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"New Form of Declaratory Judgment" as a Subsequent Suit for the Interruption of the Running of Extinctive Prescription: The Korean Supreme Court *en banc* Decision 2015Da232316, Oct. 18, 2018*

*Jongwoo Yooh***

Summary

Art. 168 and 170 of the Civil Act prescribe that a rights-holder's judicial claim shall interrupt the running of extinctive prescription of the claim. The Korean Supreme Court made an *en banc* decision 2015Da232316, Oct. 18, 2018, that a "new form of declaratory judgment"—which seeks declaration of the fact that a judicial claim was established in the prior suit—is permissible, as a cause that interrupts the running of extinctive prescription. This essay examines the legitimacy of this new form of declaratory judgment, regarding the purpose of extinctive prescription and the legal doctrines around a judicial claim.

The Korean Supreme Court focuses on the extinctive prescription's purpose as a sanction on the non-exercise of rights. However, the extinctive prescription has various aspects related to the public interest. These include relieving the difficulty of proof, reducing the burden of preparing for the

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** J.D. student, Seoul National University School of Law.

suit, and protecting the obligor's expectation that the rights-holders would not exercise their rights. To preserve the above-mentioned purposes, the balance between the completion of extinctive prescription and the interruption of the running of extinctive prescription should be protected. That is, the running of extinctive prescription should be interrupted only when there is a significant fact that goes against the current state of "non-exercise of rights." A new form of declaratory judgment does not satisfy such criteria, as it merely confirms the existence of an already well-known event that happened in the past.

Furthermore, the majority opinion is based on circular reasoning: it is based on the premise that seeking a new form of declaratory judgment is a judicial claim. The majority opinion does not clearly suggest the grounds in which a new form of declaratory judgment constitutes a judicial claim.

Moreover, this new form of declaratory judgment cannot be acknowledged as a judicial claim. This is because it merely confirms a simple fact—that a judicial claim was filed in the previous suit—and does not deal with the actual rights and duties. Additionally, such a lawsuit lacks the interest of a declaratory judgment (*Feststellungsinteresse*). This is because the fact that a judicial claim was established does not provoke a dispute as to rights or legal relationship; nor does it imply risk or insecurity around the plaintiff's legal status. Under the current law, a new form of declaratory judgment is thus contradictory to the legal doctrine around lawsuits. The benefits of adopting it—despite this contradiction—are doubtful, in light of the purpose of extinctive prescription.

[DECISION]

I. Facts of the Case: The Korean Supreme Court en banc Decision 2015Da232316, Oct. 18, 2018

The plaintiff, *A*, claimed the payment of loans of KRW 160 million and delay damages against the defendant, *B*. The judgment in favor of the plaintiff became final and conclusive on December 7, 2004. On November 4,

2014, *A* lodged litigation seeking performance for an interruption of the running of the extinctive prescription of the loan claim.

In the first instance, the court ruled in favor of *A*, as *B* did not submit any statement. In the second trial, *B* answered that the loan claim was exempted since the exemption decision was finalized in the bankruptcy proceeding. In the second instance, however, the court determined that *B* was liable to repay the loan and delay damages—ruling that the loan claim was not exempted, because *B* had maliciously omitted the claim from the list of creditors.

B appealed, but the Supreme Court dismissed it. Nevertheless, the Supreme Court examined *ex officio* the form of a subsequent suit for the interruption of running of extinctive prescription. Consequently, the Supreme Court concluded that a "new form of declaratory judgment" can interrupt the running of extinctive prescription.

II. New Form of Declaratory Judgment

Civil Act Article 168 (Causes Interrupting Extinctive Prescription)[1)]

Extinctive prescription shall be interrupted in any of the following cases:

1. Demand;
2. Attachment, provisional attachment or provisional disposition;
3. Acknowledgment.

Civil Act Article 170 (Demand by Judicial Proceedings and Interruption of Prescription)[2)]

(1) A demand by way of judicial proceedings shall have no effect of interrupting prescription, if the judicial action is dismissed, rejected or withdrawn.

(2) In the case of the preceding paragraph, if a demand by way of judicial proceedings, intervention in bankruptcy proceedings, attachment or provisional attachment, or provisional disposition is made within six months, the prescription shall be deemed to have been interrupted by the demand by way of the first judicial proceedings.

In the Civil Act, Art. 168 Subpara. 1 prescribes that "demand" shall interrupt extinctive prescription and one of its specific forms, demand by judicial proceedings, i.e., "judicial claim" is provided by Art. 170. The Korean Supreme Court has acknowledged various forms of suits—including a litigation seeking performance and an obligee's counterclaim against the obligor's lawsuit—as judicial claims that interrupt the running of extinctive prescription.

A new form of declaratory judgment is an unprecedented form of judicial claim—wherein rights-holders demand a declaration of the fact that they filed a judicial claim, such as a litigation seeking performance, in the prior suit. As a new form of declaratory judgment is a judicial claim, the running of extinctive prescription is interrupted.

