Journal of Korean Law | Vol. 16, 163-191, December 2016

The Decision of the Korean Supreme Court on the Contingent Fee Agreement in Criminal Cases: General Clauses, Judicial Activism, and Prospective Overruling*

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Abstract

On July 23, 2015, The Korean Supreme Court declared that a contingent fee agreement between a criminal defendant and the defending attorney is invalid, as it is contrary to public policy. This decision also adopted the theory of pure prospective overruling. This decision is a clear manifestation of judicial activism in interpretation. Generally, courts take the following four factors into consideration when making activist decisions: (1) the text of statutes; (2) compatibility with the existing legal system; (3) the comparative advantage between the legislature and the judiciary; and (4) the magnitude of the impact upon legal relations. In this case, the impact of the decision upon contingent fee agreements entered into before the decision was a major concern to the justices of the Supreme Court. At that point, the Supreme Court used the tour de force *of prospective overruling to make it clear that, while contingent fee agreements should not be allowed in the future, at the same time, the impact of that decision upon existing agreements of this type should be minimized. However, careful analysis shows that prospective overruling is simply not compatible with the function of courts.*

KEY WORDS: Contingent Fee Agreement in Criminal Cases, General Clause, Judicial Activism in the Interpretation, Prospective Overruling

Manuscript received: Oct. 18, 2016; review completed: Nov. 21, 2016; accepted: Nov. 25, 2016.

* This paper was originally presented at the 6th Seoul-Freiburg Law Faculties Symposium, held in June 30, 2016 at the Freiburg University in Germany. The results of the symposium will be published as a book in Germany. I extend my gratitude to Professor Youngjun Kwon, Seoul National University, for his valuable help.

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I. Introduction

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

In my opinion, this decision is a clear manifestation of judicial activism. The Court established a new rule regarding a problem of great social importance by resorting to a general clause without an explicit statutory mandate. Furthermore, the theory of prospective overruling, which the Supreme Court adopted in this decision, is a clear indicator of judicial activism. The prospective application of the new rule makes it easier to overrule, as overruling does not cause any shocks to the settled relations of the parties.[4] This paper analyzes this decision from the perspective of

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1) Supreme Court, 2015*Da*200111, (Gong2015Ha, 1238), Jul. 23, 2015. The English translation of the decision can be found at the homepage of the Supreme Court Library(https://library.scourt.go.kr/kor/judgment/eng_judg.jsp).

2) MINBUP [The Korean Civ. Code] art. 103 (S. KOR.): A juristic act which has for its object such matters as contrary to good morals and other social order shall be null and void. This article corresponds to Article 138 subpara. 1 of the German Civil Code(Bürgerliches Gesetzbuch, BGB).

3) *See* http://www.koreaherald.com/view.php?ud=20150728000996(last visit: May 27, 2016). However, the Constitutional Court Act does not permit raising the Constitutional Complaint against decisions of courts.

4) According to Justice Scalia of the U. S. Federal Supreme Court, prospective decision making is the handmaid of judicial activism, and the born enemy of stare decisis. Harper v. Virginia Department of Taxation, 509 U. S. 86, 105 (1993) (Scalia, Concurring).

judicial activism. In Part II, I describe the decision and the academic response to it. Part III elaborates on the concept of judicial activism in interpretation. In part IV,I try to determine the factors relevant to judicial activism, while Part V deals with prospective overruling.

II. The Decision

1. The Situation Before the Decision

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

However, some doubt was raised on the enforceability of contingent fee agreements. One commentator asserted that contingent fee agreements in all cases, both civil and criminal, should be banned altogether, as they are contrary to public policy. He opined that permitting contingent fees may make attorneys defend only the interests of their clients and ignore any broader concerns of social justice. In order to preserve the independence and impartiality of attorneys, contingent fee agreements should thus be prohibited.[7]

Other writers asserted that the contingent fee in criminal cases should not be allowed. According to them, a contingent fee agreement in itself can be beneficial to a party that cannot afford the attorney's fee and can give the attorney the incentive to give her best effort. However, in criminal cases, the contingent fee agreement, on the condition that the arrested defendant is released, for example, should be deemed as contradicting public policy.

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5) Civil Cases: Supreme Court 91Da7989, (Gong1992.1.1.(911), 85), Nov. 12, 1991 and more. Criminal Case: Supreme Court 2009Da21249, Jul. 9, 2009 (unpublished). The latter was overruled by this decision.

6) Supreme Court, 91Da29804, (Gong1992.5.15.(920), 1404), Mar. 31, 1992, and more.

7) Kwon, Oseung, *Byeonhosaeui Seonggongbosu* [Contingency Fee of Lawyer], *Minsa Pallyeyeongu* [Journal of Private Case Law Studies], Vol. 16, pp. 167-175, (1994).

There is a concern that attorneys would be inclined to use inappropriate means to ensure that they obtained the contingent fee. Moreover, it could lead to public distrust of the criminal justice system.[8)]

2. *Underlying Facts of the Decision*

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

The appellate court found that the payment of KRW 100 million by the plaintiff was based on the contingency fee agreement. However, the appellate court ordered the defendant to return KRW 40 million to the plaintiff, as the portion in excess of KRW 60 million was excessive, against the principles of good faith and equity, and thus invalid.

The defendant appealed to the Supreme Court.

3. *The Decision*

The Supreme Court unanimously confirmed the decision of the

8) For example, Jinsu Yune, *JuseokminbubChongchik* [Commentary on the Civil Code, General Part], Bd. 2, 3.ed., 2001, pp. 445 f.; 4. ed., 2010, p. 425.

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

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

In civil cases, an outcome can be classified as a win or a loss. Therefore, allowing a contingent fee agreement is not problematic. If the client prevails and recovers, then s/he may gain an economic interest out of which to pay the attorney's fees. Thus, because even those clients who would not ordinarily have sufficient means to pay the attorney may have access to assistance of counsel on the condition of paying a contingent fee, a contingent fee agreement can be justified. By contrast, in criminal cases, by no means can the client make economic gains depending on the outcome of the trial that may then be shared with the attorney. Moreover, the court

must appoint a public defender when the defendant is unable to retain a defense counsel for reasons of indigence or for any other reason. Therefore, we cannot simply equate a contingent fee agreement in a criminal case with a similar arrangement in a civil case.

