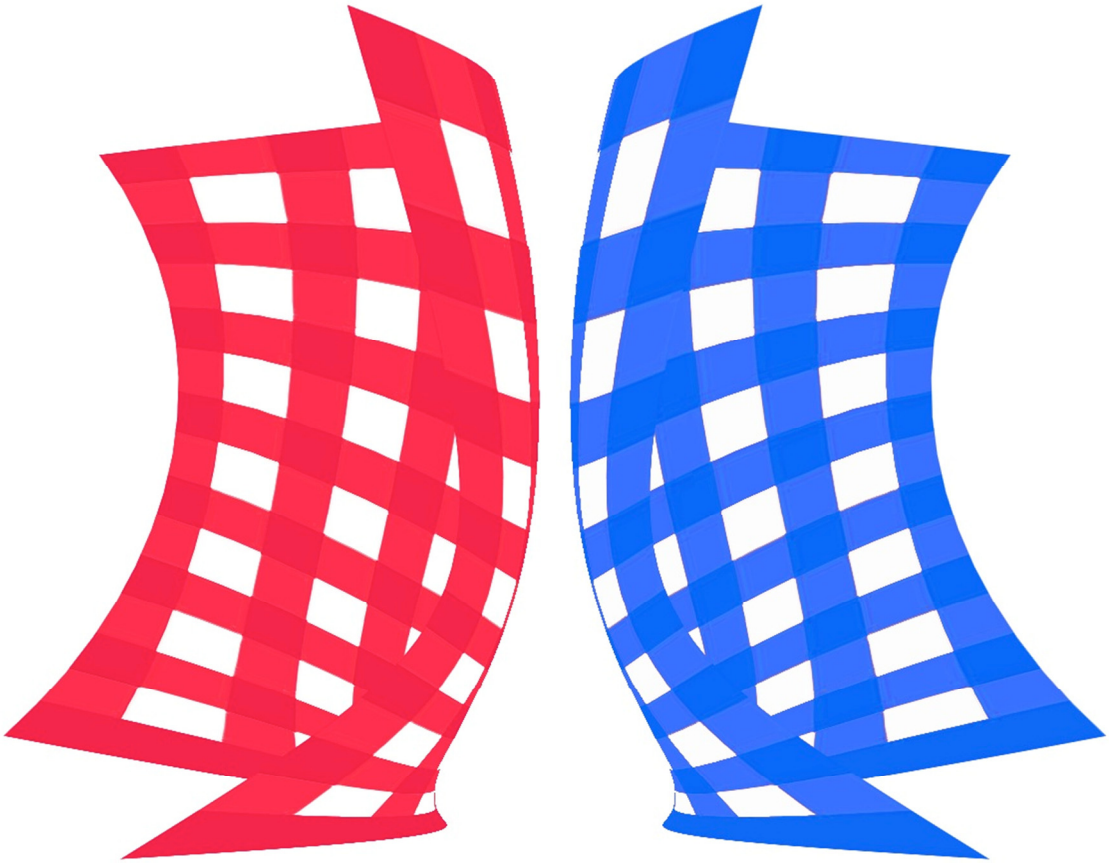
International Symposium on

Roles of the State in the Non-Profit Transfers



October 7-8, 2014

Graduate School of Law, Kyoto University

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Keynote

Empowering Non-Profit Transfers by the State

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I. Purport of the Symposium

This symposium on the "Roles of the State in the Non-Profit Transfers" addresses tasks related to public law theories of our joint research program, "Empowering Non-Profit Transfers by the State and Designing Public Services." During this two-day symposium, we have four reporters from Germany and three reporters and some commentators from Japan, who should provide insight to solve these problems from various perspectives.

In this keynote speech, I will clarify the key concepts and research tasks of this symposium as well as highlight some of the relationships among the reports in this symposium.

II. Key Concepts of the Research Program

1. Non-Profit Transfers

"Non-Profit Transfers" in the narrow sense mean private autonomous transfers of money and services outside the market (e.g., childcare, education, and nursing care inside the family, charitable donations, and volunteering). This concept includes social security, compulsory education, and taxation by state and local governments. The latter excludes an "autonomous" character, so the common determinant is "the transfer of money and services outside the market."

Generally, "Non-Profit Transfers" open up new perspectives that go beyond the traditional dichotomy of *Eingriffsverwaltung* (regulative administration and taxation) and *Leistungsverwaltung* (benefits administration) in German and Japanese administrative law scholarships. "Non-Profit Transfers" by the state include transfers of wealth both into and from the state. Although this symposium distinguishes these two types (Panels I and II), we should take a more integrated approach. The regulative administration includes administrative activities that do not involve the transfer of money or services.

2. State (Public Sector)

We should also consider the concept of the state from the perspective of *Mehrebenensystem* (multi-dimensional administrative law system). This results in two questions.

- Which organizations comprise the state? In addition to the local government,[1] public corporations and chartered companies can be included in this concept.

[1] Japan is not a federation state. Normal municipalities (characterized as territorial corps) consist of two layers (prefectures and cities/towns/villages). As of April 5, 2014, there are 47 prefectures (1 do, 1

- How should we handle non-profit transfers in a multi-layered system like the European Union?

Reports from Germany, which are prominent in academic discussion, should provide valuable insight to these difficult questions.

III. Research Tasks

This symposium focuses on the relationship between non-profit transfers in a wide sense and the role of the state. This theme is divided into two parts: support for non-profit transfers (in a narrow sense) by the state and designs of non-profit transfers by the state. The conclusions from the former are necessary to realize the latter.

parties considered	activities without a transfer of money or service	transfer of money or service	
		outside the market (non-profit transfers in a wide sense)	inside the market
public–private	regulative administration[2] intermediary administration	tax administration a) benefits administration	"private economy" administration b) benefits administration[3]
private–private	self-regulation, etc.	non-profit transfers in a narrow sense	private economy quasi-"non-profit" transfers[4]

to, 2 fu, 43 ken) and 1,718 cities/towns/villages (790 cities, 745 towns, and 183 villages). See http://uub.jp/prf/prefbase.html. After the annexation movement in the late 1990s, the number of cities/towns/villages was cut in half, but most combined cities lack central urban areas.

[2] Hiroki Harada, *Jishukisei no Kohogakuteki Kenkyu* [Self-Regulation from the Perspective of Public Law] (2007), p.10, defines the concept of regulation (in the context of administrative law scholarship) as external impacts on actors to let them choose conducts that conform with public interest, including direct regulation, indirect regulation, and framework regulation. This wide concept contains guidance administration but it no longer takes the traditional dichotomy of the regulative-beneficial administrations.

[3] Hiroki Harada, *Kokyoseidosekkei no Kisoriron* [Administrative Law Scholarship in the Multi-Dimensional System] (2014), p.225, classifies benefits administration into benefit without a return, benefit with a return, and public capital support. Typical examples of benefits with a return are public services (waterworks, public transportations) and public contracts (public works projects). Traditionally, public services and benefits without a return have been included in the benefits administration, while public works projects have been classified as a procurement administration or "private economy" administration.

[4] A factor of non-profit transfers can exist in the transfers inside the market. The problem is the concept of "non-profit." In the context of public services, this concept emphasizes the aim of the activities; "non-profit" here means activities pursued not for one's own interests. However in private law theories, the dividing point of the concept lies in the distribution of the wealth brought by activities of the corporation to its members. *See* Hiroyuki Kansaku, "Ippanshadanhojin to Kaisha – Eirisei to Hieirisei" [General Incorporated Associations and Companies], *Jurisuto* [Jurist] No.1328 (2007), p.39.

1. Support for Non-profit Transfers by the State

How the state should support non-profits transfers is considered from two perspectives: constitutional principles and policy-making guidelines from a specific vision of the state.

A. Constitutional Principles

- If the civil liberties protect non-profit transfers between private parties, regulations or taxation impeding transfers may be unconstitutional.
- If non-profit transfers between private parties are within the range of the principle of governmental responsibilities for social security (*Sozialstaatsprinzip*) or social rights, the state must support them on constitutional grounds and the state is bound by the equal treatment principle (*Gleichheitssatz*).

B. Policy-making Guidelines from a Specific Vision of the State

- The concept of *Gewährleistungsstaat* takes a more serious view of the efficiency of transfers than that of *Sozialstaat*. Hence, there is no direct connection between the concept of *Gewährleistungsstaat* and the policy to enhance public support for non-profit transfers between private parties.
- Due to financial difficulties, the Kyoto Prefecture[5] is inclined to reduce its benefits administration. In support of non-profit transfers between private parties, the benefits administration shares information with private parties that provide money. For example, the Division for Supporting Civic Activities (*Fuminryoku Suishin-Ka*) under the jurisdiction of the prefectural governor[6] supports activities of non-profit organizations and residents' associations, and the Division provides information by municipality on its website (e.g., supporting arrangements for marriage [*Konkatsu Jigyo*] in Kyo-Tango City[7]). It has insisted that this policy be based on the concept of *Kooperationsstaat* or the principle of subsidiarity. I doubt that it is the right recognition.

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[5] The population of *Kyoto-fu* [Kyoto Prefecture] is about 2,620,000 (that of Japan is 126,000,000). It covers an area of 4,613 square kilometers (Japan is about 378,000 square kilometers) and 15 cities, 10 towns, and 1 village. Kyoto City is an ordinance-designated major city with a population of about 1,470,000 and covers an area of about 828 square kilometers (the per-square-kilometer population density of the city is 1,780). The Kyoto Prefecture extends north and south; urban areas, including Kyoto City, are located in the southern part, while the northern part is mostly forest and its population is small (*Tango* area [2 cities and 2 towns] is about 100,000; *Chutan* area [3 cities] is about 200,000; *Nantan* area [2 cities and 1 town] is about 140,000).

[6] As of June 30, 2014, eight departments (general affairs, policy-making, public welfare, culture and environment, health and welfare, industries and labor, agriculture, and constructions and transportations) are under the jurisdiction of the governor of the Kyoto Prefecture. The Department of Public Welfare has **seven** divisions (general affairs, prevention of damage and atom safety, firefighting, creating safer communities, supporting civic activities, gender equality, and protecting juveniles).

[7] Kyo-Tango City lies in the northernmost area of the Kyoto Prefecture. Its population is about 56,000 (502 square kilometers, the per-square-kilometer population density: 112). It was formed by the annexation of six towns and has been troubled by the declining birthrate and aging population.

2. Designs of Non-profit Transfers by the State

Similarly, the design of legal systems, especially for benefits administration, is considered from the same two perspectives: constitutional principles and policy-making guidelines from a specific vision of the state.

A. Constitutional Principles

- From an academic perspective, there are some constitutional limits on the benefits administration, which are closely related to the concept of *Sozialstaatsprinzip* or realizing social rights.
- Discourse in Japanese constitutional law scholarship is **not so profound**.

B. Policy-making Guidelines from a Specific Vision of the State

- Legal schemes of the Japanese public utilities (electricity,[8] gas,[9] and water) depend on the ministry responsible. Electricity and gas are regulated as public enterprises, while water service is included in benefits administration in order to materialize the idea of *Leistungsstaat*.[10] Disposal of waste matters is divided into two schemes; normal trash is treated by cities/towns/villages as a part of benefits

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[8] Electricity is provided mostly by ten regionally monopolistic electronic power companies. One of them, Kansai Electronic Power Company, supplies power to six prefectures in the *Kinki* Region (Osaka, Kyoto, Hyogo, Nara, Wakayama, and Shiga).

[9] The Gas Utility Industry Act regulates enterprises that supply gas with gas pipes. The general gas business (city gas) exists only in urban areas. For example, Osaka Gas Company supplies gas to the *Kinki* Region, but its supply area is much smaller than that of the Kansai Electric Power Company; unlike electricity, which is supplied to all areas, gas is only supplied in the southern part of the Kyoto Prefecture. Although electricity reaches almost 100% of households (8,260,000 houses), urban gas reaches on average 80% of households in its supply areas (2,800,000 houses). There are about 200 urban gas companies in Japan; Osaka Gas Company is one of the Big-4 companies. On the other hand, there are 2,600,000 houses using LPG (small gas tanks) in Japan, making its market shares equal to urban gas. Because there are over 20,000 LPG companies, which are not under the regulations of public enterprises, prices vary significantly, depending on the company and even by customer for one supply company.

[10] The Waterworks Law requires cities/towns/villages to supply drinking water to all households. According to the Yearbook on the Local Public Utilities in 2012, 2,123 water supply businesses are run by municipalities (water supply: 1,354 [supplying to the tail end: 1,281, supplying service water: 73, small water-supply: 769]; About 48.7% of water supply businesses supplying to the tail end provide service to less than 30,000 citizens. Although water is indispensable for our daily lives, the price of city water differs by municipality because every supplier sets its own price. For example, if a household uses 20 cubic meters of water per month, the price in Kyoto City is 2,959 yen whereas that in Oyamazaki Town is 4,320 yen.

Although Oyamazaki Town has access to sufficient groundwater, Mukou City, Nagaokakyo City, and Oyamazaki Town (in the Otokuni area) must buy a certain amount of water from the Kyoto Prefecture due to the historical background of the construction of Hiyoshi Dam. The cost of city water in Oyamazaki Town is more expensive than in Kyoto City. The town was forced to institute a lawsuit against the Kyoto Prefecture. On the other hand, the price of sewerage has not change dramatically: 1,976 yen in Kyoto City compared to 1,512 yen in Oyamazaki Town. I conjecture that the difference in sewerage rates is due to the (old) Ministry of Construction, which developed the sewerage as an urban infrastructure. Indeed, in Kyo-Tango City, which has a less developed infrastructure has higher costs (city water: 3,401 yen, sewerage: 3,137 yen).

administration, while industrial waste is disposed of by private companies under the regulative administration of the prefectural governors (via environmental administrations and police administrations).

- The gradation of responsibility of the state to guarantee necessary services for daily life should be considered. Important factors include the necessity of a service and whether the service can be obtained in the market.

IV. Research Methods

Strongly influenced by the German theory of *Referenzgebiete* or reconsidering *Vorverständnis der Verwaltungsrechtswissenschaft*, our joint research program is very conscious of the limits of legal methodology (*juristische Methode*) from the viewpoint of administrative law scholarship. Our approach emphasizes research in individual administrative law fields (*besonderes Verwaltungsrecht*) that belongs to the Renaissance of the *Staatslehre*.