For example, a rights-holder with a loan claim can interrupt the running of the claim's extinctive prescription by lodging a litigation seeking performance. After that, as a subsequent suit, the rights-holder can interrupt the running of extinctive prescription through a new form of declaratory judgment that confirms the fact that a judicial claim—in this case, the litigation seeking performance—was established in the prior suit.

III. Majority Opinion

1. Problems of the Current Legal Practice

1) Substantive Examination of a Claim that a Rights-Holder did Not Intend

Under current legal practice, to interrupt the running of extinctive prescription of a claim established by the judgment in a prior suit, the obligee should file a subsequent suit that seeks performance of the claim. However, the majority opinion asserts that such practice has the following problems:

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1) Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 17905, Jan. 26, 2021, art. 168 (S. Kor.).

2) Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 17905, Jan. 26, 2021, art. 170 (S. Kor.).

> Given that the *res judicata* effect of the subsequent suit's judgment effectuates after the closing of argument in the subsequent suit, an obligor can assert grounds for objecting to the claim that occurred after the closing of argument in the prior suit and the court ought to deliberate and determine said grounds. […]
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> An obligee's genuine intent behind filing the subsequent suit lies in merely preventing completion of extinctive prescription whilst preserving the right of claim that has both effect and executory power. […] However, a litigation seeking performance requires re-examining and re-determining the existence and scope of the claim based on the period of closing of argument in the subsequent suit, irrespective of an obligee's genuine intent. […] and the existence of the claim might be denied according to the obligor's plea of defense.

2) *Infringing an Obligor's Opportunity to Instigate a Lawsuit of Demurrer Against Claims:*

> Such form of litigation can infringe upon an obligor's legal status as an eligible plaintiff who can voluntarily determine whether and when to instigate lawsuit of demurrer against claims […]
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> Furthermore, even if the obligor files objections to the claim in the subsequent suit and renders a favorable ruling, this would not mean that the executory power of the judgment of the prior suit extinguishes. If an obligee attempts to enforce execution based on the judgment of the prior suit, an obligor has to instigate an additional lawsuit of demurrer against claims and file the exact same objections to block the execution.

Civil Execution Act Article 44 (Lawsuit of Demurrer against Claims)[3)]

(1) If a debtor intends to raise any objection against the claims that have become final and conclusive by a judgment, he/she shall file a lawsuit of demurrer against the claims before the court of the first instance which rendered such judgment.

(2) For the demurrer under paragraph (1), any grounds therefore shall be those that have arisen subsequently to a closure of pleadings (in cases of any judgment without holding any pleadings, it shall be subsequent to a declaration of judgment).

(3) If there exist many kinds of grounds for a demurrer, they shall be alleged simultaneously.

3) The Risk of Dual Enforcement:

> If a judgment of performance in a subsequent suit becomes final and conclusive, the judgment has a *res judicata* effect along with executory power. As seen earlier, the *res judicata* effect or executory power of a judgment is permanent as a matter of principle; thus, two separate enforcement titles come to exist with a valid executory power, which entails the risk of dual enforcement.
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> The court has a system to manage a situation where more than one execution clause is granted for one enforcement title. However, "the court cannot control the grant of execution clauses by connecting the two separate enforcement titles generated from separate judgments, the prior suit, and the subsequent suit."

4) Vague Standards of the Legality of the Subsequent Suit:

> As a matter of principle, lodging a litigation seeking performance—identical to a prior suit—as a subsequent suit for the interruption of running of extinctive prescription is not compatible with the *res judicata* effect. Therefore, filing such a lawsuit is allowed only in exceptional cases where the ten-year lapse of the extinctive prescription period is nearing.

Consequently, the obligees would suffer from unpredictability because the legality of their subsequent suits relies on a vague standard of nearing

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3) Minsa jiphaeng beob [Civil Execution Act], Act No. 6627, Jan. 26, 2002, *amended by* Act No. 13952, Feb. 2, 2016, art. 44 (S. Kor.).

the ten-year lapse period.

2. Grounds for Adopting a New Form of Declaratory Judgment

> The key is that the subject matter of a new form of declaratory judgment is different from a previous suit. That is, while the existence or absence of a specific claim under substantive law is the subject matter of a prior suit, the subject matter of a new form of declaratory judgment is confined to interrupting extinctive prescription through a judicial claim, excluding the actual existence or absence and scope of a claim.
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> Inasmuch as that judgment has no effect under substantive law, other than interrupting the running of extinctive prescription of the claim established by judgment in a prior suit, there is no need to examine the substantive legal relationship such as the existence or absence and scope of a claim, including the running of extinctive prescription in the relevant suit. Obligees only have to assert that judgments regarding their claims became final and conclusive in the prior suits, and that they lodged subsequent suits for the interruption of the running of extinctive prescription of the claims. They only need to prove such assertion through submitting the copies of the judgment in the prior suits and the certification of confirmation, etc., and the court only has to deliberate on the asserted portion. […]

Along with the abovementioned grounds, the majority opinion justifies how a new form of declaratory judgment constitutes a judicial claim with following logic:

> Seeking a new form of declaratory judgment obviously constitutes an obligee's "assertion" of a right through instigation of a suit. In that sense, there is sufficient room to deem that seeking a new form of declaratory judgment constitutes "judicial claim." […]
>
> If a rights-holder's assertion of a judicial right is indicative of the principle that equity aids the vigilant and not those who slumber on their rights, this would reaffirm the Supreme Court's established

position deeming that such form of litigation constitutes judicial claim.