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

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

However, the Court ordered the prospective application of the rule, as it feared the retroactive application would endanger legal certainty. Its reasoning is laid out in what follows.

The question of which juristic act goes against good morals and other social order and thus is void under Article 103 of the Civil Code should be determined at the time of the juristic act. Meanwhile, the attitude of the Supreme Court precedent thus far was that contingent fee agreements were valid in principle, irrespective of any distinction between the types of cases accepted or their features. It is true that attorneys and clients failed to grasp fully the problems attendant on contingent fees in criminal cases and/or the influence such problems may exert on the validity of contingent fee agreements. Consequently, it was not uncommon to draw up even normal fees that were designed to be paid by the client in the manner of contingent

fees. Therefore, it is difficult to conclude those fee arrangements already entered into as void merely for the reason that the fee agreement was nominally a contingent fee agreement. However, if ever a contingent fee agreement is entered into in the future, because the Supreme Court has made it clear through this decision that contingent fee agreements in criminal cases may be evaluated as contrary to good morals and other social order, then such an agreement should be deemed void.

4. The Influence of Foreign Laws

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

Germany precedents have regarded contingent fee agreements (*Erfolgshonorarvereinabrung*) as contrary to public policy and invalid since 1926.[10)] The decision of the Federal Court of Justice (*Bundesgerichtshof*) on December 15, 1960, reaffirmed those precedents.[11)] According to that decision, an attorney has the duty to maintain independence vis-a-vis the client. This independence is at risk if an attorney's own interests lie in the outcome of the dispute, as, in such a case, an attorney could be induced to strive for success without consideration for the real factual and legal situation, perhaps even resorting to dishonest means.

The Federal Attorney Act (*Bundesrechtsanwaltsordnung*) of 1994

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9) http://www.scourt.go.kr/portal/news/NewsViewAction.work?currentPage=&searchWord=성공보수&searchOption=&seqnum=1055&gubun=6 (last visit: June 3, 2016). However, it is not entirely accurate that France prohibits contingent fee agreement altogether. French law does not prohibit contingent fee agreement, only pactum de quota litis is not allowed. See Article 10 of Loi n° 71-1130 du 31 décembre 1971.

10) See, Jan Schepke, *Das Erfolgshonorar des Rechtsanwalts*, 1998.

11) NJW 1961, 313.

comprehensively prohibited contingent fee agreements. However, in 2006, the Federal Constitutional Court (*Bundesverfassungsgericht*) declared that the prohibition of contingent fees is incompatible with the Constitution to the extent that it allows no exception for cases in which, through a success-based fee agreement, the attorney takes account of special circumstances of a client that prevent that client from pursuing her or his rights.[12] As a result of this decision, the law was changed; the revised Attorney's Compensation Act (*Rechtsanwaltsvergütungsgesetz*) Article 4a postulates that the contingent fee may be agreed upon only when clients would, thanks to such an agreement, be able to pursue their rights because of their economic circumstances.

In England and Wales, after a long period of the prohibition of contingent fee agreements,[13] a conditional fee agreement, including a success fee agreement, was legally acknowledged by section 58 of the Courts and Legal Services Act 1990.[14] However, conditional fee agreements for criminal and family proceedings are still not permitted.[15] At present, only conditional fee agreements for personal injury proceedings are permitted.[16]

In the US, contingent fee agreements were considered unethical and illegal in the 19thcentury in both civil and in criminal cases. While civil contingent fees have gradually become accepted in that country, the treatment of the contingent fees in criminal cases has not changed.[17] The American Bar Association's *Model Rules of Professional Conduct* (2004) provides that a lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.[18] It

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12) BVerfGE 117, 163.

13) *See* Schepke, *supra* note 10, pp. 21 ff.

14) A conditional fee agreement means an agreement which provides for that person's fees and expenses, or any part of them, to be payable only in specified circumstances. Section 58 (2) of the original act. It can include succession fee. See section 58 (2) (b) of the present Act revised in 1999.

15) Section 58 (10) of the original Act; Section 58 A (1) of the present Act.

16) Article 4 of the Conditional Fee Agreements Order 2013.

17) Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. Crim. L. & Criminology 593 ff. (1991); Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 597 ff. (1993).

18) Rule 1. 5. (d) (2). This rule was first adopted in 1969 by the Model Code of

can be said that the ban on formal contingent fees in criminal cases is thus well and broadly established.[19] For the justification of this ban, several arguments have been advanced.[20] One is that contingent fee agreements lead to conflicts of interest between attorney and client, while another holds that, while a successful plaintiff's civil suit produces a *res* ("thing") with which to pay the contingent fee, there is no *res* produced in a successful criminal defense. Still one more argument is that, while contingent fees may make legal services available to a group of litigants who would otherwise be unable to retain counsel, indigent criminal defendants have a guaranteed right to appointed counsel. The final argument asserts that contingent fees create a risk of overzealous and compromised representation. An attorney will have a greater incentive to engage in corrupt practices if they enhance his/her prospects of financial gain.

5. The Response to the Decision

As noted above, the KBA vehemently criticized the decision and went so far as to file a constitutional complaint with the Constitutional Court.

Appraisal by scholars was divided. One author welcomed the decision. She stressed that attorneys have an official duty to preserve justice and human rights. If people believed that the results of criminal cases might differ depending on defendants' economic capacity, this would bring about great distrust in the judicial system. Therefore, contingent fee agreements in criminal cases should be prohibited. Contingent fee agreements in family court cases should also be allowed. However, the author was critical of the decision in that the Supreme Court did not authorize the retroactive application of the rule. The prospective application of invalidity does not cohere with the concept of invalidity.[21]

Other authors regarded the decision as incorrect. One asserted that the

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Professional Responsibility.

19) *See* Karlan *supra* note 17, p. 602. However, there are some critical opinions. *See* Lushing *supra* note 17 and Karlan *supra* note 17.

20)*See* Lushing *supra* note 17, pp. 515 ff.; Karlan, *supra* note 17, p. 602 ff.