Which method that should be used to design the legal system is unclear. For example, the defect of administrative enforcement (*Vollzugsdefizit*) is based on the research methods of sociology or the study of public administration, and these types of proposals tend to reinforce the enforcement. However, the legal system must depend on concrete goals in the policy area. The defect in controlling public interest corporation[11] or incorporated social welfare institutions in the context of preferential taxation,

[11] For many years, the Japanese Civil Code has stipulated regulations on public interest corporations. Article 34 of the old Code approved the right of each responsible minister to give a corporation a charter for legal personality with discretionary powers and to control the corporations strongly. However, this regulation framework lacked provisions for the so-called intermediate corporations whose aims are neither public interest nor moneymaking. The Law Concerning the Promotion of Specific Non-Profit Organization Activities (the NPO Law) was enacted in 1998, and Intermediate Corporations Law was enacted in 2001. Furthermore in 2006, regulations in the Civil Code were revised to improve the transparency of public interest corporations and to promote non-profit organization activities. *See* Keizo Yamamoto, *Minpo Kogi I* [Civil Law I] (3rd ed., 2011), pp.451-457.

There are currently three types of public interest corporations: general incorporated associations or foundations approved in the procedure of the Act on General Incorporated Associations and General Incorporated Foundations, non-profit organizations on the NPO Law, and corporations based on individual acts (religious corporations, incorporated educational institutions, incorporated social welfare institutions). Preferential taxation for public interest corporations in a narrow sense is only given to public interest incorporated associations or foundations, which are general incorporated associations or foundations that must receive approval based on the Act on Authorization of Public Interest Incorporated Associations and Public Interest Incorporated Foundation.

The old public interest corporations that continued as general incorporated associations or foundations after 2008 had to select one of three options by 2013: to become a public interest incorporated association or foundation, to become a general incorporated association or foundation, or dissolution. Even if it chose to become a general incorporated association or foundation, it must spend property formed in the old public interest corporation due to the preferential taxation on activities promoting public interest according to the Spending Plan for Public Interest because the property should be given back to society. There is an interesting case with a public interest association founded by a religious corporation related to this point. *See* Hikaru Takagi, "Ninka=Hojukoisetsu no Shatei (1) (2)" [The Academic Scope of the Approval as a Supplementary Act], *Jichi Kenkyu*, Vol.90 No.5 (2014), pp.3-15; No.6, pp.3-15.

for example, could pragmatically support non-profit activities. Hence, the relationship between academic methods and policy proposals is not unique.

V. Closing Remarks

I hope that this symposium can contribute not only to the specific questions raised in the panels but also to general principles, such as what is a raison d'être of the public law and public law scholarship?

Panel 1:
Aspects of Financial Transfers into the State

Taxation Without Redistribution

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I. Introduction

Taxation is always discussed, analyzed, and justified based on its effects on the distribution of income and wealth. When the Diet introduces, modifies, or abolishes a tax, legal and economic scholars pay attention to how it affects people's income, wealth, or other indicators that denote well-being. In the political process, it is almost impossible to discuss the tax system without referencing redistribution. Conversely, whenever the government plans redistribution, one of the means is taxation. In such cases, redistribution is the purpose of taxation and not the effect. Hence, taxation and redistribution seem to be firmly linked.

However, efficiency analysis in economics strongly advocates for neutral taxation (i.e., taxation independent of people's choices). For example, if chocolate ice cream is taxed but not vanilla ice cream, some consumers will choose vanilla to avoid the tax burden. This change in choice decreases the consumer surplus, causing welfare loss (dead weight loss). To be neutral, taxation should not distort people's free choices and should defer to the market mechanism of distribution assuming that the market operates ideally.

What do taxation and redistribution mean? Can taxation with the purpose of redistribution be neutral? Can taxation exist without a redistributional effect?

This paper argues three points. First, the line between a tax and a non-tax is unclear and meaningless. Second, redistribution is very difficult to define. Third, neutral taxation that can carry out redistribution is feasible.

II. What is a Tax?

In order to discuss taxation, it is important to differentiate between a tax and a non-tax. However, the line between the two is unclear because the purpose and reason to draw the line is not well grounded. Article 84 of the Constitution of Japan provides that "No new taxes shall be imposed or existing ones modified except by law (statute) or under such conditions as law may prescribe." Article 30 also states that "The people shall be liable to taxation as provided by law." The Supreme Court of Japan has interpreted the words "tax" and "taxation" in these provisions to mean a monetary transfer to the government that meets the following necessary conditions: compulsiveness, no consideration, purpose, and generality.[1] If these conditions are clear, then a well-defined tax concept exists. However, some of them have ambiguities, as shown below.

[1] Supreme Court Judgment, March 27, 1985, 39 Minshu 247.

1. Compulsiveness

The transfer should be initiated by the taxing power of the national or local government. As an attempt to define "tax", this statement by the Court fails because the word "taxing power" makes the logic circular. The Court should have said that the transfer ought to be compulsory, not voluntary, and the government ought to have the power to enforce payment. However, most taxpayers submit tax returns and make payments without any administrative actions. This system of return and payment is called a voluntary return and payment system. Although negligence is subject to penalty where the taxing agency assesses the tax obligation, cases of negligence are very rare.

In one famous case, the Supreme Court ruled that the "corporate income tax" of Guernsey Island is a tax, even though its tax rate is selectable; the rate is chosen by the taxpayers.[2] This choice is very favorable for multinational corporations because they can circumvent the CFC (Controlled Foreign Corporation) rules in their home jurisdictions through the taxpayers' choice. Under the CFC rules, if the tax rate of the host jurisdiction, which is the jurisdiction where the controlled foreign corporation (subsidiary) is established, is below a threshold rate prescribed by law, which is two-thirds of the corporate tax rate according to Japanese law, then the home jurisdiction taxes the income earned by the subsidiary in the host jurisdiction, even if the income is not distributed to the parent corporation in the home jurisdiction. Although the CFC rules are extraterritorial taxation because it taxes foreign corporation's foreign income, almost all developed countries have this type of taxation, which is called "anti-tax haven" or "anti-deferral" taxation.

In the Court case, a subsidiary of a Japanese insurance corporation in Guernsey Island, which is a tax heaven, chose Guernsey's tax rate, which is just above the threshold rate where Japan starts to tax the CFC's income. The Japanese tax agency imposed the CFC tax on the parent company on the theory that Guernsey's "corporate income tax" is not a tax due to the taxpayers' entitlement to choose the rate. However, the Supreme Court held it is a tax mainly because the levy is imposed in the form of tax and after the taxpayers set the rate, the tax authority of Guernsey enforces payment.[3] This decision shows the ambiguity in the first condition.

2. No Consideration

The transfer should not be a consideration for specific goods or services. Tax is a consideration for living in a civilized society, but the word "specific" in this statement excludes general governmental benefits such as police, national defense, and elementary education. However, it is difficult to distinguish between specific and non-specific. As discussed later, a very well known case questioned this.

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[2] Supreme Court Judgment, December 3, 2009, 63 Minshu 2283.

[3] As a result, the Court permitted the insurance company's tax avoidance structured by the Guernsey's government. This permissive attitude may extend the wealth disparity because the rich have considerable chances to exploit tax rules to avoid taxation, while poor working people do not.

3. Purpose

The transfer should be to raise revenue to meet the expenses of conducting governmental functions. Although this requirement is designed to distinguish taxes from fines or other monetary penalties, what constitute a government function is debatable. Is redistribution one of these functions? Some have argued that since taxation performs poorly in redistribution, redistribution should be carried out by other means, including transfer payments and benefits in kind.

The scope of this argument should be extended to governmental spending, because regardless of whether taxation is an adequate tool for redistribution, tax money funds almost all governmental activities, which inevitably affect wealth distribution. For example, higher educational institutions in Japan, including private universities, are primarily operated by tax money. If only wealthy people and their children can afford such an education, the governmental function to operate and subsidize higher education might have regressive economic effects and increase inequality, even if the tax system itself is progressive with respect to redistribution. On the contrary, if this spending of tax money gives poor people an increased opportunity for higher education relative to higher income people, it has redistributional effects. Thus, the argument about the purpose or effects of taxation has limited validity from the viewpoint of redistribution. However, this does not mean that the effects of taxation on redistribution can be ignored. Instead the effects must be accurately estimated in order to evaluate the total effects of governmental activities.

Finally, since almost all taxes affect redistribution, it is meaningless to exclude redistribution from the purposes of taxation in defining what a tax is. Redistribution is surely a governmental function, and taxation is one of the tools. However, the difficulty in determining the redistributional effects of taxation by itself makes the boundary of tax ambiguous.

4. Generality

The transfer should be levied on all of those who satisfy the prescribed conditions. However, this wording is unclear on whether a tax can be levied on a few or specific persons (individuals or corporations). This type of taxation is called “snipe” taxation. For example, nuclear fuel–related taxes are imposed by local government usually on only one entity, the electric power company in the area. Is this levy really a tax or just an expropriation (taking) without compensation that is prohibited by the Constitution? The line is difficult to draw.

Another example is the exit tax, which is a sort of capital gain tax without realization (sale or other disposition) that is imposed on the increased market value (unrealized capital gain) of a taxpayer’s property when a taxpayer changes his or her tax status from a resident to a non-resident. This taxation is required because as a Japanese resident exits the country, it is the last chance for Japan to tax capital gains accrued on his or her property. However, it entails a great deal of compliance costs and administrative resources to evaluate unrealized gain accurately. Considering this difficulty, this tax may be limited to super rich individuals. If so, this would be similar to

a snipe tax or expropriation without compensation. Actually the Treasury Department hopes to introduce such tax in April 2015 with further limitation on the targeted taxpayers. According to the bill, only those who intently leave Japan in order to avoid Japanese taxation on their capital gains are subject to this tax. However, if it is imposed on a very few individuals, it may not satisfy the requirement of generality to be a tax.

5. A Specific Example — National Health Insurance

Let's examine a well-known Supreme Court case about the levy of a public health insurance premium. Japan has a national health insurance system, which demands that all people be insured by publicly operated insurance organizations.[4] Employees and their families are insured by the Society-Managed Health Insurances, which are public legal entities organized by employers and employees by a special law under the supervision of the Ministry of Health, Labour and Welfare. However, this Court case involved insurance for non-employees (sole proprietors and unemployed persons) and their families. They are required to join the National Health Insurance System, which consists of health insurance plans operated by local governments (municipalities). The issue in front of the Court was whether the premium of this insurance system, which is imposed by the local government (Asahikawa City), is a tax subject to Articles 84 and 30 of the Constitution that require a law to impose a tax (a local ordinance in this case), In this case, the premium was determined not by a city ordinance but by the discretion of the mayor according to the framework provided by an ordinance. The Court ruled that the premium is not a tax because it is a consideration for insurance coverage, a specific service and the purpose of the levy is not to raise governmental revenue but to share the cost of medical care among the insured. However, the Court continued to state that because the payment of the premium is mandatory and the local government has the power to levy and collect the premium in the same manner as taxes, the purport of Articles 84 and 30 should apply, and that non-tax levies are subject to the principle of taxation by law required by the Constitutional provisions, depending on the degree of compulsiveness in the enforcement, the purpose of the levy (how the levied money is spent), and other characteristics of the levy and the system. Thus, the decision requires that the city ordinance provide a basic method to calculate the amount of the premium, which the ordinance already did, but the mayor could determine its exact amount. The decision was a victory for the city and the mayor.

This judgment calls for reflection. Although the premium levy does not come under the Constitutional concept of a "tax" without satisfying the conditions of non-consideration and a revenue raising purpose, the Court applied the "purport" of Articles 84 and 30 to the levy, considering its enforcement process, purpose, and other features. This soft and indirect application has even further blurred the boundary between a tax and a non-tax. The Court paid careful attention to the fact that only one-third of the cost of the insurance system is covered by premiums, and the rest is

[4] Supreme Court Judgment, March 1, 2006, 60 Minshu 587.

from the general revenue (tax money) of the city. The reason why so much tax money is diverted into the system is because the insurance system is mostly for unemployed people and their families, a significant number of who are so poor that the full levy cannot be charged. In addition, the amount of the premium is based on the income of the insured (in some municipalities the amount of the property is also taken into account) plus an amount per capita. Thus, the poorer the insured, the more the system consumes tax money. This fact makes the levy more like tax and less like an insurance premium. The finances of the insurance system are managed by the local government not by the group of the insured and the insurer, and the cost of the system, which is funded by premiums and tax money, is partially allocated according to one's ability to pay.

The decisive point that distinguishes a levy from a tax, the Court said, is the relevance between the insurance coverage and the premium levy. Generally speaking, insurance coverage is a specific benefit (service) acquired with the payment of premium. Indeed, the coverage is a counter-value of the premium, and no coverage is offered without payment. However, the national health insurance does not work this way because the insurance is mandatory and all people must be insured, even if they cannot pay the premium. This is why many insured are exempt from the premium and its amount is partially based on their income. Then what is the relevance between the coverage and the premium? The Court did not explain clearly. In reality, recently nonpayment without permission for an exemption has resulted in a suspension of coverage. Though compulsory collection similar to that of taxes is possible, local governments seldom opt for this. It is a well-known social issue that many people are virtually uninsured, though they are legally still insured. The relevance observed by the Court should be understood against this background.

6. Summary

The above discussion casts doubt on the significance of the distinction between a tax and a non-tax. Not only is the line unclear, but also why the line is drawn is uncertain. The national health insurance system operates via a mixture of tax money and premiums, but the exact ratio changes annually. Is there any merit in classifying the premium as a tax? Regardless of the answer, it is important to discuss what kind of money transfers national or local governments can levy, how they should be enforced, and what, other features, if any, are necessary to be classified as a tax.

These discussions mostly belong to policy choices. In legal terms, the Constitution only demands that if a government, national or local, levies a money transfer with compulsive enforcement, such transfer should be prescribed by law to the extent of its compulsive nature and other features, whether it is a tax or not. Thus, formulating "tax" as a legal concept has a limited scope of validity.

III. Redistribution and Neutrality

The word "redistribution" means to "distribute again." In order to redistribute, there must be an original distribution, or an original state (status quo ante). A typical

thought is that people created the original state without governmental intervention, and redistribution by the government modifies it. Based on this assumption, arguments for and against redistribution are adduced. Libertarians generally believe redistribution is wrong because it distorts free choices of people, except in cases where the original state is created through unjust means. Material egalitarians demand redistribution to equalize people's possessions. Policies of redistribution, including tax policies, are formulated in between these extreme views. However, are these assumptions correct? Did the original state ever exist?

1. Neutrality

The answer is of course no, historically. When we were born, the government was already established and influencing people's choices. Hundreds or thousands years ago, it was there. However, an ordinary way to think about redistribution is to imagine an original state without the influence of government and then to examine each governmental function. If a function does not change people's choice, it is regarded as neutral.