IV. Dissenting Opinion 1

1. Rebuttal to the Problems of Current Legal Practice

The dissenting opinion rebuts the majority opinion's argument about the problems of current legal practice.

1) Infringing an Obligor's Opportunity to Instigate a Lawsuit of Demurrer Against Claims:

> It is true that an obligor is burdened with having to assert all grounds for objection such as payment in the subsequent suit. However, this is a burden that any obligor ought to endure. Just because an obligor is unable to instigate a lawsuit of demurrer against claims at a time that is most advantageous for the obligor, it cannot be deemed as unlawful or an infringement of the obligor's legal status. Furthermore, […] it may be more convenient on the part of an obligor to answer as a defense such grounds in a subsequent suit raised by an obligee, rather than instigating a lawsuit of demurrer against claims.

2) The Risk of Dual Enforcement:

> It is difficult to deem that there lies a high risk of dual enforcement. [...] If an obligee takes advantage of the fact that there are two enforcement titles and attempts enforcement exceeding the amount established by judgment in a subsequent suit, an obligor may file a lawsuit of demurrer against claims to exclude the executory power of the claim.

3) Substantive Examination of a Claim that a Rights-Holder did Not Intend:

> The intent of an obligee to lodge a performance suit cannot be readily deemed as solely interrupting extinctive prescription. […] Through a subsequent suit, an obligee may realign *de novo* the scope of [the] *res judicata* effect and executory power by reflecting the circumstances after the closing of argument in a prior suit. Furthermore, by effectuating the *res judicata* effect after the closing of argument in the subsequent suit, the obligee may prevent the obligor from lodging a lawsuit of demurrer against claims based on the circumstances after the closing of argument in a prior suit.

4) Vague Standards of the Legality of the Subsequent Suit

> As noted in the majority opinion, "nearing the ten-year lapse period" is somewhat vague but does not significantly vary on a case-by-case basis. On the part of an obligee, lodging a subsequent suit [when nearing] the ten-year lapse period is cost-efficient.

2. New Form of Declaratory Judgment's Problems Based on Legal Doctrine

> There is room for doubt as to whether a new form of declaratory judgment could be acknowledged as "litigation" in which the subject matter pertains to a dispute over specific rights and obligations. The subject matter of a lawsuit, referred to as a new form of declaratory judgment, merely pertains to the fact that "a judicial claim was made for the interruption of running of extinctive prescription." An obligor has no room to challenge such a fact in itself. Even if such a fact was established by judgment, the declaration of a mere fact itself does not generate any legal effects. Also, the "confirmation of instigation of a suit" is not a subject matter of a lawsuit but a matter pertaining to the request for issuance of a certificate. […]
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> The new form of declaratory judgment merely purports to seek "affirmation of the fact that a subsequent suit has been lodged". It is a bit of a stretch to construe that, based on the same, an obligee is

making a "demand" or "exercising a right." The interruption of running of extinctive prescription is one of the collateral effects of a judicial claim. Deeming that there exists a separate kind of judicial claim, solely for the interruption of running of extinctive prescription, and that extinctive prescription is interrupted when such a judicial claim is filed creates a circulatory paradox.

V. Dissenting Opinion 2

The dissenting opinion 2 opposes the majority opinion's new form of declaratory judgment and suggests that "declaratory judgment of a claim" would be enough to solve the problems of current legal practice.

> If it is necessary to allow a new form of lawsuit as a new option for the interruption of running of extinctive prescription as a way of judicial interpretation, "declaratory judgment of a claim" would suffice. Adopting a new form of declaratory judgment falls within the legislative realm and not under the purview of judicial interpretation. […]
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> A new form of declaratory judgment means that "the instigation of a suit for interrupting extinctive prescription has been confirmed." As to such point, no dispute exists that ought to be resolved between the parties through litigation. […] The interest of a declaratory judgment of such a declaratory judgment cannot be acknowledged as there is no room for dispute by the other party.

VI. Supplementary Opinion

The supplementary opinion supports the majority opinion—and adds several reasons for which a new form of declaratory judgment is a theoretically valid and practically appropriate option to resolve the problems of current legal practice.