21) Yun-soon Jang, *Hyeongsasageoneui Seonggongbosugeumyakjeongeui Hyoryeoke Guanhan Yeongu* [Research on the Effects of the Contingent Fee Agreements in Criminal Cases], Dong-A Law Review, Vol 69, pp. 297-328(2015).

ban on contingent fee agreements could not achieve the aim of preventing the emergence of distrust in the judicial system. Moreover, new attorneys will experience more difficulty than those with careers as judges or prosecutors, as the contingent fee system allows less experienced attorneys greater chances of being retained. In this view, contingent fee agreements should be regulated by the statutory attorney law or the ethics code of the KBA.[22]Another author noted that it is difficult to justify denying the validity of contingent fee agreements only for criminal cases. Contingent fees function as a mechanism for lawyers to be paid the appropriate level of efforts. From the point of view of social welfare, agreements between defense lawyers and clients in criminal cases will become more rigid than before the judgement. On the other hand, whether this decision would reduce the demands for former judges and prosecutors now serving in private practice remains uncertain. As the contingent fee agreement has been ruled void, defense lawyers' fees will temporarily decrease, but the social welfare effect is unclear, since the mechanisms that can inspire better efforts from lawyers no longer exist.[23]

III. Judicial Activism in the Interpretation

1. The Concept of Judicial Activism

There are different definitions of judicial activism in the literature. For example, Canon lists six dimensions of activism: majoritarianism, interpretive stability, interpretive fidelity, substance/democratic process distinction, specificity of policy, and availability of an alternate

22) Jewan Kim, *Hyeongsasageon Byeonhosa Seonggongbosuyakjeong Muhyohwae Daehan-Bipanjeok Gochal* [Contingent Fee Agreements for Criminal Case Representations in South Korea], *Ingweongua Jeongeui* [Human Rights and Justice, Official Journal of KBA], Vol. 457, pp. 6-35 (2016).

23) Chang Min Lee · Han Soo Choi, *Hyeongsaseonggongbosu Muhyo Yakjeong Pangyule-Daehan Beobkyeongjehakjeok Bunseok* [Economic Analysis on the Supreme Court's Judgement That Contingent Fee Agreements for Criminal Cases Are Void], Korean Journal of Law and Economics, Vol. 13 No. 1, pp. 165-186 (2016).

policymaker.[24] Kmiec identifies five core meanings of judicial activism: invalidation of the arguably constitutional actions of other branches, failure to adhere to precedent, judicial "legislation," departures from accepted interpretive methodology, and result-oriented judging.[25]

In the context of the present paper, I would like to distinguish three dimensions of judicial activism, namely: (1) judicial activism in judicial review, (2) judicial activism in interpretation, and (3) the readiness to overrule precedents. Judicial activism in judicial review means that courts are prone to invalidate acts of the legislative or executive branches. Judicial activism in interpretation occurs when courts interpret the law extensively or use analogy to arrive at their preferred results. The readiness to overrule precedents denotes the extent to which courts respect the principle of *stare decisis*. Much of the legal literature includes these three dimensions in the concept of judicial activism, although with different terminology.[26]

In particular, the distinction between judicial activism in judicial review and judicial activism in interpretation is important in countries like Korea or Germany, where Constitutional Courts have exclusive competency to invalidate a statute enacted by the legislature. In countries under this type of rule, ordinary courts other than Constitutional Courts cannot engage in judicial review of laws passed by a legislature. However, activist interpretation by courts has an implication for the judicial review. If courts extensively interpret the law so as not to collide with the constitution,[27] the necessity for Constitutional Courts to invalidate laws is diminished.[28]

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24) Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 Judicature pp. 239 ff.(1983).

25) Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 Cal. Law Review, pp. 1444 ff. (2004).

26) See, Stephanie A Lindquist and Frank B Cross, Measuring Judicial Activism, 2008, pp. 29 ff.

27) The so-called constitution-compatible interpretation (*Verfassungskonforme Auslegung* in German).

28) This relation between judicial activism in judicial review and in interpretation is well illustrated in the English case of *Bellinger v. Bellinger* (2003), 2 W. L. R. 117 (House of Lords, April 10, 2003). In this case, the House of Lords declined to interpret »female« in sec. 11(c) of the Matrimonial Causes Act 1973 to include a transsexual female, but instead declared that above sec. 11(c) was incompatible with the right to respect for her private life under Art. 8 and with her right to marry under Art.12 of the European Convention of Human Rights. If the

Therefore, the counter-majoritarian problem, which is inherent in judicial review, is not a problem in the case of judicial activism in interpretation. However, the common problem between these two forms of judicial activism is the definition of the relation between the legislature and the judiciary. In other words, the separation of powers principle is of great import in both cases.

This section and those that follow are dedicated to judicial activism in interpretation. The readiness to overrule precedents is dealt with in part V in relation to prospective overruling.

2. Judicial Activism in Interpretation

Judicial activism in interpretation can be better understood by comparison with the notion of judicial restraint in interpretation. A restrained court declines to accept an interpretation that is not supported by the clear wording of a statute, even if the result of that interpretation is preferred by the court itself. By contrast, an activist court interprets the law broadly to achieve its preferred result, even though the text of the statute is ambiguous or non-existent with regard to the matter in question. Sometimes, when it is clear that the result cannot be derived from the text of the statute, the activist court uses analogy.[29)]

Several examples from German and Korean precedents are provided below. The first is the legal treatment of transsexuals in the two countries.[30)] A 1978 German Federal Constitutional Court decision[31)] declared that one who had undergone a transsexual operation could be treated as a man in

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House of Lords interpreted female in the Act to include a transsexual female, there were no need of incompatibility decision. About this decision, see Jinsu Yune, *The Role of the Courts in the Protection of Transsexuals' Human Rights: A Comparison of Korea with Germany and the U. K.*, in Helms und Zeppernick (Herausgeber), Lebendiges Familienrecht, Festschrift für Rainer Frank, 2008, pp. 415 ff.; Günter Hager, *Der Einfluss des Human Rights Act 1998 auf die Rechtsmethode in England*, ibid., pp. 27 ff.

29) Strictly speaking, one can distinguish analogy from interpretation in the original meaning. However, the word 'interpretation' is used here extensively to include analogy or even the creation of law by the court (richterliche Rechtsschöpfung).

30) *See* Jinsu Yune *supra* note 28.