For example, assume there are only two goods, chocolate ice cream and vanilla ice cream, and the government starts to impose a consumption tax. If only vanilla ice cream is subject to the tax, some consumers will change their mind from vanilla to chocolate. This is a distortion of people's choice, and the tax is not neutral. This distortion is called the substitution effect. Note that even if the tax is imposed neutrally, that is, even if people do not change their choices between chocolate and vanilla, they cannot afford to consume the same quantity due to the tax burden. This is called the income effect. These are the basics of economics, but behind them, the aforementioned assumption is present.

Based on a world without taxation, the neutrality of a tax can be evaluated. Furthermore, based on a world without government, the functions of the government, including redistribution, can be evaluated. However, this argument depends on the plausibility of the imagined original state. What state is it? Assume a world without a national defense, police, elementary education, consumer protection, and other regulations. This world would be very chaotic and unsafe. People could not keep their property or even their lives. So they would cooperate with each other to seek safety and restore social order. We call such an assembly of people a government. Thus, a world without government seems unimaginable, and the above argument is not persuasive.

Then, is neutrality or no governmental intervention meaningless? No, but its validity is microscopic. In the example of chocolate and vanilla ice cream, a neutral consumption tax is one that does not change any consumer's choice and achieves neutral results if and only if the state before the taxation is neutral. However, there are many taxes as well as non-tax monetary transfers that affect people's choices. For example, cacao producers in the Ivory Coast may be more subsidized than vanilla planters in Indonesia. If so, rather than imposing a neutral consumption tax, taxing chocolate at higher rate than vanilla might improve the neutrality of the end results.

However, counterarguments are also possible, such as the effects of another country's subsidies to the producers are too remote to evaluate.

We can generalize this argument to contend that the original state is too remote to be a base of evaluation. Thus, analysis from the viewpoint of neutrality only shows if a tax or governmental transfer favors or disfavors its target compared to the state before the tax or transfer. In our example, it only indicates how the relative positions of chocolate lovers and vanilla lovers have changed, but it cannot elucidate whether a tax or a transfer improves the neutrality in absolute terms.

The above discussion indicates that identifying redistributional effects is very difficult. Since redistribution means "to distribute again" by the government, essentially all governmental actions entail some redistributional effects, but quantifying them is almost impossible. Analysis of (non) neutrality only indicates whom or what is favored. This observation implies that one's attitude toward a governmental action and its redistributional effect, whether he or she approves or disapproves, mostly depends on his or her opinion of the present situation.

2. Benefit Theory

If the government "reimburses" the exact amount of a tax to the taxpayer who paid it, then there is not an economic effect and redistribution does not occur. As we discussed earlier, the economic effects of taxation should be evaluated by the expenditures of the taxed money. The benefit theory of taxation starts from this point. If taxation retrieves the exact value of the benefits that the government has conferred, there redistribution does not occur. This thought can be extrapolated to mean that as long as taxes are considerations for such benefits, there is no redistribution and the taxation is neutral.

Libertarians and egalitarians often adopt the benefit theory. Libertarians strictly limit the scope of neutral taxation and demand the proof of why redistribution through taxation is necessary. Egalitarians urge that income taxes and property taxes are necessary based on the benefit theory that all the income we earn and all the property we hold are benefits conferred by the nation because without the governmental protections our income, property, and even our lives would disappear. Furthermore, because benefits should be evaluated in terms of personal satisfaction, the law of diminishing marginal utility justifies progressive taxation.

The benefit theory has several weaknesses. First, neutral taxation (i.e., taxation without redistribution) can be identified only by evaluating governmental benefits, which is impossible as shown above. Second, the time when the benefits are conferred may be very distant from the time of taxation. Especially in an egalitarian's understanding of the theory, this timing difference must be very large. However, reducing this difference may alter the definition of a tax. If a monetary transfer to the government has a direct and immediate relevance to a benefit by the government, it is called a counter payment, not a tax, even though the transaction is under legal compulsion, as demonstrated by the national health insurance case. Third, it is too blunt to claim all the income and property of people are conferred by the government. Instead, it is

much more natural and intuitive to assume most of them are earned by people's own endeavors. Thus, the benefit theory almost fails. If so, taxation without a redistributional effect is not possible.

3. Ability Theory

Another theory of taxation is the ability theory. Tax should be imposed according to each person's ability to pay. Although this theory avoids some of the weak points in the benefit theory, its weakness lies in the ambiguity of the concept, "ability." What does ability mean and how can it be identified and evaluated in terms of money? Is it income, property, or consumption? Does it include potential or future abilities that have yet to be realized? Due to this ambiguity, this theory could justify almost any tax base. Because income, property, consumption, or any combination thereof demonstrates ability, any taxes based on these items can be considered as fair and equitable. Even your life itself shows ability, so a poll tax would be a just tax. In other words, a significant part of the debate over tax bases is about determining the proper ability for the purpose of taxation.

This ambiguity of the ability theory carries serious implications for the discussion of redistribution. What is redistributed is no more certain than what is the ability to pay. Is it income, property, consumption, or some other indicator of wealth or happiness to be redistributed? Should someone who intently neglects to exercise or develop his or her ability be redistributed?

Further, should the tax base and redistribution base be the same? That is, if the tax base is income, should income also be the base for the transfer payment by the government? If so, redistributional transfer becomes a negative income tax.

In reality, no country has introduced a negative income tax. Few scholars think it is appropriate to use a negative amount of taxable income as a base to calculate the transfer payment of social welfare and its payment is started at the minimum taxable level. This is mainly because in the field of social welfare, holding property is taken into consideration, but most countries have no general property taxes. Property taxes in Japan are mostly on lands, buildings, and depreciable assets. The difference between tax bases and transfer payment bases highlights the difficulty in finding an appropriate indicator of people's well-being.

IV. Possibility of Taxation without Redistribution

Let's assume that a solid indicator of the ability to pay is agreed upon and the same indicator is also the best base for redistribution. As an illustration, assume that this indicator of people's well-being is the comprehensive income built up by Robert Haig[5] and Henry Simons.[6] Then the crucial question becomes: does taxing compre-

[5] Robert Haig, *The Concept of Income—Economic and Legal Aspects*, *in* The Income Tax 16–17 (Haig ed., Columbia Univ. Press 1921)

[6] Henry Simons, Personal Income Taxation 198–199 (Univ. of Chicago Press 1938).

hensive income entail any redistribution? This question keenly asks the meaning of redistribution.

Although any transfer between people and the government brings about redistributional effects, it is also understood that an equal tax on chocolate and vanilla ice cream does not change consumers' choices. Thus, it is a neutral taxation with an income effect only. Is this an example of taxation without redistribution? If comprehensive income taxation (or taxation based on more precise indicator of well-being, if any) does not change people's choices, is it an approximation of taxation without redistribution?

Another question arises about the progressivity of taxation and redistribution. Assuming the aforementioned ideal tax base is found, would a gradual rate structure add a redistributional feature to taxation? In the example of chocolate and vanilla ice cream, if the price and elasticity of both flavors are identical and the base rate is set to 10%, then this would result in a neutral tax. However, what happens when a gradual rate structure is introduced? For example, what if the first ice cream is subject to a 10% base rate, but additional ones are subject to 15% and 20% for chocolate and vanilla, respectively. If this progressive taxation does not change people's choices between chocolate and vanilla, a redistributional effect without impacting neutrality will probably be observed. However, the neutrality of this gradual rate structure is uncertain in real terms. If second ice cream is more expensive than first one after tax, consumers might change their choices. Another fundamental question is whether a disproportionately large amount of tax paid by those who can afford to eat two or three has any redistributional effect?

V. Conclusion

This paper examines neutral taxation and redistribution. Both the lines between a tax and a non-tax and between distribution by people's choices and redistribution by the government are unclear. Although any transfer between the government and people has some effect on wealth distribution, distinguishing redistribution from other monetary transfers is almost impossible. Analysis based on neutrality is valid only in a microscopic area, and the status quo ante (the situation before redistribution) plays a critical role in evaluating redistribution. Under the benefit theory, both of these lines are drawn by sorting government-related benefits from other benefits, which is almost impossible. In addition, the benefit theory of taxation fails to demonstrate a scenario of taxation without a redistributional effect.

On the other hand, the ability theory of taxation is ambiguous in its key concept of "ability," resulting in ambiguity in the base of redistribution. However, based on the ability theory, if and only if an ideal indicator that reflects people's situation accurately is found, then neutral taxation based on that indicator can redistribute the indicated item.

One important question remains, "Who bears the tax burden in real terms?" When the principal earner of a family is taxed, other family members also become poorer to some extent. When an income tax or value added (consumption) tax is im-

posed on a corporation, the burden shifts to shareholders, employees, consumers, and other parties. Similar shifts occur in transfer payments. The law can decide who should pay taxes and who can receive transfer payments, but it cannot control these incidences. Economic analyses of these shifts are unsatisfactory. If economically strong persons, such as the rich and large corporations, assume a greater tax burden than others but absorb more governmental subsidies and transfer payments, the effects of redistribution are very small or even negative. These questions have yet to be examined.

The Restriction of Common Welfare in the Ongoing Legal Strategy Pursued by the European Union Concerning Public Services in the Water Sector
- Empowering non-profit public services in the water sector -

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I. Introduction

This article deals with "The restriction of public welfare in the ongoing legal strategy pursued by the European Union concerning public services in the water sector." It will focus on the field of public water and sanitation supply, which is crucial for the constitutionally guaranteed well-being of the people in Germany and elsewhere. Discussing the matter of executing and financing these essential public tasks, the paper will point out that it ultimately affects pivotal questions of the state's obligation to the common welfare and the citizens´ well-being.

It is common knowledge that access to safe water supplies and basic sanitation is essential for maintaining public health, and water is vital to support healthy ecosystems, which in turn provide crucial environmental goods and services. In short, safe drinking water and sanitation supply are fundamental to the dignity of all human beings. However, as the demand for and the availability of water becomes more uncertain, especially in consequence of climate change, all societies become more vulnerable to a wide range of risks associated with inadequate water supply, including hunger, thirst, high rates of disease and mortality, economic crises, and dwindling ecosystems. Therefore the protection of inshore waters, the implementation of sustainable water management systems and the assurance of safe, equitable and affordable access to adequate water and sanitary supply for all are counted among the pivotal questions of global societies.[1]

Obviously, the need for forward-looking answers in the field of water concerns everybody's daily life. On closer examination, the individual access to an adequate water and sanitary supply affects questions of self-determination - which is the classical meaning of democracy.[2] Consequently, water related questions, including the

[1] *See* UNESCO, *World Water Development Report 2014. Water and Energy*, Vol. 1, 2014, p. 26: "According to the most recent climate projections from the Intergovernmental Panel on Climate Change (IPCC) (2008), dry regions are to a large extent expected to get drier and wet regions are expected to get wetter, and overall variability will increase. There is mounting evidence that this is indeed happening as a result of an intensification of the water cycle (Durack et al., 2012) and it is affecting local regional water supplies, including those available for energy production."; *see also European Environmental Agency* (EEA), EEA report 1/2012. Towards efficient use of water resources in Europe, download http://www.eea.europa.eu/. EEA states clearly "Europe needs to redouble efforts in using water more efficiently to avoid undermining its economy".

[2] It was the 'Declaration on the granting of independence to colonial countries and peoples' (UNGA Resolution 1514 from 14 December 1960), which first recognized the right of self-determination (Scott 2012, 206; Young 2007, 40). Adopted six years later, the two international human rights covenants – on Civil and Political Rights and on Economic, Social and Cultural Rights, respectively – confirm this

question of affordability, require public involvement and the representative participation of all community members. In this context municipality law is relevant, which is based in Germany on the ground of the *principle of municipality autonomy* as stated in Art. 28.2 German Basic Law (= German Constitution).[3] This principle does not only include the right of municipalities to define specific duties in view of the local communities, but also to rate fees and taxes in order to cover the expense for performing their tasks.[4] But in the last years, the financial scope of municipalities became more and more restricted by European Law which intends to develop new marketplaces for private enterprises especially in the field of services for the public – totally regardless of the principle of municipality autonomy which is known, in a similar vein, in all European member states.[5]

'right of self-determination', which entitles all peoples to 'freely determine their political status', in their identical Article 1, *see Charlesworth, Hilary* 2012: The conceptual politics of democracy in international law, in: The Conceptual Politics of Democracy Promotion, edited by Christopher Hobson and Milja Kurki, London: Routledge, p. 189 ff.; but *see also Ober, Josiah* 2008: The Original meaning of "Democracy": Capacity to Do Things Not Majority Rule, Constellations – An International Journal of Critical and Democratic Theory, Oxford: Blackwell, Vol. 15 No. 1, p. 3: "Democracy is a word that has come to mean very different things to different people. In origin it is, of course, Greek, a composite of *demos* and *kratos*. Since *demos* can be translated as "the people" (qua "native adult male residents of a polis") and *kratos* as "power," democracy has a root meaning of "the power of the people. (…) democracy originally referred to "power" in the sense of "capacity to do things."

[3] *Article 28 German Basic Law:*
[Land constitutions – Autonomy of municipalities]

(1) The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.

(2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

(3) …

[4] *Jarass, Hans D./Pieroth, Bodo* 2014: Grundgesetz [German Basic Law]. Commentary, 13th edition, Munich: C.H. Beck, Art. 28 No. 14 "Gewährleistung der Grundlagen der finanziellen Eigenverantwortung"; *Mehde, Veith* 2014 in: Maunz/Dürig, Grundgesetz [German Basic Law]. Commentary, 72nd supplement delivery, Munich: Beck, Art. 28.2 marginal sign 76f; *Henneke, Hans-Günter* 2014 in: Schmidt-Bleibtreu/Hofmann/ Henneke, Grundgesetz [German Basic Law], 13th edition, Cologne: Carl Heymanns, Art. 28 marginal sign 117.

[5] E.g. Art. 116, 118 Austrian Constitution, Art. 114 Italian Constitution, Art. 72 French Constitution, Art. 162, Art. 164, 166, 168 Polish Constitution, Chapter 14 Para. 1, 6 Swedish Constitution; Art. 2 No. 2 Belgian Constitution.