> A subsequent suit for the interruption of running of extinctive

prescription, as stated in the majority opinion, is a lawsuit instigated merely for the extension of extinctive prescription, premised on the fact that an obligee continues to preserve a claim established by judgment. That said, in such subsequent suit, re-examining the substantive existence or absence and scope of the claim and rendering another performance judgment would be an outcome unintended by the relevant party, and therefore, not only devoid of utility but also contradicts the principle of civil litigation. […]

A person with intent on bringing forth any type of action has the right to instigate a suit at the most appropriate time upon having compiled all relevant assertions and evidence related to the cause of claim, and such a legal position and benefit should not be carelessly disregarded. […] If an obligee fails to assert any and all substantive grounds that emerged after the closing of argument in the prior suit, the obligee cannot forestall the enforcement with the ground that occurred after the closing of argument in the prior suit, due to the *res judicata* effect of the subsequent suit.

This is the same as allowing an obligor to demand a "declaratory judgment of the nonexistence of the grounds for objection," which is an action not intended by the Civil Execution Act. […]

The Civil Act considers demand as the cause interrupting extinctive prescription because a rights-holder's assertion of the right against the other party who is to benefit from the running of extinctive prescription overturns the fact, non-exercise of rights, that served as the basis for the extinctive prescription. In principle, a judicial claim is the instigation of a lawsuit where an obligee becomes a plaintiff. However, the Supreme Court has maintained the position that a judicial claim does not necessarily have to be raised in the form of a lawsuit[4] and that the claimed right *per se* does not have to be the subject matter of the lawsuit.

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4) For example, the Korean Supreme Court decided that obligee's filing of a counterclaim in a lawsuit raised by the plaintiff asserting the completion of extinctive prescription constitutes a judicial claim and therefore interrupts the running of extinctive prescription. *See* Supreme Court [S. Ct.], 91Da32053, Mar. 31, 1992 (S. Kor.).

[COMMENTS]

I. Introduction

The Korean Supreme Court dismissed the appeal but examined *ex officio* the form of a subsequent suit for the interruption of running of extinctive prescription. As a result, the Supreme Court invented a new option for rights-holders to interrupt extinctive prescription. They did this by adopting a new form of declaratory judgment, which merely confirms the fact that a judicial claim was established in the previous suit.

Extinctive prescription imposes severe consequence to rights-holders, as their rights could expire due to the passage of time, which seems irrelevant to the legitimacy of a claim. On the other hand, extinctive prescription aids the public interest by relieving the difficulty of proof, reducing the burden of preparing for the suit, and respecting the obligor's expectation.

Inasmuch as extinctive prescription has a significant effect, the interruption of the running of its period is just as important as the extinctive prescription itself. Yet the majority opinion explains that, in this new form of declaratory judgment, the defendant cannot make a plea of defense and the plaintiff never loses the suit because the judgment merely confirms the simple fact that the plaintiff had filed a judicial claim in the previous suit. A new form of declaratory judgment collides with legal doctrine around lawsuits. The question of whether it would be beneficial to adopt such a form of judgment should thus be critically reviewed, despite this contradiction.

The validity of the majority opinion's grounds supporting a new form of declaratory judgment will be examined, with regard to: (1) the purpose of the extinctive prescription, (2) whether a new form of declaratory judgment can be acknowledged as a judicial claim, and (3) whether a new form of declaratory judgment possesses the interest of declaratory judgment.

II. Purpose of Extinctive Prescription

1. Theories about the Purpose of Prescription

Prescription is a legal system that generates legal effects such as the acquisition or extinction of rights, when a *de facto* situation has existed for a long time. In Korea's Civil Act, extinctive prescription is stipulated in the General Provisions section and acquisitive prescription is stipulated in the Real Rights section. Traditionally, the following three theories have been proposed to explain the purpose of prescription.[5)]

First, if a certain *de facto* situation remains over a long period of time, society trusts that the situation corresponds to actual legal relations and thus creates various legal relations based on it. Even if the situation turns out to be contrary to actual legal relations, denying the existing situation would jeopardize legal security.

Second, prescription relieves the difficulty of proof. As time passes, evidence gets lost and witnesses' memories fade away. On that ground, it becomes extremely complicated to reveal the truth about rights and duties.

Third, those who neglect to exercise their rights for a long time do not deserve to be protected by the legal system. After a long period of non-exercise of a right, an obligee might forget the existence of the obligation; abruptly exercising their right would thus be a "surprise attack" on the obligor. By the principle of good faith, the rights-holder should exercise the right in time, so that it does not become a surprise attack.[6)]

2. The Majority Opinion's Stance on Extinctive Prescription

According to the majority opinion, the reason that the prescription system exists is to respect the long-maintained *de facto* situation. This is

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5) Yoonjik Kwak & Jaehyung Kim, Minbeobchongchik [General Provisions of Civil Act] 416-417 (9th ed. 2019); Tucksoo Song, Minbeobchongchik [General Provisions of Civil Act] 448 (4th ed. 2018) (In Korean).