31) Decision of the German Federal Constitutional Court on September 11, 1978 (BVerfGE 49, 286).

the context of the Civil Status Act (*Personenstandsgesetz*). In this case, the transsexual had raised an application for his sex, which was designated in the birth register as male, to be changed to female. The Appellate Court of Berlin (*Kammergericht*) accepted the application by way of analogy. The court found that the provision of corrections of the birth register laid out in the Act did not cover the applicant's case, because this provision covered only the cases of incorrectness that had existed when entries were first made, and that this gap could be filled by analogy. However, the German Federal Court of Justice (*Bundesgerichtshof*) did not agree with the Appellate Court. According to it, such an analogy was not permissible. In contrast to these two decisions, the Federal Constitutional Court found that the concept of correction in the Act could be interpreted to denote an *ex post* rectification of a false statement. Therefore, a transsexual should be allowed to apply for the correction of her or his sex designated in the birth register. The Court justified this result by the way of constitution-compatible interpretation.

The majority opinion of the Korean Supreme Court accepted the reasoning of the German Federal Constitutional Court.[32] By contrast, the dissenting opinion understood the majority opinion not as an interpretation of the Family Register Act, but rather as an analogy. It opined that this kind of analogy was beyond the limit established by the legislation and that the legislature, not the court, should decide how to solve the question of transsexuals. In my view, the true explanation of the German and Korean case law should be that each court employed analogy rather than interpretation. The Korean and German courts both filled the gap by analogy under the name of constitution-compatible interpretation. However, the results in each case can be supported.[33] These cases are good examples of judicial activism in interpretation.[34]

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32) Supreme Court 2004Su42, Jun. 22, 2006, *Pallyekongbo* 2006, 1341 ff. The supplementing opinion to the majority opinion cited to the above decision of the German Federal Constitutional decision.

33) *See* Jinsu Yune *supra* note 28, pp. 418 ff.

34) Jinsu Yune, *Judicial Activism and the Constitutional Reasoning of the Korean Supreme Court in the Field of Civil Law*, in Jiunn-rong Yeh (ed.), *The Functional Transformation of Courts, Taiwan and Korea in Comparison*, pp. 123-138 (2015).

Another example is a Korean case law regarding retrial[35] in a criminal proceeding. Article 23 of the Act on Special Cases Concerning Expedition, etc. of Legal Proceedings prescribes that, when it is impossible to determine the whereabouts of a criminal defendant in the trial proceedings at the court of first instance, trials may be held without hearing a statement from that defendant. Article 23-2 deals with the retrial of such a defendant and stipulates that any person who has been found guilty under a trial according to Article 23 and was unable to attend the trial proceedings due to the reasons unattributable to him or her may file a request for a retrial to the court of first instance.[36]

In its *en banc* decision of June 25, 2015,[37] Supreme Court offered a divided opinion as to whether a defendant can file a request for a retrial against the appellate court decision according to Article 23-2 of the Act. In this case, the defendant was sentenced to 5 million KRW in absentia, according to Article 23 of the Act, in the first trial. The prosecutor appealed that decision. The appellate court reversed the decision and ordered one year of imprisonment in the absence of the defendant. After the decision became final, the defendant asserted that there were grounds for retrial according to Article 23-2 of the Act.

The point at issue was whether a defendant may file a request for a retrial against the decision of the appellate court, not against the decision of the court of first instance, as prescribed precisely in Article 23-2. The majority opinion answered in the positive, arguing that Article 23-2 can be applied to the decision of the appellate court by analogy. It reasoned that, in light of constitutional provisions, especially the right of fair trial, the defendant may file a request for a retrial against the decision of the appellate court. By contrast, the dissenting opinion of two justices denied the possibility of analogy, asserting that the majority opinion went beyond the legitimate power of statutory interpretation. It felt sympathy with the

35) *Wiederaufnahme* in German.

36) The former Article 23 was declared unconstitutional by the Constitutional Court decision of Constitution Court 97*Heonba*22 (HeonGongJe29Ho), Jul. 16, 1998. Honpop chaepanso Pallyejip (Reports of Constitutional Court Decisions) Vol. 10-2, 218. The reason was that the extent to which this Article could be applied was too broad. As a result, Article 23 was revised to narrow the applicable extent and Article 23-2 on retrial was newly inserted.

37) Supreme Court 2014Do17252, (Gong2015Ha, 1112), Jun. 25, 2015.

intention of the majority opinion to accord the defendant the right to a fair trial by giving him the chance of a retrial. However, there was no such provision in the Act, and such a defect in the Act should be dealt with in legislation by the Assembly, not by an interpretation of the courts.

The majority and dissenting opinions are typical examples of judicial activism and judicial restraint respectively.

The third example is the recognition of a general personality right (*Allgemeines Persönlichkeitsrecht*) by German courts. As known to all German jurists, Article 253 subpara. 1 of the German Civil Code specifies that money may be demanded in compensation for any damage that is not pecuniary loss only in cases stipulated by the law. Nevertheless, the German Federal Court of Justice had awarded money in cases of non-pecuniary loss not stipulated by the law in the name of protecting the general personality right.[38] It was controversial whether such precedents went beyond the legitimate sphere of interpretation. However, the German Federal Constitutional Court confirmed the precedents of the Federal Court of Justice and expressly acknowledged the competence of the judge to employ creative discovery of law (*schöpferischer Rechtsfindung*).[39] The Constitutional Court opined that, in certain circumstances, more of a law exists beyond the positive statutes of the state power, which has its source in the constitutional legal system and is capable of acting as a corrective against the written law. Finding the law and actualizing it in decisions is the task of the judiciary.[40]

3. General Clauses as a Means of Judicial Activism

General clauses such as good faith[41] and public policy[42] can be

38) BGHZ 26, 349 (Herrenreiter); BGHZ 35, 363 (Ginsengwurzel).

39) BVerfGE 34, 269 (Soraya).

40) "Gegenüber den positive Satzungen der Staatsgewalt kann unter Umständen ein Mehr an Recht bestehen, das seine Quelle in der verfassungsmäßigen Rechtsordnung als einem Sinnganzen besitzt und dem geschriebenen Gesetz gegenüber als Korrektiv zu wirken vermag; es zu finden und in Entscheidungen zu verwirklichen, ist Aufgabe der Rechtsprechung."

41) MINBUP [The Korean Civ. Code] art. 2, para.1. (S. KOR.)