II. The public water sector in the eye of the European Union

At the moment the European legislator focusses on the Member States´ national water sectors which are dominated by local public utility companies.[6] Against this background, an increasing number of citizens especially in Germany is beginning to question the political direction the European Union is taking. They criticize the legal blindness for the social and democratic aspects of public services.[7] Harsh criticism was passed on a political and legal directive that employs the economic and legal strategy of the European Commission to liberalize public services in all fields, including the European water sector.[8]

1. Municipality services

This strategy endangers the democratically founded model of municipality water supply and distribution as well as municipality sewage services, which is still customary practice in most European member states. In consequence, public water services are mostly administered and provided by local Civil Service, and enterprises which act as state-controlled monopoly-holders, all operating for the common good, independent and legally protected from the forces of market competition and commercialization.[9] Spirit and purpose of this "old fashioned" model is ensuring basic water services for

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[6] Around 70 % of drinking water consumers and around 90 % of wastewater disposers are communities, public companies and associations. It general public water management in Germany is safe, fine and low-priced. For further information *see Allianz der öffentlichen Wasserwirtschaft* (Berlin), http://aoew.de/pages/english.php; for an analysis of the different types of public and public-private supplier in the German water sector *see Laskowski, S. R.* 2010: Das Menschenrecht auf Wasser (The Human Right to Water), Tübingen: Mohr Siebeck, p. 775 ff.

[7] Especially in view of water, *see* the critical report "Water makes money" by Leslie Franke and Herdolor Lorenz and the German/French and German public-service broadcasters ARTE/ZDF, which shows how private corporations make money with water within the EU, supported by the European policy, for further information *see* http://www.watermakesmoney.com/de/; *see also* the critical report by *Nikolaus Steiner, Kim Otto, Philipp Jahn, Bastian Pietsch* of German Public-Service Broadcasters ARD/WDR, Monitor 2014: TTIP: Angriff auf die Demokratie?, http://www1.wdr.de/daserste/monitor/sendungen/freihandelsabkommenttip100.html; especially young German academics in the field of Public Law are very critical, *see* http://www.juwiss.de/junge-wissenschaft-im-offentlichen-recht-e-v/.

[8] Several critical articles in leading German newspapers and political magazines were published, e.g. the article by *Prantl, Heribert*, Privatisierung der Wasserversorgung. Schlecht für den Geldbeutel, http://www.sueddeutsche.de/politik/privatisierung-der-wasserversorgung-schlecht-fuer-den-geldbeutel-schlecht-fuer-die-nase-1.1583873; *see also* Spiegel.online "Protest gegen Wasser-Privatisierung: EU kapituliert vor Bürgerinitiative", http://www.spiegel.de/wirtschaft/service/eu-kommissar-barnier-nimmt-wasserversorgung-von-privatisierung-aus-a-907198.ht. Lots of articles were published by critical civil society members and organizations in the internet.

The ECI is supported by the European Federation of Public Service Unions (EPSU).

[9] For Germany *see e.g.* § 31 Act Against Restraints of Competition in the version published on 15 July 2005 (Bundesgesetzblatt / BGBl. (Federal Law Gazette) I, page 2114; 2009 I page 3850), as last amended by Article 5 of the Act of 21 July 2014 (Federal Law Gazette I, page 1066). An overview of the complex legal field in Germany one can find in *Laskowski, Silke Ruth* 2010: Das Menschenrecht auf Wasser (The Human Right to Water), p. 842 ff.

all, regardless of personal attributes (age, gender, ethnic etc.) and income in accordance with water conservation. The municipalities´ purpose is not to make large profit but to serve the local public – it's each and every member. Fair prizing of the service, sufficient and forward-looking investment in the infrastructure and no abuse of local water resources serves the local public as well as avoiding mismanagement at public expense. Apart from isolated cases, the public model stood the test and works successfully – in compliance with the local consumers. Therefor till this day no German legislator ever saw any reason for a risky paradigm change – in accordance with the general public. This is the reason why the public water sector in Germany is still subject of strong state provision and municipality control and a state run monopoly.

2. Political strategy of the European Commission

But since the 1990ies the European Commission – which is the executive body of the European Union, responsible for proposing legislation, implementing decisions of the European Council, and upholding the Union's treaties[10] – takes action to push the idea of liberalization and privatization of the public sector including water services, and to destabilize the municipality-governed local public water sectors. In its eyes, it is one of the last state monopolies that should be open for competition and (big) private enterprise in order to generate economic growth.[11] Mainly transnational French companies, like SUEZ, SAUR or Veolia, which are big players in the international water sector already, would profit from the strategy of liberalism and privatization already pursued by the International Monetary Fund and the World Bank.[12] The EU is exerting influence and pressure on public services in form of ever tighter restrictions on their nature, responsibility and scope by means of European competition law, European law of public procurement and state aid.[13]

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[10] The Commission may take action if a Member State fails to incorporate EU directives into its national law and to report/communicate to the Commission what measures it has taken or is suspected of breaching Union law, for more information *see* the official website of the Commission, http://ec.europa.eu/.

[11] *See Laskowski, S. R.* 2010: l. c., p. 597 ff., 872f.

[12] *See Bayliss, Kate/Hall, David* 2002: Unsustainable conditions

– the World Bank, privatisation, water and energy; *see also* further studies by *Hall, David* from *University of Greenwich/Public Services International Research Unit* (PSIRU), Water and Sanitation, http://www.psiru.org/sector/water-and-sanitation; Coleman, Wiliam D. 2011: Property, Territory, Globalization: Struggles over Autonomy, UBS Press:Vancouver; *Belén Balanyá, Brid Brennan, Olivier Hoedeman, Satoko Kishimoto and Philipp Terhorst* 2005: Reclaiming Public Water Achievements, Struggles and Visions from Around the World, 2nd ed., *see* also *Lang, Andrew* 2011: World Trade Law after Neoliberalism, Oxford: Oxford University Press; *Krajewski, Markus* 2010: Neoliberalismus und Konstitutionalismus im Weltwirtschaftsrecht: Entstehung, Krisen, Alternativen, Kritische Justiz, Vol. 43 Issue 4, Baden-Baden: Nomos, p. 384 ff.

[13] Essential ECJ, Judgement of 24 July 2003, C-280/00 ("Altmark Trans"), Slg. 2003 I-7747, search for the case under http://curia.europa.eu/.

3. First successful European Citizens´ Initiative "Right2Water"

The latest – and failed – attempt by the EU Commission to break the water sector was the so-called *Concession Directive*. In 2013, reacting to this legislative attempt, the first successful *European Citizens´ Initiative* was established, which united more than one million people in signing an appeal to stop the Directive.[14] Criticism pointed out the "current focus on competition and market-based approach" and demanded a reversion of the political direction towards a public service attitude and an approach based on the human right to water. The *Citizens´ Initiative* underlined that "water is a limited natural resource and a public good, fundamental for life and health." In this view, water "is a 'natural' monopoly and must be kept out of internal market rules".[15] In the end the strongly criticized Directive was modified and exceptions for the water sector were included.[16] However, demands for European regulations to implement the *Human Right to Water and Sanitation* and to guarantee affordable public water and sanitation services for all, were rejected by the Commission.[17]

4. CETA, TTIP and TiSA

In spite of the massive civil society´s opposition, the European Commission is still pushing its legal strategy to liberalize and privatize public services, including the supply of water and waste water disposal. Up to date the connecting factor is the *international law of trade in public services*. These days there is a lively debate in all Member States, especially in Germany, about the Free Trade Agreement between the

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[14] The European Citizens' Initiative was launched in April 2012 as a powerful agenda-setting tool in the hands of citizens. It allows 1 million citizens from at least one quarter of EU Member States to invite the European Commission to take action in areas where the Commission has the power to do so. The first successful ECI, Right2Water, collected 1.68 million signatures, passing minimum thresholds in 13 Member States – far above the legally required minimum. Altogether, more than 5 million EU citizens have now signed up to more than 20 different initiatives. *See European Commission*, Communication on the Right2Water ECI,
http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/answered.

[15] "We believe that the European Union must implement the human right to water insofar as water and sanitation services are subject to European law (as a service of general interest). The European Union must promote national implementation of this human right by setting binding targets for all Member States to achieve universal coverage. Human Rights above market interests: No liberalisation of water services.
We want the EU to change their mind-set from its current focus on competition and completely market-based approach, to a public service attitude and a rights-based approach. Water is a limited natural resource and a public good fundamental for life and health. It is a 'natural' monopoly and must be kept out of internal market rules. Global/ Universal access to water and sanitation for all**.**
We believe that the EU should make a bigger effort for water and sanitation to be enjoyed universally. The EU must set targets and make the achievement of universal (global) access to water and sanitation part of its Development policy. By doing so the EU will actively promote that the right to water and sanitation can be enjoyed globally.", for more information *see* http://www.right2water.eu/.

[16] Directive 2014/23/EU of 26 February 2014 on the award of concession contracts, OJ EU 28.3.2014, No. L 94, p. 1.

[17] *European Commission*, Press release of 19 March 2014 (IP/14/277),
http://europa.eu/rapid/press-release_IP-14-277_en.htm.

EU and Canada – *Comprehensive Trade and Economic Agreement* –, called *CETA*[18], and the Free Trade Agreement between the EU and the USA – *Transatlantic Trade and Investment Partnership* –, called *TTIP*[19], and the multilateral Trade in Services Agreement – *Trade in Services Agreement* –, called *TiSA*[20], which all tend to liberalize trade in public services and open market access for private enterprises to those local sectors which are until now closed for competition. Looking at *Germany* and *Japan*, especially *TiSA* should awake our interest. This stand-alone plurilateral agreement on trade in services is currently being negotiated between 22 members of the *World Trade Organisation (WTO)*, including the EU, Japan, Canada and the USA. Together, all these countries account for 70% of world trade in services. TiSA is based on the WTO's *General Agreement on Trade in Services* (*GATS*), which involves all WTO members. The key provisions of the GATS – scope, definitions, market access, national treatment and exemptions – are also found in TiSA. [21]

A special characteristic of TiSA, CETA and TTIP is a lack of transparency regarding the negotiations of the agreements. They are held in secrecy. Without public control, the declared purpose to promote commercial services, to remove regulatory constraints on trade, to open the access to public procurement markets, to eliminate duties and other restrictions for trade in service, to establish special regulation of investment protection and enforcement by an investor-to-state dispute before private arbitration courts, should appear dubious to even a dyed-in-the-wool libertarian, who will always uphold the rule of law. Millions of EU citizens are already alarmed. [22]

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[18] The consolidated CETA Text (Draft) was published by the European Commission on 26 September 2014 after a storm of public protest, *see European Commission* (Directorate-General Trade), EU-Canada. CETA, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[19] On 7. January 2015 the European Commission published a raft of texts setting out EU proposals for legal text in the Transatlantic Trade and Investment Partnership (TTIP) it is negotiating with the US. This is the first time the Commission has made public such proposals in bilateral trade talks, *see European Commission* (General Direction Trade), http://ec.europa.eu/trade/policy/in-focus/ttip/.

[20] TiSA aims at opening up markets and improving new rules of trade such as licensing, financial services, telecoms, e-commerce, maritime transport, and workers moving abroad temporarily to provide services. So far it is unclear, if the water sector will be affected, *see European Commission* (Directorate-General Trade), http://ec.europa.eu/trade/policy/in-focus/tisa/.

[21] EU and currently 21 WTO-members, being Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Mexico, New Zealand, Norway, Panama, Paraguay, Pakistan, Peru, Switzerland, Turkey and the USA.

[22] There are several Civil Citizens´ Initiatives in Germany and elsewhere in the EU working on stopping TiSA, TTIP and CETA by collecting signature, e.g. *Omnibus,* a civil society´s organization which promotes the idea of direct democracy collected more than 1.3 Million signatures so far, *see* https://www.omnibus.org/stop_ttip.html; the request for registration of another (successful) *European Citizens´ Initiative* which aimed to stop CETA and TTIP - "Stop TTIP" - was refused and stopped by the European Commission in September 2014, officially for formal reasons, *see European Commission*, The Europeans Citizens´ Initiative, Official Register, ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041?lg=en.

In this context, also the future Free Trade Agreement between the European Union and Japan, called *EU-Japan FTA*[23] deserves our attention. In my opinion, this is a European-Asian bilateral Free Trade Agreement which follows the CETA-, TTIP- and TiSA-model. Actually, eight negotiating rounds took place, the last in December 2014 in Tokio.[24] Against this background one important question arises – does the International and European Free Trade Strategy really implement the goal of public welfare concerning public water services?

III. The European Water Sector

In order to find an answer, first one needs to take a closer look at the European water sector. Since the 19th century, European nations have provided their citizens with services designed to foster the welfare of society as a whole. These include, or included, e.g. services to safeguard public order, healthcare, social housing, public transport and also water supply and sewage disposal. All these services cover economic, social and cultural activities. They are characterized by the guarantee of equal, universal access, security and continuity of provisions. In those European states where the State is the provider, these services are furthermore characterized by democratic scrutiny and public accountability because of their duty to report to the democratically legitimized local council.[25]

Looking at the sensitive European water sector we can find different models of public water and sanitation supplies because of different legal traditions. But predominantly the state respectively local governments – like in Germany, the Netherlands, Belgian (Flanders) - are in charge to safeguard the providing of water supply and sewage disposal, mostly conducted by public institutions or public enterprise.[26] And where forms of privatization were tested by local governments in the past, now they

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[23] The 7th round of negotiations was held on October 2014 and brought together over 100 negotiators from the EU and Japan. The areas under negotiation are: tariffs, technical barriers to trade, access to public tenders, trade in services, rules on investment competition, sanitary and phytosanitary measures, regulatory cooperation, transparency and protection of intellectual property, including geographical indications and access to the Japanese public procurement market, *see* European Commission (Directorate-General Trade), *see European Commission* (Directorate-General Trade), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1168.

[24] So far the European Commission does not give any information about the result, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1168.

[25] In order to offer resistance to political strategies of liberalization and privatization in the EU, Aqua Publica Europea (APE) was founded in 2008 to promote public water management at European and international level. APE is an international, not-for-profit association under Belgian law. The members are publicly owned water and sanitation services, together with their national and regional associations. APE brings together 100% publicly owned water and sanitation services, and their national and regional associations, from all over Europe. Its members provide water and sanitation services to over 70 million European citizens, *see* http://www.aquapublica.eu/?About-APE-8&lang=en.