6) Yeonkab Lee, Juseokminbeob [Civil Act Commentary] 757, 755-887 (Yongdeok Kim eds., 5th ed. 2019) (In Korean).

indicative of the concept that "Equity aids the vigilant, not those who slumber on their rights." Since the latter has more weight in case of extinctive prescription, when rights-holders assert their judicial rights of claim and demonstrate that they are not slumbering on their rights, extinctive prescription is interrupted.[7)]

These statements indicate that the majority opinion puts emphasis on the third theory among the three traditional explanations presented above: the "restriction on non-exercise of rights". Therefore, it intends to approve the interruption of running of extinctive prescription as easily as possible—to the extent that, when rights-holders somehow show even a minimal level of intent, they are "not slumbering on their rights". This explains why the majority opinion is in favor of broadening the range of a judicial claim, by allowing rights-holders to interrupt extinctive prescription with a simple declaratory judgment, which merely seeks declaration of the fact that a judicial claim was filed in the previous suit.

3. The Balance Between Extinctive Prescription and Interrupting the Running Thereof

The expiration of a right, just because of the lapse of time, would be a harsh consequence for a rights-holder. The Civil Act provides not just for extinctive prescription but also for intervention therein, to balance the conflicting interests between rights-holders and obligors.[8)] Balance should thus also be considered in the case of acknowledging a judicial claim; this is one cause for interrupting the running of extinctive prescription.[9)] Nonetheless, a new form of declaratory judgment allows a rights-holder to interrupt the extinctive prescription with almost no effort. This is because the defendant cannot file any defense in the lawsuit and the extinctive prescription period extends infinitely, as if the prescription system did not exist at all. Consequently, the rights-holder's interests outbalance the

7) Supreme Court [S. Ct.], 91Da32053, Mar. 31, 1992 (S. Kor.).

8) Supreme Court [S. Ct.], 2018Da22008, July 19, 2018 (S. Kor.).

9) Jongbae Won, *Sihyojungdaneul wihan saeroun bangsig-ui hwaginsosong-e daehayeo [On the 'New Form of Litigation Seeking Confirmation' for the Interruption of Extinctive Prescription]*, 65 Kyungpook Natl. U. L. J. 199, 211 (2019) (In Korean).

obligor's interests.[10)]

As examined above, the majority opinion deems extinctive prescription a "restriction on non-exercise of rights." However, imposing a penalty on "those who slumber on their rights" is not the one and only purpose of the prescription system. On the contrary, critics have noted that not protecting those who slumber on their rights is merely an additional ground for relieving the difficulty of proof and cannot be grounds for the prescription system itself.[11)] Failing to exercise one's right for a long period cannot be the sole premise for extinguishing said right. In a prior case, the Korean Supreme Court decided that—as the extinctive prescription is a cautiously legislated legal system that had been honed by historical experience, with the purpose of managing growing uncertainty due to the lapse of time—legal security should be seriously considered.12) That is, the Supreme Court also acknowledges the first and the second theories among the three traditional theories.

Along with the traditional theories, various ideas have been suggested to explain the purpose of extinctive prescription. First, extinctive prescription reduces the burden of preparing for the suit. If there were no extinctive prescription, rights-holders could file lawsuits whenever they wanted; obligors would have to be endlessly prepared for such lawsuits. Combined with the previous problem—in which a trial might be held based on distorted evidence, due to the passage of time—obligors are compelled to collect evidence more thoroughly. Even when obligors fulfill this obligation, they must keep the evidence of this fulfillment; this becomes extra burden to them, both mentally and physically. Therefore, extinctive prescription should exist to prevent the waste of resources due to excessive preparation for lawsuits.[13)]

Second, extinctive prescription protects the obligor's expectation that rights-holders would not exercise their rights. If rights-holders do not exercise their rights for a significantly long time, obligors might establish

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10) *Id*., at 222-223.

11) Dayoung Jeong, *Sihyojungdan-eul wihan jaepansang cheonggu [A Study on a Lawsuit for Suspension of the Extinctive Prescription]*, 36 J. Prop. L. 107, 119 (2019) (In Korean).

12) Supreme Court [S. Ct.], 2009Da44327, May. 27, 2010 (S. Kor.).

13) Yeonkab Lee, *supra* note 6, at 760-761.

various legal relationships with a third party, based on trusting that rights-holders would not exercise their rights. Abruptly exercising a right after a few decades would jeopardize the legal relationship between the obligor and this third party.[14)]

To preserve the abovementioned purposes, the running of the extinctive prescription should be protected—unless there are circumstances that outweigh those purposes. As the majority opinion has pointed out, the prescription system respects a *de facto* situation that has been maintained for a long time. Interruption is an institution that ceases running of the extinctive prescription period, when a fact arises that goes against the current situation of "non-exercise of rights."[15)] That is, a significant enough reason should be given to overturn the current situation, interrupting the extinctive prescription.

Under the current law, litigation seeking performance interrupts extinctive prescription. Demanding a specific performance clearly shows that rights-holders will not slumber on their rights from now on, and that they have a strong intent to exercise their rights. Consequently, litigation seeking performance successfully breaks the current state and interrupts the extinctive prescription.