42) MINBUP [The Korean Civ. Code] art. 103, para.1. (S. KOR.)

convenient tools for the activist judge, as shown by this case. General clauses empower the courts to decide in the manner of what they regard as equitable,[43] but they do not indicate precisely how to decide on cases. General clauses can be channels for general principles, such as the guarantee of human rights, to flow into private law.[44] In this manner, courts can play an active role in the sense of judicial activism. Nevertheless, it must be stressed that general clauses are not licenses for courts to decide cases based on a subjective evaluation of equity. Rather, they must comply with the objective law.

Two examples from German case law can be cited here as general clauses used as tools of judicial activism. One is the so-called revaluation precedent (*Aufwertungsrechtsprechung*).[45] In the period of hyperinflation after the First World War, the Imperial Court of Justice (*Reichsgericht*), then the highest court in Germany, declared on November 28, 1923 that the debt one owed to a creditor should be revaluated to adapt to the devaluation of the debt due to inflation.[46] The court based its decision on the good faith provision of Article 242 of the German Civil Code. However, the decision was heavily criticized as interfering with the realm of the legislature.[47]

Another example is the precedent on the invalidity of a suretyship contract made by the close relatives of a debtor. Typical cases develop when individuals becomes sureties of debts that their parents or domestic partners owe to banks. In many instances, the amount of the debt was so high and the earnings of sureties so low that the sureties themselves became bankrupt. In these situations, the German Federal Court of Justice did not accept the assertion that such a suretyship contract was invalid, as contrary to public policy (Article 138 subpara. 1 of the German Civil Code).

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43) Jauernig/Mansel, Kommentar zum BGB, 16. Auflage 2015, § 242 Rdnr. 9 (*Ermächtigunsfunktion*).

44) For example, Münchener Kommentar zum BGB/Schubert, 7. Auflage 2016, § 242 Rdnr. 57 ff.

45) Detailed description of this case in English can be found in Michael L. Hughes, *Private Equity, Social Inequity: German Judges React to Inflation*, 1914-24, Central European History, Vol. 16, No. 1, 1983, pp. 76 ff. See, Grimm, NJW 1997, 2719, 2724 f., too.

46) RGZ, 107, 78-94. In this case, the debt was arose in 1913, and the due date was in 1920. According to the court, the cost of living index had between 1913 and 1920 increased tenfold.

47) *See* Hughes *supra* note 45.

However, the German Federal Constitutional Court ruled that civil courts are bound to control the content of contracts that are unusually burdensome for one of the two parties and which result from structurally unequal bargaining power.[48] Although this decision was highly controversial,[49] the Federal Court of Justice accepted it.[50] Strictly speaking, this was not a case of conflict between the legislature and the judiciary, but between the Federal Constitutional Court and ordinary courts. However, it is still a good example of judicial activism in interpretation.

IV. Factors Relevant to Judicial Activism

I posit that courts should take the following four factors into consideration when making activist decisions, and they generally do so in practice: (1) statutory texts, (2) compatibility with the existing legal system, (3) the comparative advantage between the legislature and the judiciary, and (4) the magnitude of the impact upon legal relations.

1. The Statutory Texts

In cases where there is a statute, interpretation should always begin from the text of the relevant statute. Extensive interpretation is a preferred tool of the activist court. Constitution-compatible interpretation is a good example. Even when the statute seems to state something other than the result the court wants to achieve, that is not always an insurmountable hurdle for an activist court. The court may use teleological reduction, analogy, or teleological extension to circumvent the statute.

In extraordinary situations, courts decide against the clear text of statutes (contra legem). An example from Korean law is the precedent on the statement of the place of issue in a bill of exchange or promissory note. The Korean Bills of Exchange and Promissory Note Act, which is an literal translation of the Geneva Convention Providing a Uniform Law For Bills of

48) Decision on November 19, 1993, BVerfGE 89, 214 ff.

49) For example, Zöllner, *Regelungsspielräume im Schuldvertragsrecht*, AcP 196 (1996), 1 ff.

50) See, Philip Ungan, *Sicherheiten durch Angehörige*, 2013.

Exchange and Promissory Notes (1930), provides that a bill of exchange should contain a statement of the place where the bill is issued and that any bill issued without such a statement is invalid. However, the majority opinion of the Korean Supreme Court on April 23, 1998[51] held that a domestic promissory note, issued and payable in Korea, remained valid even though it did not contain a statement of the place where the bill was issued. The supplementing opinion to the majority opinion insisted that it is the mission of the judiciary to interpret statutes reasonably so as to adapt an archaic law to the progress of social phenomena and that it is improper for courts to be bound to follow the law as written until it is revised by the legislature when the courts know that the conventional interpretation and application of the outmoded law would bring about inequitable results.

However, the legitimacy of these interpretations is highly questionable. It is apparent that the majority opinion is based upon the maxim "*cessate ratione legis, cessat lex ipsa*" ("the law itself ceases, if the reason of the law ceases"). Such a maxim should not be accepted in principle, as the judiciary has no authority to change laws purely on the strength of its own findings.[52] Only when textual interpretation leads to an evidently absurd result may a court make a correction of a statute.[53] The issue involving the lack of a statement of the place of issuance of a bill of exchange is hardly such an example.

If there is no relevant statute, as is the case with regard to the contingent fee issue, then the text of statute cannot be a factor to consider.

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51) Supreme Court, 95Da36466, (Gong98.5.15.[58], 1338), Apr. 23, 1998,.

52) Ernst A. Kramer, Juristische Methodenlehre, 2. ed., 2005, p. 200. However, Larenz and Canaris seems of somewhat different opinion. Mehtodenlehre der Rechtswissenschaft, 3. ed., 1995, p. 171.

53) *See* Kramer *supra* note 52, p. 201 ff.; Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf demKontinent*, Bd. 2, 2001, p. 1267. About the absurd result rule in the US, see, for example, William Eskridge, Jr. et al., *Legislation and Statutory Interpretation*, 2nd ed.,2006, pp. 207 ff.; Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. Cin. L. Rev. 25 ff. (2006).

2. *Compatibility with the Existing Legal System*

It is evident that the results of activist interpretation cannot be accepted, if such results are not compatible with or even contradict the existing legal system. The following two Korean cases exemplify this phenomenon.