[26] For an overview about the different models in European states *see* OECD, Improving Water Management, 2003, p. 85 (trend to risky "public-private partnerships"); for Germany, France (formal privatization), Great Britain (material privatized) Belgian and the Netherland (privatization of public water services illegal since 2004) *see Laskowski*, *S. R*. 2010: l.c. p. 657, 762.

strongly try to close the book on water privatization and to "remunicipalize" services by taking back public control over water and sanitation management. In many cases, this is a response to the false promises of private operators and their failure to put the needs of communities before profit.[27]

1. Welfare State

The current trend to remunicipalize water services responds with the legal concept of "welfare state" which includes the state´s clear core obligation to guarantee and secure fundamental basic needs of human beings. This legal concept is the fundament of quality of life in modern societies like Japan and Germany. No wonder that the principle of the welfare state is enshrined in many constitutions in Europe[28] – like Art. 20. 1 German Basic Law ("Grundgesetz")[29], which plainly states that Germany is "a democratic and social federal state", or with regard to the European Union, Article 34 of the European Charter of Fundamental Rights[30] which refers to "social security and social assistance" in the Chapter "Solidarity", and explicitly "ensures a decent existence for all those who lack sufficient resources". In view of the Japanese Constitution under Article 25.2[31], which belongs to the Chapter of "Fundamental Human Rights", the "welfare right of individuals" is protected a lot clearer than in the German Basic Law. Following the interpretation by *Shigenori Matsui*, the constitutional wel-

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[27] *See* the instructive study by Kishimoto, Satako/Lobina, Emanuele/ Petitjean, Olivier/ Public Services International Research Unit (PSIRU), Multinational Observatory and Transnational Institute (TNI) 2014: Here to stay: Water remunicipalization as a global trend, download http://www.tni.org/sites/www.tni.org/files/download/heretostay-en.pdf; *see also* Laskowski, S.R., l.c., p. 51 ("global failure of privatizing water supply").

[28] *See* the sophisticated comparison concerning „welfare state" resp. „social democratcy" of European constitutions by *Iliopoulos-Strangas, Julia* (ed.) 2000: La protection des droit sociaux dans les Etats membres de l´Union européenne etude de droit comparé, Athens: Sakkoulas (etc.); *see also Weber, Albrecht* 2010: Europäische Verfassungsvergleichung, Munich: C.H. Beck, p. 84 ff.

[29] *Article 20 German Basic Law* [Constitutional principles – Right of resistance]

(1) The Federal Republic of Germany is a democratic and social federal state. (...).; *see* the instructive analysis of the term "Sozialstaat" ("welfare state") by *Sommermann*, *Karl-Peter* 1997: Staatsziele und Staatszielbestimmungen, Tübingen: Mohr Siebeck, p. 223 ff.

[30] The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000, on 1 December 2009, with the entry into force of the Treaty of Lisbon, the Charter in connection with Art. 9 Treaty of the EU (EUT) became legally binding on the EU institutions and on national governments, just like the EU Treaties themselves, the text is officially published in the Official Journal of the European Union of 30 March 2010 No. C 083, p. 389, http://euro-lex.europa.eu/oj/direct-access.html.

[31] Article 25 Japanese Constitution:

All people shall have the right to maintain the minimum standards of wholesome and cultured living.

2. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

fare right is viewed „as a natural right and a fundamental human right, since it is essential for human dignity".[32]

The obvious purpose of all these constitutional provisions is to create equal living conditions and guarantee the availability of essential goods and facilities to everyone in order to protect her or him from violations of her or his human dignity. This matches exactly the idea of the modern "welfare state" ("Sozialstaat"), respectively the idea of "social democracy", carefully worded by the great German reformer *Lorenz vom Stein* in the 19th century.[33] The legitimation of the State is based not only on the constitution but also on the services for the public like public health care or public water and sanitary supply. To offer and to ensure these services to the public is the means to guarantee equal participation and fundamental human rights not only formally but in reality. This is the "core-duty" of a democratic state - the most elegant and noble duty, which in the end leads to acceptance of the state on the part of its citizens.[34] In terms of constitutional law in Germany this core-duty is anchored in Art. 28.2 in connection with Art. 20 German Basic Law.[35]

This idea of public services is well known in all Member States of the European Union, where only the legal terminology is different. In France e.g. the more general term "service public" is used, in Great Britain the term "services of general interest".

As part of public welfare these services are not only linked with Fundamental Basic Rights, but also with Environmental Protection Law which requires safe sanitary supply in order to safeguard the existing water resources, which furnish the basis of safe public water supply. One liter of waste water contaminates eight liters of freshwater. In the German Constitution this combined approach of protection of Basic Human Rights and Environment is anchored in Art. 1.1 ("Human dignity and human rights"), Art. 2.1 ("Personal freedoms"), Art. 3.1, 3.2, 3.3 ("Equality") and Art. 20a ("Protection of the natural foundations of life and animals"), which includes the important principle of precaution that aims to avoid environmental damages. Furthermore Art. 2.2 German Basic Law has to be emphasized, which includes the state's

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[32] *Matsui, Shigenori* 2011*:* The Constitution of Japan, A Constitutional Analysis, Oxford: Hart Publishing, p. 155.

[33] *See* the sophisticated analysis by *Böckenförde, Wolfgang* 1976: Lorenz vom Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat, in: Böckenförde, Staat, Gesellschaft und Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht, Frankfurt a.M.: Suhrkamp, p. 147, 155.

[34] The German Basic Law – GBL - („Grundgesetz") does not know explicitly social fundamental right. Therefor the significance of the principle of the welfare state as stated in Art. 20 GBL concentrates at first on the interpretation of Art. 1 para. 1 GBL „human dignity" and the state´s duty to protect fundamental rights of its citizens, *see Sachs, Michael* 2014 in: Sachs (ed.), Grundgesetz (German Basic Law). Commentary, 7th edition, Munich: C.H. Beck, Art. 20 marginal sign 54, p. 805.

[35] BVerfGE 56, p. 54, 77; 77, p. 381, 402f.; 79, p. 174, 202; BVerwGE 107, p. 350, 357; Jarass, Hans D./Pieroth, Bodo 2014: Grundgesetz (German Basic Law). Commentary, 13th edition, Munich: C.H. Beck, Art. 2 marginal sign 99, p. 98; *see also Nishihara, Hiroshi* 2007: Aktuelle rechtliche Entwicklungstendenzen in Europa – Insbesondere die Bedeutung der Grundrechte in einer Konkurrenz zwischen Systemen der Staatsaufgaben –, in: Murakami, Junichi/Marutschke, Hans-Peter/Riesenhuber, Karl (Ed.), Globalisierung und Recht. Beiträge Japans und Deutschlands zu einer internationalen Rechtsordnung im 21. Jahrhundert, Berlin:De Gruyter Recht, p. 127 ff.

duty to protect the basic rights of individual life and health against third-party intervention.

2. Concretization by strong regulation of sustainable public water services

In order to make an impact, the state's core-duty needs legal and administrative operationalization. Looking at Germany, consequently the local water sector – water supply as well as wastewater disposal – is strongly regulated by administrative law that refers to the field of "Daseinsvorsorge", regulated by the 16 federal states ("Länder") and municipality law. Furthermore the municipal water sector is clearly embedded in the field of environmental law respectively water protection law by the amended Federal Law that is binding the Länder and municipalities – see § 50 para. 1 and § 56 Federal Water Act ("Wasserhaushaltsgesetz").[36] The German water legislation is part of the administrative law and is strongly influenced by the *European Water Framework Directive (2000/60/EC*).[37]In view of the Federal Wasserhaushaltsgesetz[38] which implements this Directive, the water authorities of the Länder have to pay attention to water as a public good, first of all to water balance – especially the amount of water abstraction –, water quality and water control. This is the legal context of the German public water supply and wastewater disposal as imbedded in § 50 and § 56 Wasserhaushaltsgesetz.[39]

3. Influence of the European Water Framework Directive 2000/60/EC

The Federal Water Act is in accordance with the European Water Framework Directive 2000/60/EC which came into effect in all European Member States in 2000. At the latest since then the European welfare state in the field of water is directly linked with the field of water protection and sustainable water use and management.[40] The environmental protection measures stipulated by the *European Water Framework Directive* (EWFD) aim to reach the goal "good water status" for all water bodies (Art.

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[36] Federal Water Act of 31 July 2009 (Bundesgesetzblatt / BGBl.- = Federal Law Gazette I p. 2585), as last amended by Article 2 of the Act of 15 November 2014 (Bundesgesetzblatt I p. 1724), download http://www.gesetze-im-internet.de/whg_2009/.

[37] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, Official Journal No. L 327, 22/12/2000, p. 1, download http://eur-lex.europa.eu.

[38] BGBl. 2009 I, p. 2585.

[39] For the new legal concept of "ecologically sustainable water policy" (incl. water supply, sewerage) *see Laskowski*, *S. R*. 2011: Privatisierung der Wasserversorgung (Privatization of water supply), Kritische Justiz , Baden-Baden: Nomos, p. 185, 187; *Laskowski*, S. R. 2010: l.c., p. 854 ff.

[40] For details *see Laskowski, Silke R./Ziehm, Cornelia* 2014: Gewässerschutzrecht (Water Protection Law), in: Hans-Joachim Koch (ed.), Umweltrecht (Environmental Law), 4th edition, Munich: Vahlen, p. 296 ff.; *Epiney, Astrid* 2014: Umweltrecht der Europäischen Union, 3rd edition, Baden-Baden: Nomos/ Helbing Lichtenhahn, p. 395 ff.; *Köck*, *Wolfgang* 2015: Zur Entwicklung des Rechts der Wasserversorgung und der Abwasserbeseitigung, Zeitschrift für Umweltrecht, Vol. 26 Issue 1, Baden-Baden: Nomos, p. 1 ff.

4 EWFD) by 2015, assisted by the *European Council Directive on the quality of water intended for human consumption (98/83/EC)*[41] and other directives. Both Directives named above have positive effects on the European water supply sector in the long run – because good water quality does not need expensive investments in chemical water treatment. If the Directives are respected properly, they consequently lead to sustainable long term investments in water protection and management – especially preventing and reducing pollution, promoting sustainable water usage, environmental protection, improving aquatic ecosystems and mitigating the effects of floods and droughts. Therefore it is necessary to integrate the sustainable management of water into other national policies – e.g. water supply and wastewater management – and making the most of public participation (Art. 14 Directive).[42] In particular the underlining principle of the Directive has to be considered in respect of water supply and wastewater management – see Consideration No 1 which states: "Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such".

4. Local autonomy – organization and funding

Furthermore, as mentioned before, public water supply and sewage disposal is strongly linked with the legal principle of local autonomy of local public entities that are in charge of providing the services for the local community. The autonomy of municipalities[43] is protected by Art. 28.2 of German Basic Law. It aims to involve the local population into matters concerning the local community. In the final analysis, it rests not only on the idea of decentralization of administration, but also on the idea of democratic self-determination and public control of the performance of local tasks.

A. Funding

Additionally, the principle of local autonomy empowers the communities to generate sufficient revenues for its performance and to decide on the question, which targets should be achieved and how they should be financed. In this context, they are allowed to raise taxation and social security contributions ("Steuern", "Gebühren", "Abgaben"). Concerning water supply and waste water services one can find mixed taxes: For long term infrastructure measures like pipes, water treatment plants, canalisation, sewage disposal plants – so called "sunk costs", ca. 80 % of all costs – gener-

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41 OJ L 330, 05.12.1998, p. 32.

42 *See also* http://europa.eu/legislation_summaries/agriculture/environment/l28002b_en.htm.

43 Article 28 German Basic Law [Land constitutions – Autonomy of municipalities]:

(1) …

(2) Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

ally taxes (tax = no reward) are used. For the services as water delivery and waste water disposal usually fees are used (fees = services in return).

The service calculation has to consider many aspects. Since 2000, when the EWFD came into force, the calculation has to include Art. 9 EWFD and incorporate "external environmental costs". Since then the calculation has to follow not only a microeconomic but also a macroeconomic approach. Intended is a "full cost recovery" – pertaining to burdened private households, industry and agriculture in equal measure. So far the German legislator just burdens private households, while industry and agriculture are still privileged. Furthermore also Art. 9 EWFD allows "social prices" for households. And nothing has changed concerning the water itself – it is still free ("public good"). Only the service is charged. The municipal operator has to respect the cost recovery principle, which is established by law of the Länder.[44] This principle includes an upper limit in order to protect private households and a lower limit in order to protect the local government finances. Which kind of costs is included? All microeconomic costs like general operating costs (staff, equipment, collection and transport of water, dealing and depositing of waste water etc. Amortization and a limited rate of reserve funds can be included. And what about environmental costs for using natural water resources? Yes, concerning sewage disposal the Federal Waste Water Fee Law imposes fees for waste water sewage plants which the operator can include into the price calculation and allocate to private consumers. For the usage of freshwater one can find a similar fee-model in several Länder regulation ("Wasserpfennig"). But since 2000, Art. 9 EWFD rules to research external environmental costs of water uses and to include them into the calculation. The second important principle to be respected is the "principle of Equivalence" which derives from the principle of proportionality. Within this principle also aspects of fundamental human rights and equal treatment have to be respected. Furthermore the aspect of economic viability is relevant, but this term does not mean "profit". Investment costs for the infrastructure are mostly covered by contributions of the owners of developed real estate and taxes by the public which have to be proportional, too. To summarize, the prices for the local public are limited by the principle of cost recovery and the principal of proportional equivalence, which do not allow any commercialization of the municipality´s job performance, in contrast to private business which concentrates on profit only! Basic public water and sanitary supply has to be affordable for everyone – without exclusion and discrimination of anyone. As a result the water infrastructure in Germany is in good condition, the drinking water price in general is 1,70 Euros per m^3 (2013; minimum: 1,23 Euro, maximum 2,17 Euro per m^3 – the costs vary from region to region, also because of different local conditions of the groundwater which is mainly used).[45]

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[44] This principle is found in all „Kommunalabgabengesetzen" ("municipal charges law") of the Länder.

[45] In 2013 one could find ca. 6.200 public water supply operators, investments to the amount of 2,0 milliards, for statistics and more details about the legal basis of calculation see *Federal Ministry for the Environment, Nature Conservation and Nuclear Safety*, 2014: Water Resource Management in Ger-

Concerning the prices of waste water disposal, which also follow the above mentioned principles, the local authorities may draw on various tariff models with different fee components when setting prices. The following factors are taken into account: a volume fee for wastewater in relation to the volume of the consumed freshwater, a volume fee for precipitation water per m^2 of sealed land, and a basic annual charge to cover fixed costs. The basic charge covers around 75–85 % of the costs of depreciation, interest, staffing, and plant maintenance incurred for wastewater disposal, irrespective of the quantity of water that is discharged and purified in the wastewater treatment plants. A nationwide survey by the Federal Statistical Office in 2010 indicates the tariff systems used and the broad variety in fee levels. Computing an average nationwide price for the individual fee components, this would produce the following figures: Average wastewater fee: 2,36 Euro per m^3 (according to freshwater consumption); average precipitation fee (owner of sealed land): 0,49 Euro per m^2, per annum; average basic charge: 15,39 Euro per annum. Especially the level of wastewater prices and the basic principles by which fees are calculated are a hotly debated topic among the general public today. Recent court rulings on the admissibility of selected tariff models could lead to changes in the fee structure. To date, however, the level of fees has not been affected by this.[46]

To summarize, in Germany public water supply and wastewater disposal is a traditional non-profit sector and non-market sector which in general works well and leads to consumer satisfaction.