In contrast, a new form of declaratory judgment merely confirms the existence of an event that happened in the past. The events of the past are already incorporated into the current state of affairs. It would be impossible to challenge the *status quo* with what happened in the past, unless it is due to the revelation of an unknown and staggering secret. However, the fact that a rights-holder filed a lawsuit is a simple and overt event. The majority opinion concludes that confirming such fact, through a new form of declaratory judgment, interrupts the running of extinctive prescription. This approach is not just contrary to the Supreme Court's own principle on interrupting the running of extinctive prescription. It also destroys the balance between the running of extinctive prescription and its interruption.

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14) Yeonkab Lee, *supra* note 6, at 759.

15) Supreme Court [S. Ct.], 85Nu797, Nov. 11, 1986 (S. Kor.).

III. Judicial Claim

I. Circular Reasoning of the Majority Opinion

Art. 168 and 170 of the Civil Act provide that a judicial claim interrupts the running of extinctive prescription. Art. 2 (1) of the Court Organization Act stipulates that courts shall judge legal disputes and litigation. That is, a judicial claim should be a claim about specific rights or legal relations. A dispute over the existence of a simple fact cannot be an object of a suit.[16)]

The majority opinion is based on the argument that a new form of declaratory judgment constitutes a judicial claim and therefore interrupts extinctive prescription. This argument is supported by the assertion that a new form of declaratory judgment is different from the prior suit, because the subject matter is different. While the existence or absence of a specific claim is the subject matter of the prior suit, the subject matter of a new form of declaratory judgment is confined to interrupting the extinctive prescription of a claim. This excludes examining the actual existence or absence and scope of a claim.

However, such an argument is a circular reasoning; it is already premised on the idea that a new form of declaratory judgment is a judicial claim, while asserting that a new form of declaratory judgment can interrupt the running of extinctive prescription. Interrupting the running of extinctive prescription is a "result" of establishing a judicial claim.[17)] That is, the interruption of the running of extinctive prescription cannot be the subject matter of a suit. To accept the majority opinion's assertion, there must be a separate reasoning, suggesting the actual subject matter of a new form of declaratory judgment. Nevertheless, demanding a declaration that a judicial claim was established in the prior suit cannot be a judicial claim, as demonstrated by the following reasons.

16) Siyoon Lee, Sinminsasosongbeob [Civil Procedure Act] 222 (14th ed. 2020) (In Korean).

17) Jongbae Won, *supra* note 9, at 210.

2. The Criterion for a Judicial Claim

Theoretically, anything can be an objective of a claim or a demand. The current law sets several criteria for the legality of a judicial claim. One of the most important standards is that filing a judicial claim should be allowed only when the claim is an assertion about specific rights and duties.[18] For example, the Korean Supreme Court decided that a judicial claim that seeks revision or deletion of contents in a clan's pedigree is not permissible, because such a claim is not about the legal relations of property or status.[19] As illustrated in the following reasons, a judicial claim should be restricted to claims around actual rights and duties to prevent an abuse of lawsuit.

First, the risk of becoming a defendant of a lawsuit would increase if judicial claims were unlimited. Suing others would become prevalent, even around trivial arguments. When a lawsuit is filed, defendants have no choice but to collect evidence, write documents, and attend court. It would rob a significant amount of time and effort from defendants, thereby disturbing the tranquility of their daily lives. Judicial claims should thus be properly limited, to promote the predictability and stability of legal relations.

Second, the court has limited resources. As noted above, the number of lawsuits would surge, while the number of judges and courts is restricted. The court's capacity would be allocated to the tide of derisory claims. More serious cases, which require thorough examination, would consequently go unresolved.

Third, the intervention of public authority should be regulated. "The Principle of Autonomy" is the fundamental spirit of the Civil Act. When a judgment becomes final and conclusive, the state authority irreversibly settles a dispute between the plaintiff and the defendant and even grants the plaintiff a compulsory execution against the defendant's will. Abusing judicial claims would increase individuals' dependence on litigation, rather than on discussion and negotiation. A judicial claim should be a last and exceptional resort, when there is no alternative but for the authority of the

18) Siyoon Lee, *supra* note 16 at 222.

19) Supreme Court [S. Ct.], 92Da756, Oct. 27, 1992 (S. Kor.).

court to determine litigants' actual rights and duties.

3. Is a New Form of Declaratory Judgment a Judicial Claim?

The Korean Supreme Court has broadly construed judicial claims as litigation seeking performance, a declaratory judgment, a claim of obstruction removal, damages, and/or the restitution of undue benefit.[20] These examples satisfy a minimum standard, in that they deal with actual rights and duties.