The first is the precedent regarding the so-called conscientious objector problem. Korean law does not provide an exemption from mandatory military service for conscientious objectors. However, it prescribes that one who does not muster shall not be punished when he has a just cause. Therefore, there is a dispute as to whether one who has refused military service on conscientious grounds may be regarded as having a just cause. The majority opinion of the *en banc* decision of the Supreme Court on July 15, 2004 answered this question in the negative.[54] It opined further that the legislature's failure to provide an exemption from military service for conscientious objectors without providing them alternative civilian service is not unconstitutional.

In my opinion, it is difficult to acknowledge the refusal of military service for reasons of conscience as having a just cause. If conscientious objectors are exempted from military service, they should be assigned to alternative civilian service, as occurs in other countries that do permit the refusal of military service for reasons of conscience. In other words, a precondition of exemption from military service should be the possibility of alternative civilian service. As long as no such option exists, it is impossible to regard conscientious objectors as having a just cause on the level of interpretation. However, from the perspective of human rights, this situation is much more problematic. To require military service for conscientious objectors without providing alternative civilian service should be regarded as a violation of the human right of conscience. Regrettably, the decision of the Korean Constitutional Court on August 26, 2004[55] declared that this was not unconstitutional. However, the Court recommended that the legislature consider the introduction of alternative

54) Supreme Court, 2004Do2965, (Gong2004.8.15.[208], 1396), Jul. 15, 2004.

55) Constitutional Court, 2002Heonga1, (HeonGongJe96Ho), Aug. 26, 2004, Honpop chaepanso Pallyejip Vol. 16-2.

civilian service or other measures to protect the human rights of conscientious objectors.[56] The Constitutional Court has maintained this position through the present day.[57] I believe that the Constitutional Court should have decided that the relevant law was not merely unconstitutional but actually incompatible with the Constitution, as long as there was no possibility of alternative civilian service.

The second example is the recent first instance decision regarding same-sex marriage. On May 25, 2016, the Seoul Western District Court determined that same-sex couples could not marry each other.[58] In this case, the judge Taejong Lee, President of the Court, declared that marriage should be entered into by a man and a woman, not between a man and a man, as, in this case, or a woman and a woman. In addition to citing the decisions of the Supreme Court and the Constitutional Court, which understood marriage as the union of a man and a woman, he stressed that Article 36 subpara. 1 of the Constitution prescribes that marriage and family life shall be entered into and sustained on the basis of the dignity of the individual and the equality of both sexes. Furthermore, even though the Civil Code does not expressly define marriage as the union of a man and a woman, the Code denotes the partners in a marriage as husband and wife. In light of these facts, Judge Lee concluded that marriage as prescribed in current law cannot be interpreted more widely, i.e. as a union of two persons irrespective of sex.

3. The Comparative Advantage Between the Legislature and the Court

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

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56) The dissenting opinion asserted that not providing the alternative civilian service was unconstitutional.

57) Case 2007Heonga12, (HeonGongJe179Ho)(Honpop chaepanso, Aug. 30, 2011) et al., Honpop chaepanso Pallyejip Vol. 23-2, 132; Case 2008Heonga22, (HeonGongJe179Ho) (Honpop chaepanso, Aug. 30, 2011) et al., Honpop chaepanso Pallyejip Vol. 23-2, 174.

58) Seoul Western District Court, 2014*Hopa*1842, May 25, 2016 (not yet officially published).

The legislature has a comparative advantage over courts when special information or knowledge that the court cannot easily obtain is needed to resolve a problem. In these cases, the legislature can obtain the necessary information or knowledge from specialists or other relevant actors in a variety of ways. When this is the situation, the role of the courts should be limited. The Korean Constitutional Court once declared that a finding of the reasonableness and appropriateness of the fiscal expenditure requires expertise in the fiscal area, and that any review by the courts may thus be difficult.[59)]

In other cases when comprehensive and overall reforms or detailed regulations are necessary, courts should refrain from active intervention. For example, the decision of the Seoul Western District Court on same-sex marriage[60)] held that the problems that could be expected to arise in the event of the protection of same-sex marriages would necessitate regulations in various legal areas, and that these problems could not be resolved within the scope of courts' interpretation of the law. Rather, they should be treated in a novel manner by new acts of legislation.

If it is likely that the legislature will react in a timely fashion to a certain problem, it is reasonable for the court to await the decision of the legislature. For example, in Bellinger v. Bellinger, the UK House of Lords declined to interpret "female" as including a transsexual female, declaring instead that the relevant statute was incompatible with the European Convention of Human Rights.[61)] One plausible explanation is that, at the time the decision was delivered, Parliament was about to consider the Gender Recognition Bill,[62)] which aimed to put into place an entirely new scheme for the registration of newly acquired genders.[63)]

Another example is the *en banc* decision of the Korean Supreme Court

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59) Constitutional Court 2005Heonma598, (HeonGongJe114Ho), Mar. 30, 2006, Honpop chaepanso Pallyejip Vol. 18-1, no. 1, 298.

60) *See supra* note 58.

61) *See supra* note 28.

62) The Bill eventually became Gender Recognition Act 2004.

63) *See* Tom R. Hickman, *Constitutional Dialogue, Constitutional Theories and The Human Rights Act 1998*, Public Law 2005, 332; Jinsu Yune *supra* note 28, p. 420; Günter Hager *supra* note 28, pp. 27 ff.

regarding an occupational accident on September 28, 2007.[64] In this case, the majority opinion declined to overrule previous precedents that accidents arising in the course of commuting were not occupational accidents in the context of public occupational accident insurance.[65] The supplementing opinion of three justices to the majority opinion cited, alongside other grounds, that this matter had been discussed in depth by a committee of the government and that a bill reflecting that discussion was pending in the Assembly, so the court should refrain from intervening.

On the other hand, if it does not appear plausible that the legislature will act in the near future, that can provide an opportunity for a court to be more activist. The Korean precedent on transsexuals, referred to above, is a good example here.[66] At the time of the decision in 2006, there was no sign of legislative action. On the contrary, a bill that had been planned to permit a change of sex for transsexuals had been introduced in the Korean Assembly in November 2002. However, without serious discussion, it expired in 2004when the terms of the incumbent members ended.[67] Moreover, during the 10 years since the decision in 2006, no relevant law has been passed. Therefore, the intervention of the Korean Supreme Court seems all the more justified.[68]

4. The Magnitude of the Impact Upon Legal Relations

Finally, the magnitude of the impact of a decision should be a major concern for courts. In general, the result of an activist judgment is likely to set up a new rule that overturns a previous rule. The new rule may require changes in people's behavior. Alternatively, it may create a great burden on a certain class of people, or increase an existing burden. As precedents of courts should be retroactive in principle, the disturbance they cause can be great. This can make the court reluctant to adopt an activist stance.

