Acts, but this has primarily increased the amount of paper transferred to the German *Bundestag*. The problem of classifying information according to its relevance for the national political space is unsolved. To my mind this problem is built in the structure of the European political process and it shall be compensated not by strengthening the national but by strengthening the European Parliament. The latter is been regarded as the proper representative of EU citizens. However, as long as this institution is not rooted in the public sphere the same way national parliaments are, and is not addressed by citizens as political body responsible for the common good, we have to improve the mechanisms and institutions disseminating information to Parliament.

The Right to Ignorance in Medicine*

Gunnar Duttge

I. Ambivalence of Knowledge

"Knowledge is Power"[1] – "Knowledge liberates"[2]: Following this credo, present day modern society still today points one on a journey towards a "way out of self-inflicted sheepishness"[3] with incessant optimism. Nothing less shall apply to an individual than applies to the "enlightened" public as an indication of their dependable "progress"[4]: New discoveries, lately increasingly regarding our own species (only think about the research and exploration of DNA or recently of the brain), inventions, and new technical innovations, which make life easier (e.g. drugs in the context of medicine) or broaden the natural-given scope of action (e.g. in-vitro-fertilization); following utopias of an "unblemished" world (especially in the area of regenerative medicine) and regarding relentless work towards these utopias as a matter of course.

Correspondingly, modern society sees merely positive potential in the persistent and life-long strive for more information and the widening of one's own

* This is a revised version of the paper published in the Journal *Datenschutz und Datensicherheit* vol. 34, no. 1, 34-38 (Jan. 2010).

[1] The phrase of Bacon in his Novum Organum (1620) is well known: „Scientia et potentia humana in idem coincidunt, quia ignoratio causae destituit effectum".

[2] This modification of Bacon's phrase is inputed to Joseph Meyer, bookseller and publisher from Leipzig, Krois/Möckel (issuer), Ernst Cassirer. Nachgelassene Manuskripte und Texte, vol. 9, 1995, p. 420 Anm. 582; applicable criticism: *Steinmüller*, Informationstechnologie und Gesellschaft, 1993, p. 234 et seq. with annotation p. 417 (p. 760): „For the West German intellectual… , it is characterising, that he knows almost everything, but therefrom nothing is resulting for his acting".

[3] *Kant*, Beantwortung der Frage: Was ist Aufklärung?, 1783, in: Weischedel (issuer), Werke in zehn Bänden, 5.edition. 1983, vol. 9, p. 53.

[4] To „Fortschritt im Recht" cf. *my*basic pre-consideration in: Schweighofer and others (issuer), Effizienz von e-Lösungen in Staat und Gesellschaft. Aktuelle Fragen der Rechtsinformatik, 2005, p. 546 et seqq.

horizon of wisdom, which therefore shall lead one to better understanding and "right" decisions, enabling the individual to "self determine" their destiny.

Today, this described worldview sustainably molds the work of modern medicine, which – at least in Western Europe and the Anglo-American cultural environment – has dissociated itself from their former paternal conduct and meanwhile no longer deems the transfer of responsibility to the patient as a loss but rather and increasingly as a relief.

With the establishment of the concept of "*informed* consent", today's patient is ipso jure regarded as a character of equal rank and jointly responsible for therapeutic procedures. Therefore, and for the purpose of effectual insight into this responsibility, the patient is to be conveyed the "nature, meaning, and scope" of the imminent intervention, with special consideration to the associated risks[5].

This is already common practice when it comes to the distribution of medication: The information leaflet included in medicine packets by the manufacturer must inform the consumer in a "generally comprehensible" manner and "legible writing" about the subject and indication group of the drug, known contraindications, possible precautionary measures to be taken when using it, interactions with other drugs, possible side effects and contingent necessary countermeasures, as well as explicitly recommend to "consult a doctor or pharmacist" (§ 11 I AMG) in case further information is needed.

The result of all this effort is well known: The medical layman rather keeps away from the insurmountable obstacle of comprehending the leaflet's information and finds it to be an unreasonable demand to seriously analyze the unbearably vital messages. A logical reason for this behavioral maxim lies certainly within the innate human drive not to have hope and optimism be taken away quite so quickly. Optimism, at times, is of clinical relevance ("Placebo effect")[6] and generally a factor not to be underestimated in the doctor-patient relationship, itself rooted in mutual trust. There, however, is also by no means unwarranted fear that one's own freedom of decision-making is not only strengthened but maybe paralyzed by information about negative perspectives[7]: Knowledge might make one more competent, yet simultaneously less free, and occasionally even incapable of acting!

Not infrequently, the individual therefore prefers to concentrate on the one aspect which is important to him and willfully ignores the farther reaching complexity; consequently, he rather engages in the risk of (inevitably partly blind) trust than acquaint himself with the details.[8]

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[5] To the particular relevance of „Risikoaufklärung" detailed *Deutsch/Spickhoff,* Medizinrecht, edition 6, 2008, marginal no. 273.

[6] Meanwhile even judicially affirmed, cf. LG München MedR 2008, 563, 567; *Enck/Zipfel/Kloster-halfen*, Bundesgesundheitsblatt 2009, 635 et seqq.; *Oeltjenbruns/Schäfer*, Anaesthesist 2008, 447 et seqq.

[7] Information is from the informationtheory´s point of view always and necessarily perspectivistic, to this detailed *Steinmüller* (n 2), p. 200 et seq.

[8] To the fundamental divergency of reliance and familiarity detailed *Luhmann*, Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität, 3. edition, 1989, p. 17 et seqq.

Thus, "waiving of information" and "informational escape", as the central hypothesis points out, may not be one-sidedly understood as a deficit but instead – when closer examined on a realistic level – as a principle which allows and secures freedom in the first place (Simitis)[9] and therefore needs to be saved and protected. However, is there actually such a "Right to Ignorance"?

II. Known and unknown fields of application

In the recent past, one area-specific field of application, in which recognition of an individual "right to informational isolation"[10] is no longer genuinely denied, has reached the center of attention in Germany.

The Law of Gene Diagnostics[11], essentially inured on February 1st 2010, fulfills the declared purpose of securing "that no one shall against their will be forced to take note of their genetic dispositions" and tolerate "such restriction of free personality development"[12]. The person that has agreed to medical examination is to be explicitly notified about this in order to allow for *informed* consent. Additionally, the person also has to learn that they do not need to take note of already available results and therefore may at any time request to have them destroyed.

In the context of work and insurance policies, this basic understanding forms the fundamental notion for worries regarding specific genetic discrimination as well as far reaching prohibition of determination, cognizance, and exploitation of such information.

Interpreting the fundamental right of everyman, which grants "bio ethical self-ruling"[13], proves to be considerably difficult to implement and substantiate when "bio informational" interests of multiple people collide. In the context of a human genetic medical examination, it is unavoidable to concurrently acquire genetic data[14] of one's relatives, without them being aware of such proceedings. This is where the individual's right to attain information clashes with the right to secrecy and later – when positive results have come in and are subsequently passed on to the family members – with their "right to be let alone"[15]. How does the new law solve this conflict? It does not regard the prospect of affecting others as a reason why claiming of genetic examination shouldn't happen. It also doesn't stipulate any

[9] *Simitis*, in: Kroker/Dechamps (issuer), Information – eine dritte Wirklichkeitsart neben Materie und Geist, 1995, p. 153 et seqq.
[10] *Taupitz* in: Wiese-Festschrift 1998, p. 583, 585.
[11] Gesetz über genetische Untersuchungen bei Menschen v. 07-31-2009 (BGBl. I, 2529).
[12] Cf. The explicit reasons of the draft law proposed by the faction Bündnis 90/Die Grünen from 11-3-2006, BT-Drucks. 16/3233, S. 3; the bill of the Bundesregierung from 08-29-2008 (BR-Drucks. 633/08) is unchanged in comparison to this idea.
[13] Detailed *Koppernock*, Das Grundrecht auf bioethische Selbstbestimmung, 1997.
[14] According to § 3 Nr. 11 i.V.m. Nr. 4 GenDG data (gained through genetic analysis) about genetic properties, i.e. inherited or during insemination or until nativity gained genetic information.
[15] Detailed *Duttge*, in: Der Staat 36 (1997), 281, 301 with further supporting documents

kind of notification of relatives concerning the planned (indirect) assembly of their genetic make-up. Should, of course, analysis reveal genetic qualities significant to an avoidable and treatable disease, then human genetic advice shall include an additional recommendation, namely for the examined person "to advocate a genetic consultation to these relatives" (§ 10 III S. 4 GenDG).

Obviously, the legislator strove for a compromise, which aims to avoid evident disregard of the right to ignorance by immediate confrontation with negative information. Just as evident is, nevertheless, that the utilization of the advised person as well as the privatization of the information conflict, in accordance with general accountability principles,[16] does not release the physician from their responsibility for the initiated notification of the family members, after all.

This form of "conflict resolution" is somewhat Pharisee-like[17] and moreover scarcely a fortunate task: Addressing the family members after the already occurred ascertainment of clinical results easily reveals to them that something is wrong. Consequently, they will hardly be able to evade – as secretly aspired – the recommendation to seek human genetic advice themselves.

However, only as long as the future is yet untold, one can speak of tangible as opposed to simply postulated freedom of decision making. The prerogative of relatives to be spared the burden of information, accordingly, demands their prior notification about the planned examination. Otherwise it cannot be pledged that they will be able to decide for this new and unsought information source free from external influence.

Since this freedom of decision making is not lost once a statement is made, a submitted consent must be revocable until the notification about the results is issued. Informing the relatives beforehand, however, inevitably collides with the possible wish of the patient to keep their plans secret. Then again, this concern does not prevail: Due to the preordained relation to third parties, it is not unreasonable to ask of the person to waive their right to secrecy, this being especially true because it regards a planned undertaking rather than already available information acquired through "covert" testing.

It applies all the more since secretly carrying out the exam inevitably violates the warranted interest of the relatives not to have their personal data given up. As made clear by the German Supreme Court of Justice in its recent ruling on the subject of "secret paternity tests", it is a constitutional statutory duty to "offer individual protection from third party access to personally identifiable information without the person's knowledge or permission". As a result, the relatives' right to informational self-ruling would be infringed by allowing for the challenge of

[16] to the ineligible „escape into private law" in a different context (mission of contact persons) detailed *Duttge*, JZ 1996, 556 et seqq.

[17] Pharisee-excuses: we do not transfer information, which is moreover not having any concrete content and which is in particular not mentioning the positive diagnostic findings;; the findings are getting announced after abidance of the commendation and in with it authorised by the wish of information of the affilated.

coping with the aforementioned collision of fundamental rights to be "subject to the discretion of one individual"[18].

This surely does not mean that the family members are essentially handed a right of veto since that would mean long-ranging prevention of future genetic diagnostics and would rob the individual of any possibility of foresighted life planning.

In ancestry cases, a doubting father's claim to information must yield to even (only) anticipated prejudice of the child's interests in the integrity of the current family structure and in avoiding of unwanted confrontation with existential insecurities[19] (compare now § 1598a BGB in conjunction with § 17 GenDG). If this law is recognized, then the right to know one's own genetic constitution shall certainly not be thwarted by the relatives' interest in secrecy as long as their right to information (regarding the examination as such) as well as their freedom of choice (regarding the awareness of the medical results) are granted and protected.

The thereof resulting question is: Is the recognition of a (basic) right to ignorance specific to genetic data or relevant to all (health related) information? The idea of "exceptionalism"[20], which, despite all criticism, lays the foundation for the new Law of Gene Diagnostics, could suggest the first assumption.[21] German development of law, however, has long been disregarding this drawn line, exemplified by the discussion on the reform of the Law of Pregnancy Conflict[22], which was also enacted last year. It states that due to the psychologically exceptional situation, in which a pregnant woman finds herself after conspicuous results of a prenatal diagnosis, it is required not only to offer specific consulting (§ 2a), but also to previously notify the patient about the "psychological and ethical potential for conflict" (Ziff. 2.2. of the PND guideline of the country's medical association)[23] which may require approval regarding the collection of prenatal diagnostics.

A "right to ignorance" is unquestionably acknowledged in this situation, and that is, by no means, with limitation to genetic findings, howbeit the medical practice noticeably tends to systematically frustrate this right by giving insufficient information and by advertising the necessity of a "premature detection of high-risk pregnancy" [24].

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[18] BVerfG NJW 2007, 753, 754 et seq. – Notabene: beyond that it seems to be a legal contradiction in valuation, that in the lead-up to the genetic analysis there is attached great importance to an informed consent concerning the person getting analysed, whereas the affilated are not even getting informed.
[19] In this regard the BGH spoke about a „right to ignorance", cf. in: NJW 2005, 497, 498.
[20] To this detailed *Damm/König*, MedR 2008, 62 et seqq.; *Kiehntopf/Pagel*, MedR 2008, 344 et seqq.
[21] Sceptical to a general right of lack of knowledge e.g. *Simitis*, in: Schweizerisches Institut für Rechtsvergleichung (issuer), Genanalyse und Persönlichkeitsschutz, 1994, p. 107, 121 et seqq.
[22] Act from 08-26-2009 (BGBl. I, 2990).
[23] Deutsches Ärzteblatt 1998, A-3236 et seqq.
[24] According to the general purpose of a PND as it is described in the so-called „maternity-guidelines" of the federal commission of doctors and health funds (available at: www.g-ab.de/informationen/richtlinien/19); it is significant, that the claim for consultancy and advice in the lead-up to the PND-procedure is expressed quite vaguely (cf. chapter A, cypher 1).

Another, nowadays undisputed field of application, is the unauthorized HIV test in conjunction with the disclosure of the results, which, above and beyond the intervention into the integrity of the body by vein puncture, is considered a manifest violation of the right to self-determination.[25] According to the prevailing opinion, the patient may generally forego owed explanations if they do not wish to deal with the risks and possible side effects of the designated therapy. It is, however, rightfully pointed out that a doctor must not assume such a waiver of information hastily or ever conclude conduct implying intent. In point of fact, it is to be implied that one wants to be informed. The information on diagnosis, order of events, and risks, nevertheless, is of such high relevance to one's own personality that it is justifiable to allow partial or complete informational abstinence to those, who wish not to be bothered.[26]

Certainly there are also fields of application, in which recognizing a right to ignorance is out of the question: That is, in cases of endangerment of specific others or even the general population as for example in the event of infectious diseases or when somebody's suitability to drive a motor vehicle is in question. When such a threat exists, which is to be determined by means of a medical-psychological testing, the undoubted priority of the opposed interests call for the denial of a right to ignorance.

Alarming, however, are those circumstances, in which the doctor proceeds in a paternalistic way "for the good" of the patient's health without first giving them a choice in the matter. The across the board "screening" of newborns by means of tandem-mass-spectrometry seems to be such a recent instance in which the need for parental approval as well as the need for limitation to treatable illnesses is increasingly emphasized.

With this last mentioned restriction to remediable symptoms, § 16 GenDG now allows "genetic mass screening", i.e. systematically exercised medical examinations within the entire population for medical purposes (compare § 3 No. 9 GenDG). The regulation, unfortunately, does not (at least not explicitly) include the seemingly natural requirement of voluntary participation on the basis of broad information. The explanatory statement of the law nebulously mentions that the

[25] In this sense e.g. LG Köln NJW 1995, 1621 et seqq. with review *Teichner* MedR 2005, 409 et seqq.; *Uhlenbruck*, MedR 1996, 206 et seq.; to the contempt of an explicit refusal of a patient: EuGH NJW 1994, 3005 et seqq.

[26] The concept of the SPD (social democratic party) for a so-called „patient-rights" and accordingly „patient-protect-bill" explicitly speaks about a „right to lack of knowledge" (cf. coalition agreement from 10-28-2008, p. 90)" (Eckpunkte eines Patientenrechtegesetzes from May 2009, p. 3, available at: www.spd.fraktion.de); the former opinion, after what an effective relinquishment assumed at least a vague idea of the contures of the object of the relinquishment (*Roßner*, NJW 1990, 2291, 2294; similar *Fenger/Klotz/Hoffmeier*, DMW 2005, 2910 et seq.), de facto implicates a forced advice. The judgement BGHZ 107, 222 et seqq. = NJW 1989, 2318 et seqq., which was misleadingly mentioned in favour of an obligation of informing, however regards the different case of a doctor paternalistically (because of supposed „mental lability") avoiding to give advice to the affilated, although there was no indication, that the patient could be aversed to a consultancy.

"public interest in mass screening is valued superior to the individual interest of the examined person"[27]; such a way of thinking, however, just asks for abuse!

The right to ignorance with consideration to a possible "benefit" is questionable in yet another context: The utilization of imaging processes within the scope of modern neuroscience introduces the possibility of so called "chance finds" in perspective to therapy as well as research. The physician's main problems used to be the risk of facing criminal or liability charges when such conspicuous features were not spotted, moreover, the struggle of finding the boundaries of his investigative duties.[28] Seemingly taken for granted, on the other hand, was – even in the context of research studies – the disclosure of findings (e.g. of an accidentally discovered brain tumor) to the person affected for reasons of consideration towards the person's wellbeing. Slowly now the understanding prevails that the assigned treatment is oftentimes limited, and that (especially healthy) patients hardly ever expect such horrifying news. Consequently, the patient or test person shall explicitly consent in notification, something that can only be done "voluntarily" if it happens *before* the conduct of the (medical) check-up and the (research) study respectively. It should be self-explanatory that a person's refusal cannot be disregarded or pushed aside by relating to defense of necessity. In order to avoid the moral conflict a physician is bound to have, researchers suggest making it a requirement for participation in the study that the patient gives their consent to the notification about a possible chance find.[29] The hereby cleverly intended avoidance of conflict, however, paradoxically assumes that one knows exactly what he does not want to be told, meaning which result may possibly be found. This is obviously the chief problem of a "Right to Ignorance" as an autonomous decision requires just the knowledge which in fact cannot yet be known.[30] Essentially, a great deal of foresight is demanded of both the researcher and the doctor. This increase in complexity, conversely, is unavoidable due to the subject status pertained to not only the patient's body but also his informational rights.

III. Consolidation under constitutional law

After all this, one concludes that although the basic right to "informational privacy" demands for no "absolute" validity, it sure does demand *prima facie* legitimacy. The latter is, not least of all, a result of the immediate connection between the fundamental right to ignorance and the basic idea of individual self-

[27] BT-Drucks. 16/10532, p. 33.
[28] See i.e. *Hentschel/Klix*, Fortschritte der Neurologie – Psychiatrie 2006, 651 et seqq.; *Schleim/Spranger/Urbach/Walter*, Nervenheilkunde 2007, 1041 et seqq.; exemplary also *Kummer*, Deutsches Ärzteblatt 2007, A-3186: „If it is the diagnosting doctor istead of the disease, that is rated as a risk, ignorance gets elevated to an ethic principle".
[29] Cf. *Heinemann/Hoppe/Listl/Spickhoff/Elger*, Deutsches Ärzteblatt 2007, A-1982, 1986.
[30] *Taupitz*, in: Wiese-Festschrift 1998, p. 583, 597.

determination, which is restricted not only by physical but also by informational "pressure". This clarifies that, in the end, another aspect of the right to informational self-ruling is questionable, one that has not yet been sufficiently unveiled: The "sovereignty of data", guaranteed since the famous Federal Constitutional Court ruling on "national census", by no means only refers to "outgoing" but just as much to "incoming" personally identifiable data.[31]

However, how can one speak of a "Right to Ignorance" when (self-)knowledge "has been extolled since the Delphian days as a symbol of higher life of which one can only have too little but never too much"? [32] – Obviously the "drawbacks"[33] of wisdom and its "Janus-headedness"[34] urge caution. Wisdom's quality to affect behavior does not automatically have merely positive effects on the individual. But what about those who have knowledge at their disposal and believe to know it all? However indispensible their concern and care may be, it always also entails a tightrope walk. Too easily may it turn into infantilizing and then deserve the conclusion, which has once been appropriately articulated by the US-American judge *Brandeis*, himself the "discoverer" of the "Right to Privacy" [35]: The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding![36]

IV. Outlook

Now, where do my observations lead us? Hans Jonas once formulated that uncertainty is a "precondition to freedom". From time to time it can be a relief not to have to know something. In other words: Ignorance is inevitably imminent in all human wisdom, yet not necessarily deemed a flaw.

[31] As well as *Hofmann*, Rechtsfragen der Genomanalyse, 1999, p. 47 et seqq.; *Katzenmeier*, Deutsches Ärzteblatt 2006, A-1054 et seqq.; dissenting *Retzko*, Prädiktive Medizin versus (Grund-)Recht auf Nichtwissen, 2006, p. 149: „Allge-meines Persönlichkeitsrecht"; *Stockter*, Das Verbot genetischer Diskriminierung und das Recht auf Achtung der Individualität, 2008, p. 511 et seqq.
[32] *Jonas*, ib.
[33] *Wehling*, in: Brüsemeister/Eubel (Hrsg.), Evaluation, Wissen und Nichtwissen, 2008, p. 17 et seqq.
[34] *Steinmüller* (Fn 2), p. 235.
[35] *Warren/Brandeis*, The Right to Privacy, Harvard Law Review IV (1890), Nr. 5.
[36] In: Olmstead vs. United States (1927), 277 U.S. 479.

Recent Research Accidents and New Approaches to Vaccination

Legal problems regarding the testing of new vaccines for infectious diseases

Erwin Deutsch

I. Introduction: Latest research accidents

In the last years, spectacular cases occurred concerning phase I of clinical research. The pioneer patient, Gelsinger, at the University of Pennsylvania died a dreadful death after the administration of a new medicinal drug.[1] The gene therapy study in question was performed the day after Jesse Gelsinger's 18th birthday, avoiding the need for parental consent. The hospital steered clear of a trial by offering a high settlement, and exempted the co-defendant from liability, an ethical advisor, who had insisted on accepting an adult in the study although the particular disease is known to be easier to treat in children.

The second attempt to go wrong was carried out by the American company Parexel for Tegenero Ltd., a company associated with the University of Wuerzburg.[2] Eight volunteers from England, Australia, New Zealand, and South Africa were injected with the antagonist TGN 1412, two volunteers received

[1] Savolescu, Two deaths and two lessons: Is it time to review the structure and function of research ethic committees?, jmedethics 2002, 28, page 1; Paul Gelsinger, Jesse's intent, Bull.Med.Eth., June/July 2002, page 5 ff.
[2] Bull.Med.Eth., March 2006, pages 3 ff.

placebo. All members of the test group suffered from severe side effects and had to be treated in the intensive care unit for multiple days. Tegenero's insurance paid each injured person EUR 10.000. This and more would have been required of them, if experimentee insurance, i.e. insurance for test persons including international coverage, had been contractually applicable.

The latest event occurred in Chicago, where a 36-year-old woman died of multiple organ failure.[3] Jolee Mohr had participated in a gene therapy study by the pharmaceutical company Targeted Genetics, aiming to improve her arthritis treatment with the aid of an applied gene vector. The study has not yet been fully explored; however, it is quite clear she was infused with a vehicle carrying the gene for the tumour necrosis factor receptor. Reports suggest that it was an early clinical study of phase I, dealing exclusively with the safety of this typical gene remedy. The patient's consent had been sought with the premise that these experimental treatments may not actually be able to relieve her symptoms.

II. History

One of the early cases of medical experiments involved vaccines, a vaccine against smallpox to be exact. In his *Lettres anglaises, Voltaire* describes medical trials with inmates of the Newgate prison in London. This case's history is quite fascinating: The English emissary at the High Gates had conveyed an old custom of the Cherkessian, a tribe in the Caucasus. There, the skin of young children was scribed by the blood of a person infected with smallpox resulting in the effective prevention of the smallpox virus. This custom allegedly stems from Arabic cultures. Even the British ambassador's wife, Lady Montagu, had inoculated her son with the blood of a person suffering from smallpox.

According to *Voltaire,* condemned London prisoners were given the opportunity to participate in the inoculation with the smallpox virus in return for being released. The prisoners unanimously agreed and were released following inoculation. As a result of this trial, the inoculation against smallpox was very popular in England. At the same time, however, the Paris parliament (the courts prior to the revolution) outlawed the inoculation of the smallpox virus, citing bodily harm.[4] *Voltaire* criticized this decision and represented the opposite standpoint in England.

The largest medical experiment of all time also revolved around vaccination, namely the salk vaccine against poliomyelitis, which was tested on hundreds of

[3] FAZ broadsheet daily newspaper from August 8, 2007, page 34: death after knee problems (Tod nach Kniebeschwerden)

[4] *Voltaire* in Fernand Massé (ed.), Lettres anglaises 1967 pages 62 ff.; the history of trials with pocks vaccines in the USA and England, described by *Moore* Daedalus 98 (1969), 502 (504 ff.); on vaccination trials in Hanover in 1766 *Benzenhöfer*, Der Hannoversche Hof- und Leibarzt Paul Gottlieb Werlhof (1699-1766) 1992, 10 and experiments in Breslau discussed by *Vollmann/Wienau*, Informed Consent in Human Experimentation before the Nuremberg Code BMJ 1996, 1445.

thousands of children in the United States of America in the mid 1950's. The subjects were divided equally into two groups. Many hundreds of thousands of other children were treated with the vaccine through the extended access study. The experiment yielded an undoubtedly clear result regarding the efficacy of the salk polio vaccine.[5]

The curse of smallpox, presumed exterminated, returns disguised as a possible terror attack, reminding oneself of the spread of the plague in the middle ages. The Genuese garrisons of Crimea were besieged by the Tartars. Through the use of catapults, the besiegers hurled the bodies of plague victims above the barricades into the enemies' fortresses. This led the defenders to flee on galleys, subsequently carrying the plague to Europe.[6] The following entry can be read in the Guinness' "World Records": *Earliest use of smallpox as a biological weapon: During the French and Indian War of 1754-1767, British soldiers fighting in North America at that time distributed blankets contaminated with smallpox among the American Indians. Epidemics followed, killing more than 50% of affected tribes*[7].

III. General rules of clinical trials

The general rules of clinical trials apply for all new vaccines against smallpox and other emerging infectious diseases, such as the bird flu. However, one particularity needs to be stressed: The test subjects usually are not at risk of falling ill with smallpox or any other new epidemic. Such an event would only occur, if the experimental proceedings were similar to practices used during World War II, when prisoners were separated into groups of vaccinated and non-vaccinated persons and then exposed to the contamination.[8] This, however, is unethical and possibly even criminal. An elaborate trial with a large number of experimentees, who are treated with the new vaccine, should set precedent in the determination of the safety of a particular drug or treatment, e.g. ensuring the treatment is efficacious and holds no risk of secondary viral infection.

As far as efficacy goes, this is similar to the immunisation of donors for the extraction of plasma to make special immunoglobulins (§ 8 TPG). Here as well, volunteers are infected with a specific medication for the purpose of immunisation, e.g. against pertussis. The rationale often given includes the sufficient supply of

[5] On polio experiments in third countries cf. *Deutsch,* Das Recht der klinischen Forschung am Menschen 1979 page 83.
[6] *Ziegler*,The Black Death 1975, pages 15ff.
[7] Guinness Book of World Records 2005, page 306
[8] Namely the concentration camp experiment with thyphus: United States v. Rose, Trials of War Criminals before the Nuremberg Military Tribunals volume 2 page no. 264. Malaria trials with volunteers in the American Stateville Prison in Illinois during the Second World War, described in the bestseller of *Leopold*, Life plus 99 years 1958 pages 305-338.

immunoglobulin for the population as well as the existence of a consenting donor.[9] § 8 TPG regulates both the necessity of comprehensive information and written consent. Additionally, the donor is socially insured in the event of an accident.

According to the new formulation of the Declaration of Helsinki[10], and generally accepted rules transpired from laws (such as §§ 40 AMG, 20 MPG) and court rulings, clinical experiments are based on two pillars: Medical defensibleness and consent based on thorough information. Regarding medical defensibleness, the evaluation of possible advantages and foreseeable risks is a necessity. Thus, the experiment is medically defensible if reasonable to the patient, which in turn depends on prevailing judgements of the scientific and medical communities.[11] Concerning vaccinations, the primary consideration must be the underlying intention in the immunisation of the patient.

Immunizations are recognized instruments for the prevention of infectious diseases, such as poliomyelitis, yellow fever, influenza, rabies, measles, mumps, rubella, chickenpox, diphtheria, tetanus, cholera, etc. Due to immunizations, smallpox has been eradicated since 1978, and poliomyelitis was successfully restricted to a handful of countries.

The second and equally important prerequisite to research is, as mentioned above, the necessity of patient consent after having been fully informed. The research subjects should be told about the aims, methods, benefits, and risks of the study; the concomitant discomfort of the experimental treatment should not be kept from them. Medical experiments on uninformed patients have always been illegal and have even led to criminal proceedings. Consent is designed to follow a thorough explanation of the potential treatment(s) that lay ahead, must be given at utter liberty. Force, fear, and deceit should not play any part. Participating in clinical trials is reserved for volunteers as they are the only persons able of expressing their own free will based on comprehensive information. Consent given as the result of intimidation or deception is invalid and is in violation of both civil and criminal law.[12] It is still uncertain, whether soldiers under the command of their officers require informed consent or whether the reception of information alone shall suffice. This issue shall be further discussed later on.

Concerning informed consent, uncertainty remains with regards to whether information has to be communicated in writing and whether consent needs to be in writing. As long as the Law does not oblige differently (as it does in §§ 40 AMG and 8 TPG), consent is not bound by formal requirements. Nevertheless, the

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[9] For general justification of the immunisation of donors, cf. *Deutsch/Bender/Zimmermann*, Transfusionsrechts 2001, page 125f.; *Lippert/Flegel*, Kommentar zum Transfusionsgesetz (TFG) und den Hämotherapierichtlinien 2002 § 8 No. 2.3ff.

[10] Declaration of Helsinki by the World Medical Association Edinburgh 2000.

[11] Cf. for general information: *Giesen*, Arzthaftungsrecht 1995 pages 68ff.; *Katzenmeier/Laufs*, Arztrecht 16. Aufl. 2010 XIII, 14ff.

[12] *Van Oosten*, The doctrine of informed consent in medical law 1991 page 177ff.; *Laufs/Uhlenbruck*, Handbuch des Arztrechts 3.edition 2002 § 130; *Deutsch*, Das Vertragsrecht des Probanden, VersR 2005 1609, 1610ff.

written form is usually used to ensure distribution of uniform information and for means of proof. Regardless, consent must be given by the individual in complete freedom; which means that every volunteer may revoke their consent without listing reasons for doing so.[13]

Clinical trials are rooted in part by the principle not to conduct experiments on vulnerable groups, such as children, mentally ill individuals, and members of esprit de corps, i.e. police officers and firemen. However, under certain circumstances, even within these experiments vulnerable groups can be permissible. The restrictions concerning these groups are due to the inherent inability of these individuals to give free consent. Children typically are too young and dependents of their parents; civil servants may feel obligated to participate due to pressure by their colleagues.

The clinical trial is permissible, however, in the case it revolves around one of those groups, e.g. a typical children's disease, § 40 IV AMG. Still, it must be confirmed that the experiment cannot instead be conducted with adults able to consent. There are, however, multiple ways of confirming the need for experiments on children: An ethics committee of which at least one member must be familiar with the treatment of children's diseases, must examine and evaluate the proposal. The unresolved question that remains is whether it is permissible to include into the trial a control group consisting of matched children for the above mentioned children, especially when the control group shall only receive placebo, e.g. shall use a respirator for 15 minutes daily. In this context, it is necessary to differentiate and ensure the burden and inconvenience of the control group remains minimal. They shall not be expected to do more than participate in a superficial and time restricted manner.[14]

It is still very controversial, whether the patients ought to be told on whose authority the study is to be performed and who shoulders the costs.[15] The last principle shall be clarified by saying, that each participant may be given a monetary or similar incentive. Certainly, in case of a mishap, the innocent victim of an experiment shall be given compensation without having to prove fault of another party. This is where sacrifices come into play; the subjects jeopardize their own health for research and the welfare of the general public.[16] Therefore, § 40 AMG grants insurance to the subjects, and French laws grant extended liability in case of research accidents.

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[13] For written consent cf. § 40 Abs. 1 Nr. 3b AMG. Under special circumstances, consent to experiments on ill people does not have to be in writing (§ 41 AMG). Compare *Deutsch/Spickhoff*, Medizinrecht 6. edition 2002 Rdn. 927.

[14] Compare Officially Directive 2001/20/EC of 4 April 2001, of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States relating to implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, Art. 17: Protection of incapacitated persons in research projects.

[15] Vgl. *Finkel*, Should Informed Consent Include Information on how Research is Funded? IRB 1991 Nr.5 S. 1.

[16] Anders *Granitza*, Haftungs- und versicherungsrechtliche Fragen bei der Prüfung zu einem Arzneimittel, in: Helmchen et.al., Psychiatrische Therapieforschung 1978 page 83.