On the other hand, a new form of declaratory judgment merely confirms the fact that a judicial claim was previously established. This does not imply a specific right or a legal relation. Even the majority opinion states that the judgment "has no effects under substantive law other than the validity of interrupting extinctive prescription" and "there is no need to examine the substantive legal relationship." Also, "Even if there exists ground for objection that occurred following the closing of argument in a prior suit, an obligor does not have to assert the same and the court does not have to deliberate albeit the assertion by the obligor." The majority opinion thus admits that a new form of declaratory judgment does not involve actual rights and duties. A new form of declaratory judgment is therefore not a judicial claim and cannot be a cause for interrupting the running of extinctive prescription, under the current Civil Act.

4. Range of Interruption of the Running of Extinctive Prescription, Due to a Judicial Claim

Even if filing a lawsuit to seek a declaration that a judicial claim about a plaintiff's right had been established in the previous suit could be acknowledged as a judicial claim, the assertion that such a lawsuit interrupts the running of extinctive prescription of the plaintiff's right is contrary to the Supreme Court's stance.

There are two competing explanations about the range of extinctive prescription. The "confirmation of rights" theory asserts that interrupting

20) Supreme Court [S. Ct.], 79Da569, July 10, 1979 (S. Kor.).

the running of extinctive prescription is confined to those rights that had been declared by adjudication and that the *res judicata* effect thus occurs. According to the "exercise of rights" theory, as long as the right is exercised by a lawsuit, a *res judicata* effect is not required.[21)]

The Supreme Court has adopted exercise of rights theory, by asserting that a judicial claim does not have to correspond to the range of *res judicata* effect.[22)] A judicial claim that interrupts the running of extinctive prescription can be not just a lawsuit seeking the declaration or performance of a right—but also a lawsuit regarding the fundamental legal relations that created the right.[23)] For example, the Supreme Court has decided that a lawsuit to register the establishment of the right to collateral security is a judicial claim—one that interrupts the extinctive prescription of the secured claim.[24)]

However—even though the exercise of rights theory adopted by the Supreme Court acknowledges the interruption of running of extinctive prescription more broadly than the confirmation of rights theory—a new form of declaratory judgment does not exceed the threshold of the exercise of rights theory. A new form of declaratory judgment merely declares that a judicial claim was established in the prior suit. The fact that there was a judicial claim about a right has no relevance to the right itself, nor to the legal relationship behind it. Even from the viewpoint of the exercise of rights theory adopted by the Supreme Court, such a claim does not fall into the range of a lawsuit that interrupts the running of extinctive prescription of the right.

IV. The Interest of Declaratory Judgment

Logically, the scope of the objects that can be declared is limitless. Therefore, seeking a declaratory judgment is accepted only if a legitimate interest to seek a declaratory judgment—that is, "the interest of declaratory

21) Wonlim Jee, Minbeobgangui [Civil Act Lecture] at 402 (17th ed. 2020) (In Korean).

22) Supreme Court [S. Ct.], 79Da569, July 10, 1979 (S. Kor.).

23) Supreme Court [S. Ct.], 2011Da19737, July 14, 2011 (S. Kor.).

24) Supreme Court [S. Ct.], 2002Da7213, Feb. 13, 2004 (S. Kor.).

judgment" (*Feststellunginteresse*)—is acknowledged. Since a new form of declaratory judgment is a declaratory judgment, if it lacks an "interest of declaratory judgment" then it should be dismissed. The interest of declaratory judgment prevents both the courts and the interested parties from wasting time and effort on meaningless lawsuits.[25)]

The majority opinion has stated that a new form of declaratory judgment has no substantive effect, other than interrupting the running of extinctive prescription. However, as examined above, the assertion that a new form of declaratory judgment interrupts extinctive prescription is based on circular reasoning and the interest of declaratory judgment is acknowledged by that circular reasoning. A separate reasoning is required, to show that a new form of declaratory judgment shows the interest of declaratory judgment.

The interest of declaratory judgment could be acknowledged only if there is existing insecurity or risk to a plaintiff's rights or legal relations—and when a declaratory judgment is the most effective and appropriate measure to eliminate said insecurity or risk.[26)] That is, the interest of declaratory judgment requires the following three conditions. First, in terms of "legal interests," a declaratory judgment should affect the legal interests of a plaintiff, not their reflective or economic interests. Second, in terms of "existing insecurity"—insecurity and risk to a plaintiff's legal relationship should exist at the moment. Third, regarding "effective and appropriate measure to remove the insecurity"—there should be no effective and appropriate measure, other than declaratory judgment, to eliminate the insecurity.[27)]

The interest of a new form of declaratory judgment should thus be examined, via the above-mentioned criteria. The objective of a new form of declaratory judgment is to interrupt the extinctive prescription of a plaintiff's right. The first condition can be satisfied, as the plaintiff's right is "legal interest." If the extinctive prescription of the right is close to completion and the right is about to expire, then "existing insecurity" on

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25) Junghoo Oh, *Hwagin-ui iig-ui pandan-e gwanhayeo [On evaluation of the interest of declaratory judgment]*, 54 Seoul L. J. 163, 168 (2013) (In Korean).

26) Supreme Court [S. Ct.], 91Da14420, Dec. 10, 1991 (S. Kor.).