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64) Supreme Court, 2005Du12572 (Gong2007.10.15.(284), 1685), Sept. 28, 2007.

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

66) *See supra* note 32.

67) *See* Jinsu Yune *supra* note 28, p. 410.

68) *See* Jinsu Yune *supra* note 28, pp.419 ff.

The Korean precedent on the occupational accident, mentioned above,[69] can serve as a good example in this context. The supplementing opinion of three justices to the majority opinion asserted that to include accidents during commuting in the category of occupational accidents would cause an enormous burden on the finances of the public occupational accident insurance scheme and cause a deterioration in its effectiveness, increase the burden on employers, and hinder the efficient distribution of the national budget, among other consequences. Therefore, the supplementing opinion concluded that this matter should be decided upon by the legislature, not by the court.

5. Application to This Case

Thus, may the Supreme Court decision on the contingent fee agreement be justified in terms of judicial activism? I believe that it can be.

To begin with, there was no statutory law regulating contingent fees for lawyers. Therefore, there was no textual hurdle for the court; nor is there an incompatibility problem with the existing legal system.

Secondly, whether the legislature can handle the matter better than the court, as some Korean scholars maintain, is worth considering carefully. If the legislature intervenes, it could create a detailed rule. For example, it could prescribe the exact conditions under which lawyers can agree to receive a contingent fee in criminal cases. Alternatively, it could establish a cap on contingent fees in criminal cases. It should be acknowledged that such a regulatory system might be a better alternative than complete nullification of contingent fee agreements in criminal cases.

However, it was unlikely, at the time of the Supreme Court's decision, that the Korean Assembly would make a law regulating contingent fee agreements. In fact, there had previously been debates about legislation that would regulate such fees. In 2000, The Judiciary Reform Committee, an advisory committee to the President, recommended that contingent fee agreements in criminal cases should be prohibited, even while they are allowed in other areas. Furthermore, bills prohibiting the contingent fee

69) *See supra* note 64.

agreement were introduced in the Korean Assembly twice, in 2006 and 2008. However, these bills expired in 2008 and 2012, respectively, when terms of Assembly members ended. One reason for the failure of the bills was the opposition of the KBA. The press release cited above[70] emphasized these facts. From all of the above, it can be safely assumed that the justices of the Supreme Court believed that a change in the law by the Assembly was not to be expected at the time of the court decision.

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

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

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70) *See supra* note 9.

V. The Problem of Prospective Overruling

1. Prospective Overruling

It was conventional wisdom that "[J]udicial decisions have had retrospective operation for nearly a thousand years."[71] Recently, however, prospective overruling has been recognized in several jurisdictions.[72] There are two types of prospective overruling: selective prospective overruling and pure selective overruling. Selective prospective overruling means that the new rule applies to the case announcing the new rule and, possibly, to some other limited cases, but is not applied retroactively to other cases predating the new decision. Any overruled precedent still governs old cases. By contrast, pure prospective overruling denies any retroactivity of the new rule, even to the case announcing the new rule.

The merit of prospective overruling is that it can protect legitimate expectations in regard to overruled precedents. The retroactive application of overruling decisions to cases prior to these decisions may infringe on the legitimate expectations of the people who have acted in reliance on old precedents. The retroactive application of a new law has the same problem. One difference is that the classic understanding of the role of courts is that judges interpret, rather than make, the law.

The US experience in this regard is well understood.[73] Since Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,[74] the United States Supreme Court has acknowledged that prospective overruling might be

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71) *Kuhn v. Fairmont Coal Co.* 215 US 349, 372(1910) (Holmes, dissenting).

72) For comparative researches, Eva Steiner ed., *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (2015); articles by Jürgen Basedow, Hannes Rösler, Helge Dedek, Felix Maultzsch, Susan Emmenegger and Bertrand Fages in Rabels Zeitschrift Vol. 79, pp. 237 ff. (2015). For a short description, see Günther Hager, Rechtsmethoden in Europa, pp. 213 ff. (2009).

73) See, Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, in Eva Steiner ed., *supra* note 72, pp. 209 ff.; Hannes Rösler, *Die Rechtsprechungsänderung im US-amerikanischen Privatrecht*, Rabels Zeitschrift Vol. 79, pp. 250 ff. I have written on the subject, too. Jinsu Yune, *Migukbeobsang Panryeeui Sogeubhyo* (The Retroactivity of Precedents in American Law), Justice Vol. 28, No. 1, pp. 91-121 (1995).

74) 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed.360 (1932).

permissible in certain special cases. In the 1960s, prospective overruling was used more frequently. The leading cases are Linkletter v. Walker[75] among criminal cases and Chevron Oil Co. v. Huson[76] among civil cases. However, beginning in the 1980s, these precedents of prospective overruling were again overruled by Griffith v. Kentucky[77] for criminal cases and Harper v. Virginia Department of Taxation[78] for civil cases. It must be noted, however, that whether pure prospective overruling, apart from selective overruling, should not be allowed remains unclear. Furthermore, state courts may limit the retroactive operation of their own interpretations of state laws.[79]

In the UK, five out of seven Law Lords of the House of Lords in National Westminster Bank v. Spectrum Plus Ltd.[80] agreed that the possibility of prospective overruling cannot be entirely excluded, although prospective overruling in that particular case was denied.[81] Lord Nicholls of Birkenhead said that he would not regard prospective overruling as trespassing beyond the functions properly discharged by the judiciary under the constitution.[82]

In Germany, there are also instances when courts declared overruling to be prospective.[83] One recent example is the decision of the grand panel of the Federal Fiscal Court (*Bundesfinanzhof*) on December 17, 2007.[84] In that decision, the Court held that the overruling of precedents in that case, which would be less favorable to taxpayers, should be applied only to the cases that occurred after the day of the decision's publication. It reasoned that the principle of material justice had equal value with the principle of

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75) 381 U.S. 618, 85 S.Ct. 1731(1965).