IV. Medical justification at the start

The new medications are first applied in phase I; the vaccine's safety is tested with regards to the patient's tolerance and if the results reveal low risks to the volunteer. Only after safety is assessed, further medical experiments may commence. This test is especially important when healthy volunteers undergo an experiment with vaccines and when the vaccine is designed to protect an individual from diseases for which there is no cure available. Certain cases touch on the problem of safety.

- Some live vaccines, such as the sabin vaccine, can cause mutations which have the same virulence as wild viruses. In countries with higher incident rates, the sabin vaccine was therefore replaced with the salk vaccine.
- *Cytokine Release Syndrome Study, incidents at the Northwick Park Hospital in London:* Eight individuals participated in phase I of a clinical trial involving humanised monoclonal antibodies, and two subjects received only placebo. The six who were treated with the actual preparation fell critically ill. TeGenero, based in Wuerzburg, was the producer, with Boehringer-Ingelheim as the manufacturer. The experiment was carried out by the US company Parexel with its head office in Brussels. The cause was assumed to be an overreaction (cytokine storm) due to the effects of the antibody TGN1412. This monoclonal antibody does not have an antagonistic effect but acts as an agonist. Its goal is the induction as opposed to the prevention of an immune reaction. Apparently the severe consequences were typical for an agonist.[17] Meanwhile, the research subjects have been released from the hospital, albeit one was diagnosed with leukemia. The insurance company of TeGenero transferred EUR 10.000 to each sick person's account, which amounts to the sum due according to the insurance conditions but yet disregards § 40 III AMG, which demands for appropriate compensation for the risks connected to the clinical trial; and in the event of death or unceasing inability to work even speaks of "at least EUR 500.000".
- *Malaria experiment in the Stateville Prison, Illinois*: During the Second World War, malaria tests were performed on volunteers in the American Stateville Prison located in Illinois. The press was invited and reported on the patriotic motivations and the wish of many prisoners to participate in the trial. They had been fully informed. The test subjects, by the way, released the head of the trial and all institutions from their liability. Many trial participants were pardoned in 1947 by the governor of Illinois.[18]

[17] Compare for more details DÄBl 2006 A988: Patienten genesen, Hersteller entlastet.
[18] In more detail *Leopold* aaO (Fn. 4). *Leopold* himself participated in the tests.

V. Efficacy

The efficacy of medication is tested in phases II and III; generally, it is a clinically controlled study, in which two groups are juxtaposed: Members of one group receive the medicinal drug whereas the members of the other group receive placebo or, in case this is too dangerous, the medication they have been receiving thus far. The concept of efficacy is a serious problem when testing a vaccine. Many cases concerned the efficacy:

- *The testing of the Salk polio vaccine*: In 1955, the first vaccination against infantile paralysis was tested. It was a medication developed by Salk. The press reported a few hundred thousand children had participated.[19] They were separated into groups; one group received the vaccine, the other group received placebo. It was also reported, that many parents cheated the system by signing up their children for the vaccination in multiple places hoping their child would at least once be in the test group.[20]
- *Malaria experiments in* Oxford *and the Gambia*: A new vaccination against Malaria, which affects bacteria in the liver, was just recently tested on 70 volunteers in Oxford. All had received the actual vaccination. Every participant was bitten five times by infectious mosquitoes. According to news paper articles, a partial but significant protection shield became apparent. Now there shall be a trial in the Gambia with 360 adults, half of whom shall receive the new vaccine whereas the other half shall receive a drug against rabies. During the malaria season, the test persons' health shall be examined[21]; the results have yet to be published.

The testing of whether a vaccine is efficacious raises difficult ethical and legal questions. Experiments with vaccines oftentimes are not illegal, even if the test subjects neither suffer from any disease nor are in the immediate danger of becoming infected. Clinical trials aiming at maintaining a low level infection, especially those of epidemic nature, are permissible. At the same time, one must also bear in mind the health and well-being of the participants. However, even if there is a significant chance of infection, especially for the members of the placebo group, it is a risk worth taking. If there was no control group to take the risk of becoming infected, drugs could enter the market which promise neither prophylaxis nor cure but rather feign them. An impressive example is the false evaluation of passive prophylaxis of tetanus during the First World War, when people believed to have found tetanus anti serum, a valuable prophylactic. The medical corps also used it in the Second World War, albeit the active vaccination

[19] Compare for more information and for general information on experiments with children *Deutsch*, Das Recht der klinischen Forschung am Menschen (1979), 83ff.
[20] Strictly against experiments on children *Pappworth*, Human Guinea Pigs (1967). More careful *Beecher*, Research and the individual (1970).
[21] Cf. The Economist vom 20.8.2002 S. 60: A new Malaria vaccine is being tested in the Gambia.

was only given to paratroopers. Besides paratrooper casualties, many lives were lost to tetanus despite the passive treatment with serums.

Test persons under command set forth particular problems. Generally affected are the military, however, members of other occupational groups are also considered, e.g. hospital staff. Consent is not necessary, if one is obligated to participate. Therefore the next question to present itself is whether the test persons may be left in the dark about experiments conducted with and on them. The so called Thorotrast case, which was carried out during the Second World War at the University hospital of Heidelberg, was about a contrast medium of which's risk the patient was not informed. The case Desert Storm also left the soldiers clueless that a not yet authorized vaccine was tested on them.[22] These practices should be questioned; not only for the reason of informed consent but to disclose to the participants the risks and give them the chance to claim damages, just as they were in the Heidelberg case.

VI. Consent and Information

Usually information supersedes consent and in most cases brought to court, claims are based on insufficient information. Yet consent is the actual legal justification for the experiment. As aforementioned, consent should be given by the subject personally; he or she ought to be free. Pressure and conceit are inadmissible. Consent is based on given information and cannot go beyond what the person has heard or read. Consent has two legal sides. The first refers to the permission of harming a person. The unlawful harm done is justified due to the given consent. On the other hand this implies that the consenting individual generally bears the risk of damage to his or her health. This is not applicable in the event of negligence or in the case compensation is granted for the sacrifices. However, usually it is the subject who bears the consequences. Consequently, information must be thorough and complete to be able to lead to consent. The individual must be told what is done to him during the experiment as well as how long it will take and which inconveniences, risks and possible advantages are entailed. Based on this information the person can consent. The following cases clearly capture the validity of this statement:

- *United States v. Rose*[23]: Rose was the head of the department for tropical medicine at the Robert-Koch Institute. During the war, experiments were carried out on concentration camp prisoners using typhus, and his department supplied the concentration camps of Buchenwald and Natzweiler with rickettsia bacteria and vaccines. Rose visited the sick rooms in Buchenwald and studied the medical history. For purposes of the experiment, both a vaccinated and a control group were infected with

[22] BGHZ 20, 61 (Thorotrast); Doe v. Sullivan 756 F. Supp. 12; 938 F. 2d 1376 (1991; Desert Storm).
[23] United States v. Rose, Trial of war-criminals before the Nuremberg Military Tribunals Bd. 2 S. 264.

typhus fever. Quite a few patients of either group died, many fell very sick. A total of 729 prisoners were infected, of whom at least 154 died. The experiment was described to them as harmless; better treatment had been promised. *Rose* was charged for both war crimes and crimes against humanity.

- *United States v. Stanley*[24]*:* In 1958, a sergeant of the American army volunteered for a program in which the effectiveness of protective clothing against chemical warfare was tested. Without his knowledge he received LSD, which leads to hallucinations and memory loss. Not until 1975 was he informed of the true circumstances of the experiment.

VII. Control groups, placebo trials and randomisation

Medical research is especially convincing when a comparison strategy is used. This approach is also applicable for vaccination trials against the smallpox virus. Utilizing different groups when testing vaccines, i.e. both a test and a control group, was rarely tried. New information came about in 1871: The German army was vaccinated whereas the French army was not and suffered from significantly more diseases, becoming the foundation of German vaccination laws. A clinically controlled trial on smallpox did not lead to results accepted by the medical community; in trials of 1959 and 1971 with vaccine antigens and MVA vaccines against smallpox, control groups were not utilized. An experiment conducted in 1962 within the Netherlands used a combined active-passive vaccine but the homogeneity of the subjects was unverified. Some participants had been previously vaccinated as children.[25]

The use of placebo, a substance containing no active ingredient, yields difficulties in itself. As long as different vaccines are tested against one another, medical research seems to be justified since the starting point is a subjective uncertainty.[26] However, it is quite another matter to directly expose a group to the dangers of an incurable disease. This is considered unethical, illegal and even criminal. In the latest version of the Declaration of Helsinki, the admissibility of Placebo trials was constrained. Accordingly, the use of mock medication is allowed only if there is no approved prophylactic diagnostic or therapeutic treatment method.[27] Due to the protest of American medical doctors, a note of clarification has been issued by the board of the world medical association, stating that a placebo controlled experiment can be ethically permissible only if urgent and scientifically acknowledged methodical reasons prevail or if the possible symptoms

[24] United States v. Stanley 107 S.Ct. 3054 (1987)
[25] *Thomsen*, Pocken- und Pockenschutzimpfung 2002
[26] *Lorenz* et.al, Chirurgische Arbeitsgemeinschaft für klinische Studien, Patientenzuteilung bei kontrollierten klinischen Studien in Der Chirurg 1982, 514; *Deutsch* loc cit (Fn. 9) Rdn. 542.
[27] Declaration of Helsinki Edinburgh 2000 C Nr. 29.

as well as the experiment itself cannot lead to additional risks of grave and irreversible damage.[28] This is now expressed in the Social Version (2008) C32. Experiments with smallpox vaccines touch on this issue.

Randomization, i.e. the allocation to the different groups by chance, is done in order to prevent erroneous results and make the groups more representative.[29] Normal vaccination trials require large subject groups. Due to the inherent complexity of each group, there is not much room for sensible randomization.

VIII. Liability and Sacrifices

In the event of negligent bodily injury during the planning or execution of an experiment, liability exists in the form of §§ 280, 823 BGB due to a breach of contract and a tortuous act.[30] Negligence includes not observing due care and attention, § 276 II BGB. In Scotland, government agencies just recently were presumed to carry fault for not initiating clinical trials in response to repeated notifications by the medical community, warning about side effects. This case dealt with the treatment of men and women of small stature, whom were given growth hormones of animal origins. When multiple patients developed Creutzfeldt Jacob syndrome, state agencies reacted slowly to the reports on the very many side effects.[31] This coined scientific and social progress by rendering the first case in which omission of a clinical experiment was perceived as negligent. In clinical trials, circumspection is chiefly the overseeing medical doctor's responsibility.[32] Moreover, the ethics committee as well as government agencies are obligated to prevent overly dangerous experiments.

In case no one is at fault, sacrifice compensation may generally be demanded, albeit it shall not lead to full damages but shall somewhat take care of the innocent victim. Each time the subject was not asked to consent such sacrifice compensation is demandable, especially in the case of soldiers under command. Moreover, many countries have established general rules for objective liability or have ensured that if the risks of a clinical trial are realized, there would be insurance for sacrifice compensation. France, for example, instated a law in 1988 clarifying the rules on liability during medical experiments: For non-therapeutic experiments it provides objective liability; for experiments yielding immediate

[28] *Klinkhammer*, Umstrittenes Dokument DÄBl 99 (2002), A 409; *Taupitz*, Note of Clarification – Kaum zu verantworten DÄBl 99 (2000), A 411.
[29] Vgl. *Deutsch/Spickhoff*, Medizinrecht 5. edition (2002) Rdn. 654.
[30] *Fischer*, Medizinische Versuche am Menschen 1979 S. 78; *Deutsch*, Haftung bei Forschungsunfällen, Mitteilungen des Hochschulverbandes 1979, 165; *Jung*, Die Zulässigkeit biomedizinischer Versuche am Menschen 1996 mit rechtsvergleichender Untersuchung auf Grundlage des französischen Rechts.
[31] Thus decided in The Plaintiffs v. U.K. Medical Council, Queens Bench, Bull. Med. Eth., November 1996, 16: 16 Children died of CJD, three more suffer from this disease. In 1977 there were more than enough signs suggesting the danger in using corpse hormones. However, the clinical study was delayed for two years. The Courts ruled this to be negligent.
[32] More in detail *Deutsch*, Das Vertragsrecht des Probanden, VersR 2005, 1609ff.

benefits for the test person, it instates responsibility for suspected negligence.[33] Germany provides casualty insurance in favor of a third party (§§ 40 AMG, 20 MPG) for the testing of medicinal drugs and products.[34] This casualty insurance is a seldom emergence of compensation insurance in the event of accidents. One ruling of the American Supreme Court illustrates quite well the liability for fault in case a government agency does not insist on sufficient testing:

- *Berkovitz v. United States*[35]: A two month old child was injected with a polio vaccine, which had been produced by a company named Lederle. The so called Cox live vaccine contained a paralytic form of the polio virus. Within a short amount of time the child developed a very severe case of infant paralysis. According to the applicable law, liability of the federal government was possible in case the provided discretion had not been executed free from error or in case of a failure of obligation of either a government agency or an official. The suing child argued that the National Institute of Health (NIH) and its Department for Biological Standards should not have granted Lederle a licence to produce the vaccine. The appellate court dismissed the case; however, the Supreme Court allowed it, stating that it was probable that the NIH had exceeded its scope of discretion. If this could be proven, such government misconduct would lead to damages.

IX. Extraordinary situations and war

Rules of law and normal standards of ethical behavior affect normal situations. Yet, in the event of an "abnormal" situation, ethical standards are, if without complete abolition of legal and ethical rules, decremented. The case of Desert Storm well illustrates this fact[36]:

- *Doe v. Sullivan*[37]: Desert Storm occurred during the gulf war operation. The United States of America faced the fear that in their war against Iraq chemical and biological weapons would be used as in previous conflicts. Therefore the Department of Defense sought permission from the Federal Drug Administration (FDA) to use medications and vaccines which had not yet been approved for use. They were supposed to be applied even without the knowledge of soldiers on the ground. They claimed military necessity. Due to the state of war, the FDA granted approval, also

[33] Loi No. 88-1138 vom 20.12.1988. Cf *Jung* loc cit (Fn. 27).
[34] *Klingmüller*, Zur Probandenversicherung nach dem neuen AMG in Festschrift für Hauß 1978 page 169; Deutsch, Das Vertragsrecht des Probanden, VersR 2005, 1613.
[35] Berkovitz v. United States 486 U.S. 531 US Supreme Court 1988.
[36] *Annas*, Changing the consent rules for Desert Storm The New England Journal of Medicine 1992 S. 770; *Gunby*, Informing of investigatonal drugs, devices JAMA 1995 s. 276.
[37] Doe v. Sullivan 756 F. Supp. 12; 938 F. 2d 1376 Federal District Court, Federal Court of Appeals 1991.

> acknowledging the obvious and immediate danger the soldiers found themselves in. This approval was contested in court, but the case was dismissed in two instances. The trial court claimed the approval to be a strategic decision and denied its jurisdiction. The majority of the judges of the appellate court recognized their jurisdiction for the reason that the case dealt with a special license given by the FDA rather than military matters. However, they still did not allow the appeal, stating that the main reason for using non-approved medication and especially vaccines was not scientifically but militarily sustained. Therefore normal restrictions were not applicable.

The so called War on Terror established another situation. The danger that viruses may be used for terroristic activities is very real. Therefore people who may come in contact with infectious diseases are obligated to get vaccinated. This particularly affects personnel of health services, mainly of hospitals. On the occasion of these vaccinations it would be permissible to test a new vaccine against smallpox, which yields no known side effects. A known side effect of the current smallpox vaccine is encephalitis. Due to the large number of people affected by such a vaccination (presumably more than one million individuals), groups could be formed, and one would be treated with the usual vaccine and function as a control group while the other one would receive the new vaccine.

X. Research with vaccines today

These considerations lead to another controversy, namely active and passive vaccinations against pathogens of new developing epidemics and pandemics, e.g. a mutant form of the bird flu virus H5N1, allowing infection of humans. According to rumors a similar virus was contracted by US soldiers towards the end of World War I, resulting in influenza and the death of millions. The death toll is said to have been 30-40 million people worldwide.[38]

The anticipation of the bird flu has led to a variety of experiments in Germany and the USA. While the pandemic risks were discussed in life insurances, the "virtual paperchase" made headlines in Germany. The Frauenhofer Institute for Applied Information Technology conducted an *epidemic menace:* Both a German and a Belgian Team compete against each other in solving the following virtual case: In a secret medical research laboratory a dangerous virus was discovered, which could lead to the extinction of human life on this planet. The research director clarifies that it is essential "to catch as many viruses as possible, then figure out who spread the virus, and take that person into custody". In a communication center,

[38] DÄBl. 2006 A 986: Impfstoffentwicklung: Begrenzte Immunogenität einer H5N1-Testvakzine; press release from 26 July 2006: H5N1-Pandemie-Impfstoff von Glaxo-Smith-Kline (hohe Immunantwort bei geringer Antigendosis).

surveillance cameras show the moves of the two groups, their members and the viruses. The simulated catastrophe, namely the contamination of all paths with dangerous viruses, is depicted by leaf-like shapes in red, green, orange, and pink. The members of both groups are supposed to see and destroy those shapes. They are equipped with a positioning technique, which is controlled from a weather station. The scenario is recorded by a game server aware of each player's position. One member of each team is sent outside while the rest of the team via cell phone directs him where to find the shapes. Stationary and mobile players are switched out periodically. The viruses are exterminated with a shooting tool, with the simple push of a button. A hit is made known through music, whereas a miss sets off no audio stimulus. The player's extent of infection is indicated in percent, and the more his capability decreases the more imperative it becomes to switch him out.[39]

A very different procedure is used in the Center for Disease Control in Atlanta, where a combination of the bird flu virus H5N1 and the flu virus type H3N2 are crossed. Such a mix is pure horror for flu experts. It is even assumed that the pathogens of the two last flu pandemics of 1968 and 1957 followed from a gene swop of a bird virus. The virus mixture was tested on ferrets, which didn't fall at all as sick as they had with the earlier H3N2. Also, they did not infect other ferrets in neighboring cages. Ferrets are used for flu experiments because their respiratory tract is similar to humans with respect to docking points for viruses.[40]

The government of the United States of America decided on a program to fight pandemics, which includes distinct encroachments into current legal regulations for vaccination trials. These trails are to be facilitated, e.g. by total freedom from liability. Also, the experiments and first and foremost their results are supposed to be applied to hospital personnel.

It is questionable whether studies on epidemiological models are appropriate in this time and age, chiefly due to the possible speed at which a pandemic H5N1 infection can spread. Experiments for the production of experimental vaccines and their application are of greater importance. A current uncertainty revolves around an American vaccine, which has been planned in Rochester and produced in Paris by Sanofi-Pasteur: In case of a pandemic development, how can immune protection be generated as quickly as possible? The antigen composition of pandemics is unknown; the production of vaccines, therefore, cannot begin before it first presents itself and is isolated. Production requires several months. Maybe two doses of the vaccine ought to be injected with time lag in order to achieve full protection. Therefore the delay will be even greater. Owing to these circumstances, current model systems are testing whether a pre-vaccination with a current H5N1 isolate can prepare a person in such a way that in case of a pandemic he or she will only require another dose of the epidemic stem. Such experiments, called "pre-pandemic vaccination", are very promising. Researchers are also occupied with

[39] FAZ from 10 July 2006 page 48.
[40] SZ 03 August 2006: Killer-Experimente, H5N1-Kreation erstaunlich harmlos.

figuring out the necessary doses of the vaccine for intracutaneous and intramuscular injections, hoping to save serum which in case of an emergency will be needed in huge quantities.[41]

Considering the risk of epidemics and pandemics from a medical and legal point of view, in case of an emergency many requirements revolving around experiments will be disregarded.[42] Personal requirements will either be relinquished or strongly imposed upon. This includes the notification of being a member of the control group as well as sufficient information and consent, although minimum consent must remain required. Also, the country could initiate an obligation of certain personnel to participate in trials.[43] Forgoing scientific requirements such as randomization or any kind of group organization is not feasible. When a new drug is tested, the group not involved in the trial, e.g. all doctors and nurses of a specific region, can be given the test drug by ways of extended access study.[44] It remains uncertain whether insurance of the test persons can be waived, yet it would have to be limited to those actually participating in the trial. Insurance companies will prefer avoiding the risk. Maybe the government should step into the breach.

An entire array of vaccines can be tested with the immune response of the body. In order to test a vaccine made to protect from pneumococcs, for example, 1100 patients are divided into two groups; after one month a crossover takes place. The subsequent determination of the immune status of both groups, including the placebo group, is then used to determine efficacy. The efficacy is supposed to be determined without clinical controls. Obvious doubts from medical statistics remain.

XI. Prospects

Vaccination against smallpox was the very beginning in the discussion about medical experiments on humans. More than 250 years later we still face the same old problem. The possible attackers continue to be nature itself through mutation of her genes, but moreover human kind.

[41] notification by R. Thommsen
[42] *Wiesing u. Marckmann*, Eine neue Pandemie – alte ethische Probleme. DÄBl. A 1888 even consider imposing on basic human rights.
[43] Already so described *Carmi*, The Challenge of Experimentation, in: Veröffentlichungen des IV. Weltkongresses für medizinisches Recht (July 1976).
[44] This *extended access study* was introduced unter this name by the FDA when experimenting with AZT and DDI against HIV infections. Since then, it has been used more and more often in clinical studies, especially regarding new drugs against absolutely deathly diseases such as renal cell carconoma.

SECTION 2:
CONTRACT LAW, INDUSTRIAL LAW AND GOVERNING STOCK EXCHANGE

Judicial Modification of Contract in Relation to the Change of Circumstances

Youngjoon Kwon

I. Introduction

One of the purposes of contract law is to enforce valid agreements. Therefore, the famous maxim of '*pacta sund servanda*' (one should abide by agreement),[1] stressing the sanctity of contract, stands as the most important principle in contract law. Consequently, a contractual relationship is set forth at the time of the valid contract, and is, in principle, not subject to alteration or annulment afterward unless a new agreement allows it. However, there are cases where enforcing the contract on its face would put one party in a drastically disadvantageous position due to the *ex post* change of circumstances surrounding the contract. Imposing excessively onerous burden on a faultless party who has never assumed such an unanticipated risk at the time of contract seems unfair. The doctrine of change of circumstances addresses this pathological issue of the contract law. This brief paper touches upon this topic, particularly concentrating on judicial modification of contract as one of its remedies. This topic concerns itself with the issue of information and risk – main themes of this symposium – in that it deals with symmetric information imperfections on future unforeseen events as well as risk allocation in the aftermath of such changes. The argument set forth here is that the modification of the contract by the court, though it may and should take place rarely only in exceptional cases, can be justified as a necessary and justifiable tool

[1] On this notion, See generally Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 543, 576-582 (1990).

to prevent grossly unfair result. Although Germany has already recognized this mechanism, Korea is unfamiliar with this doctrine.

Against this backdrop, I have structured this paper as follows. In part Ⅱ, I will give a general overview of the doctrine of change of circumstances in order to set the tone for a further discussion. In part Ⅲ, I will make an observation from a comparative perspective to show how prevalent this approach of the judicial modification of contract has become on an international level. In Part Ⅳ, I will make normative arguments on the necessity and justifiability of the judicial modification of contract to demonstrate that Korea may need to provide a legal ground for this by legislating a relevant provision. Finally in Part Ⅴ, I will give a brief summary of what has been discussed and conclude with a few remarks on the prospect of this doctrine.

II. General overview on the doctrine of change of circumstances

1. The doctrine of change of circumstances as a risk-allocation mechanism

The doctrine of change of circumstances is, after all, a doctrinal vehicle that allocates unallocated risks of the contract. Contract concerns future obligations. Since future is full of contingencies, contract inherently faces certain future risks. In this sense, parties commonly assume and accept that circumstances may change between the time of contract and the time of performance. Therefore, allocating risks becomes the central element of a contract. Insurance contract, where premium is set according to the scale of the risks, is a representative example. Other forms of contracts also presuppose this sort of risk assessment though not as conspicuous as in an insurance contract. Sometimes, parties pre-allocate risks in the form of an explicit clause. For instance, hardship clause[2] or MAC (Material Adverse Change) clause[3] are contractual mechanisms designed to handle unexpected events. Even when there are no explicit clauses like these, there may be an implicit agreement between parties as to who bears the risk of unforeseen events in the future. In principle, a promisor assumes risks associated with performance. Therefore, a promisor bears an unconditional obligation to perform

[2] Hardship clause is a clause in a contract that is intended to cover cases in which unforeseen events occur that fundamentally after the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved. See Stefan Vogenauer & Jan Kleinheisterkamp (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts(PICC)*, 711 (2009) for more details.

[3] A MAC clause is a self-help clause that provides the right to terminate or renegotiate a contract under specified change of circumstances in the realm of M&A contracts or financing contracts. This clause enables the acquirer or a funder to refuse to complete the transaction with the party being acquired or financed if certain material and negative changes occur. See generally David Cheng, *Interpretation of Material Adverse Change Clauses in an Adverse Economy*, 2009 Colum. Bus. L. Rev. 564 (2009).

in principle. For this reason, a change of circumstances does not automatically invoke special treatment of the contract. Rather, a party is still bound to fulfill its contractual obligation even when performance becomes onerous. Therefore, a mere fact that the cost of performance has increased may not excuse a party from its obligation. Thus, even major changes in the economic climate do not necessarily justify judicial intervention since the economy normally fluctuates.

However, not all risks are the same. Some risks are gross, while others are minor. Some are foreseeable, while others are not foreseeable. In reality, the limit of human capacity to foresee the future or bounded rationality of the parties makes it impossible for them to assume all the future risks in advance at the time of contract. There are some risks that both parties have never anticipated, making performance excessively onerous that it does not do justice to enforce the contract. Here comes the necessity of an *ex-post* risk allocation mechanism by virtue of law or the power of a court, instead of totally relying on a contractual framework that sometimes fail to provide a basis for alleviating or allocating such grave risks. This necessity becomes even more significant when it comes to a long-term contract, where its contractual relationship is vulnerable to a great number of contingencies throughout the contractual term.

2. World-wide acceptance of the doctrine

A majority of countries across the world have introduced some mechanisms to correct such injustice resulting from the change of circumstances, either in the form of law or legal doctrines.

A. Germany and other European countries

Germany has developed a peculiar form of doctrine on the change of circumstances. BGB, with its liberal and individualistic conceptual model of the contract, did not explicitly accept this idea at its first codification stage. The basic rationale was to ensure legal certainty in legal transactions.[4] This was also partly due to the expansion of a will theory in the contract law as well as the retreat of the natural law theory which supported the notion of *clausula*. However, Germany has gone through a serious hyperinflation after the First World War, the peak of which was between 1920 and 1923.[5] It was evidently unfair to enforce the contract on its face in the wake of an unprecedented hyperinflation. To address this problematic situation, the Reichtsgericht (RG) first resorted to the notion of the impossibility

[4] A similar notion was advocated by a publication in 1850 by Windsheid, "Die Lehre des römischen Rechts von der Voraussetzung (The Doctrine of Pre-supposition in Roman Law)". Although the legislators of BGB were familiar with this notion, it was not incorporated in BGB.

[5] At the end of 1921 – to some degree due to the reparation payments of the Versailles Treaty of 1919 – prices were 35 times higher than before the war. And a year later they had risen to a level that was 1,475 times higher. Hannes Rösler, *Hardship in German Codified Private Law ß In Comparative Perspective to English, French and International Contract Law*, 15 EuRP, 487 (2007).

of performance, which had already been codified in § 275 (1) BGB. The RG, with the notion of economic impossibility, released the party from its duty to perform according to the above provision.[6] At the same time, the notion of "Geschäftsgrundlage" was first introduced by Oertmann in 1921.[7] Geschäftsgrundlage, the basis of juridical act if translated literally, is the term representing circumstances or perceptions shared by both parties at the closing of the contract that forms the basis of contract. RG began to accept this notion from Feb. 1922[8] on the basis of good faith doctrine in BGB § 242, and this continued to solidify throughout numerous decisions to follow.[9] In 2002, Germany codified this judge-made doctrine of "Störung der Geschäftsgrundlage" in BGB § 313. According to the above Article, modification or termination of contract is made available if the circumstances that have become the basis of the contract have changed fundamentally after the contract was concluded.

Many European countries - including Austria,[10] Greece,[11] Portugal,[12] Poland,[13] Spain,[14] Russia,[15]Italy[16] - have also provided similar mechanisms either by statute or case law. France and England show some reluctance toward this based on their strong advocacy of the sanctity of the contract. However, they are not without remedies. France Civil Code Article 1148 allows the release of the party from contractual obligation in the case of *force majeure*. In French administrative law. the *imprévision* (unforseeability) was recognized by the highest judges where adjustment of contract was allowed at the occurrence of unforeseen events.[17] In England, the doctrine of frustration handles this problematic situation, as I will explain below.

B. England and U.S.A.

In common law, this mechanism partially finds its place in the doctrine of frustration, and the doctrine of impracticability. The basic logic of the doctrine of frustration is that if, after a contract is made, something happens through no fault of the parties and makes its performance meaningless, the contract is said to be

[6] RGZ 94, 45, 47; RGZ 100, 129, 130.
[7] P. Oertmann, Geschäftsgrundlage-Ein neuer Rechtsbegriff (1921).
[8] RGZ 103, 328.
[9] RGZ 104, 394; RGZ 111, 157. BGHZ 25, 390, 392; BGHZ 74, 370, 372. Fikentscher/Heinemann, Schuldrecht, 10. Aufl. (2006), S. 127.
[10] ABGB § 936, 1052, 1170a, by way of analogy, served as the statutory starting point for the development of the changed circumstance rule. Christian von Bar & Eric Clive, Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR), Full Edition (2009), Vol 1. p. 717.
[11] Greek Civil Code § 388.
[12] Portuguese Civil Code § 437.
[13] Polish Civil Code § 357.
[14] Spanish case law permits the court to end the contract if a less radical way of preserving it cannot be found. Ole Lando & Hugh Beale, Principles of European Contract Law, Parts Ⅰ and Ⅱ (2000), p 328.
[15] Russian Civil Code § 451.
[16] Italian Civil Code § 1467.
[17] Conseil d'État, 30 March 1916, *Gaz de Bordeaux*, D. 1916. III. 25.

frustrated, and the relevant obligation comes to an end. Until the middle of the nineteenth century, the common law always required specific performance of contractual obligation under the 'rule of absolute liability'. However, *Taylor v. Caldwell* [18] paved the way for the doctrine of frustration by establishing its precursor, the doctrine of impossibility.[19] The doctrine of frustration first appeared in *Krell v. Henry*[20], where a party was excused from contractual obligation to make payment for the room it had contracted to rent to view King Edward Ⅶ's coronation when the coronation parade was cancelled due to the King's illness. Unlike in *Taylor*, performance of the contractual obligation, payment in this case, was not impossible. However, forcing a party to pay for the room was inappropriate and meaningless. Thus, the English court expanded the logic of the doctrine of impossibility to the case where the purpose of the contract was frustrated, thus establishing the doctrine of frustration.

Both doctrines were accepted in America. For instance, the doctrine of impossibility and frustration were both included in the Restatement (Second) of Contracts in Section 263 and 265. American courts went even further than this. The doctrine of impracticability evolved out of the doctrines of impossibility and frustration,[21] providing a remedy where performing one's obligation becomes impracticable, though not impossible. Section 2-615 of the Uniform Commercial Code deals with impracticability in the contest of sale of goods. Section 261 of the Restatement(Second) of Contract touches upon this as well. This is in line with the doctrine of the change of circumstances, or the notion of hardship that is commonly used in the cross-border transaction contracts.

C. Japan and Korea

Influenced by European jurisdictions, Asian countries have also taken on a similar approach. Japanese Civil Code, which has been quite influential on Korean Civil Code due to the past colonization of Korea by Japan, does not include any explicit and comprehensive provision on the change of circumstances. This is quite understandable since Japan, at the stage of preparing its draft for Civil Code, was heavily relying on French Civil Code and the first draft of BGB, both of which did not have such a provision. However, under the influence of the doctrine of

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[18] Eng. Rep. 309 (1863).

[19] The parties in the case had entered into a rental agreement concerning the use of the Music Hall for a series of concerts. Six days before the planned date for the first concert, the building was destroyed by fire, making it impossible for the concerts to go ahead. The party planning to put on the concerts was sued for breach of contract, but the action failed because performance was impossible, thus establishing the doctrine of impossibility.

[20] 2 K. B. 740 (1903).

[21] See *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 p. 458 (1916); *Transatlantic Financing Corporation v. United States*, 363 F.2d 312 (D.C. Cir, 1966). . See also Paul L. Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case*, 6 J. Leg. Stud. 119 (1977); Richard Posner & Andrew Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Leg. Stud. 83 (1977).