B. Organization

Predominantly we find 100 % public owned operators in the German water and waste water sector. But in fact we have to recognize a risky development: the ongoing process of privatization and commercialization in the field of public water supply should be kept into consideration, in particular the model of "Public Private Partnerships" — in which originally publicly owned undertakings are partially privatized. In many cases the publicly owned share in the new "water business" is reduced to a (legally accepted) minimum of 50.1 % — from the legal point of view the minimum to influence the company. But it works only theoretically, not in practice —another reason are the (secret) restrictive covenants with the private partners. Today it is well known that with a private share of 25,1 %, private partners insist on having a decisive influence on investments for infrastructure, on water prices etc.[47] Because of the absence of a special "Public Private Partnership" Law, and of the weak economic position of municipalities, of false or missing legal advice by the superior authorities (mu-

many Part 1 "Fundamentals", p. 80,
http://www.umweltbundesamt.de/sites/default/files/medien/378/publikationen/wawi_teil01_web.pdf.

[46] *See* Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, 2014: l. c., p. 84, 94.

[47] For details *see Laskowski , S. R*. 2011: l.c., p. 185, 191; *Salzwedel, Jürgen* 2001*:* Die Wasserwirtschaft im Spannungsverhaltnis zwischen water industry und Daseinsvorsorge, in: Dolde (ed.), Umweltrecht im Wandel, Berlin: Erich Schmidt, p. 613, 616.

nicipalities cannot afford expensive legal advice by law firms), municipalities are in an inferior position during the negotiations with private actors. Therefore private and public interests in those "Public Private Partnerships" are not really balanced. The model "Public Private Partnerships" weakens the democratic influence and control of municipalities and their inhabitants on the way how communal water is supplied. The more democratic influence is reduced, the more so-called "economical rationality" is implemented. Then water services for the public become more and more "commercialized" in order to increase the profit of the private partners — one example is the "Private Public Holding" of the "Berliner Wasserbetriebe" in Berlin which was established in 1999 (RWE/Veolia — former Vivendi: 49,9 %; municipality of Berlin: 50,1 %; several nontransparent and secret contracts, hidden from the Berlin Parliament and the general public). Since 2001 the water prices in Berlin jumped up by 35 %. That is a very extraordinary step for the German water sector, because public utilities are bound to set not only cost-covering prices but also reasonable —fair and social — prices in order to make water affordable for everybody. Nowadays the price for water supply in Berlin is the highest in Germany — and highly profitable only for the private partners. Due to a clause in the secret contracts between Berlin and RWE/Vivendi, the Berlin Government ("Senat") warrants a certain margin of profit for the private partners each year — at the public's expense. After a referendum in 2010 which aimed to re-municipalize the "Berliner Wasserbetriebe", the Senat was forced to make the secret contracts accessible to the public.[48] Afterwards the public forced the Senat to remunicipalize the "Berliner Wasserbetriebe".

"Public Private Partnerships" do not only lead to "democratic costs". They also imply "environmental costs". Voluntary measures to protect the environment by public enterprises which are practiced traditionally by public operators have important influence on the good quality of (ground-) water resources in Germany — e.g. financially supported cooperation with locally based farmers to prevent them from using pesticide in order to protect the groundwater etc. Now these measures are considered "economically dysfunctional" by the private partners.[49] Though especially voluntary environmental protection measures aim to reach the goals of the *European Water Framework Directive (2000/60/EC)* and the *European Council Directive on the quality of water intended for human consumption (98/83/EC)* and have positive effects in the long run — they are not consented in "Public Private Partnerships" anymore.

IV. European Competition Law

Regarding European Competition Law, the classification of public services becomes unclear. The reason is the internal market law (including procurement law), competition law and state aid law which affects the so called "services of general economic interest" which are stipulated in Art. 14 of the *Treaty of the Functioning of*

[48] For details *see Laskowski, S.R.* 2010: l. c., p. 796.

[49] For details *see Laskowski, S. R.* 2011: l. c., p. 185, 191; *Salzwedel, Jürgen* 2001: l.c., p. 613, 616.

the European Union (TFEU) and in Art. 36 of the *European Charter of Fundamental Rights* ("Access to services of general economic interest"). Art. 36 states, that "the Union recognizes and respects access to services of general economic interest as provided for in national laws and practices", but only „in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union". In addition Protocol 26 of the TFEU underlines that "services of general interest", which include "services of general *economic* interests", shall respect "a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights". And though Art. 36 of the European Charter of Fundamental Rights clearly operates to safeguard the Member States` competence to create and provide "services of general economic interest", it is phrased in a rather general way. The explanation of the role of Art. 36 of the Charter is not clarified yet, so it is very unclear whether European Law will indeed show respect for national constitutional identity and Art. 28.2 German Basic Law.[50]

V. International Free Trade Treaties´ input

Including the above-mentioned International Free Trade Law, things become even more unclear and problematic. Since the European Union is one of the contracting parties, on the one hand the contents of the treaties are not permitted to violate European Law. On the other hand, the treaties belong to international law and include certain liabilities of the parties which have to be respected by European and national Member States´ Law – and will influence the interpretation of European and national Law afterwards. Furthermore the interpretation of the treaties will be mainly determined by private arbitration courts, paid by the parties. Whether those private courts will respect European and national Fundamental Rights and elementary European and national principles like the principle of precaution, remains absolutely unclear and rather doubtful. But here a constitutional conflict between EU Law and the German Basic Law might arise in the future: In 1993 the German Constitutional Court deduces municipal "core duties" according to Art. 28 Section 2 German Basic Law as "absolute" barriers for interference in the local autonomy by European Law.[51] The Court, following a Constitutional Complaint, gave a ruling confirming the legality of ratification of the former Treaty of the European Union. The Court declared this Treaty, the so called Maastricht Treaty, compatible with the German Constitution, but the Court also asserted the right to review the legal instruments of European Institutions to see whether their acts remain within the limits of the rights conferred to them by the German Federal Parliament ("control of ultra vires act"). The Court clearly stated,

[50] *See Szyszczak*, *Erika* 2014 in: Peers et. al. (eds.), European Charter of Fundamental Rights. Commentary, Oxford: Hart/C.H. Beck/Nomos, Art. 36 marginal sign 36.39; but *see also* BVerfGE 89, p. 155, 210 ("municipal core area"); *Bungenberg, Marc* 2014: Social Rights, in: Grabenwarter (ed.), Europäischer Grundrechtschutz (Enzyklopädie Europarecht), Baden-Baden: Nomos, p. 714 ff.; *Jarass, Hans-D.* 2013: Charta der Grundrechte der Europäischen Union (GRCh – European Charter of Fundamental Rights), Commentary, 2nd edition, Munich: C.H. Beck, Art. 36 marginal sign 2 ff.

[51] BVerfGE 89, p. 155, 210 ("municipal core area").

European Legislation would not be binding, if it was a transgression and violation of the limits of European competences. Here a conflict might arise between the German Constitution and the European Law, as well as a conflict between the German Federal Constitution Court and The European Court of Justice. So far the German Constitutional Court hasn´t clarified the term municipality "core duties". To my mind, the public water and sewage services can be identified as "core obligations" for constitutional welfare reasons, as mentioned above. Consequently this constitutional barrier is also relevant for all Free Trade Agreements of the European Union which are binding the European Member States, including Germany in principle.

Finally, a short glance on the *Japanese Constitution* in this context: Article 93 of the Japanese Constitution looks very similar to Article 28 German Basis Law and includes also the "principle of local autonomy" which protects the organization and operation of local public entities. And I have learned - also in Japan these entities are predominantly in charge with providing public water and sewage services. Furthermore, one has to mention Article 13[52] which protects personal freedom and the "right of life, liberty and the pursuit of happiness". Also the right of environmental protection could be deduced from this article.[53] Against the background that *Japan* is party of the future Free Trade Agreement with the European Union and one of the parties of the Free Trade Agreement TiSA, all above-mentioned considerations concerning the legal influence of the treaties on national law apply accordingly – and to my mind should be taken into consideration in view of the Japanese constitution as well. But in view of the water sector, corrective action should derive from the Human Right to Water.

VI. Importance of the Human Right to Water

The above mentioned idea of democratic self-determination also reflects the modern human rights approach – each human being has the basic right to life and to decide on her or his own affairs.[54] In the international legal context one will find this democratic-human-rights-approach mainly stipulated in the International Covenant on Civil and Political Rights as well as in the International Covenant on Economic, So-

[52] Article 13 Japanese Constitution:

All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

[53] *See Sanden*, *Joachim* 2010: Umweltgrundrechte, Umweltstaatszielbestimmungen sowie Umweltgrundpflichten im Gefüge der Europäischen Verfassungen – vergleichende Überlegungen mit Blick auf das Japanische Verfassungsrecht, Hitotsubaschi Journal of Law and Politics, Vol. 38 No. 2/2010, p. 31, 56.

[54] Alongside, this approach is found in modern International Environmental Law which combines environmental protection and human rights – e.g. the UN Convention on the Law of Non-Navigational Uses of International Watercourses which entered into force in August 2014. The Convention is governing shared freshwater resources that is of universal applicability. It imposes detailed obligations upon riparian states towards the protection and conversation of international watercourses and their ecosystems. This includes especially measures to prevent and reduce water pollution.

cial and Cultural Rights which both became effective in 1976. While water has not been explicitly recognized as a self-standing human right in international treaties, international human rights law entails specific obligations related to the access to safe drinking water. These state obligations follow from the "Human right to water and sanitation" which is stipulated in *Art. 11 and 12 International Covenant on Economic, Social and Cultural Rights (ICESCR)*. In November 2002, the Committee on Economic, Social and Cultural Rights adopted its general comment No. 15 on the right to water, defined as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses. The Committee also stressed that the right to water was linked to the right to health and the right to life. The Right to Water was affirmed by the UN General Assembly in 2010 and by the Human Rights Council. Though the affirmation of the General Assembly has only soft law character, it shows the consensus of the international community concerning the interpretation of Art. 11 and 12 – and has a self-binding effect to the states. Most importantly: The Human Right to Water contains a core obligation of all states. In any case the state is obliged to supply a minimum of 20 liters of drinking water per person/per day. This means: The state has to guarantee 20 liter freshwater for each person per day even if the person is not able to pay for this minimum amount. It is obvious that the core obligation operates as an automatic brake concerning the commercial abuse of market power in the global water sector.

The core obligation of the Right to Water and Sanitation according to Article 11 and Article 12 ICESCR also belongs to the minimum protection of the German *Basic Law* and the *Charter of Fundamental Rights of the European Union:* Due to the concretization in General Comment No. 15 — and considering the Optional Protocol to the ICESCR (2008)[55] — nowadays the legal opinion that denies the justiciability of the ICESCR based rights belongs to an outmoded concept. The direct applicability and effectivity of the state's core obligation according to Art. 11 and Art. 12 ICESCR, to guarantee the availability for each person of 20 liter of water per day ("obligation to fulfill"), is justiciable and enforceable by law.[56] Indeed as a result of Art. 53 of the *Charter of Fundamental Rights of the European Union* international law and international agreements to which all the Member States are party, such as the ICESCR and the ECHR — become essential for the interpretation of the Charter. In this respect we have to stress the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[57] There we can also find a link to the human right to water in

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[55] Res. A/RES/63/117 of 10.12.2008, in force since May, 5th 2013; *see also Aichele, Valentin 2009:* Das neue Fakultativprotokoll zum UN-Sozialpakt, Zeitschrift Vereinte Nationen 2009, p. 72.

[56] Comprehensive and instructive *Schneider, Jakob* 2004*:* Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte. Deutsches Institut für Menschenrechte, download http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/studie_die_justiziabilitaet_wirtschaftlicher_sozialer_u_kultureller_menschenrechte.pdf.

[57] Article 53("Level of protection") Charter of Fundamental Rights of the European Union:

" Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party,

Article 2.1 ("right of life") and Art. 8 ("Right to respect for private and family life") in connection with the *European Charter on Water Resources* (see art. 5: "Everyone has the right to a sufficient quantity of water for his or her basic needs").[58] Though the *European Charter on Water Resources* is only a "soft law" resolution it is helpful to interpret the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. According to Art. 52.3 and Art. 53 of the *Charter of Fundamental Rights of the European Union*, the fundamental rights of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* will be relevant to identify the minimum level of protection by European fundamental rights. Furthermore the core obligation of the human right to water as deduced from Art. 11 and 12 ICESCR is applicable federal law in Germany (Art. 59 S. 2; Art. 25 GG).[59] Against this background it is imperative that the European and the German legislator enacts and implements appropriate laws to ensure and fulfill the core obligation of the "Human Right to Water" for everyone in Germany and the European Union — regardless from nationality, age, "race," gender, or income.[60]

VII. New European Movement: Reclaiming Public Water and Establishing Public- Public- Partnerships

In this context we should also take a new European movement into consideration: In the 1990ies, communities across Germany and the EU were often relying on an aging water infrastructure in need of repair or replacement. In order to get "fresh money" for modernization or to improve their management, several models of privatisation have since been established in the public water sector, in particular "Public Private Partnerships" (PPP) – see above. It was often assumed that privatization or Public Private Partnerships will result in greater levels of technical efficiency. The idea behind it was that the private sector can always deliver a given level of service with less input costs than the public sector. But there is now extensive experience of all forms of privatization, and researchers have published many studies of the empirical evidence on comparative technical efficiency. The results are remarkably consistent across all sectors and all forms of privatization and outsourcing: there is no empirical evidence that the private sector is intrinsically more efficient. The evidence shows that in the end only the private partners benefit from those models, and not the public. Especially "PPPs" lead to non-transparent responsibility structures, non-transparent financial transactions, non-transparent fees calculation and growing prices for the public – it is a model that gets out of public control and develops to a free market economy model. One problem deriving from this model was the exclusion

including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

58 Council of Europe/ Committee of Ministers, Rec (2001) 14, 17.10.2001.

59 For details *see Laskowski, S. R*. 2012: Time for implementation of the right to water and sanitation – e.g. the missing implementation in Germany, Journal for European Environmental & Planning Law (JEEPL) 9.2, Leiden/Boston: Koninklijke Brill NV, p. 164 ff.