76) 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1972).

77) 479 U.S. 314 (1987).

78) 509 U.S. 86 (1993).

79) *Harper v. Virginia Department of Taxation*, 509 U.S. 100 (1993).

80) [2005] UKHL 41.

81) See, Helge Dedek, *Rumblings from Olympus:* Das Zeitelement in der (Fort-)Bildung des englischen *common law,* Rabels Zeitschrift Vol. 79, pp. 313 ff.

82) According to Lord Nicholls, 'Never say never' is a wise judicial precept.

83) Felix Maultzsch, Das Zeitelement in der richterlichen Fortbildung des deutschen Rechts, Rabels Zeitschrift Vol. 79, pp. 323 ff.

84) BeckRS 2007, 24003227.

legal certainty and the protection of legitimate reliance and that these two subprinciples of the rule of law principle (*Rechtsstaatsgebot*) should be balanced in accordance with the principle of practical concordance (*praktische Konkordanz*). It asserted that the principle of retroactive law may be applied to the overruling of precedents by analogy and, in this case, the grand panel of the Federal Fiscal Court *de facto* acted as a maker of rules.

In Korea, there were two precedents of selective prospective overruling prior to this decision.[85)]

One was the precedent regarding membership in the *Jongjung*. A *Jongjung* is an organized group of descendants of a common male ancestor. According to customary law, only adult male descendants of a common ancestor could be members of a *Jongjung*. Female descendants were excluded from a *Jongjung*. However, on July 21, 2005,[86)] the *en banc* decision of the Supreme Court declared that the customary law that had excluded females from *Jongjung* was no longer valid and that females could also be members of a *Jongjung*. Moreover, this decision declared that the new rule should have only a prospective effect, as its retroactive application would disturb numerous legal relationships that had been formed in reliance on age-old precedents. The new rule was retroactively applied only to the present case. The other case involved determining the host or hostess of ancestor worship ritual(*Jesa*). According to Article 1008-3 of the Korean Civil Code, the property for ancestor worship ritual belongs to the host or hostess of a particular ancestor worship ritual. Traditionally, the eldest legitimate son of the ancestor served as the host of the ritual, and Supreme Court precedent had confirmed this custom several times. However, the *en banc* decision of the Supreme Court declared, on November 20, 2008,[87)] that the customary rule of choosing the host or hostess of the ancestor worship ritual was no longer valid. It held that the host or hostess must be decided by agreement among heirs. If no such agreement could be reached, the eldest son (in the case of his being deceased, his eldest son) or, in the case when no son was present, the eldest daughter should be the host or hostess. Furthermore, the Supreme Court again adopted the method of selective

85) About these decisions, *See* Jinsu Yune *supra* note 34.

86) Supreme Court, 2002Da1178, (Gong2005.8.15.(232), 1326), Jul. 21, 2005.

87) Supreme Court 2007Da27670, (Gong2008Ha, 1727), Nov. 20, 2008.

prospective overruling. If this new rule were to be applied retroactively, numerous previous instances of the succession of the property for ancestor worship ritual would be affected and both legal certainty and the protection of the reliance based on the principle of good faith would be endangered. Therefore, the new rule should be applied only to the succession of the property after this decision. However, this new rule should be applied to the present case, too, as the aim of the declaring the new rule in this case was to use it as the legal basis for this very decision. The decision on the contingent fee agreement differs from previous Korean precedents, as this decision adopted pure prospective overruling, not selective prospective overruling.

2. Criticism

In my opinion, the theory of prospective overruling cannot be sustained. I could not find any principled argument in support of the theory advanced, except for the necessity to protect reliance on the previous overruled precedents. Prospective overruling is not compatible with the function of courts. Courts should decide about the actual cases before them, not about possible future cases. The task of courts is to do justice to each litigant on the merits of his or her own case.[88] That is, they should decide cases based upon the court's best current understanding of the law.[89] Selective overruling enables the parties of overruling cases to obtain the benefits of overruling, and thus does not remove the incentive of the party to assert overruling. However, this is not possible, even for the legislature. Therefore, prospective overruling makes courts a sort of super-legislature.[90] The protection of legitimate reliance is also an important interest. However, that protection can and should be assured through the rules of the substantive law, not by choosing a legal rule.[91] For example, the

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88) *Desist v. United States*, 394 U.S. 244, 259 (1969) (Harlan, dissenting).

89) *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991).

90) *Danforth v. Minnesota*, 552 U.S. 264, 274 (2008) {Stevens, citing Justice Harlan in Desist v. United States, 394 U.S. 244, 259 (1969)}.

91) *American Trucking Associations, Inc., v. Smith*, 496 U.S. 167, 210 (1990) (Stevens, dissenting).

principle of good faith, abuse of right, laches (*Verwirkung*) can be used to protect legitimate reliance. In the contingent fee agreement case, what the Supreme Court was most concerned about was that the agreed contingent fee could not be agreed on a non-contingent basis at the same amount, if the prior contingent fee agreement were to be regarded as void altogether. However, this result could be avoided by the theory of supplementary interpretation (*ergänzende Auslegung*). According to this theory, if there is a gap in the contract upon which the parties had not reckoned, courts can fill in the gap by what the parties would have agreed upon had they known of the gap. The Korean Supreme Court has acknowledged and applied the theory of supplementary interpretation.[92] If supplementary interpretation were applied to the invalid contingency fee agreement, an attorney could request the sum to which the parties would have agreed on a non-contingent basis, had they known the invalidity of the contingency fee agreement. If the client had already paid the contingent fee to the lawyer, the client could not request the return of the payment, as the payment would be for an illegal purpose.[93] If the Korean Supreme Court had chosen this path in this case, prospective overruling would be unnecessary.

VI. Conclusion

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

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92) Supreme Court, 2005Da13288, (Gong2007.1.1.(265), 24), Nov. 23, 2006; Supreme Court, 2009Da91811, (Gong2014Ha, 2305), Nov. 13, 2014.

93) MINBUP [The Korean Civ. Code] art. 746 (S. KOR.) (excluding return of Enrichment arising from a transfer made for an illegal or immoral purpose, *condictio ob turpem veliniustam causam*). This article corresponds to article 817 of the German Civil Code roughly.