Geschäftsgrundlage in Germany, Japanese scholars and courts began to develop the doctrine of change of circumstances from 1920s. The first decision by the highest court approving this doctrine was handed down in 1944. This doctrine remains valid up to now.

The Civil Code of Korea does not have any provision comparable to BGB §313, either. As mentioned above, Japanese civil law has been influential on Korea and the doctrine of change of circumstances was no exception to this. Korean scholars have accepted this doctrine, mainly building on academic discussions by Japan. Yet, Korean judiciary has been extremely stringent in applying this doctrine. It has never accepted an argument based on this doctrine in a specific case. Even in a case where the value of the object has hiked 1,620 times the original price due to the Korean War, the Supreme Court rejected the application of the doctrine.[22] However, Korean Supreme Court has explicitly recognized the feasibility of this doctrine in its decision in 2007,[23] though the argument itself failed to pass through the strict muster of the Supreme Court. Recently, this doctrine has drawn attention with thronging of multiple cases regarding KIKO contracts, which I will explain further at the later part of this paper.

D. Model laws

This doctrine has been accepted not only by domestic laws, but also by international model laws as well.

European model laws,, such as "Principles of European Contract Law (PECL)" in § 6:111 and "Draft Common Frame of Reference (DCFR)" in Book 3-§ 1:110 deal with this doctrine. For example, PECL § 6:111 (2) states that "if, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it" under certain conditions provided in the same section, and section (3) of the same article further states that courts may end or adapt the contract if the parties fail to reach agreement within a reasonable period.

"Principles of International Commercial Contract (PICC)" by UNIDROIT also addresses this in § 6.2.1. through § 6.2.3. Although it states this issue using a different terminology of 'hardship', a basic rationale and the solution are very similar to the above European model laws. The incorporation of the doctrine on an international-level model laws shows that this is not worldly accepted doctrine.[24]

[22] Supreme Court 63Da452, Decided on Sep. 12. 1963.
[23] Supreme Court 2004Da31302, Decided on Mar. 29. 2007.
[24] This notion is also accepted in the realm of public international law, as can be seen in Art. 62 of the 1969 Vienna Convention on the Law of Treaties and as an axiom of customary public international law that also binds the EU Institutions(ECJ Case C-162/96-Racke[1998] ECR Ⅰ-3655).

3. The requirements and legal consequences

A. Requirements

There are multiple ways of describing the requirements of the change of circumstances. The Korean Supreme Court has stated its requirements as follows; ① the change takes place after the contract, ② the change was not foreseeable at the time of the contract, ③ the change has nothing to do with the fault of the party claiming this doctrine, and ④ adhering to the original contract would yield outcome contrary to good faith.[25] German BGB § 313 requires that ① the basis on which the contract was made has drastically changed, ② the same contract should not have been made if the party has foreseen the change, and ③ the party cannot be expected to bound to the original contract in consideration of all the circumstances including risk-allocation. PECL § 6;111 suggests that ① performance of the contract becomes excessively onerous because of a change of circumstances, ② the change of circumstances have occurred after the contract was made. ③ circumstances should not have reasonably been taken into account by the parties, and ④ the risk of the change of circumstances is not one which, according to the contract, the party affected should not be required to bear.

Although languages are different, three factors seem to play a dominant role.

Firstly, there is a change related factor. The change has to be excessively onerous and unforeseeable. In general, price fluctuation due to the inflation does not satisfy this requirement since it is neither excessively onerous nor unforeseeable. This is to be distinguished from the notion of impossibility in the sense that the performance is still possible, though the borderline is sometimes blurry. Additionally, it should not arise from the obligor's fault. One should not be allowed to benefit from her own fault.

Secondly, there is a time related factor. The change should take place after the contract was made. If this change has already taken place at the time of contract, and the parties have failed to take notice of this, it is not a matter of change of circumstance but rather a matter of mutual mistake. How mutual mistake is to be handled differs among jurisdictions. For example, Germany would take this issue in the same framework of "Geschäftsgrundlage", while Korean Supreme Court dealt with this case from the perspective of supplemental interpretation of contract (ergänzende Auslegung).[26] Though both approaches share the notion of the judicial intervention, the latter is slightly different from the former in the sense that it does not completely lose the connection with the intention of contract parties,. The notion of Geschäftsgrundlage allows judicial gap-filling without regard to the parties' intention, whereas the notion of supplemental interpretation of contract presupposes hypothetical intention of the parties.

[25] Supreme Court 2004Da31302, Decided on Mar 29. 2007.
[26] Supreme Court 2005Da13288, Decided on Nov. 23. 2006.

Thirdly, there is a risk-allocation related factor. If the risk has already been allocated to the parties by way of contract, there is no room for the doctrine of change of circumstances to step in. When there are explicit provisions against future risks, those provisions will govern. The mere fact that a given risk is a low probability risk does not mean that it has not been foreseen or assigned to one or the other party.[27] Insurance contract is a typical example of risk-allocation over a low probability risk. Even when there are no such provisions, the court should see to it that if the risk has implicitly been assumed or allocated between parties. A more speculative contract is more likely to have allocated the risk in advance. For instance, a sale on the future market is a speculative contract. Thus, one might easily assume that the party has already born the risks in advance. Same thing can be said of KIKO contract, which has been quite a controversial legal issue in Korea. KIKO (Knock-in, Knock-out) contract is a currency hedging contract designed to reduce potential risks from foreign exchange rate fluctuations. Under the contracts, exporters could sell dollar earnings at a higher exchange rate to the banks when the currency fluctuates, thereby hedging the fluctuation risks. This will give bank some losses in return for contract fees. However, if the foreign currency strengthens against the won over a specified limit, the exporters must sell foreign currency at a lower rate, which leads to losses of exporters and gains of banks. Contrary to the common expectation, foreign currency has dramatically soared up in the wake of global financial crisis, leading to tremendous losses of exporters. Concerned exporters have filed total of more than 110 cases, arguing the invalidity of this contract on various arguments.[28] Among them was the argument based on the change of circumstances. Though there was a case where the court has decided that it amounts to the change of circumstances, thereby granting an exporter the right to terminate this contract,[29] courts generally have been reluctant to accept this argument.[30] This outcome can easily be understood from the risk-allocation perspective. The contract itself was aimed at hedging or allocating risks arising out of currency fluctuation. Therefore, the exporter has already agreed to assume the risks at the time of contract. In this case, there is no room for the doctrine of change of circumstances.

Korean Supreme Court also suggests the requirement based on good faith principle. However, the above three factors already presuppose good faith or fairness basis. Therefore, it would be sufficient to consider fairness in the process of interpreting those requirements.

[27] Michael J. Trebilcock, The Limits of Freedom of Contract (1993), p 128.
[28] As of Feb. 16. 2010, 117 KIKC-related cases are pending at the level of the court of first instance.
[29] Seoul Central District Court, 2008Kahap3816, Decided on Dec. 30. 2008.
[30] For example, Seoul Central District Court, 2008Kahap4262, Decided on Jan. 8, 2009; Incheon District Court, 2009Kahap228, Decided on Mar. 9. 2009; Seoul High Court, 2009Ra997, Decided on Aug. 21. 2009.

B. Consequences of the changed circumstances

When the change of circumstances satisfies above requirements, special legal consequences come into being.

Most jurisdictions that do recognize the doctrine of change of circumstances discharge a concerned party from her obligations. Korean Supreme Court has declared that the party suffering the change has the right to terminate the contract. German BGB § 313 expressly states that the disadvantaged party can terminate the contract, if a modification is not possible or reasonable. The Restatement of the Contract (2nd) §265 in the U.S.A., with regard to frustration, states that "remaining duties to render performance are discharged unless the language or circumstances of the contract indicate the contrary". PECL, PICC and DCFR take similar, but somewhat different approach. In those model laws, the court, upon the request of parties, finally determines the termination as well as its terms and conditions (PECL § 611 (3)(a); PICC § 6.2.3. (4)(a); DCFR Book 3, § 1:110 (2)(b)).

Another possible treatment is a modification of the contract. Here, the modification refers to the judicial modification, meaning that the court finally decides or at least confirms the terms and conditions of the modification. Voluntary modification by parties is also possible and desirable. However, this is rather a consequence from new agreement than a consequence from the change of circumstances itself. Whether or not judicial modification of contract is an acceptable form of the legal consequence is highly controversial. This is the very topic addressed in this paper. Therefore, I will examine this issue more in depth and details later on.

In addition to the above consequences, there is an issue of the obligation of renegotiation. For instance, PECL § 6:111 (2) requires parties to renegotiate before they demand for modification or discharge of the contract. The aim is clear; to facilitate autonomous solution between parties before seeking a court remedy. If one of the parties refuses to renegotiate contrary to good faith, she is subject to damages. However, PICC and DCFR do not recognize the duty to renegotiate. Domestic laws are not favorable to this approach either. In Germany, the parties are not bound to renegotiate according to prevailing view.[31] Likewise, neither the Italian nor the Dutch Code provisions on hardship oblige the parties to renegotiate. Although it is clear that autonomous dispute resolution by renegotiation should be favored than judicial intervention, it does not necessarily lead to the conclusion that parties have "obligations" to renegotiate.

[31] See Grüneberg in; Palandt, BGB, 67. Aufl. (2008), §313, Rn. 41. For an opposite view, see Roth in; Münchener Kommentar zum BGB, 5. Aufl. (2007), §313, Rn. 90.

III. Comparative overview on the judicial modification of contract

European jurisdictions generally show favorable stance to judicial modification of contract. As mentioned above, Germany has employed judicial modification of contract as a prior remedy for the change of circumstances in BGB § 313.[32] Netherland (§ 6:258), Greece (§ 388), Italy (§ 1664), Russia (§ 451), and Scandinavian contract law (§ 36) have adopted the same device. In other countries, judicial modification is allowed in either common mistake as can be seen in Luxembourg (§ 1118), Portugal (§ 293), and Austria (§ 872) or unfair contract as can be seen in France (§ 1681), Austria (§935) or Slovenia (§ 119). This wide tendency to admit judicial modification of contract is also found in European model laws such as PECL or DCFR. In PECL § 6:111, judicial modification of contract is enumerated as the first remedy against change of circumstances. DCFR has almost identical clause in § 1:110 in Book 3. PICC, prepared as the global contract principles by UNIDROIT, takes the same stance in § 6.2.3.

England and U.S.A. have been reluctant to accept this attitude. However, the controversial decision by the U.S district court in 1980 has sparked a debate as to the adequacy of court-imposed modification. In Aluminum Co. of America (ALCOA) v. Essex Group, Inc.,[33] the court chose to modify the contract itself, instead of taking all-or-nothing approach. In this case, ALCOA entered into twenty-year contract with Essex, agreeing to supply molten aluminum. They had price-adjustment index within a contract, with the help of economist Alan Greenspan, to correlate the price with fluctuating costs. This contractual device of risk-allocation worked fine until economic upheavals caused by oil crisis drastically raised the costs far beyond the basic presumption of the index. This left ALCOA with an estimated sixty million dollars loss on the contract. The court has modified the contract, instead of discharging ALCOA from contractual relationship or conferring all burdens on the shoulder of ALCOA. This conclusion, however, caused controversy. While some commentators welcomed this approach,[34] it invited criticism as well.[35] There is no decision to the same effect after ALCOA.

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[32] The English version of § 313 (1) BGB reads as follows. "If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration."

[33] 499 F. Supp. 53 (W. D. Pa. 1980).

[34] Robert W. Reeder, *Court-imposed modifications: Supplementing the All-or-Nothing Approach to Discharge Cases*, 44 Ohio St. L.J. 1079 (1983); Robert Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law,* 1987 Duke L.J.

[35] Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 Hastings L.J. 1 (1991).

Therefore, it is not certain at this point if this approach has reached the position of doctrine.[36]

Now looking at East-Asia region, Japan or Korea has no provision or doctrine justifying the judicial modification. Although invoking on good faith principle to modify the contract made by parties seems theoretically possible, this has never happened. However, there is notable sign of change in Japan. Japan is in the process of preparing the draft for a large-scale civil code amendment. In April 2009, the concerned committee has published the "Basic Principles of the Amendment of Japanese Law of Obligations (hereinafter "Principles")", which is likely to serve as the very first draft. Article 3.1.1.91 of the Principles provides a general provision for the requirements and effects of the change of circumstances. It proposes that the party of the contract can request the court to modify the contract at issue by presenting a draft of what she thinks to be the most adequate. Korea has also considered introducing similar provision back in early 2000s. The Ministry of Justice has launched the committee for the amendment of Korean Civil Code back in 1999. In the process of creating a draft, the committee members unanimously agreed that a provision governing change of circumstances needed to be codified. The committee also considered judicial modification as one of the possible remedies for the change of circumstance. However, this proposal was rejected by a narrow margin after some discussion. The main ground for the rejection was that it might impair party autonomy in contract law and that it will increase the caseload due to the outcry of contract party's call for modification.

IV. Thoughts on the judicial modification of contract

Having examined the comparative background of this issue, I turn to the issue of the judicial modification of contract. Since Germany has already accepted and codified this doctrine, I analyze this issue from Korean perspective.

Having no provision to govern this issue, there are two dimensions to this discussion. The first dimension regards the feasibility of the judicial modification within current civil code, with no express provision. It may be possible, as can be seen in Germany. Though there was no explicit ground in BGB, German court has developed this doctrine under BGB § 242, which stipulates good faith principle. In theory, this may be feasible in Korea as well. Yet, I feel that it is just too much a stretch of good faith principle. Good faith principle is the last instrument to rest on, and should be used in moderation. Germany was in an exceptional circumstance - the hyperinflation in the aftermath of the First World War – when they first created this doctrine. Without such an extraordinary factor, stretching good faith principle to such extent seems unfeasible considering the strict attitude

[36] Restatement of Contract (2nd) § 265 refers to the change of circumstances. However, it only states the discharge of obligation as its legal consequence. In contrast, American Jurisprudence (2nd) § 517 addresses judicial modification of contract based on ALCOA decision.

of the Korean Supreme Court toward the doctrine of change of circumstances. The second dimension regards the feasibility of the judicial modification on a level of legislation. It concerns the desirability of accepting judicial modification of contract on a legislative level as a means to resolve problematic situations caused by the change of circumstances. Since Korean Civil Code Amendment is now in progress, this may be a possible and realistic way of accepting it. Therefore, I address the desirability of allowing judicial modification in the would-be amended Korean civil code. I will examine this from two viewpoints; necessity and justifiability.

1. Necessity

The first challenging aspect of this issue is that the judicial modification of contract rarely takes place even in countries where they explicitly allow this. Furthermore, in those rare cases where this mechanism should step in, jurisdictions without such provision already have some substitute mechanisms that can work nearly as fine.

This raises the issue of necessity. If it is seldom used and has some other alternative means by which the same result can be reached, what is the use of codifying this controversial doctrine? The argument in a more detailed version will be as follows. Courts will seldom feel the need to exercise the judicial modifying power, even when they can do so. Change of circumstances that is grave enough to justify annulment or alteration of the contract rarely happens in reality. The fact that Korean Supreme Court has never accepted the argument based on the doctrine of change of circumstances vividly supports this statement. Even when the case at issue satisfies strict requirements provided by this doctrine, courts can still reach the same conclusion by using other methods without taking troubles to modify the contract. There may be explicit contractual clauses, such as force majeure or hardship clauses, that have already allocated these risks between parties, making judicial intervention unnecessary. Even when there are no such clauses, court may take this issue in the context of contract interpretation. Despite the non-existence of such clauses, courts may assume that there has been an implicit agreement on who will be bearing unforeseen risks. The recognition of such agreement also bars judicial intervention, at least ostensibly. In fact, Korean courts have been virtually modifying the contract in the name of interpretation and good faith principle. Court-led mediation procedure has also played a great role in modifying the contract to suit the notion of fairness. Considering all these alternative means to guarantee fair outcome, there is little necessity to recognize explicit mechanism of judicial modification of contract.

The above argument has its own merits. However, it does not lead to the conclusion that there is no necessity at all. In addition, not all the provisions in Civil Code are meant to be used extensively. Some are used on a daily-basis, while some are provided for a 'just-in case situations'. Thing is that there are these sort of extreme situations. Time-limitation or lack of experience may cause a party

unable to take reasonable steps to consider effects of the extreme contingencies. Even the most considerate parties can fail to do so. Furthermore, the difference of the legal culture may aggravate this. Compared with American contracting culture, European and Asian cultures are relatively accustomed to simpler and shorter contracts, especially in contracts where individuals, as opposed to corporations, are involved. In these cases, a problem associated with a gap between contract and circumstances typically arises. The altnernatives mentioned above may not be able to get rid of the gap completely. It is evident that something needs to be done with regard to the gap arising out of the contract and the unforeseen circumstances. The ideal way of solving this deadlock is to make a new agreement based on the changed circumstances. However, reaching a new agreement is not something that you can always expect to take place. Excusing an obligor from contractual obligation is one of the remedies in this regard, as is found in a large number of jurisdictions. Yet, this remedy stands on 'all or nothing approach' that renders fine-tuning of the contractual interests of both parties unfeasible. This is also true when both parties intend that the contract be preserved but fail to find a solution by themselves due to opposing micro-interests. In this context, the court needs to step in prudently and draw out the fairest conclusion. What courts do in the name of interpretation or good faith principle has its own limitation. Though solving the contractual dispute by way of interpretation seems attractive since it preserves the party autonomy while enabling the fair outcome, interpretation should be based on the intent of the parties. Courts can enforce a contract only to the extent of the agreed terms. Stretching outside this scope is not an interpretation, but a hidden form of judicial creation of the contract. I am not saying that this function, which exists in practice, should be completely expelled. Rather, I am saying that this should be done in a more upfront way based on the statutory ground provided by legislators. Good faith principle, due to its amorphousness, also has its dangers of misuse or overuse. This is why good faith principle should yield its way to specific provisions containing explicit requirements. After all, those provisions all incorporate the spirit of good faith principle, yet provide more refined solutions. Therefore, providing a way by which a court can intervene to solve the dead-lock contractual dispute is a candid and refined way of dealing with this issue.

2. Justifiability

Would it lead to fair and efficient outcome? Would it not invite too wide judicial discretion into the realm of contract law where legal certainty and stability need to be preserved? As for the justification of the judicial modification, three aspects of this issue – fairness, efficiency, and the role of the court in contract law – come into our sight.

A. Possible concerns

The argument against judicial modification may raise following concerns.

(a) Party-autonomy and fairness concern

In the first place, judicial modification is not consistent with the notion of fairness. It infringes upon the autonomy of the party, the very foundation of the contract law. The intervention of the court seems, on its face, to be enhancing fair and just outcome of a specific case. However, its fairness is not guaranteed. Rather, it will fall to arbitrariness of the judicial discretion, thereby sometimes rendering bizarre outcome. This problem will be aggravated when the resolution of the dispute calls for highly sophisticated and specialized knowledge and experience, which judges usually lack.

(b) Inefficiency concern

Secondly, judicial modification is likely to undermine efficiency. It will lower legal certainty and stability, which will in turn chill market activities. Moreover, it is the most efficient way to have parties provide relevant contractual clauses in advance. The possibility of judicial modification of a contract will severely decrease incentives to negotiate and incorporate such clauses. Same can be said of the incentives to purchase insurance plans that can spread the risks. These will lead to the increase of dispute-resolution costs. The increase of the costs will occur in the following sense as well. Parties who feel that they have been disadvantaged by unforeseen events will throng to the court to demand modification of the contract. In turn, court might have to use considerable time and energy in the process of modifying the contractual terms of tons of cases.

(c) Judicial expansion concern

The third and final point focuses on the fear of the emergence of despotic court in the realm of contract law. Contractual relationship is to be created, altered, and extinguished by the parties. The intervention of the court in this regard should remain minimal. As mentioned above, judges are by no means wiser than parties in terms of information as to what will enhance their interests. This is especially true when it comes to a contract between sophisticated parties.[37]

[37] Benjamin E. Hermalin & Michael L. Katz, *Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach*, 91. J.L.Econ & Organization 230 (1993).

B. Thoughts

Although the above arguments have their own merits, the judicial modification of contract can still be justified for the following reasons.

(a) On party autonomy and fairness

In the first place, I doubt if judicial modification of contract infringes upon party autonomy. The supremacy of a party's contractual freedom is unquestionable in the realm of contract law. Yet, the intervention of the court in the above context does not directly conflict with parties' contractual freedom. Contractual freedom has its own ambits. It is only to be respected when there exists a contract or an intention to make a contract. When things at issue fall outside the realm of contract, no binding contract exists. The judicial modification of contract only matters when there is indeed no agreement over who will bear risks to what extent. Further, this only matters when the parties finally fail to reach a new agreement to deal with the situation. In reality, this failure is something we can naturally predict. Parties would typically not enter into modifications unless they both feel better off relative to the position that would or might have obtained without a modification.[38] This is where legal or judicial intervention is justified. In addition, contract parties are completely at liberty to contract out of this intervention by providing such clauses in a contract. For example, they may put an arbitration clause to bar the court from stepping into the contractual dispute resolution, or they may agree to deny any sorts of judicial intervention at any unexpected incidents. This is possible since the provision for judicial modification of contract will stay merely as a default rule, not as a mandatory rule.

From the fairness standpoint of view, this can enhance fairness of the outcome. This is the very reason why a substantial number of countries and international model laws have opted to allow this. Leaving risks outside the scope of contract as they are, leads to undeserved gains or losses of contract parties. Rigid adherence to 'all-or-nothing' approach, as opposed to what I would call as 'sharing' approach, can often lead to injustice and fail to fine-tune micro interests of contractual parties.[39]

(b) On inefficiency

From the efficiency standpoint of view, judicial modification of contract can leave efficiency of the contract unharmed, and sometimes even enhance it. This may be explained both from *ex-ante* and *ex-post* perspectives. From *ex-ante* perspective, making a complete contract, meaning providing contractual clauses for every

[38] Michael J. Trebilcock, The Limits of Freedom of Contract (1993), p 136-137.

[39] Charles Fried argues that in many cases where both parties are harmed and neither is at fault, the principle of sharing comes into play. This principle applies where no convergent intentions exist as to the contingency in question, no one in the relationship is at fault, and no one has conferred a benefit. Sharing applies where there are no rights to respect. See Fried, Contract as Promise (1982), 69-74

possible contingency, is impossible or too costly in reality. Strict rule of discharge would only create an incentive to write a more detailed and complicated contract, thereby creating additional negotiation costs.[40] Moreover, assigning all the risks to a certain party may increase transaction costs in trying to insert additional provisions to allocate risks in a different manner.[41] The strength of incomplete contract is that parties do not have to involve themselves into time and money-consuming negotiations and writing process to come up with complete contract, as long as there are reasonable default rules and judicial gap-filling mechanisms supplementing what was not expressly bargained for. Therefore, the judicial modification of contract can reduce unnecessary costs of complete contract. From *ex-post* perspective, judicial modification of contract can contribute to the continuation of the contractual relationship. This is particularly true in the long-term contract.[42] In contrast to demolishing the contractual relationship where parties might have invested so much of their resources, maintaining it by modifying it may enhance efficiency. A concern on the increase of the litigation is somewhat overstated. Provided that the court take a strict stance toward applying the provision, as witnessed in many jurisdictions with this provision, the litigation won't dramatically increase in the long run.

(c) On the role of the court in contract law

From the judicial role standpoint of view, this can be justified as well. Contract law is not only a norm of parties, but also a norm of a community. There are a great number of provisions in current civil code where things are solved by law or judges, not by parties either due to the lack of contract in contractual disputes or due to the need for protecting fundamental social values. Thus, contract law embraces both autonomy and social values. Contract law is a not a regime that is entirely internal to the parties to the contract. On top of this, it is noteworthy that there is a gradual paradigm-shift taking place, mainly in Europe, that permits more judicial discretion than before in the area of contract law. This may be a reflection of anti-formalism in contract law, or a reflection of diverse and risk-full world where a great number of interest-factors should be taken into account for a more reasonable outcome. For example, PECL widely uses the notion of reasonableness as well as good faith, which invites some degree of judicial discretion. This tendency still exists in PICC or DCFR, where strict rules are gradually replaced by flexible standards. Whether or not this tendency is desirable is subject to further

[40] Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. Legal Stud 119, 154 (1977).
[41] Charles Tabor, *Dusting off the Code: Using History to find Equity in Lousiana Contract Law*, 68 LA. L. Rev. 549, 563 (2008).
[42] Ian R. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law", 72 Northwestern University Law Review 854, 905 (1977-1978). Also see Fried, Contract as Promise (1982), 69-74 where he acknowledges that there are gaps that cannot be filled by the promise principle, for the simple reason that the parties have no convergent intentions.

discussion. However, it is evident that there are cases where judicial discretion needs to step in. Courts should be highly prudent not to impound on parties' autonomy, but should be flexible once the case qualifies the stringent requirements. It is true that courts are not always better than parties in drafting a modified contract since they have limited information as to parties' circumstances and preferences. First of all, this is a common feature of nearly every litigation. Parties are nearly always in a better position to acquire information as to the disputes and their well-beings. Yet, it does not necessarily mean that courts cannot adjudicate the case due to their inferiority in terms of information. Moreover, in practice, courts are likely to consider the drafts of a contract and relevant information competitively presented by both parties to get a better result.

V. Conclusion

I have so far examined the feasibility of the judicial modification of contract in the changed circumstances. This is not likely to be allowed under current civil code regime, given the strict stance of the Supreme Court toward the doctrine of change of circumstances and the lack of explicit provision providing the ground for the modification. Yet, there is room for discussion over this issue in the process of the Civil Code amendment, though it will cause fierce controversy.

I am of the opinion that the judicial modification of contract as a legal consequence of the change of circumstances can be justified in exceptional cases, as I have so far argued. In principle, contract law is the typical domain reserved for self-determination. Yet, judicial modification can function as the last resort to ensure fair outcome in extremely onerous cases. If that is the case, it is better to regulate that exceptional realm by legislation, rather than leaving it to the realm of interpretation or good faith. A comparative study on this matter also shows a wide trend toward accepting this mechanism.

New Developments in Data Privacy for Employees in German Law

Rüdiger Krause

I. Introduction: On the way to a Worker Data Privacy Act

In December 2010 the German Government passed the draft bill of an Act on employee data protection.[1] Although the bill is contested not only between employer associations and trade unions but also within the Government, it is expected that the Act will enter into force in 2011 bringing a long lasting discussion to its end. The first demands for a particular act on data protection for workers go back to the 1980s but for a long time the German legislator didn't make any real attempt to regulate this topic. The situation changed in 2008, when the abuse of employee data in several large German companies became public.[2] Driven by the public, the previous Government reacted immediately and inserted just before the last election in 2009 a single provision into the Federal Data Protection Act (= Bundesdatenschutzgesetz = BDSG) which expressly addresses worker data privacy for the first time. At the same time the Government announced that this amendment should only be an interim solution and should be

[1] BT-Drucksache 17/4230 of 15/12/2011.

[2] Several retailers have spied on their employees with hidden video cameras at the workplace. German Telekom has wiretapped employees who are suspected of passing confidential information on to journalists. German Railway has executed a furtive screening of personal data of some 170.000 employees in order to unveil and prevent corruption. More details on these and other comparable cases in *Däubler*, Gläserne Belegschaften, 5. Aufl. (2010), Rn. 2a ff.

followed by a more detailed Act. The new Government, in office since fall 2009, has picked up that project and started the current legislative procedure.

This paper does not aim to go too much into all details of the existing Federal Data Protection Act or the current draft of an amendment to this Act. In fact it will focus on some more general problems. First, the paper tends to analyse the conflicting interests each legal order has to consider in the issue of data privacy of employees (II). Secondly, it will turn to the legal background and in particular to the approaches of German and European law (III). Thirdly, this paper will sketch some main aspects of the new Act and tackle some specific problems (IV).

II. Conflicting interests

1. Employer interests

As regards the employer interests at stake one should distinguish between the situation prior to and after the conclusion of the employment contract.

In the pre-contractual phase the employer faces a dilemma: On the one hand the employer has an economic interest to get the best quid pro quo for his pay. On the other hand the value of an employee cannot be assessed entirely at the moment of the conclusion of the employment contract, but only by experience if he or she has worked for some time in the enterprise. So the employer must decide with uncertainty whether or not he will hire a particular applicant. In order to gain a maximum of output for his input and to avoid or minimize risks adherent to the person or the behaviour of the employee, the employer has an interest to gather as much information as possible on the applicant for a job. In detail, the employer is interested to know whether the applicant is sufficiently qualified for the job, has a strong physical and mental condition and doesn't have attitudes which can cause frictions with the employer, other employees or customers.

To put it more generally: In a market economy every actor needs a high level of information as the basis for a rational choice because the actor will bear the risks if the decision turns out to be disadvantageous. In this respect the possibility of grasping information is the backbone of private autonomy and is consistent with the general principle of the informed consent as a concept of modern contract law.[3]

After the closing of the employment contract the situation changes in principle. In institutional terms the employment relationship is a principal-agent setting. The employer as principal has an interest that the employee performs his work in a proper manner and does not violate his obligations by causing any damage or even criminal acts like theft or fraud. But the employee as agent can

[3] Cf. *Grundmann/Kerber/Weatherill* (Ed.), Party Autonomy and the Role of Information in the Internal Market (2001).

misuse his position as contract partner and for example could work slowly or deal on his own account. Thus, the employer is interested in monitoring the employee to guarantee a specific behaviour and prevent moral hazard.

More generally the employer has an interest to collect all data he needs to organize and optimize the operations within the enterprise. An economic success depends on information on the environment of the company like the general market conditions but first and foremost on precise information on the operating procedures. A lot of personal data of workers is from the employer's point of view mere operational data.[4] Hence, one of the fundamental questions of every regulation on worker data privacy is who "owns" the data that are both personal and operational.

One particular problem is the safeguarding of compliance. Compliance is one of the most discussed keywords in the context of data privacy of employees in the past few years[5] and it is often used as an argument against a strict regulation on data protection. The German legislator has mentioned it in its grounds for the current draft too.[6] But what is the meaning of compliance and in which way is compliance connected with data privacy of employees?

Compliance can be conceptualized as regarding of rules. These rules can be imposed on the employer by external actors, in particular by the legislator, or they can be created internally by the employer himself. In the latter case it is an additional problem whether or not the employer actually has the authority to create rules which he wants to enforce by observing employees.[7] It is clear that there is no legitimate interest in collecting employee data if the goal, namely to enforce a regulation, is in itself invalid. Hence, the safeguarding of compliance can be used as an argument against a rigid data privacy law but it can not be used in all cases.

2. Employees

On the side of the employees there are tangible and intangible interests. First, the worker might have an interest to hide particular data because the disclosure of these data would worsen his chances to get the job. Secondly, he has an interest not to be handled like an object. Nobody wants to be seen only as a sum of data

[4] *H. Buchner*, Vom "gläsernen Menschen" zum "gläsernen Unternehmen", in: Zeitschrift für Arbeitsrecht (ZfA), 1988, 449-488 (at 451 f.)

[5] *Kort*, Zum Verhältnis von Datenschutz und Compliance im geplanten Beschäftigten-datenschutzgesetz, Der Betrieb (DB) 2011, 651-655; *Thüsing*, Arbeitnehmerdatenschutz und Compliance (2010).

[6] BT-Drucksache 17/4230 of 15/12/2011, p. 1.

[7] A much debated issue is the enforcement of "ethics rules" of U. S. corporations like Honeywell and Wal-Mart under German Law; cf. BAG 22.7.2008 – 1 ABR 40/07 – BAGE 127, 146 = NZA 2008, 1248; LAG Düsseldorf 14.11.2005 – 10 TaBV 46/05 – NZA-RR 2006, 81; *Deinert/Kolle*, Liebe ist Privatsache. Grenzen einer arbeitsvertraglichen Regelung zwischenmenschlicher Beziehungen, Arbeit und Recht (AuR) 2006, 177-184; *Kort*, Ethik-Richtlinien im Spannungsfeld zwischen US-amerikanischer Compliance und deutschem Konzernbetriebsverfassungsrecht, Neue Juristische Wochenschrift (NJW) 2009, 129-133.

which are used by others persons for their selfish goals. Even more, nobody wants to be monitored permanently by other persons. An unlimited observing and indexing of personal data touches human dignity. Furthermore the collecting of personal data might influence the behaviour of the employee. If the worker does not know which personal data are gathered by the employer or even if he knows it is likely that he will behave in a manner which he assumes to be wanted by the employer. This does not only mean to work as hard as possible and to avoid negligence. Depending upon the concrete personal data which are collected it is possible that the employee stops acting naturally because he fears that the employer will draw negative consequences. For example, the employee will omit to go to the toilet if he or she knows that every walk to the toilet will be exactly registered.