60 For details *Laskowski*, *S. R.* 2010: l. c., p. 536.

of private households by "Cut offs" in Great Britain, because people couldn´t afford to pay the bill for water supply.[61]

However, the ultimate responsibility for adequate supply of necessary goods and services is solely born by the state – therefore it is always the state respectively the tax payer who pays the bill in the end. Against the background of multitudinous negative experiences with the privatization of the water sector worldwide (including the European Union, GB and Germany), today a new wave of "Public Public Partnerships" has started – very often encouraged by the local inhabitants. Therefore a growing number of public water operators have started to help other public water suppliers to improve their services in order to become more efficient and better trained. Such a support agreement is called "Public-Public Partnership". Such cooperation is often created because of twin town arrangements between cities or municipalities. The water utilities or water companies work together on a non-profit basis to build up skills through the use of counselling, training, management, financial restructuring, joint investment and other measures. And finally Public- Public- Partnerships cause no "democratic costs".

VIII. Need for Non-Profit Solutions

As the current publication about "Environmental health inequalities in Europe", published by the WHO in 2012, shows, European countries have specific portfolios of environment-related inequalities - especially inequalities in deficient water supply and sanitary facilities of poor populations.[62] In particular in Central and Eastern Europe, poor and minority populations, e. g. Romani, suffer disproportionate environmental harms and lack of access to environmental benefits. Women and children within those groups tend to suffer the most. By example of *France*, where the human right to water was implemented by the "Right of access to drinking water at an affordable price", introduced through Article 1 of the Law Nº2006-1772 of the 30 December 2006 on water and aquatic environments. It states:

"...each natural or legal person has the right to obtain drinking water for nutrition or hygiene in conditions that are affordable to all" (Environmental Code, Art. L210-1).

This regulation affects the affordability of water. In addition, the French Government was due to submit a Bill in September 2011 that aims to protect the poorest members of the population from having to spend an excessively high proportion of their income on water and sanitation services. In France it is generally recognised that households should not spend more than 3% of their income on water.[63]

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[61] *See* above footnote 12.

[62] *WHO* 2012: Environmental health inequalities in Europe, p. 26 ff.

[63] *See Laskowski, S. R*. 2012: Time for implementation of the right to water and sanitation – e.g. the missing implementation in Germany, Journal for European Environmental & Planning Law (JEEPL) 9.2, Leiden/Boston: Koninklijke Brill NV, p. 164, 177 ff.; *see also Smets, Henri* 2012: For an increased effectivity of the right to drinking water in France, in: H. Smets (Ed.), Le Droit á l´Eau potable et á l´Assainissement en Europe – Implementing the right to drinking water and sanitation in 17 European

IX. Conclusions and Perspective

As shown, the global water sector stands between the European and International market and the goal of public welfare. This situation is risky for the national water sectors, especially with regard to the future Free Trade Agreements between the EU and states like Canada, USA and Japan. These Free Trade Agreements could create a "regulatory chill" by putting pressure on domestic policy makers to consider only measures which conform the agreement. As a result, democratic legitimated regulation in favour of social and environmental protection will be neglected as such a regulation could be seen as a barrier to trade which jeopardizes the profit of private enterprises. This applies especially for the legal implementation of the states core obligations concerning the human right to water. In addition, the perspective of private arbitration courts should cause our concern, because ultimately democratic standards in accordance with the rule of law are in danger. Regarding the water sector we need clear democracy based regulations which define public water and sanitary supply as non-profit sectors in accordance with the Human Right to Water. Consequently, the water sector has to be excluded from all future Free Trade Agreements.

countries, Rapport prepare pour le 6ème Forum Mondial de l´Eau en Marseille 2012, Paris: Editions Johanet, p. 160 ff.

Comments

Takahiro Hattori
Kyoto University

I would like to briefly comment on both professors' lectures. First, I agree completely with Prof. Okamura's thesis that the line between a tax and a non-tax is blurred, especially in terms of income redistribution. When legal scholars think about redistribution via a tax imposed by a government, we assume an original state without governmental interference. Beyond this assumption, this is where the viewpoints of libertarians and egalitarians diverge — a welfare state versus a minimal state. These perspectives are also of interest to legal philosophers. However, Prof. Okamura says that the assumption of an original state of affairs without any governmental interference is meaningless and unrealistic. I concur with his assessment.

In addition, many legal scholars often think that an imposed tax by a government influences people's preferences for goods and cannot be neutral. However, Prof. Okamura argues that we can still speak of the neutrality of a tax if its function is viewed in a wider context. His argument is very instructive. As a member of the planning committee of the Japan Association of Legal Philosophy, I found Prof. Okamura's lecture extremely useful, especially his suggestion about an annual conference discussing "taxes or the tax system and legal philosophy."

Second, Prof. Laskowski's lecture was thought provoking. Almost all of the water supply and basic sanitation in Japan are overseen by local public entities, but this scenario has recently been scrutinized. Last Friday I found an article in Nikkei, Japan's leading economic newspaper, in which a university professor asserts that the usage fees for water and sanitation greatly vary by the local public entity. The most expensive fees are ten times that of the cheapest fees. He argues that reforming the water supply and sanitation system is necessary using all available means and that private funding and the know-how of the private sector should be utilized. He recommends concessions as an ideal method for reform. I agree with Prof. Laskowski's assertion in her lecture that Japan should learn from European experiences and discussions in Germany about privatization and public–private partnerships in the field of public service essential to human basic needs.

Furthermore, I think that the emphasis on the role of local public entities in terms of water supply and sanitation is perhaps related to the subsidiarity principle, which is an important principle in Germany and the rest of Europe. This principle, which has been introduced in Japan, is sometimes misunderstood as a kind of principle for privatization, economic competition, and a market economy. However, I think that the core of this principle is human dignity and personal self-decision, which Prof. Laskowski emphasizes as common basic rights in the German and Japanese constitutions. Thus, Japan should learn from a historical perspective the important role that this principle has played as a basic society-composition standard in Germany.

Comments at the International Symposium

Atsuko Kimura
Kyoto University

Regarding Prof. Okamura's argument on taxation law, I would like to make a few comments about non-profit transfers among family members. There are different methods for taxation of married couples: on an individual basis or as a couple. Japan introduced individual-based taxation in 1949, but a Spousal Deduction (1961) and a Special Spousal Deduction (1987) have been introduced. These changes may provide a tax break to a company-employed husbands' income tax when his spouse makes less than a certain amount. These deductions were originally intended to promote women's domestic work by valuing it. In Japanese society after the 1960s, these deductions combined with social security policies helped to establish the post-war family model where husbands work outside and housewives support them at home. This model is believed to have sustained economic growth during that economic boom.

On the other hand, the Spousal Deduction has been criticized for discouraging women from working and preventing them from participating in the labor market. Now that Japan is facing an aging population combined with a diminishing number of children, which is accelerating the decrease in the workforce, this Spousal Deduction has been reviewed in order to increase the number of women in the workforce.

It should be noted that these spousal deductions do not necessarily give housewives direct favorable benefits; they only give favorable benefits and encouragement to domestic workers. The system itself is designed to be gender neutral. Consequently, we should view the underlying problem as the condition of domestic work within married couples to which a gender-neutral taxation is applied as well as the work environment and family values.

Even now, many women are non-regular workers and mainly engage in domestic work at home. A fundamental problem is that this lifestyle model makes it harder for women wishing to work outside to fully engage in work as they are overly tasked with childcare, nursing care, and domestic work. Thus, we must reconsider the framework in which the state supports non-profit roles, including housework, childcare, and nursing care among family members. Specific measures include helping family members share domestic work equally and externalizing or outsourcing domestic work to the wider society and market. An example of the former is childcare leave, while the latter includes the introduction of nursing care insurance.

Most lifestyle models consider domestic work to be burden and focus on either reducing this burden or sharing it equally. The state has designed systems to alleviate the burden and risk of domestic work according to this way of thinking, while considering the efficiency of providing roles and financial restrictions. However, this process naturally expects that individuals have a duty to engage in domestic work and the sense of burden to this obligation limits the willingness to work outside the household.

In response, a viewpoint has emerged in which individuals should take initiative in determining the type of work (domestic or paid) to engage in. This standpoint justifies the provision of domestic work services in the market based on a contract between concerned parties (a business and an individual) and also justifies family members taking up the burden of domestic work as an active decision. In this case, the state could design a system based on respect and support for the decisions made by concerned parties.

However, the state needs to support individuals' initiative to make decisions regarding domestic work in an encouraging manner instead of simply respecting such decisions. Thus, some argue that the paid-work-centric mentality needs to be corrected and active societal value should be established to recognize care work for family and volunteer activities. Therefore, what the state can do, what society can do, and what the market can do all need to be simultaneously reevaluated.

Comments - Panel I

Gabriele Koziol
Kyoto University

I would like to briefly remark on an issue of competition law which Prof. Laskowski raises in her paper. How public services (e.g., the water supply) are integrated in the framework of competition law rules is a very interesting but difficult question. Under national law, public services are usually excluded from the application of competition law, but the picture is convoluted on the level of European Union (EU) law.

EU law contains several rules that address how national laws governing public services and EU competition law interact. For example, Prof. Laskowski mentions that Art. 14 Treaty on the Functioning of the European Union (TFEU) and Art. 36 European Charta of Fundamental Rights are very general and vague, and consequently not as of yet not very helpful in defining the relationship between the European Union and its Member States. It would also be interesting to know how these two rules interact with Art. 106(2) TFEU, which stipulates that

[u]ndertakings entrusted with the operation of services of general economic interest…shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Thus, it allows for exceptions from EU competition law if certain prerequisites, among others a proportionality test, are fulfilled.[1]

The conflict between EU competition law and national rules on public services may be viewed as a problem of how to divide competence between the EU and its Member States which seek to maintain their own sovereignty, and public services area has been a rather untouched area to date. It has also been suggested[2] that this conflict can be viewed as a struggle between different concepts on the roles of the market and the state. Although national states typically find it is necessary to directly intervene in economic process for the interest of the public, the EU approach is based on the idea of an internal market that promotes European integration, economic growth, and prosperity based on free movement and undistorted competition. Thus, there is a strong belief in individual economic rights and its benefits for public interests. However, if and to what extent this philosophy applies, especially to the complex issue of water supply, remains debatable.

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[1] Heike Schweitzer, *Services of General Economic Interest: European law's impact on the role of markets and of Member States*, *in* Market Integration and Public Services within the EU pp.38 et seq. (Marise Cremona ed., Univ. of Oxford Press 2011).

[2] Schweitzer, *supra* note 1, pp. 50 et seq.

Panel 2:
Aspects of Financial Distribution by the State

Constitutionalizing and De-Constitutionalizing Distribution: The Welfare State in German Constitutional Law

Florian Meinel
Humboldt University of Berlin

I. Introduction

In this paper, I will first ask why modern democratic constitutional law in general is less directly engaged with questions of redistribution than administrative law. I will then show, how constitutional interpretation has step by step established a framework that can be described as a "relative constitutionalization" of public redistribution. Examples include the parliamentary prerogative for social legislation, the interpretation of the constitutional equality principle, and the constitutional limits of taxation. In a concluding part, I will ask how the established constitutional framework is challenged by ongoing developments such as the changing role of the state in public redistribution and EU law. I will end up with the question whether we are actually witnessing a structural "deconstitutionalization" of the distributive state.

II. The blindness of constitutionalism towards redistribution

In the theory of democratic constitutionalism, "social distribution" does not have a place. Even more: for specific reasons, it cannot have a place.

Distribution logically is a three-part relation. There has to be someone who distributes, someone from whom the respective goods are taken and someone they are given to. Mutual exchange between equals without legal force may be bargaining, but not "distribution". The same is true for the two elementary forms of welfare state instruments: When for example the state expropriates a citizen, this constitutes merely an infringement of his property. The distributive act, what actually happens with the property, is legally separated from the act of expropriation. The same applies to the other side: When the state pays a social subsidy to a citizen, this will be an individual benefit. Legally speaking, it doesn't matter where the money is taken from. Taking away and giving is therefore either duty or benefit.

It is only the conjunction, the linkage between both sides that constitutes a three-part relation and which therefore makes it possible to think of it as an act of "distribution". This linkage however, is actually impossible for democratic reasons. Sure, the state is organizing distribution at a large scale, by imposing taxes and granting benefits of all kinds. But some of the most fundamental principles of constitutional law transform the three-part structure of public redistribution into two-sided legal relations:

By these principles, the horizontal relations between the citizens on both sides are made legally irrelevant and – what seems to me to be even more important – invisible.

The constitutional principles I am thinking of are widely known:

1) Fundamental rights are negative freedoms from the state or positive rights addressed to the state. However, They generally do not constitute legal obligations among individual citizens. That is to say: constitutional law does not govern the distribution within society. Rather, it is only statutory law that can establish horizontal obligations.

2) The "universality" of taxation. The duty to pay taxes does not legally depend upon any kind of public service in return nor upon the political aims pursued by the state. When the state raises taxes in relation to income and distributes the revenues by granting social benefits, there is no horizontal legal relation between those who are giving away and those who are receiving. Both relations are mediatized by the state and thus *invisible as a form of distribution.*

3) The constitutional priority of individual legal entitlements over the state budget, an obvious consequence of the rule of law. The question whether the actual tax revenue is sufficient or not to fulfill the legal obligations of the state, is not and cannot be a legal requirement or precondition of the individual right as such. The horizontal dimension of distribution remains invisible.

All these principles come down to the same end: Public revenue and public spending are legally separated from each other. Revenues and expenditures are constitutionally independent. This principle is most commonly referred to as the "principle of universality of the budget" or the "budget principle of non-affectation". Obviously, these principles have a strong foundation in democratic theory. They guarantee that the political institutions and in particular parliament can make redistributive policy choices, free from any substantive constitutional constraints.

These principles however only constitute an ideal type, a normative standard. If it is rigorously obeyed, social distribution would not be a problem of constitutional law worth thinking about. Yet an in-depth analysis reveals that in how distribution is in fact structured and governed by constitutional law. My hypothesis is, that *every constitutional system responds in a particular way to the phenomenon of distribution, directly or indirectly, explicitly or implicitly*.[1] To understand the subtle relation between distribution and the constitution it is necessary to examine the concepts and theories of constitutional law under a certain aspect, we have to ask what kind of framework they provide for the political resolution of conflicts concerning social redistribution.

If we ask that way – and I will demonstrate this for the German example – we will soon see that the "ideal type" of a liberal constitution neutral towards redistribution is all but uncontested. The constitutional system as it is currently being understood is less "blind" towards distribution than one might think at the first glance.

[1] *See*, Sigrid Boysen, Anna-Bettina Kaiser & Florian Meinel (eds.), Verfassung und Verteilung, forthcoming 2015.

III. Historical roots of the German model

To understand the transformation that has been taking place in the 20th century, it is necessary to say at least a few words about the historical origins of the German constitutional model of the welfare state.