27) Siyoon Lee, *supra* note 16, at 237-242.

the legal interest could be acknowledged. However, as examined in the previous section, a new form of declaratory judgment cannot be a judicial claim that interrupts extinctive prescription. As a result, a new form of declaratory judgment is not an "effective and appropriate measure to remove the insecurity."

Thus, not only is a new form of declaratory judgment not a judicial claim—but such a claim cannot avoid dismissal, because the interest of declaratory judgment of the claim is absent. Art. 170 (1) of the Civil Act declares that a demand by way of judicial proceedings shall have no effect of interrupting prescription if the judicial action is dismissed, rejected, or withdrawn. Therefore, it is clear that a new form of declaratory judgment does not interrupt the running of extinctive prescription.

V. Conclusion

As the majority opinion has stated, extinctive prescription functions as a sanction on the non-exercise of rights and should be interrupted when the rights-holders show that they are not slumbering on their rights. Yet there should be a proper threshold for interrupting the running of extinctive prescription, to prevent the nullification of the prescription system itself. Facts that effectively break the current state of non-exercise of rights are required, to interrupt the extinctive prescription. A new form of declaratory judgment does not satisfy such criteria, as it merely confirms the existence of an already well-known event that happened in the past.

A new form of declaratory judgment is also not a judicial claim, since it merely confirms the fact that a judicial claim was established in the prior suit and does not deal with actual rights and duties. The interest of declaratory judgment is likewise not acknowledged. This is because there is no dispute as to rights or legal relations, nor does it provoke a risk or insecurity in the plaintiff's legal status. Therefore, under the current law, a new form of declaratory judgment is contradictory to legal doctrine about lawsuits. Considering the purpose of extinctive prescription, the benefits of adopting a new form of declaratory judgment in spite of such a contradiction are insufficient.

Recently, multiple countries have revised their prescription systems by

reestablishing the terms related to prescription and to the causes of interruption and suspension. In 2002, Germany adopted the Act on the Modernization of the Law of Obligations (*Gesetz zur Modernisierung des Schuldrechts*). As the term "interruption" (*Unterbrechung*) of running of prescription had been criticized—in that it does not properly specify that the prescription period starts again from the beginning—it was revised to "renewal" (*Neubeginn*). Renewal of the period of prescription is justified via acknowledgment of the claim by the obligor vis-à-vis the obligee and acts of execution by the obligee.[28] Additionally, a significant number of causes for interruption became causes for suspension.[29]

The French Civil Code was amended in 2008. The extinctive prescription was shortened to five years from the day on which the holder of a right knew, or should have known, the facts enabling him/her to exercise her/his right. The causes of interruption and suspension were also revised. Extinctive prescription is interrupted when rights-holders are under a situation that makes filing a lawsuit impossible, or when rights-holders and obligors are negotiating. Additionally, Art. 2254 para. 2 of the French Civil Code provides that the parties could make an agreement to add to the causes of interruption and suspension of extinctive prescription.[30]

Most recently, Japan fully revised its Civil Code in 2017. Interruption and suspension of prescription were changed into "recommencement" (更新) and "suspension of completion" (完成猶予). The grounds for the intervention of prescription are now (1) when there is a fact that clearly shows the intent to exercise a right, it becomes the cause of suspension of completion; and (2) when there is a fact that proves existence of a right, it becomes the cause of recommencement. Acknowledgement remains a cause for interruption and a clause was legislated, stipulating that negotiation among the parties becomes a cause of suspension of completion.[31]

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28) Reinhard Zimmermann, The New German Law of Obligation 143 (2005).

29) Yeonkab Lee, *supra* note 6, at 764-765.

30) Dayoung Jeong, *France minbeobsang somyeolsihyo-e gwanhan habui [The Agreement Relating to the Prescription in the French Civil Code]*, 71 Kor. J. Civ. L. 267, 290 (2015) (In Korean).

31) Seongsoo Kim, *Gaejeong ilbonminbeob(2017nyeon)-ui 'somyeolsihyo' [Extinctive*

The majority opinion criticizes the current legal practice, which files a performance suit as a subsequent suit for the interruption of running of extinctive prescription, for posing numerous challenges. These include the fact that the court may undertake unnecessary deliberation; that the obligor may be subject to dual enforcement; and that the obligee is placed in an uncertain situation, given that the legality of subsequent is determined based on vague standards. While these criticisms may be valid, there are limitations to fixing the problems of current legal practice via judicial interpretation.

If Art. 168 Subpara. 1 of the Civil Act—which provides demand as a cause of the interruption—is amended, then interrupting extinctive prescription through a new form of declaratory judgment might be possible. As Germany, France, and Japan have fully revised their prescription system according to societal changes, a Korean legislative solution is likewise required to revise the prescription system and improve current legal practice.

Prescription in the Revised Japanese Civil Code (Law of Obligations) (2017)], 12 Ajou L. Rev. 37, 45 (2018) (In Korean).