3. Common goals

Concerning the common goals, different aspects can be distinguished. First, there is a common goal that enterprises function efficiently so that they can provide job opportunities and pay taxes. But this is not automatically an argument in favour of weak data protection law and the possibility to observe employees without restrictions. The efficiency of enterprises and the efficiency of the economy all depend on the existence of a certain level of mutual trust between employers and employees. An economic system in which the employees are demoralized because they were generally treated with distrust will not work properly. Thus, personal data privacy can enhance the so called "social capital" within a society and produce more efficiency.

Secondly, the compliance issue has to be mentioned once again. In respect of corruption, antitrust, accounting standards, environmental law and so on society expects from employers that the enterprise as a whole does not violate the law. Given that enterprises are only working with the help of their employees there is a common goal to enable the employers to combat criminal acts which would be a detriment to the society as a whole.

A particular problem will be the execution of internal investigations if there is a worker suspected to have committed a criminal act. If the prosecutor starts investigations against a suspicious employee the worker is protected by specific rights of criminal procedure law. If the employer takes the investigations in his own hands there is the danger that the employee lacks these rights.

To sum up, the problem of data privacy in the field of employment touches very different aspects. It is for two reasons obvious that the adjustment of the conflicting interests can not only be achieved by market forces. Due to the unequal bargaining power of the parties to the employment contract, the employer will regularly prevail. Furthermore common goals cannot be the object of private bargaining but have to be respected at all costs.

II. Development and current state of German law on worker data privacy

In regard to worker data privacy German law provides traditionally a "two-channel-approach:" The older channel follows from the so called "General right to personality" (= Allgemeines Persönlichkeitsrecht) and is developed by case law. The newer one is based on the Federal Data Protection Act. These two channels which provide a substantial level of protection are completed by a more procedural provision stemming from worker participation.

1. First channel: General right to personality (case law)

The general right to personality is a product of case law. The German Civil Code (= Bürgerliches Gesetzbuch) of 1900 does not provide such a right. The German legislator back then refused the creation of a general right to personality because it estimated that it will not be possible to give such a right clear limits in particular as regards damages in case of violation. The former Reichsgericht affirmed this position in its case law.[8] It was not until 1954 when the Federal Civil Court (= Bundesgerichtshof) acknowledged the general right to personality in a landmark case as part of private law, referring to the German Constitution (= Grundgesetz) from 1949 with its fundamental rights of protection of human dignity (Art. 1 GG) and to self-fulfilment (Art. 2 I GG).[9] A lot of further decisions of the Federal Civil Court approved the general right to personality.[10] Hence, this right has long been a commonly accepted element of German private law, although it was never laid down as such in statutory law.[11]

The acknowledgment of the general right to personality can be regarded as an expression of the important role of fundamental rights provided in the German Constitution for all parts of private law. In this respect the Federal Constitutional Court (= Bundesverfassungsgericht) held in an early landmark decision from 1958 that fundamental rights are not only relevant as rights against state action.[12] Rather, fundamental rights represent objective values that influence the whole legal order and give guidance for the interpretation of private law.[13]

In its early decisions the Federal Labour Court actually went one step further and applied fundamental rights even directly against the employer, arguing that the

[8] E. g. RG 7.11.1908 – I 638/07 – RGZ 69, 401; RG 12.5.1926 – I 287/25 – RGZ 113, 413.
[9] BGH 25.5.1954 – I ZR 211/53 – BGHZ 13, 334.
[10] Important older decisions: BGH 2.4.1957 – VI ZR 9/56 – BGHZ 24, 72; BGH 14.2.1958 – I ZR 151/56 – BGHZ 26, 349.
[11] See MünchKomm/*Rixecker*, Bürgerliches Gesetzbuch, 5. Aufl. (2006), Anhang zu § 12 – Das Allgemeine Persönlichkeitsrecht; Palandt/*Sprau*, Bürgerliches Gesetzbuch, 70. Aufl. (2011), § 823 Rn. 83 ff.
[12] BVerfG 15.1.1958 – 1 BvR 400/51 – BVerfGE 7, 198.
[13] Legal theorists have stated that the term "value" could be replaced by the term "principle" in the meaning of *Dworkins* concept of rights; see *Alexy*, Theorie der Grundrechte (1986), p. 125 ff.

power of the employer is comparable with the power of the state.[14] Although the Federal Labour Court dismissed this approach in the 1980s,[15] the concrete results do not differ very much. According to the currently prevailing approach fundamental rights oblige the state on the one hand to respect them directly and on the other hand to protect them against violation by private actors.[16] This applies also in regard to the general right to personality. Although this right is part of private law, it must be interpreted in the light of the fundamental right to personality. This is important insofar as the constitutional duty to protect human dignity and the right to self-fulfilment has a "dynamic" character which prompts the legislator and the courts to refine the legal order further if private actors cause new dangers to the right to personality.[17]

The general right to personality is regarded as a source from which derive different characteristics developed by case law. Contrary to other goods like the right to the own person or the right to property the right to personality does not protect a clear definable sphere. Thus, it must be assessed in every case, whether the general right to personality is affected and, if so, whether it is violated, which has to be checked by means of balancing all interests at stake. If the right to personality is infringed the affected person can claim for the elimination of the impairment, and in case of a serious violation also for damages.[18]

From the very beginning the Federal Labor Court gave protection to the private sphere of employees vis-à-vis the employer in general and in particular concerning personal data although the right to personality as such and even more the term data privacy was not mentioned until the 1980s. The Works Constitution Act from 1972 (= Betriebsverfassungsgesetz) supported this trend by providing expressly that the employer and the works council must protect and encourage the free development of the personality of the employees (§ 75 Abs. 2 BetrVG).

A much debated kind of cases concerns interviews with applicants. In all of these cases the Court held that the employer is only entitled to ask for those facts (for example previous offenses) if they are relevant for the performance of the job. Other questions are qualified as unjustified intrusion into the private sphere of the applicant.[19] In other cases the Court held that data in a personnel record must be deleted if they are wrong[20] and even if they are true but no longer relevant for the

[14] BAG 3.12.1954 – 1 AZR 150/54 - BAGE 1, 185; BAG 10.5.1957 – 1 AZR 249/57 – BAGE 4, 274.
[15] BAG 27.2.1985 – GS 1/84 – BAGE (GS) 48, 122.
[16] v. Mangoldt/Klein/*Starck*, Kommentar zum Grundgesetz, Band 1, 6. Aufl. (2010), Art. 1 Rn. 312 ff.; comprehensive *Ruffert*, Vorrang der Verfassung und Eigenständigkeit des Privatrechts (2001), S. 141 ff.
[17] Cf. MünchKomm/*Rixecker*, Bürgerliches Gesetzbuch, 5. Aufl. (2006), Anhang zu § 12 – Das Allgemeine Persönlichkeitsrecht, Rn. 3.
[18] Cf. MünchKomm/*Rixecker*, Bürgerliches Gesetzbuch, 5. Aufl. (2006), Anhang zu § 12 – Das Allgemeine Persönlichkeitsrecht, Rn. 221 ff.; Palandt/*Sprau*, Bürgerliches Gesetzbuch, 70. Aufl. (2011), § 823 Rn. 123 f.
[19] BAG 5.12.1957 – 1 AZR 594/56 – BAGE 5, 159.
[20] BAG 27.11.1985 – 5 AZR 101/84 – NZA 1986, 227.

employment relationship[21]. Furthermore the Court held that monitoring of employees by means of technical devices affects their general right to personality and is only allowed under certain requirements.[22] Hence, the general right to personality is a well established tool to limit the power of the employer to supervise employees and collect and store personal data.

2. Second channel: Federal Data Protection Act (statutory law)

The second channel is the Federal Data Protection Act which came into force in 1977.[23] This Act is the result of the rising awareness of the dangers to privacy in the 1960s and 1970s by the ongoing technical development in information technology. Although the focus was in the first instance on the processing of personal data by the state, the Act applies from the very beginning also to the processing of personal data by private bodies. The general concept of the Federal Data Protection Act in its primary version was two-fold: On the one hand the Act covered only automated data processing or at least the using of data from non automated filing systems. In this respect the field of application of the Federal Data Protection Act was originally smaller than the general right to personality-approach. On the other side the Act is stricter because it establishes if applicable a general prohibition of processing personal data with the reservation of permission, a legal technique often used in administrative law but alien to private law. The central argument of the legislator was that the misuse of personal data can affect the private sphere of the citizens and thus it has to be protected against specific kinds of processing of personal data which are deemed to be exceptionally dangerous.[24]

Some legal scholars argue that this concept can be regarded from a doctrinal point of view as a kind of risk management. While the general right to personality-approach protects only against violations of the private sphere the Federal Data Protection Act goes further and inhibits already the creation of risks which can violate the general right to personality in future.[25] This is supported by the grounds of the Federal Data Protection Act which stated for example that the transferring of personal data to third parties endangers (that means not violates) the private

[21] BAG 13.4.1988 – 5 AZR 537/86 – NZA 1988, 654.
[22] BAG 27.3.2003 – 2 AZR 51/02 – BAGE 105, 356 = NZA 2003, 1193; BAG 29.6.2004 – 1 ABR 21/03 – BAGE 111, 173 = NZA 2004, 1278; BAG 26.8.2008 – 1 ABR 16/07 – BAGE 127, 276 = NZA 2008, 1187.
[23] The term "data protection" is misleading because it is not to protect data but persons against the misuse of their personal data.
[24] BT-Drucksache 7/1027 of 21/9/1973, p. 14 ff.
[25] *Bull*, Zweifelsfragen um die informationelle Selbstbestimmung – Datenschutz als Datenaskese?, Neue Juristische Wochenschrift (NJW) 2006, 1617-1624 (at 1623); *Ehmann*, Zur Zweckbindung privater Datennutzung, Recht der Datenverarbeitung (RDV) 1988, 169-180 (at 178); *Franzen*, Arbeitnehmerdatenschutz – rechtspolitische Perspektiven, Recht der Arbeit (RdA) 2010, 257-263 (at 258); *Zöllner*, Daten- und Informationsschutz im Arbeitsverhältnis (1982), p. 6 ff.

sphere.[26] Other scholars argue – in line with case law of the Federal Civil Court[27] – that the Federal Data Protection Act concretizes the general right to personality and thus every violation of the Act must be regarded as a violation of the general right to personality.[28] At any rate, the Federal Labor Court uses the general right to personality to fill the gaps of the Federal Data Protection Act.[29]

For more than thirty years the Federal Data Protection Act did not provide particular regulations for worker privacy. Therefore, only the general rules for data processing by private bodies apply. Although the Federal Labor Court refers to this Act in some cases[30] it remains an exceptional part of employment law because the legal "style" of the Act resembles administrative law more than private law.

In 2009, induced by the data protection scandals mentioned at the beginning, a new provision devoted especially to worker data privacy was introduced into the Act (§ 32 BDSG).[31] In principle this provision approves only the state of case law providing that any processing of personal data of workers shall only be allowed if it is necessary for job-related purposes. But the new provision expands the application of the Federal Data Protection Act fundamentally by declaring as irrelevant whether or not the employer carries out automated data processing or at least uses personal data from non automated filing systems. This means that the primary purpose of the Act, namely to provide protection against particular dangers, was sidelined. Now according to the Federal Data Protection Act every processing of worker personal data is prohibited unless it is allowed by the Act. Thus, the general right to personality is no longer necessary as an instrument to fill the gaps of the Act.

3. Constitutional law: Right to "informational self-determination"

In 1983 the Federal Constitutional Court developed in a landmark case the so called fundamental right to "informational self-determination" ("Grundrecht auf

[26] BT-Drucksache 7/1027 of 21/9/1973, p. 18.
[27] BGH 7.7.1983 – III ZR 159/82 – NJW 1984, 436; BGH 22.5.1984 – VI ZR 105/82 – BGHZ 91, 233 (at 239-240).
[28] *Simitis*, Datenschutz: Von der legislativen Entscheidung zur richterlichen Interpretation, Neue Juristische Wochenschrift (NJW) 1981, 1697-1701 (at 1701).
[29] BAG 6.6.1984 – 5 AZR 286/81 – BAGE 46, 98 = NZA 1984, 321 (employer has to wipe out a questionnaire of an applicant who doesn't succeed); BAG 16.11.2010 – 9 AZR 573/09 – NZA 2011, 453 (employee is entitled to inspect his personnel record after the termination of the employment relationship).
[30] Cf. BAG 27.5.1986 – 1 ABR 48/84 – BAGE 52, 88 = NZA 1986, 643; BAG 22.10.1986 – 5 AZR 660/85 – BAGE 53, 226 = NZA 1987, 415; BAG 30.8.1995 – 1 ABR 4/95 – BAGE 80, 366 = NZA 1996, 218.
[31] Cf. *Erfurth*, Der „neue" Arbeitnehmerdatenschutz im BDSG, Neue Juristische Online-Zeitschrift (NJOZ) 2009, 2914-2927; *Joussen*, Die Neufassung des § 32 BDSG – Neues zum Arbeitnehmerdatenschutz?, in: Jahrbuch des Arbeitsrechts (JArbR) 47 (2010), 69-91; *Schmidt*, Arbeitnehmerdatenschutz gemäß § 32 BDSG – Eine Neuregelung (fast) ohne Veränderung der Rechtslage, Recht der Datenverarbeitung (RDV) 2009, 193-200; *Thüsing*, Datenschutz im Arbeitsverhältnis, Neue Zeitschrift für Arbeitsrecht (NZA) 2009, 865-870.

informationelle Selbstbestimmung"), which derives from the fundamental general right to personality,[32] although some aspects of such a right were acknowledged in precedents[33]. The Court held that modern forms of automated processing of personal data create serious risks for the self-determination because people can be blocked from unconstrained behaviour if they cannot know which information about their own person is known in their social environment. Hence, everybody has the right to decide in principle on the disclosure and use of personal data. The Federal Constitutional Court has affirmed its opinion in a lot of decisions.[34] From this point of view there is no personal data which is irrelevant at the outset. Therefore the right to "informational self-determination" tends to be a more rigid approach than the right to privacy-approach in its traditional meaning of a "right to be left alone".[35] In particular the right to "informational self-determination" protects not only against infringements of the right to personality but also against endangering this right.[36]

The relevance of that decision, which is often called the "Magna Charta" of German data protection law,[37] for worker data privacy is contested. Some legal scholars regard the decision as a great step forward and transfer the right to "informational self-determination" immediately into the employment relationship.[38] Other scholars stress that the Federal Constitutional Court has dealt with a state action, namely a census, and point out the fundamental difference between public law and private law.[39] But in later cases the Federal Constitutional Court didn't hesitate to apply the right to "informational self-determination" to private legal relations.[40] The Federal Labor Court doesn't worry too much about

[32] BVerfG 15.12.1983 – 1 BvR 209, 269, 362, 420, 440, 484/83 – BVerfGE 65, 1. See also BVerfG 27.6.1991 – 2 BvR 1493/89 – BVerfGE 84, 239 (at 280): „Fundamental right of data protection (Grundrecht auf Datenschutz)".

[33] Beginning with BVerfG 16.7.1969 – 1 BvL 19/63 – BVerfGE 27, 1.

[34] Cf. BVerfG 12.4.2005 – 2 BvR 1027/02 – BVerfGE 113, 29 (at 45 f.); BVerfG 4.4.2006 – 1 BvR 418/02 – BVerfGE 115, 320 (at 341 f.); BVerfG 13.6.2007 – 1 BvR 1550/03, 2357/04, 603/05 – BVerfGE 118, 168 (at 183 ff.). Current and comprehensive overview on the case law of the Federal Constitutional Court on the right to "informational self-determination" *Frenz*, Informationelle Selbstbestimmung im Spiegel des BVerfG, Deutsches Verwaltungsblatt (DVBl.) 2009, 333-339; critical of *Ladeur*, Das Recht auf informationelle Selbstbestimmung: Eine juristische Fehlkonstruktion?, Die Öffentliche Verwaltung (DÖV) 2009, 45-55; *Pitschas*, Informationelle Selbstbestimmung zwischen digitaler Ökonomie und Internet, Datenschutz und Datensicherheit (DuD), 1998, 139-149 (at 146-148).

[35] *Warren/Brandeis*, The Right to Privacy, 4 Harvard Law Review (1890), 193-220 (at 195).

[36] Cf. BVerfG 10.3.2008 – 1 BvR 2388/03 – BVerfGE 120, 351 (at 360); BVerfG 11.3.2008 – 1 BvR 2074/05, 1254/07 – BVerfGE 120, 378 (at 397 f.).

[37] E. g. *Hoffmann-Riem*, Informationelle Selbstbestimmung in der Informationsgesellschaft, Archiv des öffentlichen Rechts (AöR) 123 (1998), 513-540 (at 515).

[38] *Simitis*, Die informationelle Selbstbestimmung – Grundbedingung einer verfassungskonformen Informationsordnung, Neue Juristische Wochenschrift (NJW) 1984, 398-405 (at 400-402).

[39] *Zöllner*, Die gesetzgeberische Trennung des Datenschutzes für öffentliche und private Datenverarbeitung, Recht der Datenverarbeitung (RDV) 1985, 3-16 (at 12-13). See also *Giesen*, Das Grundrecht auf Datenverarbeitung, Juristenzeitung (JZ) 2007, 918-927.

[40] BVerfG 11.6.1991 – 1 BvR 239/90 – BVerfGE 84, 192 (at 194-195); BVerfG 23.10.2006 – 1 BvR 2027/02 – RDV 2007, 20; BVerfG 13.2.2007 – 1 BvR 421/05 – BVerfGE 117, 202 (at 228); BVerfG 11.7.2007 – 1 BvR 1025/07 – NJW 2007, 3707.

doctrinal questions. In some cases the Court referred expressly to the right to "informational self-determination".[41] In other cases which are in fact worker's data privacy cases too the Court neglected this aspect and referred only to the general right to personality but came to the same results.[42] Nevertheless, the development of a particular fundamental right to "informational self-determination" has contributed to the amendment and the sharpening of the Federal Data Protection Act during the last twenty years. In particular this right has increased the awareness for data privacy problems at the workplace and is fuelling the efforts to elaborate worker data privacy.

4. Protection of worker data privacy by means of worker participation

One particular kind of protection of worker privacy stems from worker participation law. According to the Works Constitution Act of 1972 the employer is not allowed to introduce technical devices which are determined to monitor employees unless he has achieved an agreement with the works council if existing (§ 87 I Nr. 6 BetrVG). If the parties fail to agree then a conciliation committee decides (§§ 87 II, 76 BetrVG). This regulation additionally aims to safeguard the general right to personality of the employees. The Federal Labour Court interprets that provision in a broad sense and applies it to all cases of automated data processing irrespective of whether or not the employer has the intention to monitor his staff. It is sufficient that the technical device is as such part of a system which is able to monitor employees by processing personal data of workers automatically.[43] Furthermore, according to another provision of the Works Constitution Act questionnaires require the consent of the works council (§ 94 BetrVG). In both cases the collective actors cannot deprive the employee of the protection provided by the general right to personality. The level of protection is mandatory and does not stand at the disposal of employer and works council.

5. Impact of European law

European law has not had a deep impact on German law on worker data privacy until now. In 1995 Data Protection Directive 95/46/EC was enacted. This directive concerns the protection of individuals with regard to the processing of personal data and on the free movement of such data in general by state or private actors and does not address in particular employment law. Furthermore – and in line with the original version of the Federal Data Protection Act[44] – it covers only

[41] Cf. BAG 14.12.2004 – 1 ABR 34/03 – NJOZ 2005, 2708.
[42] Cf. BAG 29.6.2004 – 1 ABR 21/03 – BAGE 111, 173 = NZA 2004, 1278.
[43] BAG 9.9.1975 – 1 ABR 20/74 – BAGE 27, 256. But there is no general exclusion of evidence improperly obtained on grounds of violation of worker participation rights; cf. BAG 13.12.2007 – 2 AZR 537/06 – NZA 2008, 1008.
[44] See above II 2.

processing of personal data by automatic means or by non automated filing systems.[45] There have been several announcements of the European Commission to propose a directive especially on the protection of employee personal data but nothing has happened. Nevertheless Directive 95/46/EC gives some guidelines which have to be respected at the level of Member States' law although the directive refers only to the approach that data protection seeks to protect the private sphere of persons while a right to "informational self-determination" is not mentioned.[46]

The most important aspect so far is that according to the ECJ case law this directive has the effect of full harmonization, because it aims to establish a level playing field for enterprises in Europe.[47] That means that the level of data protection provided by the directive is strict in both directions. Therefore national law is prohibited from setting either a lower or a higher level of protection of personal data.[48]

Since the Lisbon Treaty came into force in December 2009, Art. 8 of the European Charter of Fundamental Rights (ECFR) which guarantees the protection of personal data must also be recognized because pursuant to Art. 51 the Charter is applicable if the Member States implement Union law.[49] It is at this moment far from clear whether Art. 8 ECFR will affect the full harmonization-approach.

In 2010 the European Commission launched a new comprehensive approach on data protection in the European Union to adjust the existing legal framework to the current demands of informational society.[50] The Commission has announced it would propose new legislation in 2011, but up to now nothing has happened.

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[45] See Art. 3 para. 1 Directive 95/46/EC.

[46] Cf. Art. 1 para. 1 Directive 95/46/EC. This is in line with the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28/1/1981 (cf. Art. 1).

[47] ECJ 20.5.2003 – C-465/00, C-138/01 and C-139/01 – ECR 2003, I-4989 = RDV 2003, 231 – Österreichischer Rundfunk (para 39); ECJ 6.11.2003 – C-101/01 – ECR 2003, I-12971 = RDV 2004, 16 – Lindqvist (para 96); ECJ 16.12.2008 – C-524/06 – ECR 2008, I-9705 = RDV 2009, 65 – Huber (para 51).

[48] *Brühann*, Mindeststandards oder Vollharmonisierung des Datenschutzes in der EG, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2009, 639-644; *Forst*, Wie viel Arbeitnehmerdatenschutz erlaubt die EG-Datenschutzrichtlinie?, Recht der Datenverarbeitung (RDV), 2010, 150-155.

[49] See *Britz*, Europäisierung des grundrechtlichen Datenschutzes?, Europäische Grundrechte Zeitschrift (EuGRZ) 2009, 1-11. Another basis for data protection at European level is Art. 6 para. 2 EU (= Treaty on European Union) in conjunction with Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which protects the right to privacy. Art. 8 of this Convention is also referred in recital 10 of Directive 95/46/EC.

[50] COM (2010) 609 final (4/11/2010).

IV. Main aspects of the bill

1. General issues

A. Policy considerations

The policy of the draft is to foster legal certainty in an important field of employment law. The main purpose is of course to protect the interests of the employees.[51] However, the draft also aims to take care for the interests of the employer in particular in ensuring the demands of compliance and in preventing corruption.[52] It is remarkable that the grounds also emphasize the creation of a climate of mutual trust as a goal or at least a result of the Act.[53] This may be regarded as reference to an economic analysis of data protection regulation and notably to the concept that employees are more motivated to perform their work with due diligence and loyalty if they are respected as equal partners and not treated with distrust. But the grounds refer in this respect neither to conceptual nor to empirical analysis.

A recent inquiry of works councils gives some evidence that excessive surveillance of workers is detrimental to the quality of their work performance and in the long run to the efficiency of the enterprise.[54] This inquiry shows that there is a certain correlation between data protection problems and other conflicts in the enterprise like disregarding of participation rights, a stressed working atmosphere, a poor economic performance and even work stoppage.[55] But, as regards the interplay between neglecting worker data protection and inefficiency of an enterprise it is hard to say what is the chicken and what is the egg.

B. Structure and main rules and principles

In respect of the structure first of all it must be noticed that the Act shall not be separate but shall be included into the existing Federal Data Protection Act. This might cause some uncertainties on the relation between the new specific provisions and the general provisions of the Act, although this problem should not be overestimated.

While the amendment in 2009 comprised only one provision the current draft provides thirteen rules. These new provisions establish a two-fold system. First, the Act makes a distinction between the different periods of the employment relationship and differentiates between the period prior to the conclusion of the

[51] BT-Drucksache 17/4230 of 15/12/2011, p. 12.
[52] BT-Drucksache 17/4230 of 15/12/2011, p. 12.
[53] BT-Drucksache 17/4230 of 15/12/2011, p. 12.
[54] WSI Report (5/11/2010); available at http://www.boeckler.de/pdf/p_wsi_report_5_10.pdf.
[55] See also *Gantt*, An Affront to Human Dignity, Electronic Mail Monitoring in the Private Sector Workplace, 8 Harvard Journal of Law & Technology (1995), 345-425 (at 419).

employment contract and the period during the employment contract. Secondly, the draft combines the two generally possible techniques for regulating a permit: On the one hand the bill provides some general clauses.[56] On the other hand it regulates in a detailed manner under which prerequisites the usage of special instruments for monitoring workers shall be lawful, like video surveillance,[57] positioning systems[58] and biometric methods,[59] which are deemed to be exceptionally dangerous to the right to privacy of employees.[60] Thus, the draft combines more abstract and more concrete rules. The concrete rules shall contribute to legal certainty in situations with a high risk of violating the rights of workers. The general rules shall apply to all other cases and therefore provide an all-over regulation notably for those methods of monitoring employees which are not known today. The bill seeks to use the advantages of both manners of techniques for regulating permits.[61] Finally, the envisaged provisions contain a large number of provisions (no less than 18) on the documentation and disclosure of the processing of personal data which are to contribute to a high level of transparency.[62]

According to the fundamental rule of the Federal Data Protection Act as mentioned above every kind of collecting, processing or using of personal data is prohibited unless it is permitted by law or by consent of the concerned person.[63] This general rule is concretized by some other rules of the draft. Prior to the conclusion of the employment contract the employer may collect the name and the address of the applicant for a job.[64] This seems as a matter of course. But last fall the German Ministry for Family Affairs and five large companies (inter alia German Mail, German Telekom, Procter and Gamble) started a pilot scheme with entirely anonymous applications to avoid any discrimination in the hiring procedure because there is some evidence that applicants with Turkish names have less chances to get a job than applicants with German names. More important is another point: The employer may collect only those other personal data which he must know for assessing the ability of the applicant to perform the intended job.[65] In other words, the personal data must be job-related.

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[56] §§ 32, 32b, 32c, 32d, 32e BDSG-E.
[57] § 32f BDSG-E.
[58] § 32g BDSG-E.
[59] § 32 h BDSG-E.
[60] Additionally the processing of personal data is regulated if these data are generated by using communication systems for professional purposes (§ 32i BDSG-E). If communication systems are permissibly used by the employee for private goals then media law (Telecommunication Act = Telekommunikationsgesetz = TKG) applies.
[61] Thus, it is partial if some scholars state that this mode of regulation cumulates the disadvantages; cf. *B. Buchner*, Betriebliche Datenverarbeitung zwischen Datenschutz und Informationsfreiheit, in: Festschrift für H. Buchner (2009), 153-162 (at 156 ff.); *Franzen*, Arbeitnehmerdatenschutz – rechtspolitische Perspektiven, Recht der Arbeit (RdA) 2010, 257-263 (at 261).
[62] Cf. BT-Drucksache 17/4230 of 15/12/2011, p. 12 f.
[63] § 4 Abs. 1 BDSG.
[64] § 32 Abs. 1 S. 1 DDSG-E.
[65] § 32 Abs. 1 S. 2 and 3 BDSG-E.

In respect of those grounds which are covered by antidiscrimination law (race, ethnic origin, sex, religion or belief, disability, sexual orientation)[66] the draft is more rigid in order to prevent circumvention. Personal data may only be collected if an unequal treatment based on these grounds exceptionally constitutes no discrimination because the strict requirements of antidiscrimination law are met.[67] That means that the existence or non-existence of a characteristic related to one of these grounds constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. This spillover effect of antidiscrimination law on data privacy law is internationally well known and for example part of U. S. law too.[68] The draft will extend this test to the criminal records of an applicant although there is no need for a spillover effect of antidiscrimination law. This would apparently modify the case law at hand because the Federal Labor Court has required up to now only a job-related reason for the question on previous convictions[69] while antidiscrimination law is stricter. The grounds do not give any explanation to this change of case law.[70]

Furthermore the draft refers several times to the principle of proportionality as a requirement of collecting, processing or using of personal data.[71] This reflects a development in case law but so far it is not expressly provided in the Federal Data Protection Act.

C. Effect of the consent of the employee concerned

As mentioned the Federal Data Protection Act permits in general the processing of personal data, if the affected person declares her consent and some additional requirements are met.[72] In particular this consent must be based on a free decision.

The draft will depart from this rule and will give effect to the consent only in a few cases which are expressly mentioned.[73] The reason for this deviance is obviously the general distrust of the possibility of free decisions of applicants or workers. Some scholars argue that this is not in line with Art. 7 (a) of Data Protection Directive 95/46/EC, which provides the possibility of a consent, because according to the full harmonization-approach of the ECJ[74] Member States' law may not derogate from the protection level of Union law.[75] On the other hand,

[66] According to the German Equal Treatment Act (= Allgemeines Gleichbehandlungsgesetz) of 2006 as implementation of Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2004/113/EC.
[67] § 32 Abs. 2 BDSG-E.
[68] Cf. *Finkin*, Privacy in Employment Law, 3rd Ed. (2009), p. 217 ff.
[69] BAG 20.5.1999 – 2 AZR 320/98 – BAGE 91, 349 = NZA 1999, 975.
[70] Critically *Forst*, Der Regierungsentwurf zur Regelung des Beschäftigtendatenschutzes, Neue Zeitschrift für Arbeitsrecht (NZA) 2010, 1043-1048 (at 1045).
[71] §§ 32 Abs. 7, 32c Abs. 4, 32d Abs. 1 Nr. 3, Abs. 2 Nr. 1, 32e Abs. 3 S. 1 BDSG-E.
[72] §§ 4 Abs. 1, 4a BDSG.
[73] § 32l Abs. 1 BDSG-E.
[74] See above III 5.
[75] *Forst*, Wie viel Arbeitnehmerdatenschutz erlaubt die EG-Datenschutzrichtlinie?, Recht der Datenverarbeitung (RDV), 2010, 150-155 (at 152-153); *Thüsing*, Verbesserungsbedarf beim Beschäftigtendatenschutz, Neue Zeitschrift für Arbeitsrecht (NZA) 2011, 16-20 (at 18).

the provisions in the draft can be seen as an irrefutable presumption that due to the subordination of applicants and employees to the employer, unambiguous consent also required by the directive will not exist within a hiring procedure or an employment relationship.

2. Selected Problems[76]

A. Medical screening

Inter alia the bill addresses the problem of medical screening of applicants. It provides that medical screenings will be only lawful if a particular health status of the employee is an essential and determining occupational requirement.[77] For example the employee shall be sent into the tropics. Furthermore the consent of the applicant is necessary. This consent is entirely voluntary. The employer may not discriminate against the applicant because of his reluctance to undergo a medical screening which is not necessary to assess the ability to perform the job although this is not expressly mentioned in the bill. Genetic screenings are regulated by a particular Act which came into force in February 2010 and which provides that such screenings are generally prohibited, with very few exceptions in order to protect the worker himself.[78]

B. Video surveillance

One of the most disputed situations concerns the surveillance of employees with video cameras.[79] At the moment different rules apply depending on the fact whether the observation occurs in publicly accessible areas or non-publicly accessible areas.[80]

In a nutshell: As regards publicly accessible areas like shops, banks, restaurants a special provision of the Federal Data protection Act applies.[81] According to this provision the surveillance is permitted if there is a sufficient purpose (for example prevention of robbery or theft). The surveillance must be appropriate and

[76] Due to the limited extent of this paper many other important topics like whistleblowing, compliance and enforcement are omitted.
[77] § 32a Abs. 1 BDSG-E.
[78] §§ 19 ff. Act on Genetic Screening of People (= Gendiagnostikgesetz). More details by *Fischinger*, Die arbeitsrechtlichen Regelungen des Gendiagnostikgesetzes, Neue Zeitschrift für Arbeitsrecht (NZA) 2010, 65-70. *Genenger*, Begrenzung genetischer Untersuchungen und Analysen im Arbeitsrecht, Arbeit und Recht (AuR) 2009, 285-289; *Wiese*, Genetische Untersuchungen und Analysen zum Arbeitsschutz und Rechtsfolgen bei deren Verweigerung oder Durchführung, Betriebs-Berater (BB) 2011, 313-317.
[79] The Federal Constitutional Court has decided that each video surveillance affects the right to "informational self-determination"; cf. BVerfG 23.2.2007 – 1 BvR 2368/06 – DVBl. 2007, 497 (at 500).
[80] Comprehensive overview *Grimm/Schiefer*, Videoüberwachung am Arbeitsplatz, Recht der Arbeit (RdA) 2009, 329-344.
[81] § 6b BDSG.

necessary to achieve this purpose and the interests of the employer on the one hand and the employees on the other hand must be balanced. Furthermore the employer must disclose that the area is under surveillance. In regard to non-publicly accessible areas only case law applies. So far the Federal Labor Court has held that in general an observation must be visible. But a hidden surveillance is exceptionally lawful if it is the only instrument to investigate criminal acts.[82]

The bill tackles the problem of video surveillance of non-publicly accessible areas mainly with three rules:[83] First, an observation is only permitted for a particular purpose and if the principle of proportionality is regarded. This rule also applies in the case of dummies because these devices can influence the behaviour of workers too. Secondly, the draft will abolish the exception of hidden observation with video cameras completely. In every case the observation must be transparent to the employees. Hence, the legislator will make it more difficult to convict a worker having committed a theft. Thirdly, video surveillance shall be completely prohibited in rooms for personal retreat like restrooms, locker rooms and dormitories.

C. Social Networks

One of the most relevant aspects of data privacy during the hiring procedure is the question of which sources of information the employer may tap. In this way the bill breaks new ground and considers the increasing role of the internet.

As a general rule the draft provides that the employer must collect the data directly from the employee.[84] Thus, the employee keeps the control of the data flow to the employer. This is in line with some conceptions of privacy in the U. S. which try to specify and overcome the traditional "right to be let alone"-approach.[85] If an information source is freely accessible (like the internet) then the employer can use it if he has given a hint to the employee, for example in a job advertisement, and the interests of the applicant in the exclusion of the data do not prevail.[86]

Special attention is paid to social networks which are playing a growing role in the selection of staff. According to an inquiry from 2009 nearly 15% of all companies with more than 1,000 employees are using social networks as a source of information.[87] The bill makes a distinction:[88] If a social network is determined to

[82] BAG 27.3.2003 – 2 AZR 51/02 – BAGE 105, 356 = NZA 2003, 1193.
[83] § 32f Abs. 1 and 2 BDSG-E.
[84] § 32 Abs. 6 S. 1 BDSG-E.
[85] Cf. *Schoeman* (Ed.), Philosophical Dimensions of Privacy (1984); *Solove*, Conceptualizing Privacy, 90 California Law Review (2002), 1087-1155.
[86] § 32 Abs. 6 S. 2 BDSG-E.
[87] Available at: http://www.bmelv.de/SharedDocs/Downloads/Verbraucherschutz/Internetnutzung VorauswahlPersonalentscheidungen.pdf?__blob=publicationFile (18/4/2011).
[88] § 32 Abs. 6 S. 3 BDSG-E. See also *Forst*, Bewerberauswahl über soziale Netzwerke im Internet?, Neue Zeitschrift für Arbeitsrecht (NZA) 2010, 427-433; *Göpfert/Wilke*, Recherchen des Arbeitgebers in Sozialen Netzwerken nach dem geplanten Beschäftigtendatenschutzgesetz, Neue Zeitschrift für

support the private communication of the members like Facebook then the employer may not make investigations. However, if the social network functions as a platform for professional self-advertisement (like LinkedIn or Xing) the employer may use it. The reason can be seen in the fact that Facebook is often used by younger people who are not fully aware of the risks of the internet. Furthermore social networks aim to establish non-professional contacts between people. It is dysfunctional if an employer uses this kind of network for professional goals. If this collecting of information was lawful adverse reactions concerning the use of these networks would be possible. Insofar as social networks serve professional goals then the employer is allowed to use this source.

Thus, the provisions concerning social networks can be conceptualized as tools to insulate private communication from professional relations. If, for example, a pregnant woman who applies for a job cannot be sure that the employer does not investigate in Facebook then she will be reluctant to tell all her friends that she is pregnant. Hence the draft protects not only the private sphere of applicants in a spatial sense[89] but also societal communication as a value that shall not be affected by the logic of economy.[90]

V. Concluding remarks

Worker data privacy problems are not unique to a particular country. They arise in each developed society. Thus comparative law can be useful because each legal order has to answer the question whether or not it accepts the right to "informational self-determination" of employees and whether or not it qualifies collecting and processing of personal data of workers as impairment of this right which has to be justified by legitimate purposes. This is in general the approach of German law. Or to put it differently: Workers shall not check their rights at the door of the factory or the office.

Arbeitsrecht (NZA) 2010, 1329-1333; *Oberwetter*, Soziale Netzwerke im Fadenkreuz des Arbeitsrechts, Neue Juristische Wochenschrift (NJW) 2001, 417-421.

[89] Partial view of privacy as some kind of social isolation *Sofsky*, Privacy – A manifesto (2008).

[90] Emphasizing the role of "informational self-determination" as an instrument to safeguard communication *Hoffmann-Riem*, Informationelle Selbstbestimmung in der Informationsgesellschaft, Archiv des öffentlichen Rechts (AöR) 123 (1998), 513-540 (at 519-524).

SECTION 3:
INTERNET LAW AND INTELLECTUAL PROPERTY

Korean Netizen Equality in the Shadow of Real Name Verification[1]

John M. Leitner

I. Introduction

In 2007, the Republic of Korea ("Korea") became the first nation in the world[2] to introduce a government-mandated system by which an individual wishing to contribute content using popular internet portals must first verify his or her identity using a Korean national identification number. This real name verification system (the "RNVS" or the "System") has since been expanded to include a larger number of websites. A case currently pending in the Korean Constitutional Court (the "Constitutional Court")[3] has challenged the constitutional validity of the System,[4] but at the present time it continues to operate as a precondition to content contribution in the most trafficked channels of Korean internet life, and as a general tool for the official unmasking of netizen identity.[5]

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[1] I wish to thank Choi Ko Ya and Yang Li for their excellent research assistance. I also wish to thank Chung Hyungyo for helpfully commenting on this article.

[2] Korea is at the present time the only country with a mandatory nationwide internet user identity verification program. *See* John Leitner, *Identifying the Problem: Korea's Initial Experience with Mandatory Real Name Verification on Internet Portals*, 9 J. KOREAN L. 83, 90 (2009).

[3] The Constitutional Court is the Korean high court for adjudication of constitutional law questions. *See* Constitutional Court of Korea, *About the Court*, http://english.ccourt.go.kr.

[4] 2010 Hun-Ma47. At the time this article was published, a decision in the case was expected shortly. For general information about the arguments advanced by the complainants and the respondent, *see* Press Release, Public Relations Department of the Constitutional Court, July 8, 2010, *available at* http://www.ccourt.go.kr/home/storybook/storybook.jsp?seq=30&eventNo=2010헌마47&sch_code=BYUNRON&sch_sel=&sch_txt=&nScale=10&sch_category=&list_type=01).

[5] As explained *infra*, user identity is not publicly displayed on the internet portal, but the record of the particular individual's identity is retained and can be matched with the corresponding username in the

Supporters of the RNVS champion its potential to aid law enforcement in policing online expression that may run afoul of a variety of Korean criminal laws.[6] The System also assists potential civil litigation plaintiffs in bringing causes of action against netizens for such actions as alleged defamation or contempt.[7] Opponents argue that the System is not only generally ineffective at punishing offenders and deterring malign online behaviors, but also infringes on legally protected rights of internet users.[8] This article develops key arguments on both sides of the debate, with a special emphasis on the role of online activities in the advancement of individual rights. I argue in particular that the potential for anonymity plays a critical role in preserving the potency of cyberspace as a venue for promoting the right to equality and to an autonomous private life.

The article begins by sketching the background of the RNVS, including rationales for its creation, technical architecture, and scope of applicability online. Next, I describe the implementation of the System and its initial results, followed by a discussion of the pending constitutional challenge. I proceed to consider the general relationship between individual "privacy" (critically, for this article, privacy of identity) and engagement with the online community, including a discussion of major personal freedoms that may be impacted by the enforcement of the System. I further address the legal status of privacy in Korea and explore expanded notions of the concept in light of issues related to the right of expression and the right of equality. I conclude with a reflection on the relationship between government incursions into the basic mechanisms of cyberspace participation and the experience of individuals in the society. Throughout this article, I seek to elaborate upon the following notion: an essentially free cyber community meaningfully advances the social equality and personal autonomy of individuals. A supervised and *ex ante* restricted cyberspace is not just a missed opportunity to promote attractive policy, but an affront to individual rights.[9]

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future. This is described in Korea as "restrictive boninhwaginje", or "restrictive self-identity verification".

[6] Relevant criminalized expressions include certain political expressions, defamation, and contempt. *See* Gukgaboanbeop [National Security Act] (Law No. 10 of 1948; *amended by* Law No. 5454 of 1997); Hyeongbeop [Criminal Act] (Act No. 293, Sep. 18, 1953, amended by Act No. 7623, Jul. 29, 2005), arts. 307, 311. For a detailed analysis of criminal laws in Korea related to expression, *see* John Leitner, *To Post or Not to Post: Criminal Sanctions for Online Expression in the Republic of Korea*, TEMP. INT'L & COMP. L.J. (forthcoming Spring 2011).

[7] Defamatory and contemptuous statements can give rise to civil suits for damages and other remedies. *See* Minbeop [Civil Act] (Act No. 9650, Aug. 9, 2009), art. 764.

[8] Current efforts by opponents of the System utilize a constitutional rights theory in a pending legal challenge to the application of the RNVS, as opposed to a serious campaign to advocate for its legislative repeal on the basis of policy arguments. *See supra* note 4.

[9] By "right", I refer to an entitlement of a party to act in a particular way. As I use the concept of a "right" in this discussion, the entitlement in question is a right by virtue of the fact that it may be legally exercised in a manner that is distinctly anti-majoritarian (exercisable in a manner that a social majority disapproves of) and anti-utilitarian (exercisable in a manner that does not produce the optimal outcome under a particular calculation of social welfare or utility). *See, e.g.,* Ronald Dworkin, TAKING RIGHTS SERIOUSLY 268-278 (1977).

II. Background of the RNVS[10]

The RNVS was introduced into law through an amendment of the Information and Communications Network Act, passed on January 26, 2007.[11] Under the terms of the statute, the Korean president is empowered to decree that websites with more than 100,000 users per day must prompt their users to confirm their identities using Korean national identification numbers;[12] the identifying data is preserved and can be matched in the future with the username associated with a particular post.[13] After previously establishing a less inclusive scope for the RNVS,[14] the present enforcement decree engages the full scope of the statutory grant of authority and applies to all websites with more than 100,000 users per day.[15] As a further precaution against the existence and continuing public availability of legally suspect content, the Information and Communications Act provides that internet portals are to respond to complaints of allegedly illegal content[16] by following certain takedown procedures.[17] Legally prescribed procedures[18] enable government officials, including prosecutors, officials of the Korean tax service, and officials of the Korean CIA to obtain information on the identities of particular netizens from internet portals.

The stated justifications for the RNVS advance an objective of improving the civility of cyber-etiquette and deterring malign comments, such as those violating the laws of defamation, contempt, and tortious invasions of privacy. Cyber-defamation[19] is considered a widespread problem in Korea,[20] and famous instances

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[10] For a more detailed explanation of the design and introduction of the RNVS, *see* Leitner, *supra* note 2, at 90-91.

[11] Jeongbo tongsinmang iyong chokjin mit jeongbo boho deunge kwanhan beopryul [Act on Promotion of Information and Communications Network Utilization and Information Protection] (Act No. 8289, Jan. 26, 2007), art. 44-5 (the "Information and Communications Network Act").

[12] *Id. See also* Hyung-eun Kim, *Do new Internet regulations curb free speech?*, JOONGANG DAILY, Aug. 13, 2008, *available at* http://joongangdaily.joins.com/article/view.asp?aid=2893577. Individuals who do not have a Korean national identification number are effectively prevented from actively engaging with the online community through the internet portals subject to the RNVS. The question may be posed: does one exist as a person in cyberspace without the capacity for interacting with the online community?

[13] *See* Enforcement Decree of the Information and Communications Network Act (Presidential Decree No. 21278, Jan. 28, 2009), art. 30.

[14] *See* Enforcement Decree of the Information and Communications Network Act (Presidential Decree No. 20199, July 27, 2007), art. 22.

[15] This standard is consistent with the parameters authorized by the statute and specified by executive enforcement decree. *See* Enforcement Decree, *supra* note 13.

[16] The scope of defamatory materials to be taken down is statutorily specified. Information and Communications Network Act, *supra* note 11, at art. 44-7(1), (2).

[17] The Information and Communications Network Act prescribes that internet portals delete obviously offensive posts, while taking down posts of ambiguous legality for 30 days during a review period. *Id.* at art. 44-2(4).

[18] Jeonki tongsin saob boep [Electronic Telecommunications Business Act] (Act no. 10166, March 22, 2010), art. 83.

[19] Cyber-defamation is designated as a specific crime under Korean law and is subject to greater punishments than defamatory statements made offline. *See* Information and Communications Network Act, *supra* note 11, at art. 70.

of malicious online comments have catalyzed public opinion against the perceived menace of objectionable online expression. In a particularly significant instance, the suicide of beloved actress Jin-sil Choi[21] in October of 2008 led to speculation that her suicidal feelings were shaped to a significant degree by online rumors, [22] and expansion of the RNVS was expedited following the suicide.[23]

Further examination reveals an additional government motivation. Social movements organized online have in some cases resulted in notable civic unrest. A persistent rumor that American beef could infect consumers with mad cow disease triggered growing social fomentation, largely online, culminating in massive outdoor demonstrations.[24] The Korean government responded to the embarrassing and disruptive episodes by seeking new instruments for the prevention of at least certain forms of social demonstration.[25] One such instrument is the RNVS. The advance identification of potential demonstration organizers facilitates state interference with or prevention of public spectacles. In defending the need for further online identity-related measures, President Myung-Bak Lee declared that Korea must counteract "a phenomenon in which inaccurate, false information is disseminated; prompting social unrest that spreads like an epidemic."[26]

III. Initial Results

Initial research has produced little evidence of a substantial reduction of legally objectionable comments since the introduction of the RNVS. A general survey of Korean netizen behavior has found that, contrary to common assumption, the rates at which internet user behavior deviates from particular social norms are not increased when netizens are acting anonymously, casting doubt upon the promise

[20] The Korean police reported 10,028 cases of online libel in 2007, a substantial increase from the 3,667 cases reported in 2004. Sang-hun Choe, *Korean Star's Suicide Reignites Debate on Web Regulation*, N.Y. TIMES, Oct. 12, 2008, *available at* http://www.nytimes.com/2008/10/13/technology/internet/13suicide.html.

[21] In Korea, family surnames are stated first, followed by the individual's given name. In this article, I adopt the western practice for the reader's convenience, except in footnote references, where I follow the convention used by the source publication.

[22] See, e.g., Sang-hun Choe, *Web Rumors Tied to Korean Actress's Suicide*, N.Y. Times, Oct. 2, 2008, *available at* http://www.nytimes.com/2008/10/03/world/asia/03actress.html?em; Choi Jin-sil, Akpeuli Jukyeotda Dongryo·Netizen Kongbun [Negative replies kill Choi], SportsKhan, Oct. 2, 2008, available at http://sports.khan.co.kr/news/sk_index.html?cat=view&art_id=200810022225376&sec_id=562901.

[23] See Lee Tee Jong, Seoul Rushes Internet Bill, The Straits Times, Oct. 13, 2008, available at http://www.straitstimes.com/Breaking%2BNews/Asia/Story/STIStory_289173.html; Tong-Hyung Kim, More Limits Planned on Internet Anonymity, Korea Times, Oct. 3, 2008, http://www.koreatimes.co.kr/www/news/biz/2008/10/123_32121.html.

[24] *See* Jin-seo Cho, *Portals Turning Into Rumor Mills?*, KOREA TIMES, May 14, 2008, *available at* http://www.koreatimes.co.kr/www/news/biz/2008/05/123_24189.html.

[25] See Michael Fitzpatrick, South Korean government looks to rein in the Net, N.Y. Times, Sept. 5, 2008, available at http://www.nytimes.com/2008/09/05/business/worldbusiness/05iht-sknet.html.

[26] *Id.*

of enforcing notions of civility through identity verification.[27] A study concerned with assessing the impact of the RNVS examined comments and replies on a popular internet portal's bulletin boards. The study found that the number of total comments decreased after the introduction of the RNVS, but the proportional share of defamatory comments did not decrease.[28]

A Korea Communications Commission study[29] of the first phase of the introduction of the RNVS found that there was a decrease in the rate of malign internet posts[30] from 15.8% to 13.9%.[31] This study provides the most favorable results to date of the RNVS's effectiveness. The law has produced, at best, marginally improved protection of private reputation.

Initial Korean government analysis suggested that the RNVS has not had a "chilling effect" on Korean expression through the internet because its study indicated that the number of internet posts on Korean internet portals has remained consistent or increased since the System was introduced.[32] However, this fact does not establish a lack of chilling effect, as the introduction of the RNVS may have prevented an increase in posting that may have otherwise occurred.[33] Furthermore, statistics alone do not reveal the content of expression that is made (or not made) through the internet, and it is possible that certain kinds of speech, such as speech regarding sensitive but socially important subjects, has been reduced.[34]

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[27] Yong-suk Hwang, *Internet Kesipan Silmyeongjee Daehan Bipanjeok Yeongu [Critical Approach to the Implementation of Real-Name system on Bulletin Board of the Internet]*, 15 EONRONKWA SAHWE [PRESS AND SOC'Y] 97, 108 (2007).

[28] Jisuk Woo et al., *Internet kaeshipan shilmyeongjaeui hyokwae daehan siljeung yeongu: Jaehanjukboninhwakinjae sihenge ddaren kaeshipan nae keulsseuki haengui mit bibangkwa yokseului hyeonhwareul jungsimeuro [An Empirical Analysis of the Effect of Real-name System on Internet Bulletin Boards: Focusing on How the Real-name System and Users' Characteristics Influence the Use of Slanderous Comments and Swear Words]*, 20-21, Hengjeongnonchong Vol. 48(1), Seoul Daehakgyo Hangukhengjeongyeonguso [Seoul National University Korean Administration Institute] (2009).

[29] This study evaluated the rate of malign reply; sought to gauge the "chilling effect" of the law, or the degree, if any, to which it discouraged use of the internet; and also attempted to measure the "balloon effect," or the degree, if any, to which the law caused netizens to switch from using large internet portals subject to the RNVS to smaller ones not subject to the requirement. Bangsongtongsinwiwonhoe [Korea Communications Commission], *Jaehanjeok boninhwakinjae hyogwabunseokeul wihan josa bogoseo* [*Analysis of the Effect of Limited Real Name Verification*], October 2007, 1-2. The study asserted that because the number of internet posts and the popularity of large internet portals remained constant, no chilling effect or balloon effect was observable. *Id.* at 18-20.

[30] The term used to describe these messages in the study is "Akseongdaetgeul," translated here as "malign". The study defines the term to include libel, sexual harassment, invasion of privacy, and contempt. *Id.* at 9.

[31] *Id.*

[32] *Id.* at 18.

[33] This possibility is supported by the fact that, since the introduction of the RNVS, the number of Korean internet users has significantly increased, while the number of posts on portals has been stagnant. An alternative explanation, however, may be that internet portals are becoming less favored as sites of online expression, bypassed by some users in favor of alternatives like social networking sites.

[34] As I argue, *infra*, the RNVS impacts particular individuals and groups disproportionately, more greatly deterring their expressive and associative activities and obstructing their opportunities for more equal status in the society.

As a further practical matter, the RNVS is susceptible to "leakage" concerns. Sites outside of the jurisdiction of the Korean government, such as sites based in other nations, may provide an attractive alternative to Korean users who are not comfortable with revealing their identity information online. A specific illustration of leakage has arisen within Korea's own jurisdictional boundaries. The Google-owned website YouTube permits registered users[35] to upload videos that can then be streamed by anyone who accesses the website. Registered users can also post comments about a particular video, which are displayed below the video box on the computer screen. Google maintains a Korea-based subsidiary that administrates, amongst other properties, the Korean version of the YouTube site.[36] Google objected to the RNVS as compromising user anonymity in a manner inconsistent with its vision of online freedom.[37] Google interpreted the law to only apply to the Korean version of the YouTube site, and so it deactivated the uploading and commenting features for individuals whose country preference is set to "South Korea" in order to avoid a legal obligation to participate in the RNVS. When YouTube is accessed from a Korea-based IP address, the front page contains a message explaining the limited functionality of the Korean page and offering a "one-click" conversion of the user's preference to the U.S.

While many instances of "leakage" may be largely conjectural or at least difficult to gauge, the case of YouTube provides a vivid illustration of the practical limitations of the RNVS. Migration to the use of Google products for a variety of online activities, including blogging[38] and other methods of creating online content, has become an increasingly popular method for individuals in Korea to remain anonymous.[39] Given the means available to a party who intends to defame another online, including the use of someone else's identification number,[40] the RNVS is particularly unlikely to prevent the most premeditated and organized acts of defamation.[41]

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[35] YouTube requires users wishing to post content to provide certain personal information, but the only verified information is access to the email address that is provided.

[36] *See* kr.youtube.com.

[37] Google's protection of user anonymity is not absolute. Google's privacy policy states that it will share information with third parties when "[w]e have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request…" Google Privacy Center: Privacy Policy, http://www.google.com/privacypolicy.html.

[38] Google provides its "Blogger" service (www.blogger.com) to Korean users. So far, it has not qualified for inclusion as an internet portal within the scope of the RNVS due to an insufficient number of daily users, but the site could be the source of future conflict with the Korean government if its popularity continues to grow.

[39] *See* Tong-hyun Kim, *Google Avoids Regulations, Korean Portals Not so Lucky*, KOREA TIMES, Apr. 27, 2009, *available at* http://www.koreatimes.co.kr/www/news/tech/tech_view.asp?newsIdx=43939&categoryCode=129

[40] A google.com search conducted by the Korean Information Security Agency produced well over a hundred thousand Korean ID numbers that could be obtained for free online. *Google Exposing Thousands of Korean ID Numbers*, CHOSUNILBO, Sept. 22, 2008, *available at* http://english.chosun.com/w21data/html/news/200809/200809220010.html.

[41] Provocative research already exists suggesting that instances of online defamation have not been curbed by the introduction of the RNVS. *See* Woo et al., *supra* note 28, at 20-21.

IV. Constitutional Court Challenge

On January 25, 2010, three Korean citizens filed a constitutional complaint arguing that the RNVS violates several of their constitutional rights. The complainants asserted that they desired to post expressions on a number of Korea-based websites, including ohmynews.com and ytn.co.kr, but were unable to do so because they were unwilling to comply with the RNVS. Oral arguments in the case were heard by the Constitutional Court on July 8, 2010;[42] a decision is expected imminently.[43]

The complainants argued[44] that their freedom of expression was violated by the RNVS, in particular their freedom to express anonymously.[45] They argued further that the law effectively imposes prior restraint, a violation of the constitutional prohibition on censorship.[46] The complainants claimed that the RNVS violates the least restrictive means principle[47] and improperly undervalues individual private interest against the public interest.[48] As an alternative theory, the complainants asserted that the high risk of information leakage poses a threat to privacy grave enough to threaten the constitutional right to privacy, defined in Constitutional Court precedent as the right to freedom of a private life and the freedom to control one's own personal information.[49] Finally, a theory of equality was presented, alleging unequal treatment between those seeking to express themselves on the internet and those utilizing any other medium, where no equivalent name verification requirement operates.

The respondent[50] argued that the RNVS requirement is an appropriate means of achieving justified government purposes. The purposes advanced included promoting a more responsible and respectful online space for public expression and stimulating more use of online bulletin boards by lessening the apprehension

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[42] *See supra* note 4.
[43] The decision in this case had not been made at the time this article was published, and pursuant to Constitutional Court practice, the date of decision is not publicly announced in advance.
[44] See id.
[45] Under the Constitution of Korea (the "Constitution"), citizens have a right to freedom of speech, but such speech shall not violate the honor or rights of other persons or undermine public morals or social ethics. Heonbeop [Constitution], art. 21 (S. Korea), *translated at* http://korea.assembly.go.kr/board/down.jsp?boarditemid=1000000155&dirname=/eng_data/1000000155E1.pdf.
[46] *Id.* at art. 21(2).
[47] For a discussion of the special status (to utilize non-Korean parlance, "heightened scrutiny") that freedom of expression formally receives under Korean law, *see* 89Hun-Ma165, 3 KCCR 518, 534 (Sept. 16, 1991).
[48] The rights of citizens may be restricted by the government when such restrictions are necessary for national security, maintenance of law and order, or for public welfare. The Constitution asserts that such restrictions cannot violate the "essential aspect" of the right in question. Constitution, *supra* note 45, at art. 37.
[49] *See* 99Hun-Ba92, 2000Hun-Ba39, 2000Hun-Ma167 · 168 · 199 · 205 · 280 (consolidated), 13(2) KCCR 174, 203 (Aug. 30, 2001).
[50] In this dispute, the Korean Broadcasting Commission, a government agency within the Korea Communications Commission, defended the law as the respondent.

of individuals that they will be treated in an illegal manner by other netizens.[51] The respondent asserted that, because the identity of the posting individual is not displayed in public view on the internet portal, her interest in anonymous expression is not violated, and the policy does not violate either a "least restrictive means" or "balance of private and public interest" test.[52] The defense argued that the formal requirements for legally proscribed prior censorship were not met in this case. The fact that posting is voluntary was argued by the defense to negate the claim of a privacy right violation.

The decision of the Constitutional Court is expected shortly. The outcome of the complaint can hardly be predicted, but in the following discussion I offer briefly my own assessment of the merits of the case.

As a matter of legal principle, the plaintiffs should succeed on their claim of freedom of expression. The RNVS requirement imposes an affirmative obligation and, in many cases, an actual and "chilling" burden on essentially all the members of Korean cyber-society, many of whom are also rights-holding citizens of Korea. In the face of this limitation to individual rights, the state offers only general notions of a state interest in an attractive and widely used cyberspace. On the former consideration, of desirable internet culture, the state advances a speculative vision of promoting, if tenuously, certain characteristics of what the government defines as preferred internet etiquette. If this government interest is accepted as a legitimate basis for limiting individual rights, it is a broad and dangerous one. A further question of the nature of individual rights is also raised. Is the "right" in question that is to be limited a legal entitlement at all, if a roughly sketched notion of attractive social behavior in a particular public forum is a legitimate basis for limiting the right? As for the latter consideration, of promoting the widespread use of the internet as a forum for expression, the fact that the RNVS has arguably reduced the total quantity of online expression that would otherwise have occurred indicates that the law is inappropriate for advancing this public interest.

I argue below that the RNVS also violates meaningful individual rights to privacy and equality. The arguments of the complainants did not capture the full scope and applications of these two legal theories,[53] but a nuanced and

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[51] The respondent analogized the case to a recent precedent, 2008Hun-Ma324, 2009Hun-Ba31 (consolidated), 161 KCCG 595 (Feb. 25, 2010), in which complainants challenged a law that requires "internet news sites" to verify the names of individuals posting politically relevant content during a several week period preceding elections. The sites are required to delete posts where the author has not verified her real name. The Constitutional Court, after considering claims that the law was void for vagueness, constituted prior censorship, violated the least restrictive means principle, and compromised privacy, upheld the law.

[52] Balancing interests under Korean law reflects a distinctly utilitarian character. According to the Korean Supreme Court, "When the protection of a person's reputation and the freedom of expression are in conflict, how the two rights should be mediated depends on the comparison of various social interests by comparing the benefit of free expression and the values achieved through the protection of personal rights." 85Da-Kha29, Gong 1988.11.15. (836), 1393 (October 11, 1988).

[53] The complainants' equality theory is particularly formalistic and subject to a powerful rebuttal. The state may contend that, in the absence of the RNVS, online speakers conceal themselves behind a veil of anonymity that is generally not available to offline speakers, where identity concealment is often

contextualized consideration of equality and privacy leads to the conclusion that the RNVS cannot be tolerated in a constitutional democracy that is protective of these individual rights. I begin with a general discussion of privacy, an often nebulous concept in many legal systems that can and should be seen to operate actively to promote the "human dignity" that the Constitution purports to protect absolutely.[54] I then synthesize the "autonomy" notion of privacy with the right of equality. Understood to go beyond facial neutrality and to seek deeper fairness on the level of social status, the individual right of equality forms a powerful basis for a social duty to defend the equal rights potentials of a free and open cyberspace.[55]

V. Reflection on Privacy and the Rights of "Netizens"

The concept of "privacy" is by its nature a varying and indefinite one, perpetually a moving target in philosophical and legal analysis. To clarify the meaning of this concept as it pertains to the System, several general variables should be isolated and discussed.[56] Firstly, is a violation of "privacy" conditioned on particular kinds of affirmative actions external to the individual, such as the acquisition, dissemination, and compilation of private data by third parties? Or, alternatively, should privacy be understood from the subjective perspective of the individual, such as a person's perception of whether her or she exists in a "private" sphere with certain privacy-related characteristics, such as freedom from observation or interference, freedom of choice and action, or a sense of well-being? These two perspectives are inevitably closely interrelated. For instance, a lapse of "data privacy" (such as non-consensual dissemination of a person's health information) of which the subject is aware might in many cases have as one result an impact on the affected individual's personal view of his or her privacy. However, in principle, data privacy is compromised independently of the individual's knowledge or particular concern. In the latter sense of privacy as personal perception-based, privacy may be compromised in a variety of settings, which may not be as clearly specifiable or linked to identified external triggers as cases of wrongful data dissemination.

difficult or simply not possible. A widely accessible expressive forum with almost universal anonymity (barring *ex post* identification) is a unique result of the rise of cyberspace public discourse, and a particularized government policy may be either a rational distinction in treatment of online and offline speakers or, more dramatically, an effective rectification of a previously "unequal" arrangement.

[54] Under the Constitution, "All citizens shall be assured of human dignity and worth…" Constitution, *supra* note 45, at art. 10.

[55] While rights are generally discussed in terms of prohibition of government actions that offend those rights by obstructing the legal exercise of an individual entitlement, it may be argued that the state has a duty to act affirmatively to promote a state of greater vindication of individual rights. This possibility is referenced in "Equality/Autonomy Approach", *infra*, although the approach presented in this article is not conditioned upon acceptance of a theory of positive rights.

[56] I provide a synopsis of existing Korean privacy law, *infra*, but my objective here is to discuss general parameters for thinking about privacy.

As a second consideration, assume that privacy is understood at least in part from the standpoint of the individual's personal conception and experience. What standard for personal privacy might be adopted? One definition of privacy, or an element of the definition, is privacy as concealment of certain aspects of life from uninvited members of the public.[57] This notion is often associated with privacy as rooted in "place", such as the privacy right identified in certain American Supreme Court precedents as "emanating" from the Bill of Rights.[58] The idea, for instance, that a personal home is sacred, and that outside intrusion, including by the government, must be prevented or minimized,[59] is the archetypical notion of privacy as place-based and concealment-based. However, privacy can potentially be far more complicated. Why are certain personal decisions, such as the decision of a woman to have an abortion procedure[60] or the decision of a person to engage in a homosexual relationship,[61] categorized in American law as relating to a "privacy right"?[62] In such cases, the analysis does not depend on whether the activities related to these decisions can be concealed in a private place, but rather whether the decision itself, even if observable and potentially publicly known, is by its nature a "private" one that a dignified person must be free to make for herself.[63]

This notion of privacy is not based primarily on a particular private place,[64] but rather on aspects of human life that must be controlled by the individual through a private process independent of government proscription or coercion. Such a privacy right is often constructed out of the notion of "liberty";[65] as I suggest *infra*,

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[57] This may seem similar to the previous discussion of information obtained and disseminated by third parties. Here, however, the key is not the acts external to the individual, but rather the feeling and perception of freedom from observation.

[58] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also* Poe v. Ullman, 367 U.S. 497, 516-522 (1961) (Justice Harlan, dissenting).

[59] *Compare* Constitution, *supra* note 45, at art. 16 ("All citizens shall be free from intrusion into their place of residence") *with* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…").

[60] *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[61] *See* Lawrence v Texas, 539 U.S. 558 (2003).

[62] I illustrate notions of privacy using examples from American law to illustrate, within an inter-jurisdictional context, the complexities of "privacy" as an identified and substantive legal right.

[63] The assertion of this constitutional right to privacy has long been controversial. For just one famous illustration, *see* John Hart Ely, *The Wages of Crying Wolf,* 82 YALE L. J. 920 (1973).

[64] However, in Lawrence, the Supreme Court did reference the notion of the home as "the most private of places". Lawrence, *supra* note 61, at 567.

[65] In American law, it is asserted in precedent that the due process clause of the 14th Amendment protects liberty that encompasses personal control over certain intimate decisions. *See* Casey, *supra* note 60, at 851(stating "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education… These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

the notion of "autonomy", as related to the broader principle of equality, is more useful in clarifying the nature of this privacy right.

In light of the social value of free expression, the concept of "privacy" in the online space becomes more complicated. Proponents of the RNVS correctly assert that individuals have an interest in the protection of their private "personal rights", [66] such as reputation and freedom from defamation.[67] However, individuals also have an interest in privacy in a different sense, that is, in maintaining an anonymous profile online for the purposes of utilizing legitimate expressive and associative opportunities while being insulated from the possibility of stigma or suppression.[68] While some have questioned the value of anonymous expression, examples of the value of anonymity include the sharing of sensitive information regarding personal health issues, matters of personal and sexual identity,[69] and politically controversial topics.

The Constitution explicitly protects the reputation of Korean individuals, but reputation concerns weigh on both sides of this debate. The right of reputation surely contains the interest of the individual to be free from defamation, contempt, or other "malign" statements impugning her character. On the other hand, this reputation right should also be understood to include personal influence over the inputs of reputation. Integral to that influence is power over the public identity that the individual creates in both the offline and online worlds.

Some may find the assertion that the RNVS violates an individual right to privacy to be a specious one. Taking the notion of privacy as data dissemination-based, where the right or interest in question is violated when data is shared impermissibly, the RNVS appears to present no immediate violation of a "privacy right".[70] Privacy as personal and place-based may also seem little-compromised by the RNVS: does one have an expectation of privacy in cyberspace, and does the revelation of identity represent a violation of any privacy right that may exist

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[66] *See, e.g.,* Wan Choung, *Cyberpokryeokui Pihaesiltaewa Daeeunghangan* [*A Legal Study of Cyber Violence*], 13 PIHAEJAHAKYEONGU [KOREAN J. OF VICTIMOLOGY] 329, 347-48 (2005). Professor Choung describes "in-gyeok kwon", translated here as "personal rights", as requiring the protection provided by such policies as the RNVS.

[67] This is made explicitly clear in the text of the Constitution, which states: "Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics." Constitution, *supra* note 45, at art. 21(4).

[68] As stated by the United States Supreme Court, "Persecuted groups and sects from time to time throughout history have been able to criticize the oppressive practices and laws either anonymously or not at all... It is plain that anonymity has sometimes been assumed for the most constructive purposes." Talley v. California, 362 U.S. 60, 65-66 (1960).

[69] See Jisuk Woo and Jae-Hyup Lee, The Limitations of "Information Privacy" in the Network Environment, 7 U. PITT. J. TECH. L. & POL'Y 2, 28-29 (2006) (citing David J. Phillips, Negotiating the Digital Closet: Online Pseudonyms and the Politics of Sexual Identity, 5 INFO. COMM. & SOC'Y 406 (2002)).

[70] As a practical matter, the security of gathered identity information has been questioned, providing an opportunity for complainants to challenge the RNVS on a data dissemination theory. *See, e.g.,* Kim Jung Wan, *Leaked Personal Information Prevalent, Real Name Verification Should be Repealed* [*Kaeinjungbo Yoochul Wonhyung Internet Shilmyungjae Paejidueya*], Boan News, September 7, 2010, *available at* http://www.boannews.com/media/view.asp?idx=22766&kind=1.

online? However, if privacy is understood to encompass personal decisions and independent life behaviors, the RNVS becomes more troubling as a matter of legal principle.

1. Privacy and the Nature of Interactions

Online activities potentially and actually fill substantial roles in personal decision-making and the interaction between individuals and various communities within society. The interactive and geographic barrier-defiant nature of the internet facilitates the development of intimate and essential life experiences in cyberspace. The availability of online anonymity, and the related potential for construction and reconstruction of personal identity, facilitates meaningful additional opportunities for self-realization online. It may be tempting to focus on negative applications of online anonymity, but I would like to suggest two categories of cases of individually vital (and socially valuable) social activities that are centrally or exclusively conducted on the internet and are substantially bolstered by the availability of anonymity.

A. Activities Significantly Facilitated by the Online Medium

Various activities that are possible and occur on some level in traditional physical forums may be significantly facilitated and expanded by the availability of online interaction. For example, participation in organizations or less formal social settings involving the exchange of sensitive and personal information, which may reveal private details about an individual, may be much enhanced by online collaboration. Individuals seeking to discuss health conditions, religious and other belief-based affinities, or controversial (if legal) lifestyle choices, may find far greater opportunities for meaningful interaction in cyberspace.

B. Activities Only Possible Online

In some of the above cases, the activity in question may only be likely to occur online, due to physical-world obstacles. However, it is at least theoretically possible for the activity to happen on some scale in the physical world, and fundamentally these are endeavors of the sort that may happen and have happened in offline life. Distinguishable are those forms of interaction and engagement that exist and are understood and defined in terms of the online space. The essence, and not just form and venue, of the activity is defined by its online character. The most dramatic illustration may be the idea of a "second life", in which an individual constructs an online identity that may or may not closely resemble the individual's identity in the physical world, in the form of an online avatar.

My contention is not that any particular personal lifestyle choice related to public identity is necessarily and unambiguously good.[71] Rather, my contention is that the discretion to "space-shift" activities online or, more dramatically, to create and cultivate cyber-personae and engage in other novel online pursuits, is central to a free and independent life in a modern, developed society. Beginning with the underlying principle that individuals are free to pursue an independent life and that privacy contains the freedom to make intimate lifestyle and persona-development choices, the contextualized application of this principle in a technologically advanced society must include a robust conception of online freedom.

In cyberspace, the threshold question of existence is, does an individual have [high-speed] internet access? In a society employing a mandatory system of real name verification, the further question must be posed: does an individual have the means to directly contribute to and interact with the online community? The common characteristic of the internet activities described above is the actively participatory nature of the individual's engagement online. To limit a particular individual to the status of passive observer and recipient of online culture, and not a semiotic collaborator, is arguably to deny that person "existence in cyberspace". At a minimum, the individual has a profoundly unequal and deprived status in cyberspace due to lack of capacity to engage. The RNVS deprives some individuals of any opportunity to participate in certain channels online, and poses to all others the choice between unmasking their identity to the government or else not participating in those channels. All individuals face potential limitation of their freedom for development of online identities, and the impact is greatest for those individuals who are already marginalized and stigmatized in the offline world (and who would most directly benefit from the liberating status of online anonymity).

2. Privacy and Empowering Personal Freedoms in Korea

"Privacy" may be identified as an independent and sufficient basis for a rights-based claim under Korean law, but the meaning and substance of "privacy" concerns as a rights claim are imbued by other legal principles. In Korea, privacy is interpreted to contain three rights-related components: the protection of secret private information from being revealed (private facts and facts likely to cause social misunderstandings); the protection of freedom of privacy (a zone of privacy from which the outside world can be excluded); and a right to control the manner in which personal information is disseminated.[72] Construed this way, Korean

[71] A single answer to the question of to what ends discretion will be channeled is never possible. Some online personae, as cultivated and advanced online, are bullies or thieves. This observation does not seem, on its face, to distinguish the experience of cyberspace from the experience of offline communities in the physical world.

[72] *See supra* note 49. The first two conceptions of privacy are understood as "passive" (where the individual can exercise the freedom to preserve the status quo of private information and places), while the third is described as "active" (where the individual can control or influence particular channels and manners of information distribution that are being engaged).

privacy is rooted in privacy of place and secrecy of information. Both notions arguably lack a clear connection to the privacy of interacting in cyberspace in a manner that involves the utilization of public and shared space and the potential voluntary revelation of at least some forms of personal information. Understood in this light, the constitutional right to privacy as place-protective provides little or no legal succor to those objecting to the RNVS; the data-dissemination dimension of the privacy right may be implicated, but the arguable remedy for the threat of data security breaches is ex post litigation to address liability and damages, not an ex ante finding of a constitutional violation. Might other rights-based objections be available? I offer as a specific and relatively straightforward example concerns related to freedom of expression, before briefly sketching a broader equality framework for safeguarding online freedoms, including netizen anonymity.

A. Expression

The specter of suppression of expression exists in all societies at all times, leading to the insight that anonymous expression may play a vital role in sustaining and nourishing social discourse when application of state coercion might otherwise be stifling. This is particularly pressing, and may be most probable to occur, in matters of political and social conflict-related expression. A recent case in Korea provides a poignant example. Dae-sung Park was a widely read blogger on financial issues who posted his writings under the internet alias "Minerva".[73] Mr. Park, whose "Minerva" identity gained fame after Park pseudonymously predicted the demise of the bank Lehman Brothers, was arrested on January 7, 2009.[74] He was accused of posting online speculation regarding Korean monetary policy.[75] The prosecution alleged that these speculations were false and that Mr. Park spread the rumor with the intent to damage public interest, in violation of the *Electronic Communication Fundamental Law*.[76] He was acquitted by the Seoul Central District Court on April 20, 2009.[77] The legal provision in question was recently declared unconstitutional by the Constitutional Court.[78] The Court concluded that the

[73] Minerva is the goddess of wisdom in Roman mythology (known in Greek mythology as Athena).
[74] *See* Christian Oliver, *Financial Blogger Arrested in South Korea*, FIN. TIMES, Jan. 8, 2009, *available at* http://www.ft.com/cms/s/0/092a99ca-ddab-11dd-87dc-000077b07658.html?nclick_check=1; *see also* Jane Han, *Foreigners Puzzled over Park's Arrest*, KOREA TIMES, Jan. 11, 2009, *available at* http://www.koreatimes.co.kr/www/news/biz/2009/01/123_37648.html.
[75] *See* Ju-min Park and John M. Glionna, *Case of Internet Economic Pundit Minerva Roils South Korea*, L.A. TIMES, Jan. 16, 2009, *available at* http://articles.latimes.com/2009/jan/16/world/fg-korea-minerva16.
[76] Jeonki tongsin kibonbeop [Electronic Communication Fundamental Act], Act No. 9780, art. 47(1) states:
A person spreading a false rumor maliciously intending to damage the public interest by using an electronic machine can be sentenced to imprisonment for under five years or given a fine of under 50,000,000 won.
[77] *S. Korean Court Finds "Minerva" Not Guilty*, KOREA TIMES, Apr. 20, 2009, *available at* http://www.koreatimes.co.kr/www/news/nation/2009/04/113_43467.html.
[78] 2008Hun-Ba157, 2009Hun-Ba88 (consolidated) (Dec. 28, 2010), *available at* http://www.ccourt.go.kr/home/view2/xml_content_view02.jsp?seq=10&cname=결정문&eventNo=2008헌바157&pubflag=2&eventnum=25749&sch_keyword=&cid=01010002.

intent element of the crime, which is based upon a purpose of harming the public interest, is too vague. The intent element failed to provide the legal clarity necessary for a restriction on freedom of expression and generally violated the legal principle of nulla poena sine lege.[79] While the decision is, on its face, an advancement of the protection of individual rights, the holding itself is narrow. It is unconstitutionally vague to ask courts to divine intent by a defendant to damage public interest, but this legal defect has limited applications in other cases, including the challenge to the RNVS. In fact, it seems entirely possible that the National Assembly could modify the language of the statute to satisfy the vagueness objection, potentially reinstating a similar proscription on expression.

Expression-related considerations may be the most obvious difficulties raised by the RNVS, but their significance is heightened and clarified in the context of other, and I argue more foundational, legal rights. I propose as an alternative a rights framework of equality/autonomy as a critique of the RNVS. In this context, respecting the "right of anonymous online expression" also respects, on an essential level, the basic equality and autonomy of the members of the society.

B. Equality/Autonomy Approach

At its most sweeping and ambitious, cyberspace creates the potential for dramatically improved degrees of equality amongst individuals. Taking for a moment the notion of equality as equal access to and sharing of a benefit, a form of "equal treatment", internet high-speed access via an uncensored network provides (in general and thus far) equal online access to each end user. Based on the low barriers to content contribution through various online channels, equal access also means equal opportunities to interact with and contribute to the body of publicly available shared content. Surely, there is no guarantee that any particular content will receive equal exposure to an audience or equal readership or viewership. However, the fact remains that the channel of expression is open, a perpetual soapbox in the public square, whether or not anyone is listening to the particular speaker.

Access to high-speed internet is a central assumption of the view of cyberspace as a resource and community of equal accommodation. The assumption is certainly violated in every society, as ubiquitous network access does not exist in any particular society (Korea is one of the nations that comes closest[80]). Network access introduces a crude and general division (between the class of individuals with access to high-speed internet and those without access) with a distinctly socio-economic dynamic. Within the class of individuals that does have access, however,

[79] This maxim roughly translates as "no penalty without law".

[80] Some studies have found Korea to have the world's highest internet access rate. *See S. Korea Tops OECD in Internet Penetration*, KOREA TIMES, June 17, 2008, *available at* http://www.koreatimes.co.kr/www/news/biz/2008/06/123_26007.html; OpenNet Initiative: South Korea, http://opennet.net/research/profiles/south-korea (May 10, 2007); Rob Frieden, *Lessons from Broadband Development in Canada, Japan, Korea and the United States*, 29 Telecomm. Pol'y 595, 597 (2005).

cyberspace represents a sphere of existence free from (or at least freer from) socio-economic inequalities and social constraints. Equality is often understood in terms of formally equal treatment from the government, with a special focus on equality of basic political participation.[81] The government cannot engage in actions that impermissibly exclude citizens from the political process.

This conception of equality, focused on political participation and perhaps the rejection of many forms of facial statutory or regulatory distinctions based on demographic group, is an inadequate elaboration of the concept of equality in a modern, developed democracy. It should not be accepted, and a more robust vision of equality should be pursued. [82] The RNVS presents a particularly stark example of obstructing an opportunity for greater social equality. The equality captured by cyberspace is, by its nature, potentially one of equal access to the tools that can achieve uniquely personality-affirming and lifestyle-liberating potentials. The opportunity exists for the avoidance or mitigation of stigmas, attaching to individuals or groups, because of an exemption from those social constructs that impose stigmas and burdens. In the case of Korea, for instance, where individuals of a non-heterosexual orientation frequently find it difficult or impossible to reveal their orientation,[83] the anonymous and geographic obstacle-negating characteristics of cyberspace may prove vital to self-expression, sharing of experiences, and the elaboration of personal identity.

Another brief example may be illustrative. Korea imposes a variety of express restrictions on political expression, as codified in such statutes as the National Security Act.[84] Individuals who engage in purely abstract political expression may risk prosecution, even at the present time.[85] This issue may be understood in terms of a debate over freedom of expression, which in Korea is conducted according to the weighing of individual liberty interests against social stability and security interests, as discussed *supra*. But might this case present a question of equality? Does the society treat its citizens as equal, not just in terms of neutral application of laws, but with an awareness of the disparate impact of the laws on differently

[81] Even confining one's focus to equality of political participation, the RNVS is problematic in its impact on individual expression regarding political and social issues.

[82] The Constitutional Court recognizes a theoretical "hierarchy" of rights, determined according to the necessity and importance of the right in question in advancing human dignity. According to the Court, "Freedom of expression is the foundation for the existence and development of a democratic country, and therefore one of the characteristics of modern constitution is that this freedom enjoys a 'superior status'." 89Hun-Ma165, 3 KCCR 518, 534 (Sept. 16, 1991).

[83] For example, at Seoul National University, the national university of Korea, undergraduate students involved in a student gay-lesbian-bisexual journal work from an undisclosed office location and write pseudonymously.

[84] National Security Act, *supra* note 6.

[85] In one recent example, a sociology professor was prosecuted for his comment that America was to blame for joining the Korean War and preventing North Korea from uniting the peninsula under a single communist regime. Jung Eunjung, *Violation of National Security Law by Professor Kang Jungku, Sentenced to 2 years of Imprisonment and 3 years of Probation*, [*Kukbobeob Uiban Kang Jung Ku kyosu jingyoek2nyun, jiphengyuye3nyun seongo*], HERALD KYUNGJAE, May 26, 2006, *available at* http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=016&aid=0000209879.

situated individuals? Does the law accord to each citizen an equal degree of respect and, to utilize the language of the Constitutional Court, "dignity"? The government has an obligation not to obstruct the equality of citizens through the creation and enforcement of policies that violate the principle that individuals be treated as equals.[86] The ability to articulate at least abstract philosophical views is not only a question of expression, but also of the individual's entitlement to be regarded as politically and socially equal to other members of the society. The inequality underpinning this legislation is the suppression and marginalization of members of the society based upon their beliefs and their desire, in the absence of criminal sanction, to develop their public persona in the context of those beliefs.

The logistically simple but, practically speaking, presently impossible[87] rectification for this particular injustice is the repeal of at least certain provisions of the National Security Act. Expanded and continuous public debate of this law, and potentially further public impact lawsuit adjudication, is in order. In the meantime, a principally anonymous cyberspace facilitates a more open forum for discourse that does, inasmuch as it eludes suppressive police action, advance a *de facto* situation of equal respect of individuals with varying philosophical and social views.

If one considers seriously the notion that "privacy", or any other legal right, contains within it an entitlement to formulate personal decisions that operate within a sphere of privacy that is psychological and not necessarily physical,[88] then the state has a duty to respect the exercise of that autonomy, whether it is in the "privacy of one's own home", another more observable physical locale, or in cyberspace. Individual freedom of certain individuals to pursue a life that is more equal to those with less stigmatized or marginalized proclivities or opinions is obstructed by the RNVS, which poses heightened threats of identity revelation and various forms of legal and social repercussions. Whether or not such repercussions frequently occur, the mere existence of the requirement to reveal one's identity "chills" the expressions and activities urgently needed to mitigate the marginalization of society's most vulnerable members.

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[86] This articulation of a negative right of equality, that is, a right to be free from government action that causes or exacerbates one's status as unequal, could be made more robust by including, explicitly, a positive equality right. In the latter case, the government would bear affirmative obligations to actively promote greater equality within the society. I confine this discussion to negative right applications (specifically, freedom from government coercion to reveal one's identity online), but the idea of positive rights is certainly provocative.

[87] The specter of military conflict with North Korea provides a rationale for legislators supportive of the law's police power dimensions to invoke to justify its perpetuation. For a further discussion of the National Security Act, *see* Leitner, *supra* note 6.

[88] For a discussion of differing conceptions of liberty, where "liberty as independence" is distinguished from a notion of license, *see* Dworkin, *supra* note 9, at 262-265. Liberty as independence may be a useful frame of reference for construing the nature and scope of autonomous personal control.

VI. Conclusion

The general effect of the RNVS has been to recast the Korean experience of cyberspace as relatively less private, less expressive, and less equal. All three of these terms may be subject to varying interpretations, but I have intended to convey the following meanings:

(1) Private: Korean internet users wishing to actively utilize popular channels of communication and interaction have significant obstacles to (legal) concealment of their identities. Individuals are obstructed from engaging with online communities, a failure to respect privacy as it relates to personal choices about identity and independent lifestyle.

(2) Expressive: the absolute quantity of expression is reduced, including expression that is not illegal or otherwise eligible for curtailment under existing Korean law. Expression that may be of questionable legal status under existing laws, but with significant substantive political and social content, is particularly likely to be limited. This is most true for political and social expression relating to ideological and social minorities in Korean society.

(3) Equal: cyberspace's central characteristic as a place of equal access and equal participation is diminished. Online activities also lose their potentially unique character as avenues for achieving actual equality of treatment, status, and dignity amongst individuals, especially for those most likely to be stigmatized outside of an anonymous cyberspace context.

It remains to be seen whether the Constitutional Court will conclude that the System, as currently operated, violates constitutional requirements and as such must be modified or abolished. I argue that the System should be seen to violate individual rights principles identified in the Constitution, and should be struck down as unconstitutional. Other societies who value and seek to protect broad and technology-adaptive conceptions of equality, privacy, autonomy, and free expression should carefully consider the impact that such policies as name verification would ultimately have on individual rights, understood in the context of the unique potentials and frailties of cyberspace.

An overview of food safety regulation in Korea
- Precautionary Principle vs. Cost-Benefit Analysis -

Seong Wook Heo

I. Introduction

I would like to give a presentation on the issue of food safety regulation in Korea in the order of next two sequences.

The first one is an overview of the Food Safety Act of 2008 which has been enacted recently in Korea, and the other one is some short discussion about the relationship between precautionary principle and Cost-Benefit Analysis in food safety regulation.

II. The Food Safety Act of 2008

1. Background

While getting through with the incidents of mad cow disease and melamine additive, Korean people got more interested in the issue of food safety. And these increased interests of the public in food safety lead the Congress to enact the new Food Safety Act of 2008 (hereinafter the 'FSA') which was promulgated in June 13th 2008 having its effect from December 2008.

Before the enactment of the FSA, the Korean food safety regulatory system was under the criticism of being incomplete and inefficient, in the sense that the

relevant rules and regulation on food safety was separately divided according to the types of food and to the level of distribution, and each different administrative agency was in charge of maintaining food safety.[1]

2. Overview

A. The Food Safety Policy Committee (Article 7 -14)

To cure these incompleteness and inefficiency in food safety regulation, the FSA establishes the Food Safety Policy Committee (hereinafter the 'FSPC') which is to comprehensively coordinate the food safety policy of government.

The FSPC belongs to the Office of Premier and is headed by the Prime Minister as a chairperson. The FSPC is composed of about 20 members who are considered to have specialized knowledge and experience about food safety including the Minister of Strategy and Finance, the Minister of Education, Science and Technology, the Minister of Justice, the Minister of Food Agriculture, Forestry and Fisheries, the Minister for Health, Welfare and Family Affairs, the Minister of Environment, the chief of the Office of Food and Drug Safety, and civilian specialists, etc.

The FSPC does the review and coordination of following issues.

(1) Basic planning of food safety
(2) Major policies on food safety
(3) Rules and regulations on food safety
(4) Hazard analysis on food safety
(5) Countermeasures against serious food safety accident

Through the role and function of FSPC, it is expected that the food safety policy be executed in a more systematic and consistent way.

B. The Planning of Food Safety Administration (Article 6)

The Prime Minister has to devise the master plan for food safety under the deliberation of FSPC every three years.

The Ministers and the governors of local government have to devise and enforce food safety administrative plan based on the master plan above.

Through these planning and evaluation of the plan enforcement, it is expected that more systematic devising and enforcement of food safety policy be possible and through this overall food safety be improved.

[1] It was reported that Korea had more than 230 legislations related to food safety in 2004, and the regulatory authority on food safety was dispersed to many different administrative agencies.

C. Building up the emergency measures system and a follow-up survey (Article 15 – 19)

To cope with the advent of new style hazardous food additives, it is necessary to build up the central government-level emergency measures system.

When the central or local government finds that there happened or probably would happen serious risk to the health of people, it should devise the emergency measures plan and enforce it.

The Ministers can prohibit the producing and selling of the hazardous food, even before the scientific evidence of the hazardousness has not been provided, and should do the follow-up survey of the source of hazardousness.

By these emergency measures, it is expected that people's uneasiness about the food safety can be calmed at the earlier stage.

D. The mandatory risk assessment (Article 20)

The Ministers have to do the mandatory ex-ante risk assessment when making or revising the rules and regulations on food safety.

The Ministers have to enforce the HACCP(Hazard Analysis Critical Control Point) regulatory system.

By these scientific administering of food safety, it is expected that the efficiency of food safety administration and public confidence in food safety can be heightened.

E. The information disclosure on food safety (Article 24)

The government has to build up and operate the comprehensive food safety information managing system.

The Ministers have to disclose the related information to the producers and consumers when making a food safety policy.

The Ministers can open the information of the producers and their products when they violate food safety rules and regulations.

F. The participation of consumers into the food safety administration (Article 28)

The Ministers have to make systematic channels through which consumers can participate into the making of food safety rules and regulations.

3. Summary

By integrating the dispersed authorities and regulations on food safety to one authority and one framework legislation and reinforcing the policy measures to fight against hazardous food, the FSA is expected to build up the more sophisticated and powerful administrative system in food safety.

However, the story may not end as such a happy ending as many Aesop's Fables did.

We need to talk more about food safety regulation in the perspective of precautionary principle and cost-benefit analysis.

III. Precautionary Principle and Cost-Benefit Analysis in food safety regulations

1. Introduction

The food safety regulation issue is about the problem of Risk in modern society.

The administrative measure against Risk has the choice under uncertainty as its essence.

Compared to other traditional issues in administrative law, the modern administrative law issues are more complicated in the sense that they have to deal with the problem of Risk, for example, hazardous food, swine flu, mad cow disease, global warming, and the war against terror.

It is hard to know how hazardous some new food additives, for example, melamine, ex-ante. However, still under such uncertainty, governments are required to do something about the melamine, when the public people are terrified by the possible harm from eating melamine to themselves or to their children. But it is not easy to find the appropriate policy measures in such situations.

It seems to me that the FSA can possibly be understood as requiring the government to take the Precautionary Principle posture in food safety.

But, the food safety issue is not as simple as that.

2. The Precautionary Principle

A. Background

In such a Risk situation, the governments are commonly required to take policy measures in accordance with the Precautionary Principle, which requires that the government should do whatever possible measures to prevent the realization of the Risk into real harm.

However, it is not so easy to understand what exactly government should do to follow up the precautionary principle. Because, in modern society there are so many different kinds of Risks around us, and it is not possible to take precautionary measures to all those Risks. Actually, Risks are all around us.

B. The concept of the Precautionary Principle

It is not certain what exactly does the Precautionary Principle mean or require. Actually, we can find more than twenty different kinds of definition of the Precautionary Principle which are not compatible with each other.

We can arrange those different definitions in a continuum from a weak version to a strong version.[2]

The most cautions and weak version of the definition might be like this one, as declared in 1992 Rio Declaration.

> A lack of decisive evidence of harm should not be a ground for refusing to regulate." or "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

A stronger version of Precautionary Principle is like this. "The Precautionary Principle means that action should be taken to correct a problem as soon as there is evidence that harm may occur, not after the harm has already occurred."

In a more strong version, it is said that the Precautionary Principle mandates that when there is a risk of significant health or environmental damage to others or to future generations, and when there is scientific uncertainty as to the nature of that damage or the likelihood of the risk, then decisions should be made so as to prevent such activities from being conducted unless and until scientific evidence shows that the damage will not occur."

C. Precaution and Paralysis

The Precautionary Principle is generally understood as a good meaning to the public, because it gives the impression that the government can do exert that kind of superpower if required.

However, such understanding can be quite misleading.

In the real world, we are faced with very diverse kinds of Risks in every aspect of our lives. Basically, it is impossible for any super-power authority to take precautionary measures to all the Risks around us, because it takes some portion of resources we have, and the resources are finite.

So, if the government is required to take the posture of the Precautionary Principle to whatever kinds of Risks, it will finally be able to do nothing.

If a government exerts its best effort to fight against the mad cow disease to the level of perfect precaution(if it is possible anyhow), it will let the people be faced with higher level of Risks in other fields, for example, Risk to malnutrition, or Risk to Global Warming, etc.

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[2] Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge University Press, 2005 (hereinafter, 'Laws of Fear'), 18-19.

The government inevitably has to make some ordering of Risks, and have to decide which Risk to be taken seriously than others.

But the Precautionary Principle, especially the stronger version, itself does not give us any guidance on the point.

D. Factors affecting people to have precautionary posture

Regardless of the obvious result that strong version of the Precautionary Principle is unattainable, people tend to expect and require the government to take precautionary measures in daily life. What is the reason?

We can find some factors influencing people's decision and acting in the perspective of behavioral economics.[3]

(a) Availability Heuristic

People tend to be more sensitive to salient Risks. Those saliencies can be made through personal experiences or media exposure.

For example, people who have the experience of traffic accident to themselves or to their family will generally assess the Risk from traffic accident much higher than those who do not have that kind of experience.

When people are repeatedly exposed to some specific kinds of Risks through media, they tend to be more sensitive to the Risk, and that can lead them to press the government to take precautionary measures against that Risk. The swine flu can be a good example.

(b) Intuitive Toxicology

The general people tend to be more sensitive to hazardous materials than the professionals on toxicology.

Moreover, people tend to consider the food safety problem as all or nothing problem. They think of food additives as totally safe or too dangerous to their health to be added to food. They are not trying to understand that there are in-betweens.

This intuitive toxicology can lead to the precautionary demand to the government.

(c) Social Cascades

Certainly, human beings are not sheep, but in many cases, they just follow up other people's decisions and behaviors.

We can find many positive and experimental evidences of social cascades.[4]

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[3] The concept of those factors explained below, for example, availability heuristic, intuitive toxicology, social cascade, etc. are explained in detail in many social science books and papers. Among them, I generally referred to the explanation of Cass R. Sunstein in *Why Societies Need Dissent*(2003), *Risk and Reason*(2002), and *Laws of Fear*(2005).

Social Cascade can also be made in the area of food safety.

Even under the circumstances of uncertainty about the hazardousness of food additives, when some major groups of people strongly argue that the food additive is dangerous for health, people tend to follow the other people's opinion.

These social cascades made as such put pressure on the government to take precautionary measures, even before the scientific evidence of Risk has not been provided.

(d) Group Polarization

People have the tendency to reach the more polarized conclusion when they deliberate in group than when they think of some issues individually.

Many examples of group polarization can be found in real life.

People who were just concerned about Global Warming can become an ardent advocate of international measures against Climate Change after coming back from a conference on Global Warming. Laypersons who are in a group discussion about hazardous food additives organized , for example, by NGOs, tend to become more strict about food safety.

This Group Polarization gets stronger when the group is composed of people of similar thought, and gets weaker when the group is composed of people of different thoughts or when professionals who have relatively correct knowledge on the issue are among the group.

The Group Polarization also influences the making of statutory framework on food safety and it tends to lead the statutory framework in the direction of the Precautionary Principle.

(e) Health-Health Tradeoffs

All things and events in the world around us are correlated with each other. In that sense, it is not easy to solve some problem by separating the specific issue from other things.

The food safety issue is no exception.

Taking precautionary measures against a specific health issue may invoke a new problem to other part of health.

For example, let's think of the case when the government forbids using a certain food additive, in such case, the food producers will try to find a substitute of the forbidden additive. And, the new food additive might be more harmful to health or cause new risk.

In the U.S., when the use of asbestos was forbidden under the consideration that inhaling asbestos can raise the possibility of getting cancer, the car makers could not use asbestos to brake system anymore, which made the performance of brake worse than before, and caused higher rate of traffic accident. And, more

[4] About the experimental evidences on cascade effect, refer to Cass R. Sunstein, *Why Societies Need Dissent*, Harvard University Press (2003), 54-73.

lives than that could be saved by forbidding the use of asbestos were sacrificed by the traffic accident. This example shows the tradeoffs between health and health, the tradeoffs between life and life.

Laypersons who do not have professional knowledge on food safety are likely to do not recognize the health-health tradeoffs, and are likely to demand the precautionary measures against some specific kinds of risk.

3. Cost-benefit analysis

A. Introduction

Cost-benefit analysis has become an increasingly popular tool in modern administration.

Indeed, cost-benefit analysis is often claimed as an alternative to the Precautionary Principle. Instead of blindly "taking precautions," it is argued that administrative agencies should assess the benefits and the costs of regulation. Only in the case of the benefits outnumbering the costs, is the regulation justified.[5]

B. The Administrative Regulation Act Article 7

The article 7 of Administrative Regulation Act of Korea requires the administrative agencies to do benefit-cost analysis in making a new regulation or enforcing a stricter regulation and make a report on the regulatory analysis.

According to that clause, all administrative agencies are doing benefit-cost analysis in a new or stricter regulation.

What matters is whether the mandatory benefit-cost analysis in the ARA is compatible with the Precautionary Principle in the FSA.

C. Cost-benefit analysis and incommensurable value

The most striking criticism on cost-benefit analysis is that there are cases when the value pursued by administrative policy is incalculable and incommensurable.

Actually, it is not such an easy job to calculate the value of life influenced by food safety regulation.

However, the problem is that we have to make policy decisions and make choices among incompatible alternatives even under the circumstances of incalculability and incommensurability.

To solve the problem of incalculability and incommensurability, many researches have been done and regulatory agencies are using the calculating tools so made in actual cost-benefit analysis.

Some of the examples are as follows.

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[5] Sunstein, Laws of Fear, 129.

Table 1: Values of Life Studies
[EPA, *Guidelines for Preparing Economic analyses 89*, 2000, recited from Laws of Fear, Sunstein, 135]

Study	Method	Value of Statistical Life
Kneiser and Leith (1991)	Labor market	$0.7 million
Smith and Gilbert (1984)	Labor market	$0.8 million
Dillingham (1985)	Labor market	$1.1 million
Marin and Psacharopoulos (1982)	Labor market	$3.4 million
V. K. Smith (1976)	Labor market	$5.7 million
Viscusi (1981)	Labor market	$7.9 million
Leigh and Folsom (1984)	Labor market	$11.7 million
Leigh (1987)	Labor market	$12.6 million
Garen (1988)	Labor market	$16.3 million

Table 2: Agency Values of Life, 1996-2003
[Cited from Laws of Fear, Sunstein, 133]

Agency	Regulation and Date	Value of Statistical Life
Dept. of Transportation/Federal Motor Carrier Safety Administration	Safety Requirements for Operators of Small Passengers-Carrying Commercial Motor Vehicles 2003	$3 million
Dept. of Health & Human Services/FDA	Food Labeling:Trans Fatty Acids in Nutrition Labeling, 2003	$6.5 million
Dept. of Agriculture Food Safety & Inspection Service	Control of 1Listeria Monocytogenes I Ready-to-Eat Meat and Poultry Products, 2003	$4.8 million
Dept. of Health & Human Services/FDA	Labeling Requirements for Systematic antibacterial Drug Products Intended for Human Use, 2003	$5 million
Office of Management & Budget	Report to Congress on the Costs and Benefits of Federal Regulations, 2003	$5 million
EPA	Controls of Emissions from Nonroad Large Spark-Ignition Engines, and Recreational Engines, 2002	$6 million
EPA	National Primary Drinking Water Regulations, Arsenic, 2001	$6.1 million

D. The Precautionary Principle vs. cost-benefit analysis

If we take a strong version of the Precautionary Principle, then it seems that it is not compatible with cost-benefit analysis, because the strong version of the Precautionary Principle commands the regulatory agencies to take precautionary measures without regard to the cost of taking the measure.

And we have seen that the strong version of the Precautionary Principle leads to the paralysis on public policy.

There are many discussions on the relationship between the Precautionary Principle and cost-benefit analysis.

I cannot cover up all the discussions in this paper.

I would rather point out that both the Precautionary Principle and cost-benefit analysis are important in food safety regulatory system designing.

My idea is that the policy measures prescribed in the FSA under the vein of Precautionary Principle should be complemented with the perspective of cost-benefit analysis. And, cost-benefit analysis itself needs to be refined and substantialized.

IV. Conclusion

In this paper, I gave a brief review of the Food Safety Act of 2008 in Korea in the perspective of the Precautionary Principle. The regulatory agencies are likely to be under the pressure from the public to take the precautionary measures in food safety regulations. However, there are many things to consider in applying the Precautionary Principle in real world of food safety regulation.

My suggestion is that the Precautionary Principle should be complemented by cost-benefit analysis in a refined and sophisticated way. The clauses of FSA should be understood in that context.

Actually, the issue of balancing between the Precautionary Principle and cost-benefit analysis entails far more complicated and philosophical subject of how to understand the concept of democracy.

I will leave it as the subject of my follow up researches.

SECTION 4:
CRIMINAL LAW AND CRIMINOLOGY

Obscenity in a Changing Society

Sang Won Lee

I. Introduction

Obscenity cases reflect the changes in the means of communication. Traditional obscenity cases mainly targeted physical actions and works such as books or pictures and then began to focus on films. Modern obscenity cases are easily found on the Internet, where images or videos of sexual conduct are main targets.

The Internet is a great stage for the pornography industry. As of 2006, every second, $3,075.64 is being spent on pornography, 28,258 Internet users are viewing pornography, and 372 Internet users are typing adult search terms into search engines; every 39 minutes a new pornographic video is being created in the United States.[1]

The pornography industry is larger than the revenues of the top technology companies combined: Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix and EarthLink. The following chart shows how lucrative the industry is. It also shows that Korea is the second largest country for this industry and the first in revenue per capita.

[1] http://familysafemedia.com/pornography_statistics.html#time (last visited Sept. 3, 2010). The statistics mentioned in this section are taken from the same web page.

Table 1: Worldwide Pornography Revenues (2006)

Country	Revenue (Billions)	Per Capita	Notes
China	$27.40	$27.41	1
South Korea	$25.73	$526.76	
Japan	$19.98	$156.75	
US	$13.33	$44.67	
Australia	$2.00	$98.70	
UK	$1.97	$31.84	
Italy	$1.40	$24.08	
Canada	$1.00	$30.21	
Philippines	$1.00	$11.18	
Taiwan	$1.00	$43.41	1
Germany	$.64	$7.77	1
Finland	$.60	$114.70	1
Czech Republic	$.46	$44.94	1
Russia	$.25	$1.76	1
Netherlands	$.20	$12.13	
Brazil	$.10	$53.17	1
Other 212	Unavailable		2
	$97.06 Billion		

Notes 1=Incomplete, 2=Unavailable data

The internet pornography industry is in particular huge. Chart 2 demonstrates the size of the internet pornography market.

Table 2: Internet Pornography Statistics

Pornographic websites	4.2 million (12% of total websites)
Pornographic pages	420 million
Daily pornographic search engine requests	68 million (25% of total search engine requests)
Daily pornographic emails	2.5 billion (8% of total emails)
Internet users who view porn	42.7%
Received unwanted exposure to sexual material	34%
Average daily pornographic emails/user	4.5 per Internet user
Monthly Pornographic downloads (Peer-to-peer)	1.5 billion (35% of all downloads)
Daily Gnutella "child pornography" requests	116,000
Websites offering illegal child pornography	100,000
Sexual solicitations of youth made in chat rooms	89%
Youths who received sexual solicitation	1 in 7 (down from 2003 stat of 1 in 3)
Worldwide visitors to pornographic web sites	72 million visitors to pornography: Monthly
Internet Pornography Sales	$4.9 billion

The United States is the biggest producer of pornography in both videos and Web pages, as Chart 3 and Chart 4 show.

Table 3: Top Video Porn Producers

Country	Major Producers
1. United States	Vivid Entertainment, Hustler, Playboy, Wicked Pictures, Red Light District
2. Brazil	Frenesi Films, Pau Brazil, MarcoStudio
3. The Netherlands	Erostream, Midhold Media, Your Choice, Seventeen
4. Spain	Private Media Group, Woodman Entertainment
5. Japan	Soft on Demand, Moodyz
6. Russia	Beate Uhse, SP-Company, Dolphin Entertainment
7. Germany	Trimax, SG-Video, GGG, VideoRama, Zip Production
8. United Kingdom	Hot Rod Productions, JoyBear Pictures, Blue Juice TV, Rude Britannia, Fresh SX
9. Canada	Wild Rose Productions, Eromodel Group, Dugmor
10. Australia	Pistol Media

Table 4: Pornographic Web Pages

Country	Porn Pages
United States	244,661,900
Germany	10,030,200
United Kingdom	8,506,800
Australia	5,655,800
Japan	2,700,800
The Netherlands	1,883,800
Russia	1,080,600
Poland	1,049,600
Spain	852,800

This easy access to pornography has revived arguments on opposing sides of the obscenity debate: anti-pornography groups call for increased punishment to prevent moral decline and addiction, while free speech activists insist that obscenity prosecutions abridge the freedom of speech.[2] Strong enforcement of obscenity law might result in repression of the rights of citizens; generous regulation might result in moral insensibility and even sexual crimes.

Actually, many countries ban pornography. Among them, Saudia Arabia, Iran, Syria, Bahrain, Egypt, UAE, Kuwait, Malaysia, Indonesia, Singapore, Kenya, India, Cuba, China are top pornography banning countries. It is interesting to note that most of these countries are Muslim.

Korea has several statutes stipulating that obscenity with certain requirements be a crime. Article 243 of the Criminal Act provides that those who distribute, sell, lease, exhibit in public or play in public obscene paper, picture, film and other materials shall be punished with an imprisonment not more than one year or a fine not more than five million won. Article 244 provides that those who produce, have in possession, import or export obscene materials with the intent of offering materials for the crimes described in the article 243 shall be punished with an imprisonment not more than one year or a fine not more than five million won. Article 245 provides that those who conduct an obscene act in public shall be punished with an imprisonment no more than one year or a fine not more than five million won. The Criminal Act provides only the basic forms of obscenity crimes. Korea has many special laws that enhance the penalty under certain circumstances. Among those are the Act on the Punishment of Acts of Arranging Sexual trafficking, the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc., the Employment Security Act, and the Act on the Regulation of Amusement Business Affecting Public Morals.

Especially regarding Internet obscenity, the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. provides that whoever circulates particular information on the internet, including to distribute, sell, lease or exhibit in public obscene signals, words, sounds, images or videos, circulate on the Internet shall be punished with an imprisonment not more than one year or a fine not more than 10 million won.

While these statues regulate 'the obscene' or 'obscenity', the meaning of 'obscene' or 'obscenity' is not always clear; rather it is such a vague notion that citizens may tremble with fear of unpredictable legal interpretations and arbitrary imposition of punishment.

[2] Shannon Creasy, *Defending Against a Charge of Obscenity in the Internet Age: How Google Searches Can Illuminate Miller's "Contemporary Community Standards"*, 26 Ga. St. U. L. Rev. 1029, 1031 (2010).

II. Judicial Understanding

1. Understanding in Korea

A. Definition

The Korean Supreme Court has a firm definition of obscenity. The Court has defined obscenity in many cases as "what provokes, excites or satisfies a sexual desire of an average person, spoils a normal sense of shame of an average person[3] and runs counter to good sexual morality."[4]

Although there has been little change in the definition itself, the Court has become more generous against obscenity as the Korean society has become more and further open to sexual expression. In the 1970s, the Court had strict concept of obscenity. The court found guilty of selling an obscene picture a defendant who copied a nude image of a woman from an art-drawing anthology and sold the copies in order for matchbox manufactures to insert those copies in matchboxes and sell them.[5] The Court reasoned that, even though the original painting was a work of art, the defendant insulted the art and made it obscene.[6]

However, the present Court might take different position about this case if it came to the Court now. Holding that it is not desirable for criminal law to intervene in moral or ethical problems, and even worse to intervene in individual and private sexual problems, the Court stated that obscenity is limited only those materials depicting or describing sexual organs or conducts without reserve to the extent of having a harmful influence to the society.[7]

B. In Part or As a Whole?

In the 1970s, the Court seemed to allow the lower court to focus on part of the material in judging whether the material was obscene. Rejecting the appellant's (the prosecution's) argument that the lower court's judgment erred in convicting him because it held the novel in question was not obscene taken as a whole, the Court stated that the lower court's judgment rested on the specific part of the novel which the prosecution brought into the court and that the lower court's statements about the whole content of the novel were just dicta.[8]

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[3] This "spoils a normal sense of shame of an average person" might be understood as "causes an average person to feel shame."
[4] KSC 2006do3119 (2009); 2008do76 (2008); 87do2331 (1987), and many others.
[5] KSC 70do1879 (1970).
[6] *Id.*
[7] KSC 2008do76 (2008).
[8] KSC 74do976 (1975).

In more recent cases, however, the Court made it clear that it is crucial whether the material mainly provokes prurient interest when viewed as a whole.[9]

C. Who decides?

Admitting that obscenity is a relative notion the definition of which varies according to society and time and at the same time an abstract notion which has close relation to the customs, ethics, religions, etc., the Court nevertheless held that it is a normative notion which a judge himself can define based on an average person's feeling.[10] The court decided that a judge is the final evaluator and does not have to engage in the empirical exercise of gathering the opinions of ordinary men whether the material in question provokes their sexual interest and they think it obscene.[11]

2. Understanding in the US

A. Hicklin Test

In early days of American obscenity law, between the Civil War and the 1930s, the US federal courts largely followed a rule from an early English case, *Regina v. Hicklin*.[12] The Hicklin test allowed any material that could "deprave and corrupt those whose minds are open to such immoral influences" to be banned as obscenity.[13] This test had the unintended result of assessing materials based on the effect they had on the most susceptible, or sensitive, members of the community.[14] Under *Hicklin*, books and other materials could be judged obscene based on the effect an insignificant, isolated passage had on a child.[15] The Hicklin test fixed a community standard for reading matter based on the feeblest mentality or most *suggestible* individual in the community.[16] Thus, this Hicklin test focused on the effect certain passages would have on particularly susceptible people, not on the public as a whole, and was often used to proscribe contemporary literature.[17] This test was used against literature like Theodore Dreiser's *An American Tragedy*[18] and D. H. Lawrence's *Lady Chatterly's Lover*.[19]

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[9] KSC 2008do76 (2008); KSC 2003do2911 (2003).
[10] KSC 94do2266 (1995).
[11] *Id.*
[12] Bret Boyce, *Obscenity and Community Standards*, 33 Yale J. Int'l L. 299, 307 (2008).
[13] H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity – or Absurdity?*, 15 St. Thomas L. Rev. 517, 523 (2003) at 523 (citing Queen v. Hicklin, (1868) L.R. 3 Q.B. 360, 371).
[14] Boyce, *supra* note 12, at 311; Robinson & Mason, *supra* note 13, at 523-24.
[15] Eric Handelman, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 Alb. L. Rev. 709, 718 (1995).
[16] *Id.*
[17] *Id.* at 717-18.
[18] Commonwealth v. Friede, 171. N.E. 472, 473 (Mass. 1930); Handelman, *supra* note 15, at 718.
[19] Commonwealth v. Delacy, 171. N.E. 455 (Mass. 1930). Handelman, *supra* note 15, at 718.

Since the Hicklin test evaluate literature in terms of those most susceptible to corruption, as Judge Learned Hand correctly pointed out, the test "would 'reduce our treatment of sex to the standards of a child's library in the supposed interest of a salacious few.'"[20]

B. Roth Test

Confronting this criticism, the Hicklin standard was abandoned with the U.S. Supreme Court's ruling in *Roth v. United States*.[2122] Refusing to construe the First Amendment as protecting every utterance, the Court indicated that the First Amendment should protect only those ideas having some measure of social import and reaffirmed that "obscenity is not within the area of constitutionally protected speech or press.[23] The *Roth* Court expressly rejected the Hicklin test as "unconstitutionally restrictive of the freedoms of speech and press."[24] Trying to find a less restrictive standard to protect legitimate material, *Roth* defined obscenity as "material which deals with sex in a manner appealing to the prurient interest." [25] The *Roth* Court further reasoned that the sexual nature of art, literature, and/or scientific works was not, in and of itself, reason to deny the material constitutional protection.[26] *Roth* established a new test different from the Hicklin test, which judges the material in question as a whole rather than each portion individually and applies the perspective of the "average person instead of a the most susceptible member of society.[27] The Roth test deemed material obscene when "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [the] prurient interest." [28]

The Roth test, however, has a defect that the meanings of the elements of the test are not clear: (i) who is "the average person?", (ii) what are "contemporary community standards" and how are those standards are determined?, and (iii) what is the "prurient interest?"[29]

C. Miller Test

In *Miller v. California*, the Court established a new test.[30] *Miller* formulated a three-prong conjunctive test requiring the trier of fact to determine: (i) whether 'the

[20] United States v. Kennerley, 209 F. 119, 120-21 (S.D.N.Y.); Handelman, *supra* note 15, at 719.
[21] 354 U.S. 476 (1957).
[22] Creasy, *supra* note 2, at 1036; George M. Weaver, HANDBOOK ON THE PROSECUTION OF OBSCENITY CASES 73 (National Obscenity Law Ctr. ed., 1985); Robbins & Mason, *supra* note 13, at 523-24.
[23] *Roth*, 354 U.S. at 484-85.
[24] *Id.* at 488-89.
[25] *Id.* at 487.
[26] *Id.*
[27] *Id.* at 488-90; Boyce, *supra* note 12, at 316.
[28] *Roth*, 354 U.S. at 488-89.
[29] Handelman, *supra* note 15, at 722.
[30] 413 U.S. 15 (1973).

average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (ii) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (iii) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[31] If the material in question meets all three of the requirements of the test, that material is deemed obscene.[32] *Miller* provided a restrictive test understanding of obscenity as follows: (i) it expressly limited "obscene material" to items that deal with sex, specifically material depicting or describing "hard core" pornography;[33] (ii) it emphasized that the material in question should be viewed as a whole and could not be examined piecemeal;[34] (iii) it limited state regulation to only that sexual conduct specifically defined by statute, or authoritatively construed, as being illegal to depict or describe.[35] [36] This three-prong obscenity test of the Miller remains in effect today.[37] The Miller test requires that "an average person" apply "cotemporary community standards' to judge whether a material is obscene.[38]

However, the Miller test has been widely criticized as unconstitutionally vague and overbroad.[39] Courts have struggled to identify and define "community standards" since the introduction of the Miller test, [40] and a lot of debate has centered on how to determine the true values of a community.[41]

III. Some Challenges

1. What is "Community"

A. Vague notion

Despite the difference between the two countries' definition and despite the differences among the American tests, all the definitions have the "contemporary

[31] *Miller*, 413 U.S. at 24-25.
[32] *Id.* at 24.
[33] *Id.* at 27.
[34] *Id.* at 24.
[35] *Id.* at 23-24.
[36] Creasy, *supra* note 2, at 1038.
[37] *Id.* at 1033.
[38] *Id.* at 24.
[39] *Miller*, 413 U.S. at 37-48 (Douglas, J., dissenting); Handelman, *supra* note 15 at 731-737; Creasy, *supra* note 2, at 1038.
[40] Boyce, *supra* note 12, at 324-25.
[41] State v. Haltom, 653 N.W.2d 232, 239-40 (Neb. 2002); State v. Brouwer, 550 S.E.2d 915, 919, 921 (S.C. Ct. App. 2001); George M. Weaver, *supra* note 22, at 73 (National Obscenity Law Ctr. ed., 1985); Creasy, *supra* note 2, at 1033.

community standards" in common. However, it is still vague and subjective what the relevant community is.[42]

B. Scope of Community

Does the 'community standard' mean a local standard or a national standard?

Before *Miller*, the U.S. Supreme Court applied a national standard in federal obscenity cases. In *Manual Enter., Inc. v. Day*, the Court stated that "the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency."[43] In *Jacobellis v. Ohio*, the Court stated that a local definition of the community did not provide sufficient protection of rights deriving from the U.S. Constitution.[44] In contrast, proponents of a local standard argued that given the size and diversity of the United States, a national standard would be unascertainable.[45]

In *Miller*, the Court indicated that a local standard was appropriate. It stated, "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."[46] Finding no error where jury instructions called for a local standard, the Court stated that there is no constitutional requirement for application of a national standard.[47] At the same time, in *Hamling v. United States*, the Court stated that the application of a national standard is not a constitutional violation either.[48] In *Jenkins v. Georgia*, the Court stated that, while "a [s]tate may choose to define . . . the standards in more precise geographic terms," it is not constitutionally required to do so.[49]

Considering all the cases above, it can be said that the cases demonstrate that a national standard is neither required nor unconstitutional if applied, and that states may designate a statewide standard by statute, but they are not required to do so.[50]

Korea is neither federal nor so diverse as the US. It is not such a hot issue to choose between a national standard and a local standard. However, it is also true that recent Korea is witnessing wider and wider gap between age groups, more and more differences between social groups, and more and more ethnic diversity. This compels even Korean scholars and courts to consider which scope of community would be best applied to the case at hand.

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[42] Jan Samoriski, ISSUES IN CYBERSPACE, COMMUNICATION, TECHNOLOGY, LAW, AND SOCIETY ON THE INTERNET FRONTIER 267, 269 (Allyn & Bacon eds., 2002) (Definitions under the Miller standard … can vary from place to place, judge to judge, and even from time to time;
[43] Manual Enter., Inc. v. Day , 370 U.S. 478, 488 (1962).
[44] Jacobellis v. Ohio , 378 U.S. 184, 193 (1964).
[45] *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting) ("I believe that there is no provable 'national standard' . . . .").
[46] *Miller*, 413 U.S. at 33.
[47] *Id.* at 31.
[48] Hamling v. United States, 418 U.S. 87, 103-109 (1974), which was rendered one year after *Miller*.
[49] Jenkins v. Georgia, 418 U.S. 153, 157 (1974).
[50] Creasy, *supra* note 2, at 1042.

C. Cyber-community

The emergence of the Internet has made it more complicated to identify the relevant community.[51] Traditionally, sellers of adult material could choose which communities were appropriate locations for retail operations or were safe distribution points.[52] However, sellers operating on the Internet cannot effectively limit access based on geographical location because the Internet defies geographic boundaries.[53] Considering this, it would result in "individuals being prosecuted by the standard of the most restrictive community with access to the Internet," if courts stick to the traditional community test.[54]

It does not seem that both Korean and US courts are giving special attention to the unique characteristic of the Internet. In *Ashcroft v. American Civil Liberties Union*, the US Supreme court held that it does not violate constitutional requirements for a statute aimed at Internet regulation to rely on 'contemporary community standards' in determining whether the materials are obscene.[55] In *United States v. Thomas*, the defendants argued for a new definition of community for the Internet, such as a "cyber-community," but the trial court declined to address the cyber-community issue.[56] The Sixth Circuit affirmed the convictions, holding that "juries are properly instructed to apply the community standards of the geographic area where the materials are sent."[57]

The Internet defies geographical boundaries and cyberspace is the true community where the posted materials in question are actually located.[58] Therefore, obscenity should be determined based on the cyber-community rather than a geographical community. Here the relevant community is the cyber-community. In addition, since cyber-community reaches the whole world, there is a strong need to find a uniform standard for the Internet.

2. Proving of Community Standard

In obscenity prosecutions of both Korea and the US, neither the prosecution nor the defendant has the obligation to provide proof of the community standards.[59] Triers, judges or juries are presumed to already know the prevailing community standards. [60] Setting aside the issue of whether or not the community standard is to

[51] Nitke v. New York, 253 F. Supp. 2d 587, 603 (S.D.N.Y. 2003).
[52] Sean Adam Shiff, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 Wm. Mitchell L. Rev. 731, 749 (1996).
[53] Boyce, *supra* note 12, at 347.
[54] John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. Intell. Prop. L. 1, 3 (2003).
[55] Ashcroft v. ACLU, 535 U.S. 564, 593 (2002).
[56] Creasy, *supra* note 2, at 1043.
[57] Thomas, 74 F.3d at 711 (citing Miller, 413 U.S. 15, 30-34); Creasy, *supra* note 2, at 1044.
[58] Rebecca Dawn Kaplan, *Cyber-Smut: Regulating Obscenity on the Internet*, 9 Stan. L. & Pol'y Rev. 189, 193 (1998).
[59] KSC 94do2266 (1995); Feldschneider v. State, 195 S.E.2d 184, 185 (Ga. Ct. App. 1972).
[60] Creasy, *supra* note 2, at 1044.

be proved, both parties of an obscenity case may feel substantial or technical burden to prove the applicable standards.

First, the parties can resort to expert witness testimony. There is not a particular field that produces "obscenity experts", but a wide variety of individuals representing many fields have qualified as experts to provide insight into community standards, such as psychiatrists, psychologists, sociologists, ministers, and even police officers.[61] Of course, expert testimony should be relevant and not misleading to the jury.[62]

Second, surveys or opinion polls can be used for proving the community standards. In order to be admissible, this evidence should meet certain requirements: (i) the poll should touch on the specific issues at hand;[63] (ii) it should not be too general and should properly describe the material at issue;[64] (iii) survey questions should be carefully crafted to ensure relevancy;[65] and (iv) the sample size and selection should be based on reliable scientific methods.[66]

Third, comparable materials can be introduced. *Womack v. United States* developed a test to determine the admissibility of comparable materials.[67] The Womack test requires that the defendant show: (i) the materials are actually "similar" to the material at issue in the trial, and (ii) the comparison materials enjoy a "reasonable degree of community acceptance." [68]

Finally, now that the cyber-community is the relevant community regarding the Internet obscenity, data from the Internet would be one of the most appropriate evidences in the Internet obscene cases. Recently, Google search engines like Google Trends and Google Insights are attracting the attention of scholars as a tool of proving the community standards.[69] According to this, Differently from standard Google searches to show, for example, a mere array of pornographic material on the Internet, Google Trends and Google Insights data illuminate the standard objectively by providing the actual access data of the users.

3. Burden of proof

To the extent that "obscene" or "obscenity" is a constituent of legal concept, it is a problem of judicial interpretation and evaluation whether or not the material at issue is obscene. For example, "property of others" as the object of the crime theft is determined by legal interpretation of the relevant statues by a judge.

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[61] *Id.* at 1046.
[62] Darlene Sordillo, *Emasculating the Defense in Obscenity Cases: The Exclusion of Expert Testimony and Survey Evidence on Community Standards*, 10 Loy. Ent. L.J. 619, 637-38 (1990).
[63] *Id.* at 623.
[64] State v. Midwest Pride IV, Inc., 721 N.E.2d 458, 467 (Ohio Ct. App. 1998); State v. Tee & Bee, Inc., 600 N.W.2d 230, 233 (Wis. Ct. App. 1999); Sordillo, *supra* note 62, at 642-43.
[65] Sordillo, *supra* note 62, at 642.
[66] Weaver, *supra* note 22, at 72.
[67] Womack v. United States, 294 F.2d 204, 206 (D.C. Cir. 1964).
[68] Creasy, *supra* note 2, at 1050.
[69] Creasy, *supra* note 2, at 1054-58.

Interpretation is the judge's job and the prosecution does not have to prove the meaning of "property of others". However, notions like "obscenity" are somewhat different. Insofar as courts hold the position that 'obscenity' be judged based on the community standards, that is, what an average person has in mind regarding the material at issue, it is inevitable to find what the community standards are. The court should declare what the community is thinking rather than what the judge is thinking. This is not a mere interpretation of a statutory provision. Therefore, the court should decide what the community standards are, based on objective evidence, not on subjective evaluation.

If the community standards should be proved by evidence, who bears the burden? As a principle, in a criminal case, the prosecution bears the burden of proof for all the elements of the charges which the defendant is accused of.[70] So is proving the community standards. The prosecution should prove the material at issue is obscene judged by the community standard.

IV. Conclusion

Whether a material is obscene is decided by the community standards. In an Internet era, we must modify the definition of obscenity. At least in the Internet obscenity cases, the community is to be understood as a cyber-community where common criteria could be created beyond the geographical boundaries.

Even though obscenity is a legal notion belonging to judicial interpretation, the prosecution bears the burden of proving the material at issue is obscene by introducing evidence to prove the community standard.

This theory may be generalized to apply to other legal notions whose meaning is based on the evaluation or morals of the society.

[70] This has consistently reaffirmed by the Korean Supreme Court: KSC 2002do6110 (2003); KSC 2009do1151 (2010).

Endanger Law: War on Risks in German Criminal Law

María Laura Böhm

I. Introduction

The variation of criminal law, which I – critically – call *endanger law*[1], is a criminal law which is seeking security – and thereafter fighting 'risks' and 'dangers'[2] – as its main objective and which is acting on the basis of risk patterns developed by this law itself. Individuals who fit these characteristics are being fought against as *endangerers*, that means, as high risky figures – and not as offenders. They are not considered 'normal criminals', but as *homini insecuritas*. In this paper I will present this figure which has been constructed by the criminal policies and system in Germany during recent years, and has been co-constructed by the Constitutional

[1] The concept of *endanger law* must not be mixed with the question of offences of concrete and abstract endangerment, which are specific forms of offences within German criminal law ("Gefährdungsdelikte"). Endanger law is actually a criminological and sociological concept which is not related to the description of concrete forms of endangerment (through physical actions acting in accordance to a causal relationship between action and possible harm) but to the *description of legislation and criminal law*. When we talk of endanger law, we are talking about criminal law fighting "risky" situations or individual features (nor criminal actions) which are legally seen as potentially dangerous for general security; according to this logic these high-risk situations justify the aggressive early intervention of criminal law (procedure, measures, criminalization) even in cases without crime, without inchoate crime, and without offences of endangerment. That is why it can be called *endanger law* – law prosecuting risk and dangers – instead of criminal law.

[2] In this paper I will use simple ' to refer to concepts or terms which I analyzed or put into question because of its undetermined meaning and openness to different ideas ('organized crime', 'risk' etc) and which are usually – and erroneously – taken as clear closed concepts for most theorists, politicians and judges. Double "" are used for the normal purpose of quotations.

Court[3] in at least two cases: in the case of the *acoustic home surveillance* (*akustische Wohnraumüberwachung*) and in the case of the *subsequent incapacitation order* (*nachträgliche Sicherungsverwahrung*[4]). The aim of this article is to explain the internal logic and rationality, which seems to be leading the criminal law when constructing these mechanisms. In the first part of this paper the figure of the *endangerer* will be presented (1.). After that a sociological concept needed to understand the rationality of the law constructing endangerers will be explained: the 'risk' (2.). The two current constructions of the criminal system and of the Constitutional Court will be presented in the next part (3.). After explaining the rationale of this endanger law (4.), I will offer some critical remarks on it and on its constructions (5.).

II. Endangerer

The term "Islamist endangerer" ("*Islamistische Gefährder*") has been applied for the last five years by politicians when talking about the fight against terrorism.[5] With this term they usually mean subjects, which are seen as potentially dangerous for

[3] Germany has a centralized system for constitutional control. Not every judge declares the unconstitutionality of the law; this is done only by the Federal Constitutional Court (*Bundesverfassungsgericht*). This institution is therefore crucial for the state order, since it is the only institution that can stop an unconstitutional law. The Constitutional Court is responsible for laws respecting the constitutional law and for the safeguarding of the constitutional rights of the public and individuals. As it will be seen in this paper, the Court has been explicitly or implicitly recognizing that the limits and the content of the constitutional law are no longer as clear as they were in the past. Furthermore, some decisions stated that politicians *can* and *have to* search *for* and evaluate - without the need of a judicial intervention - the most useful means to achieve their politically established goals (cfr. BVerfG, Decision of 5th February 2004 – 2 BvR 2029/01 –, in the following: BVerfGE 109, 133). The problem is that in the last years "security" seems to be the main goal, and in order to seek security all means seem to be acceptable – even for the Constitutional Court.

[4] On the current situation of this legal measure see *infra* note 50.

[5] The concept was first used in the field of prevention of dangers (Gefahrenabwehr) and of war on terrorism (see *von Denkowski* 2007). Nevertheless in these fields the term was present only in police (crit. *Thiede* 2008, *von Denkowski* 2008) and political discourses, but not in law texts. The discussion around this term was sparked by an interview of the Home Office Minister Wolfgang Schäuble in the weekly journal *Der Spiegel*, Nr. 28 of 9th July 2007. Schäuble has been clamouring for years for radical changes in the form and goals of law-making policies. The defence of the public against terrorism and the survival of the constitutional state against the background of global non-democratic threats were sufficient reasons for 'changes'. These changes included among others the expansion of police powers, an increased number of military interventions, the shooting down of civil airplanes kidnapped by terrorists, practicing targeted-killings of high-risk-suspects, etc. According to Schäuble, this is a necessary constitutional expansion as "The old categories do not match any more" (p. 36). He proposes a re-defining of the so called "red line": "*The red line is very easy: It is always defined by constitutional law, which of course can be modified. A proposal for the modification of constitutional law is not an assault upon the constitution. To me, the fortification of the preventive idea signifies the fortification of the constitution, because it provides confidence to the people.*" (p. 36). For a detailed analysis of this interview see *Böhm* 2008: 25 *et seq*. The proposed amendment or the reinterpretation of the Constitution proposed by Schäuble in order to be able to go further with the war on terror sounds very complicated. However, this is exactly what the Parliament has been doing and what the Constitutional Court has been accepting in its decisions – not only regarding the war on terror, but also many other criminal areas such as sexual crimes and economic crimes analyzed in this paper.

the national security because of their religious or national background, because of their relationship with suspects of terrorism activities, etc.[6] It is argued, that it is necessary to get as much information as possible about them in order to know and to prevent each possible future step: Investigation measures became more flexible (for example surveillance, data mining, etc.), while the forms of individual intervention (for example detention or interrogation) became more intense.[7] The figure of an endangerer, however, is constructed not only in the anti-terrorism domain. The 'organized crime', for example, and even sexual and violent offenders have been redefined – not expressively but implicitly – as endangerers through law amendments for at least the last ten years. They are seen as high-risk figures jeopardizing general security. For a better understanding of these ideas, in the following section the notion of risk will be explained which may conceptually explain how endangerers are constructed – even implicitly – in legal discourse.

III. Risk

A useful way to introduce the concept of risk is by talking about the *risk society*. According to *Ulrich Beck* the risk society is a result or further development of the modernisation process.[8] The risks created by the risk society in the most advanced stage of development of the forces of production[9] are systematically conditioned, often irreversible, for the most part invisible and based on causal interpretations, i.e. dependant on knowledge and therefore particularly open for social definition processes.[10] Risks will only become such when they are socially acknowledged and allocated.

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[6] As was defined by the Group of the Leaders of State Bureaus of Crime and the Federal Bureau of Crime (*Arbeitsgemeinschaft der Leiter der Landeskriminalämter und des Bundeskriminalamte* - AG Kripo) on the 21st November 2006 (in the following: BT-Drs. 16/3570), p. 6, Question 9: „An endangerer is a person with regard to whom some facts justify the assumption that she or he is going to commit politically motivated serious crimes, in particular those related to § 100a of the Procedural Code" („Ein Gefährder ist eine Person, bei der bestimmte Tatsachen die Annahme rechtfertigen, dass sie politisch motivierte Straftaten von erheblicher Bedeutung, insbesondere solche im Sinne des § 100a der Strafprozessordnung (StPO), begehen wird."). A person can be classified as an endangerer even without having committed or having intended to commit a crime. According to the Secretary of State, for the definition of the concept legal fundaments were "not necessary" ("nicht erforderlich") (BT-Drs. 16/3570, p. 6, Question 10).

[7] For instance in a new Act regulating the collection of data on high "dangerous persons" (*Gesetz zur Errichtung gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder (Gemeinsame-Dateien-Gesetz)* vom *22. Dezember 2006* (BGBl. I 66, p. 3409) it is provided that this information may be collected and recorded in secrecy. No crime commission or intended crime commission is necessary for that. Cfr. *von Denkowski* 2007: 325 et seq.

[8] *Beck* 1986. See also the actualization of his concepts in *Beck* 2000.

[9] *Beck* 1986: 26.

[10] *Beck* 1986: 30; see also on the diversity of possible risk definitions according to him *id.*, p. 40 *et seq.*

> As a particular way in which problems are viewed or 'imagined' and dealt with. […] Risk is a statistical and probabilistic technique, whereby large numbers of events are sorted into a distribution, and the distribution in turn is used as a means of making probabilistic predictions.[11]

From a criminal law perspective two aspects are of particular interest: *Firstly*, the need to define risk and danger more precisely or rather to delineate one from the other, *secondly*, the problem of the chronological dimension of the risk concept, as risks are, in respect to time, at the same time "*real and unreal"* [12], and *thirdly* the reformulations that these aspects bring or imply within the discourse of criminal law.

1. Risk and danger

It is to be noted at this point for a preliminary delineation that risks and respectively risk factors are fundamentally different from danger. That is to say *danger* can always be traced back to a causative event, capable of causing damage, which can be of human nature but doesn't have to be. For the dangers caused by humans it can be said that the subject, who has caused the danger, is just as little in the position to successfully shield the relevance of damage as third persons. Dangers, therefore, always remain unforeseeable and uncontrollable.[13] *Risks*, on the other hand, don't result from causative but from probabilistic imputation, i.e. damage is imputed through (for example) an actuarial approach.[14] A risk therefore is a melange situation, which is seen as potentially, partly responsible harmful factor – because perceived, constructed, socially 'passed on' or for whatever reason[15] – and therefore has to be preventatively set aside.

[11] *O'Malley* 2008: 57. For further reading on Risk from the *governmentality* perspective see *Donzelot* 1979; *Ewald* 1986; *Ewald* 1991; *Defert* 1991; *Castel* 1983; *Krasmann* 2003: 108 *et seq.*

[12] *Beck* 1986: 44 ("wirklich und unwirklich").

[13] *Krasmann* 2003: 112.

[14] Cfr. *Feeley/Simon* 1992, *passim*; *Feeley/Simon* 1994: 173 ("It is actuarial. It is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness. It takes crime for granted. It accepts deviance as normal. It is sceptical that liberal interventionist crime control strategies do or can make a difference. Thus its aim is not to intervene in individuals' lives for the purpose of ascertaining responsibility, making the guilty 'pay for their crime' or changing them. Rather it seeks to regulate groups as part of a strategy of managing danger.").

[15] For a detailled analysis of the different sociological constructions and approaches to risk see *Zinn* 2008: 8 *et seq.*, who present the differences between authors and theories and offers following classification of risk ideas – starting with the most concrete view of risk and increasing in the grade of abstraction and social construction attributed to this concept by the theorists; risk is differentially defined by them as a) "real and objective", b) as "subjectively biased", c) as "socially mediated", d) as "socially transformed", e) as "real and socially constructed", or f) as "socially constructed".

> … the notion of risk is made autonomous from that of danger. A risk does not arise from the presence of particular precise danger embodied in a concrete individual or group. It is the effect of a combination of abstract factors which render more or less probable the occurrence of undesirable modes of behaviour. [...] The presence of some, or of a certain number, of these factors of risk sets off an automatic alert. [16]

Risks are attributed because of a lack of physical, causative reason and aim to prevent future – potential – damage. Risks are thus conceptionally calculable and controllable. [17]

2. The chronological dimension of risk

The damage, which illustrates the concretion of risks, stands in an uncertain future, their causes, however, are being determined at present. Everywhere, "whereupon the 'guilt-seeking' spotlight falls"[18] existing actions become the cause of future damage, i.e. they become 'risks'. However, those causes are immediately – and causatively seen – neither as such nor under any circumstances damaging; this makes their penal recordal in view of attribution and legally protected interests of criminal law fundamentally problematic. Furthermore, those causes are something constructed by interpretation which in turn implicates a problem when looking at it from the aspect of action and their causation within the meaning of criminal law. "Risk discourse is future oriented. Risk rationalities and the technologies in which they are embedded bring imagined futures to the present."[19] Risk factors are not as closely linked with consequences of damage as certain (illicit) dangerous actions. Instead, they are defined objectively based on the deliberation of probability.[20] Even if one does not want to go so far to say that risk factors are socially constructed, one can nonetheless not overlook the fact that preventive orientated politics "de-construct the concrete subject of intervention, and reconstruct a combination of factors liable to produce risk. Their primary aim is not to confront a concrete dangerous situation, but to anticipate all the possible forms of irruption of danger".[21] Hereby, "to be suspected, it is no longer necessary to manifest symptoms of dangerousness or abnormality, it is enough to display whatever characteristics the specialists responsible for the definition of preventive policy have constituted as risk factors".[22] Here, governmental thinking overlaps with the perspective of *actuarial justice*. The importance of attribution processes also clearly

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[16] *Castel* 1983: 59.
[17] Cfr. *Luhmann* 1991, *passim*; *Zinn* 2008: 7; *Krasmann* 2003: 112 *et seq.*
[18] *Beck* 1986: 44.
[19] Ericson/Haggerty 2001: 87.
[20] In this respect the opinion of theorists of the "risk society" is deeply divided. See *supra* note 15.
[21] *Castel* 1983: 61
[22] *Castel* 1983: 59

stands out, if one understands the concept of risk as system-theoretical in the sense of Niklas Luhmann, and risks as a result of the process of decision-making and attribution of responsibility for those decisions. The development of risks, therefore, depends directly on whether damage is assumed to be the primary or secondary effect of certain decisions and who they are attributed to; or whether they are seen as concretised dangers without being able to be attributed to anyone:

> Accordingly, making a decision and attributing its uncertain consequences to this decision implies risk. In contrast, negative effects regarded as caused by external events are mere dangers. In other words, the distinction between risk and danger does not refer to differences in certainty, but to a difference in attribution. […] Instead of assuming a (possible increasing) number of objectively given risks/dangers […], [this careful separation of the terms 'risk' and 'danger'] makes clear that whether we regard something as a risk is a matter of attribution.[23]

If something or somebody is seen as a risk this classification implies that this subject was able to choose between an action or situation with a possible damaging outcome and a completely harmless action or situation. On the other side, to say that something or somebody is dangerous stresses the responsibility of actions and situations with possible damaging consequences *outside* the choices of this subject. Even though in these cases where there are not damaging results, the *possibility* of these results is enough reason to attribute responsibility to the risky subject in the first case – but not in the second.

3. Reformulations in criminal law

If one realises, that criminal justice normally operates in view of individual imputable damage or rather risk causation, it is clear that the opening up of criminal law and criminal justice to the needs of risk management would entail a significant modification of the well known framework of criminal law principles and logic:

First of all, the *person* as the addressee of the criminal law would be perceived in an entirely different way by the criminal law. If we think that in a new risk-approach "there is no longer a subject",[24] former personal categories were lost. "The confrontation of the delinquent with a concept of a person which accentuates the individual responsibility and excludes all other circumstances and conditions, admittedly risks passing into nothingness"[25] and likewise the creation of a liberal modern criminal law and its addressees, its doctrine of culpability, its categories of crime and its legally protected interests. The criminal law oriented by risk categories and inspired by the risk logic would be an "extensive de-

[23] *Japp/Kusche* 2008: 88.
[24] *Castel* 1983: 61
[25] *Günther* 2002: 135. On the „*delinquent"* as a „fading category of knowledge" see also *Scheerer* 1998.

personalised law"[26] and its objects would be risk groups of persons. This perception would be deferred by a combat of risks by the criminal law, for persons ("de-personalised") would thus be considered a risk because of certain traits of their character, because of nationality or religion, because of type of friendships or rareness, or even because of a certain way to be ("their being that way"), which would ultimately abolish the distinction between the offender and the offence.

Secondly, the traditional concept of a *human act* in criminal law would have to be replaced by a focus on risk factors which are not per se determined by acts. Either because in a risk society criminal law would (in the sense of *actuarial justice)* operate against – objectively assessed – risk factors (and not against actions) or because risk structures (independent of actions) *would be defined and prosecuted by criminal law.* Both cases are about the prevention of future damage through the prohibition of risks, which have been determined by actuarial assessment and political definition, respectively.

Thirdly, criminal law would with regard to its *temporal application* turn around, because it would intervene with a view into the future and not regarding the past – because of a committed or attempted act. This would happen through the punishment of pseudo-"causes", which could *potentially* cause future damage – probabilistic and not causatively viewed – i.e. through the logic of future-orientated intervention, which has no actual proof, but – *still* – *unreal* future scenarios as a basis.[27] Because these risk definitions are contingent and variable, this would even be a matter of law limited in time.

Fourthly, the *imputation* in criminal law, which rests on causality and personal responsibility, would be reformulated by probabilistic objective risk logic, because there would be no directly identifiable causality, but rather an objective diagnosis-like attribution of potential future damage, mediated by probabilistic calculations. This would in particular entail the punishment of unintended side-effects.

All these possible changes in the logic and functioning of the criminal law are not only speculations about future scenarios. In the current discourse of the criminal law in Germany all these reformulations are taking place. Addresses are constructed as risks. Even furthermore, they are not being constructed and managed as risks but rather constructed as risks and fought against as enemies.

The conceptual relationship between the war on an enemy and the punishment of a criminal is an old topic in criminal law and criminology, so it is not necessary to further discuss this issue.[28] Nevertheless, regarding the understanding of the current endanger law, it is necessary to stress that since about ten years discussions

[26] *Wolf* 1987: 390 („weitgehendes entpersonalisiertes Recht"). See also *Krasmann* 2003: 120, 237 *et seq.*; *Feeley/Simon* 1992 and 1994.

[27] See on the technique of "horror scenaries" *Opitz/Tellmann* 2009, *passim*, who explain its functioning in preventive and precautionary systems.

[28] For an historical overview of the relationship between war and crime see *Jamieson* 1998; on criminalization as a useful instrument for political and legal power enforcement see *Christie* 1986, who criticizes that criminals are "suitable enemies" for the State; for a critical analysis of the similar features of war and criminal law in "law and order" policies see *Steinert* 1998 (in particular p. 418).

concerning the relationship between war and criminal law have become frequent. It has been even explicitly formulated, theorized and proposed by the German scholar *Günther Jakobs,* who is in favor of an "enemy criminal law" or an "enemy penalty" ("Feindstrafrecht").[29] According to this approach there are some individuals who cannot be seen as "persons",[30] they are not citizens anymore and must be excluded from society because they represent a social menace.[31] The criminal law has to apply different rules to these enemies such as the forward displacement of punishability without reducing punishment in spite of this displacement, rights and guarantees are reduced or even denied, and the criminal legislation becomes war legislation.[32] These individuals do not have to be punished by the criminal system, but to be fought against as enemies.[33] The proposal of *Jakobs* is, according to him, a real – and not ideal – way to deal with the limits of law.[34] This reality can be observed within the government and the legislation, which are currently acting according to these ideas. Furthermore, I contend that these ideas are being combined with the logic of risk. Thus, criminal law becomes broader because of the diversity of risk constructions, and more aggressive because of the war logic. Risky figures being fought against as enemies is a current logic in the discourse and practice of criminal law in Germany.

IV. Current constructions legitimated by the Constitutional Court of Germany

Taking the explained risk concept as a theoretical framework and having shortly presented the idea of an enemy penalty introduced within German criminal law, it is now relevant to refer the endangerer in Germany's criminal law constructions, who shows the reality of criminal law when the discourses of risk and of war merge. It has been claimed by politicians, parliamentarians and judges that it is necessary to deprive *risky figures* of their rights (privacy, freedom) even before their potentially harmful risky status turns into concrete damaging situations. As a consequence, the idea of an endangerer is present in a non-written form in the parliamentary discourse as well as in the discourse of the Bundesverfassungsgericht (the Constitutional Court of Germany). The two constructed measures of the criminal system which will be presented in the following section are the acoustic home surveillance and the supplementary preventive detention.

[29] *Jakobs* 2000: *passim*.
[30] *Jakobs* 2000: 53, 2004: 90 *et seq.*
[31] *Jakobs* 2000: 51.
[32] *Jakobs* 2000: 51 et seq.
[33] *Jakobs* 2004: 90.
[34] *Jakobs* 2006: 289.

1. Acoustic Home Surveillance

The *acoustic home surveillance* – *akustische Wohnraumüberwachung* – is an (alleged exceptional) procedural measure consisting of the secret hearing of conversations held by a suspect, by his relatives or by anybody staying in his private premises. The objective is to obtain evidence in criminal pre-trials related to 'organized crime' and, above all, to get information about the "network structures".[35] Interestingly, Germany does not have a codified offence for 'organized crime' in its Criminal Code. Hence, parliamentarians had to introduce a long list of offences, which may be related to 'organized crime'.[36] The list contains more than one hundred offences for which it is possible to carry out the acoustic home surveillance. The asserted exceptionality of the measure, therefore, is not really an exception.

This amendment was introduced into the Code of Criminal Procedure in 1998.[37] An amendment to Article 13 of the Federal Constitution was also essential, since this article establishes the inviolability of home space.[38] In 2004 the Bundesverfassungsgericht declared the constitutional amendment as according to the Constitution since it did not violate the "eternity clausel" established in Article 79 (para. 3) of the Constitution in order to avoid amendments which could abolish

[35] Amendment Draft, BT-Drs. 15/4533, p. 27. Cfr. also Bundestag, Plenary Session of 21st January 2005 (in the following: BT-Session 15/152), p. 14291.

[36] The quasi-official definition of "organized crime" adopted in Germany is not a legal definition, but an instrumental concept for criminal policy. According to this definition "Organised crime constitutes the planned commission of criminal offences driven by the question of acquiring profits or powers. Such criminal offences have to involve the cooperation of more than two participants acting for a longer or indefinite period of time on a distributed-task basis by utilization of commercial or business-like structures, or by application of violence of other methods suitable for achieving intimidation, or by exerting influence on politics, the media, public administrations, justice systems, or commerce" („Eine von Gewinnstreben bestimmte planmäßige Begehung von Straftaten durch mehrere Beteiligte zu verstehen, die auf längere oder unbestimmte Dauer arbeitsteilig – unter Verwendung gewerblicher oder geschäftsähnlicher Strukturen, - unter Anwendung von Gewalt oder anderer zur Einschüchterung geeigneter Mittel, oder – unter dem Bemühen auf Politik, Medien, öffentliche Verwaltung, Justiz oder Wirtschaft Einfluß zu nehmen, zusammenwirken."), see *Gesetz zur Bekämpfung der Organisierten Kriminalität,* Bundesgesetzblatt I 1302, 15.07.1992 – BT-Drs. 12/989 –, p. 24). See for further critical views of the imprecision of this definition *Mozek* 2001: 61; *Lisken* 1994: 264; see also for a critical analysis of this definition as a political instrument *Fernández Steinko* 2008: 61 *et seq*.

[37] *Gesetz zur Änderung des Arts. 13 GG* of 26th March 1998 (BGBl I 98, 610)

[38] See the current version of Article 13 of the German Constitution. After establishing the inviolability of home space (para. 1) the article explains the exception for example for acoustic home surveillance (para. 3): "**(1)** The home is inviolable. (…) **(3)** If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorisation shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge." (http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#GGengl_000P13, last visited on 24th January 2011).

some of the fundamental constitutional rights.[39] The Constitutional Court understood that the acoustic home surveillance is not unconstitutional if it does not violate the *intimity sphere* of the surveilled individuals.[40] Thus, the Court reached satisfaction by demanding more restrictive rules for the effective implementation of the measure. The parameters provided by the Court, however, were found unrealistic by scholars and practitioners: If the rules are followed, the surveillance becomes impossible; if any surveillance is done, these rules are instantaneously broken and the surveillance becomes automatically unconstitutional.[41]

However, it is more important to point out that within the Bundestag[42] and the Constitutional Court the question of what exactly 'organized crime' is remained open.[43] Nevertheless, both institutions affirmed that this procedural measure was utterly necessary in order to investigate and to avoid the danger that the 'organized crime' represents for the national and general security. The national security, it was argued, is at stake and must be defended through the flexibilization and the more intense intervention of the criminal procedure. 'Organized crime' would not be a usual criminal figure, but an invisible shapeless high-risk phenomenon challenging the traditional criminal system and the *Rechtsstaat*.[44]

2. Subsequent incapacitation order

The *subsequent incapacitation order* (*nachträgliche Sicherungsverwahrung*) is an ensuring measure addressed to those who were convicted to prison because of sexual or high violent crimes. This measure was originally designed by the States of Bavaria and Saxony-Anhalt.[45] The Bundesverfassungsgericht found these concrete exceptional laws unconstitutional because of a lack of jurisdiction to release these acts, but announced the constitutionality of the idea. The Court proposed this measure to the Bundestag in 2004 in order to legally solve the exceptional situation of some specific detainees who had served their sentences, but whom the respective States did not consider appropriate to release because of their forecasted "dangerousness".[46] Thus, following the "order"[47] of the Constitutional Court, the

[39] BVerfG, Decision of 3rd March 2004 – 1 BvR 2378/98, 1084/99 – (in the following: BVerfGE 109, 279).
[40] On the "spheres theory" (in time sphere which cannot be violated by the state, private sphere where the state can intervene in some cases, and social sphere which is open to state and public intervention) and its application to this case see *Warntjen* 2007: 48 *et seq*.
[41] Bundestag, Plenary Session 12.05.2005 (in the following: BT-Session 15/175), p. 16456. See also *Haas* 2004: 3083.
[42] Cfr. Bundestag, Plenary Session 9.10.1997 (in the following: BT-Session 13/197), p. 17692; Bundestag, Plenary Session 16.01.1998 (in the following: BT-Session 13/214).
[43] BVerfG 109, 279, p. 338 *et seq*.
[44] BT-Session 13/197, pp. 17699, 17704; BT-Session 13/214, pp. 19524, 19536.
[45] See the drafts and discussions of these states as well as on the nature these states recognized to this measure (police emergency measures) *Bender* 2007, p. 26 *et seq*.
[46] BVerfG, Decision of 10th February 2004 – 2 BvR 834, 1588/02 (in the following: BVerfGE 109, 190).

Bundestag discussed and amended the federal Criminal Code in 2004[48] and made it legally possible to prove shortly before the prisoner is going to be released (probably after years of imprisonment) if he represents a "high risk" for the general security[49] – if he does, he has to stay in jail for an undetermined amount of time –.[50]

Many factors could lead to the order of this measure: the behavior in prison, the relationship to prison officers, the seriousness of the original crime (which probably occurred many years ago), the willingness of the prisoner to participate in therapy programs, etc.[51] That means that there is not a direct relation between a crime and the order of the subsequent incapacitation order nor between the manifested personality of the offender in occasion of the crime and the subsequent order of the measure.[52] Therefore, the prognosis or forecast is based exclusively on

[47] Bundestag, Plenary Session 25.03.2004 (BT-Session 15/100), p. 8995; Bundestag, Plenary Session 18.06.2004 (in the following: BT-Session 15/115), pp. 10553, 10558 *et seq.* Also critical with the attitude of the Court *Laubenthal* 2004: 744; *Kinzig* 2008: 48; *Mushoff* 2008: 40

[48] Gesetz zur Einführung der nachträglichen Sicherungsverwahrung of 23rd July 2004 (BGBl. I, p. 1838).

[49] See § (Section) 66b *Subsequent incapacitation order* introduced to the Criminal Code (StGB): "(1) If prior to the end of a term of imprisonment imposed on conviction for a felony against life and limb, personal freedom or sexual self-determination, or a felony pursuant to section 250 and section 251, also in conjunction with section 252 or section 255, or for one of the misdemeanours in section 66 (3) 1st sentence, evidence comes to light which indicates that the convicted person presents a significant danger to the general public, the court may subsequently make an incapacitation order if a comprehensive evaluation of the convicted person, his offences and his development in custody indicate a high likelihood of his committing serious offences resulting in seriously emotional trauma or physical injury to the victim and if the remaining conditions in section 66 are fulfilled. If making the order at the time of conviction was impossible under law, the court shall, for the purpose of the 1st sentence of this subsection, also take into account any facts that were already evident at that time." (http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P66b, last visited on 24th January 2011)

[50] The European Court of Human Rights (ECHR) has condemned Germany because of the retroactive application of an amendment which cancelled the 10 year limit of incapacitation (ECHR, *M. v. Germany,* Decision 17.12.2009, Nr. 19359/04, in the following: ECHR*, M. v. Germany*). In this sense, the subsequent incapacitation order may also violate Art. 5 (1)(a) (restriction of liberty according to the decision of a responsible tribunal) and Art. 7 (principle of non retroactivity) of the European Convention on Human Rights. In the case of the subsequent incapacitation order the individual is being (further) incarcerated on the basis of facts not related to his former crime and this decision is being applied – in the case of the individuals who were already in prison before the law was amended – violating the prohibition of retroactivity of criminal law (nr. 88, 105, 120, 132 *et seq.* of the decision). See comments on this decision in *H.E. Müller* 2010, passim; *Grabenwarter* 2010, passim; *Laue* 2010, passim; *Merkel* 2010: 1060 *et seq.*; *Kinzig* 2010: 238 *et seq.* Following the decision of the ECHR, Germany amended last December the Criminal Code and suppressed the general disposition for the subsequent incapacitation order (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen vom 22. 12. 2010* (BGBl. I S. 2300)); since 1st January 2011 it is only possible to order this subsequently incapacitation in cases of internment in psychiatrical institutions and in relation to very serious crimes. This last amendment was forced by a decision of the ECHR; meaning that the internal logic of the measure was not revisited because of criminal principles or because of principles of the *Rechtsstaat*, but only as a consequence of the intervention of human rights parameters imposed by the European Court. For this reason, this paper's analysis still concentrates in the criminal *discourse* of the subsequent incapacitation order, which is actually not really overcame yet.

[51] BVerfGE 109, 133, p. 161 *et seq.*, see also *Ullenbruch* 2007: 62 *et seq.*

[52] See also ECHR*, M. v. Germany*, nr. 88. See crit. also *Böllinger/Pollähne* (2010: 2154 – Rn. 7 – "decoupling" („Entkoppelung")), *Schneider* 2006: 99 (the incapacitation was "decoupled"

the conduct of the prisoner in jail and not directly related to a crime – and this fact represents the main difference between the common incapacitation and the *subsequent* incapacitation.

Some sexual offenders are even seen and classified by the Constitutional Court as "bundles of risks",[53] who are unable to come back to society. Their *subject*-quality is put aside and only the sum of attributed risk factors is justifying the incapacitation – without direct bound to a new crime or new criminal circumstances –.[54] The offered argument is that these individuals would endanger the general security. That is, it is argued by politicians and judges, many risk factors as possible should be taken into account and security measures as strong as possible have to be adopted in order to avoid any possible future damage.[55]

V. 'Endanger'

With these dispositives the criminal law becomes endanger law, which is broader and more aggressive in terms of its intervention strategies. Its function is no longer prosecuting and punishing crime and criminals, but dealing with the projection of high-risks and, subsequently, stopping subjects and phenomena as the 'organized crime' which endanger the security. The logic of the risk management explained in the first part of the paper and its combination with the idea of war on crime – as well as the idea of the criminal as an enemy –, can be seen in the mentioned examples, in which neither solely management of risk nor just war on enemies, but actually a complex *war on risks* is being carried out.

The criminal law acting in this war on risks is what is here called endanger law whose working process can be summarized as follows:

Firstly, the *forecast of each possible future damage for the general security* is represented – such as corruption, parallel economy, gangs fighting provoked by the 'organized crime", violent and/or sexual crimes to be committed by already convicted subjects etc.

Secondly, *relevant risk patterns for each area are designed (constructed)* – for example in the case of the 'organized crime' the risk factors are nationality, religion, spoken language, circle of friends, occupation among other; in the case of sexual and high violent criminality patterns are constructed taking into account the quality of the committed crimes, the everyday behavior of inmates in prison, their relationship with custody personal, etc.

Thirdly, there is *legal intervention (by means of an alleged exceptional law) in order to neutralize these risks* and in this way the right to home privacy and the right to

("abgekoppelt") from the original offence); *Laubenthal* 2004 ("deviation of the […] character of the incapacitation as a direct legal consequence of the original offence" ("Abkehr von dem […] Charakter der Sicherungsverwahrung als einer unmittelbaren Rechtsfolge der Anlasstat"), p. 741).

[53] BVerfGE 109, 133, p. 158. The Tribunal refers itself to the fundaments of the legislator.

[54] See *supra* note 52.

[55] Cfr. Draft CDU/CSU (BT-Drs. 15/2576), p. 7; BVerfGE 109, 133, pp. 159, 174.

freedom were repealed in order to enable the criminal system to proceed in *cases without crime* in which the only aim is to avoid that damages occur. Here, the idea of Minority Report offers an extraordinary illustration: In the film future crimes are forecasted by rare creatures and a special police unit intervenes immediately after these creatures *feel* the crime coming and give their alert. The preventive intervention consists in neutralizing, arresting and punishing people who did not commit any crime. In this way, predictions and interventions are immediately related. Causal chains are not relevant – there is no action, no crime, and no damaging or endangering conduct! They are irrelevant because *risk* is not *cause*, but the adscription of the responsibility for future possibilities.[56]

Fourthly, "*endangering" factors and subjects are excluded.* The exercise of procedural rights and the validity of legal principles are denied to them (principle of non retroactivity of criminal law,[57] principle of certainty of criminal law[58]), they are also excluded from the society discursively ('organized crime') and physically (incapacitation) as well as excluded from the general common legal apparatus which usually protects citizens and inhabitants of a country. 'Endangerers' as 'organized crime' or 'high risky sexual offenders' are not seen as law-subjects anymore. They are perceived neither as common citizens nor as usual criminals, but as *homo insecuritas* – that means, constructed as the opposite of the general security.

VI. Critical remarks

I would like to point out shortly that many aspects of the endanger law are not really new. If we look at the work of *Walter Benjamin,*[59] we will find the violent and police-like (without distance) character of law, which we also see in the immediate intervention and decision of home acoustic surveillance[60] and of supplementary preventive detention.[61] The impossibility of justice in the "law enforcement" was also sufficiently analyzed by *Jacques Derrida*, who – critically – recalled that is is

[56] See *supra* note 17 *et seq.* and main text.
[57] Crit. also *Kinzig* 2006: 155, *Böllinger/Pollähne* (2010: 2154 – Rn. 7 –); see the very important decision of ECHR*, M. v. Germany*, nr. 120, 132 *et seq.*
[58] See crit. also *Böllinger/Pollähne* (2010: 2154 – Rn. 7 –), *Finger* (2008: 173 *et seq.*), *Mushoff* 2008: 446 *et seq.*
[59] *Benjamin* 1965.
[60] The decision to hear the conversation or not, and whether to record it or not, must be done at the moment that the police suppose people at home are talking about crimes, not before that, and not after. For this reason it is necessary to carry out surveillance *live.* This immediate method was required by the Constitutional Court and found impossible by practitioners (BT-Session 15/152, p. 14291). See also *supra* note 41 and main text.
[61] The "alert" about the risk-factors that the prisoner represents is given by the prison officers, which are locally and temporarily immediate to him and cannot be neutral to his situation. In the same sense, the law itself was decided for immediate situations and to avoid the release of eight concrete prisoners. The law, as seen, was rapidly written to solve these concrete cases (BT-Session 15/115, p. 10555).

necessary for the law to apply *force* if it is to be truly valid.[62] The indetermination and vagueness of the law that does not exactly deal with particular acts but with no clear defined limits between *normality* and *anormality* was largely discussed by *Michel Foucault*.[63] Moreover, he situated this question in the wider framework of the relations of power and convincingly explained the role of the law as an instrument within the field of strategic power struggles. The legal legitimization of violence by claiming an exceptional situation seems to be part of this law rationality. Nowadays, says *Giorgio Agamben*, these exceptions seem to have become the rule[64] and other also point out that „exceptions are nothing but extensions of the norm."[65] In the cases analyzed here the exception was the initial argument which later flowed through very legal and very common ways into the normal rule: the emergency incapacitation laws designed to avoid the release of eight prisoners became part of the federal law of the Bundestag changing the Criminal Code, while the exceptional surveillance measure of the secret services became a common procedural measure able to be applied in all cases related to 'organized crime', that means, in the investigation of around one hundred different crime forms. Taking all these critical thinkers into consideration, the endanger law seems to not be so innovative after all.

Today the functioning and internal logic of the law, however, is even more visible and less principled than a couple of decades ago. The modern German law is being reformulated.[66]

This modern law is being reedited according to the current *rationality of risk*: law as an instrument of volatile risk management is aimed at the forecast of each possible future damage for the general security. At the same time, this modern law is being reedited according to the current *rationality of war*: law as a means for aggressive fighting and for neutralizing faceless enemies of the general security while arguing the exceptionality of the measure.

Risk management and war fighting merge. Not just risk management, but fighting; not just war to the enemy, but multiple constructions of possible 'endangerers' by means of risk calculation.

Older law logics are being brought up today: As seen, the immediacy, the violence, the vagueness and the exceptionality of law are immanent to the internal

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[62] *Derrida* 1991:12 *et seq*., and *passim*.
[63] *Foucault* 1977: 157, *Foucault* 2005: 237.
[64] *Agamben* 2002: 130; *Agamben* 2004: 9, 41. („Die unmittelbar biopolitische Bedeutung des Ausnahmezustands als einer ursprünglichen Struktur, in der das Recht durch seine eigene Suspendierung das Lebendige in sich schließt, kommt in aller Klarheit durch die *military order* zum Vorschein, die der Präsident der Vereinigten Staaten am 13. November 2001 erlassen hat. Danach ist bei Nicht-Staatsbürgern, die terroristischer Taten verdächtigt werden, »unbeschränkte Haft« (*indefinite detention*) und ein Prozeß vor »*military commissions*« erlaubt (die nicht mit Militärgerichten zu verwechseln sind, wie sie das Kriegsrecht vorsieht, 2004: 9).
[65] *Ojakangas* 2005: 16.
[66] That is the criminal law inspired by illustrated ideals and applied in the German Rechtsstaat in particular after 1945, including the more pragmatic streams of preventive criminal law. For a short review of illustrated and modern criminal law see *Arnold* 2006.

logic of modern law. The endanger law, therefore, is neither a pre-modern nor an anti-modern law. It is rather a manifestation of modern law reformulated to fit the challenges of the XXI century and its security obsession: endanger law is the instrumental law of the *securitized* times, in which there are again and again social issues which become of political relevance and after that are even declared as existential questions for the national security.[67] In the cases of the subsequent incapacitation order and of the acoustic home surveillance the securitization of the questions 'organized crime' and 'sexual criminality' have even reached high levels of *normalization* in the criminal law: they were written in the Federal Constitution following the rule of law and were even promoted by the Bundesverfassungsgericht.

Limiting the endanger law, I suggest, will only be possible after starting to recognize the internal components of law and to rethink the function of criminal law entirely. The *war on risks* may sound very innovative, but it is not a valid legal solution to the *in*security. The means-end bound between criminal law as a means and security as an end must be definitively eradicated. This eradication, however, should not be expected from the side of the constitutional and legal principles and actors. These constitutional and legal principles and actors, as seen, have been infiltrated and performed by securitization-streams as well.

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[67] See *Buzan/Waever/de Wilde* 1998; *C.A.S.E. Collective* 2006.

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The information and risk society poses a new challenge for the law in all its fragments. Modern media communication and technologies increase people's prosperity while stating new risks with not uncommonly devastating crisis-potential: The banking crisis, the safety net for the euro zone and the nuclear incident in Fukushima are only the latest forms of those specific modern common dangers which the law is facing – in many cases due to it's domestically limited validity – not or not sufficiently prepared. In order to promote the international dialog within the jurisprudence there was a conference in October 2010 held by the faculty of law of the Georg-August-Universität, supported by the chair of GAU, together with the faculty of Seoul National University School of Law discussing main issues of law in a modern information and risk society. With this volume the results of this convention shall be made accessible to everybody interested. Thereby it illustrates not only the variety of new issues and aspects, but also reveals that this can only be the beginning on the way to a deeper understanding of the complex correlations.

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