The exclusion of distributive policies from the scope of constitutional law is deeply rooted in the peculiar German understanding of the rule of law (Rechtsstaat) in administrative law as it developed in the second half of the 19th century and in particular under the constitution of 1871. The key features of this Rechtsstaat model were – as you know: (1) a strict *juridification* of administration on the field of encroachments upon liberty and property rights (2) a limitation of administrative law in the strict sense to state interventions into society. On the contrary, all forms of distributive action, were largely free from these constraints. Otto Mayer, the classic authority of administrative law in the age, categorized welfare administration under the concept of "Anstalt" (*public service*).

"State" and "society" were separated, and "society" was conceived as self-contained and subject only to occasional interventions by administration. The scope of the constitution was limited to the "state". In particular, the 19th century German constitutions were not meant to be normative foundation of social order.[2]

It is not by coincidence, that this model came up at the time when the German welfare state and its instruments of distribution under Bismarck were in a highly dynamic development; at the time when the social security system was established and when large scale infrastructure projects were realized, especially on the local government level. This simultaneous development of the welfare state and the constitutional model of the "Rechtsstaat" is no paradox. Rather, both are mutually dependent. It was precisely the exclusion of distributive administrative functions from the constitutional constraints of the rule of law that allowed for the institutional dynamic of the welfare state. Only this kind of a half-sided rule of law was in effect compatible with the authoritarian welfare state of the Bismarck era.

This model was fundamentally challenged in the Weimar Republic. The Weimar Constitution, adopted in 1919, contained a comprehensive catalogue of social rights and other provision that explicitly addressed issues of distribution such as art. 134 ("All citizens without discrimination contribute in relation to their means to the public burden."), art. 163 (constitutional right to unemployment benefits), art. 155 (the "distribution and usage of real estate is supervised by the state in order to prevent abuse and in order to strive to secure healthy housing to all German families, especially those with many children"), or art. 156 which allowed the state to "transfer economic enterprises suited for nationalization into common property, if the regulations for expropriation are obeyed and if compensation is not violated" and to "join in the administration of economic enterprises or syndicates" to "assure decisive influence".

I skip all the doctrinal and practical problems that came along with the implementation of these constitutional guarantees. What is important in this context is the

[2] M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Vol. II, 1992, pp. 121-6.

very scope of the Weimar constitution: It was meant to incorporate the welfare state, to set up certain substantive standards for distributive politics, in a way: to constitutionalize social order. The social distribution of goods from that very moment on had become a constitutional issue.

This shift was inevitable, since after the first world war, scope and quantity of public distribution has risen dramatically, and the Weimar Republic thus was the first welfare state in our modern sense. The state had to cross-fund a large scale pensions and insurance system that could no longer be run simply from the private contributions. The Reich and the individual states were cooperating on the field of social housing projects, which equally had to be financed form the budget. The state had to re-assess and redistribute pensions and savings after monetary wealth was largely destroyed by the 1923 inflation. By the early 1930s, more than a third of the population relied in their sheer existence on social security system.[3]

When the Basic Law was drafted in 1949, the outcome was quite different from the Weimar constitution. The constitution does not contain any social rights, nor does it mention any substantive standards for social legislation and the organization of the economic order. In particular, there is nothing that compares to Art. 25 of the Japanese 1947 constitution. The fundamental rights provisions are – with some minor exceptions for schools and family issues – restricted to the "classical liberal" negative freedoms. All that was taken into the new constitution from the social ambitions of the Weimar constitution was a vague principle of a "social" state (Sozialstaat) in Art. 20 (1), which ever since provides: "The federal republic of Germany is a democratic and social federal state."[4]

Unlike it may seem, the re-exclusion of social issues from the constitution cannot be understood as a restoration of the classical political economy of the constitutional monarchy with its highly ambiguous separation of "state" and "society", even though some of the most prominent critics of the early Federal Republic such as Ernst Forsthoff or Werner Weber tried to interpret the constitution precisely in this way. But the roll-back they aimed at was not the point of the constitution. The exclusion of distribution and welfare issues in the Bonn Basic Law had other reasons, namely, the deep political disagreement between Christian democrats and socialists over economic and social policies that allowed for no constitution that would have been substantive in that respect. Instead, the German constitution approaches distribution indirectly. Ever since 1949, it has given almost all legislative powers on the field of taxation and redistribution, of welfare and social security law, of housing and labor law, and of socialization and anti-trust law to the federal level. In effect, the constituency rewarded the entire power of distribution to the *Bund*. This institutional aspect has to be stressed since it explains why a key instrument of checks and balances in German Constitutional Law – the federal antagonism – has never actually worked on the field of redistribution.

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[3] D. J. K. Peukert, *Die Weimarer Republik*, 1987, pp. 132sq.

[4] On the much-debated interpretation of this clause see Ph. Thurn, *Welcher Sozialstaat?*, 2013.

IV. The "relative constitutionalization" of distribution

The interpretation of the *Grundgesetz* by both the Federal Constitutional Court and legal scholarship was thus ever since its beginnings bound by the polarities of the genealogy I have sketched so far. *On the one hand*, the integration of social welfare into the substantive scope of the constitution was irreversible. Distribution was "politicized" and "constitutionalized". *On the other hand*, the new constitution offered nothing to actually flesh out the promises of "social constitutionalism".

How did the Constitutional Court, how did constitutional interpretation react to this paradox? To sum up the results very roughly, one can say that in a long process, the restored "liberal" concepts of the constitution were re-interpreted step-by-step to (1) offer substantive (yet open and indeterminate) standards for legislative and administrative decisions over distributive issues and (2) to allow for judicial and notably *constitutional review* in these cases.

The Constitutional Court had to decide cases concerning redistribution from the very beginnings quite frequently. In one of the first cases, the Court was confronted with a statute (*Investitionshilfegesetz*) that redistributed private company profits from the secondary industrial sector to foster investment in the coal and iron industries. To defend the legitimacy of this redistribution, the Court stated in what later became one of its most famous opinions that "the constituent power has not adopted a specific economic system. This omission enables the legislature to pursue economic policies deemed proper for the circumstances, provided the Basic Law is observed, in particular the equality principle. […] Although the present social order is consistent with the Basic Law, […] it can be substituted or superseded by a different decision."[5]

These sentences contain in a nutshell the Court's attitude towards cases involving distributive policies. Until the 2010 ruling on the constitutionality of the minimum living standard (*Grundsicherung*),[6] the Court has been unwilling to adopt and to implement strict constitutional directives for political decisions on social redistribution and reluctant to take political responsibility away from the legislature. Nevertheless, the Court is has not hesitated to establish constitutional standards for an ever-denser retrospective control of such decisions. In other words: Political landmark decisions on the field of welfare state politics are left to the political process, but the Court exercises control over the fairness and appropriateness of the criteria and measures of distribution. The constitutionalization of welfare state redistribution remains "relative".

It is impossible here to give a fairly precise account of how the court handled distribution conflicts in six decades of its jurisdiction.[7] All I can do here is to draw your attention to some of the most important aspects that explain how the court step by step enhanced constitutional review on the field of the welfare state.

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[5] BVerfGE 4, 7.

[6] BVerfGE 125, 175.

[7] See the materials presented by D. P. Kommers & R. A. Miller, *The constitutional jurisprudence of the Federal Republic of Germany* (3rd edn.), 2012, pp. 622-713.

1) *The extension of the prerogative of legislation on the field of welfare matters*. There have been decades of a fierce scholarly fight[8] against the traditional doctrine according to which a statutory basis was required only for administrative action that consisted in an infringement of individual rights. Even though until today the German courts allow for autonomous administrative welfare programs, there has been a large-scale juridification of German social security law which by now in fact is almost entirely based upon parliamentary legislation.
2) *The re-interpretation of the constitutional concept of property as it is guaranteed in art. 14 (1) of the Basic Law*. There are three developments that show how the phenomenon of distribution has been integrated in the understanding of property.
    a. The constitutional protection of property has been extended to the individual entitlements acquired in the public social security system. This is maybe the most important aspect, because hereby the main instrument of redistribution in the German welfare state, the mandatory social security for old age pension and unemployment run by the state, is protected against its removal by the legislature.
    b. In a couple of decisions since the late 1970s, the court acknowledged that the constitutional protection of property rights can be different for different "social functions" of property: "The power of the legislature to limit property rights is the greater the more the object of property stands in a social relation and a social function", "the more in other words the property touches upon the interests of other people who depend on the use of the property."[9] The importance of this judicial opinion can hardly be overstated. It acknowledges the legitimacy of measures that directly modify the distributive function of property in a market society *without* an individual state intervention. Such measures deviate remarkably from the constitutional model sketched above, because they establish a three-part relation of distribution between two private individuals on both sides and the state as a redistributive agency in-between.
    c. *Art. 14 (1) as a constitutional limit of taxation*. It had been a long-standing principle in German Constitutional law that the imposition of taxes does not constitute an infringement of property rights. In consequence, there are no quantitative limits of taxation.[10] The question as to *how much of the national income is actually distributed* has

[8] The seminal contribution is D. Jesch*, Gesetz und Verwaltung*, 1961.

[9] BVerfGE 50, 290 (340), a decision in which the Court upheld an act introducing the co-determination of workers in large industrial corporations; and BVerfGE 89, 1 (6), a decision on the quasi-property right of the tenant.

[10] BVerfGE 4, 7 (#) – *Investitionshilfe* (1952); see Christian Waldhoff, *Grundzüge des Finanzrechts des Grundgesetzes*, in: Handbuch des Staatsrechts, Vol. V, § 116, No. 117.

no answer in the constitution but is left to the political process. As the amount of public redistribution seemed to be in a steady growth, particularly in the 1980s, this dogma was increasingly disputed by conservative lawyers and finally the Constitutional Court declared in the early 1990s that an overall tax burden of more than 50 percent of the income can be unconstitutional.[11] What is interesting here is that this is one of the few cases in which the legitimacy of distribution was directly in question which in a country with a robust tradition of authoritarian welfare policies is worth mentioning. But the new dogma did not make it after all, also because a tax burden of 50 percent is politically impossible anyway in a globalized economy with a free flow of capital. The Court silently abandoned the 50 percent rule in 2006.[12]

3) A further step towards the constitutionalization of distribution was taken by the development or: invention of new *"social dimensions" and "social functions" of fundamental rights* by the Constitutional Court (which as mentioned before were beyond the reach of the constitutional text). Positive rights were first recognized in a decision that concerned the admission to higher education and the distribution of the scarce places.[13] The construed the standard from a "social" interpretation of the freedom of occupation and the equality principle (art. 3 (1) and 12 (1)). It held that in cases where there are resources under public control, the constitution gives an individual right to a fair share.[14] "The more the modern state in engaged with the social security and the education of its citizens, the more the more the relation between the state and the citizen is governed not only by the principle of freedom from the state but also by the demand for fundamental rights to participate in benefits from the state."[15]
4) Even more important was the role that the equality principle (art. 3 (1)) assumed in constitutional law. Whereas until the early 20th century equality was a right addressed merely to the administration that called for the equal *implementation* of the law, it was now interpreted as a limit of legislation. It requires that differences established by law have to be justified by rational reasons, in other words: must not be arbitrary. Legislation must treat equal cases equally. Since this new doctrine was adopted by the Constitutional Court, art. 3 (1) offers a universal standard for distributive choices made by either the legislature or the administration which had not existed previously. In the legal areas in which distribution takes place, the directives of other fundamental rights are weak. That hold true for tax law as well as for social security law. The equality principle however allows for a judicial control of the system of distribution as such: It is now subject to judicial scrutiny whether in raising taxes and in

[11] BVerfGE 93, 121 (138).

[12] BVerfGE 115, 97 (114).

[13] BVerfGE 33, 303 – *Numerus clausus* (1972).

[14] BVerfGE 33, 303 (332 f.).

[15] BVerfGE 33, 303 (330 f.).

granting benefits the state has treated different social groups differently in an arbitrary way. Equality hence has become a "constitutional prosthesis"[16] on the field of redistribution. However: Also for the constitutional law of equality it remains true that the two sides of distribution (taking and giving) are not linked to each other. Taxation for instance can not be challenged arguing that a grant awarded to someone else is arbitrary. The non-affectation principle is not affected.

V. Transformation

The constitutional framework I have summarized rested and rests upon strong political and social preconditions which existed over decades in West Germany but which today are no longer self-evident. Hereby, I mean not only the factual side of the transformation of the European welfare state which sociology refers to as the "new social question" and the "individualization of social conflict". The very conditions of the constitutional and administrative framework are in doubt. The changing role of the state in the distribution of goods ("ensuring state", "regulation", "governance", "efficient allocation") has not been sufficiently discussed in its constitutional consequences: How is political control exercised over decisions on questions of distribution by administrative agencies? Are these decisions increasingly de-juridified to comply with economic rationality? Other changes have been invoked by European Union law. At the beginning of the integration project, economic and social policies were separated and the member states were eager to retain exclusive responsibility over social redistribution. The power of distribution established a constitutional counterweigh against the liberal political economy of the single market. But that separation proved to be unstable. The financial crisis has put enormous pressure upon the member states' systems of distribution and has established what critics call the "constitutional protection of capitalism".[17] Apart from that, EU law limits the national autonomy of distribution by state aid and procurement law and by the non-discrimination principle that bans (direct or indirect) discriminations against other EU citizens. As a result, political inclusion by distribution, the fundamental mechanism of the welfare state for a century, is no longer available.

[16] *Sigrid Boysen*, in: Ingo von Münch/Philip Kunig (Hrsg.), Grundgesetz, 6. Aufl. 2012, Bd. I, Art. 3, Rdnr. 88.

[17] *Danny Nicol*, The Constitutional Protection of Capitalism, 2010.

Redistribution of Globalized Policy-Making and Enforcement Processes

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I. Introduction

Social security law is defined as law regulating redistribution to support individual self-reliance in daily life.[1] Because laws granting and collecting money coexist, social security law must consider more than the law related to the administration of benefits. Traditionally, the nation state has been designated as the unit to oversee redistribution. In fact, the state is so closely related to social security law that legal scholarship has emphasized the extensive responsibility of the state.

In the context of the globalized policy-making and enforcement process, social security law is conservative, and globalization has only caused problems such as those related to social security agreements or nationality clauses in individual acts. It seems that "international social security law" or "global social security law" is not controversial in Japanese legal scholarship[2] because most of the above problems can be solved in the legal conditions of benefits. Therefore, the state will play a central role in the redistribution process, even though globalization is continuously evolving.

The question then becomes how can social security law contribute to the globalization of policy-making and enforcement processes? It is true that social security law is more closely connected to the democratic process of the nation state than other administrative law branches because the national legislator defines social security benefits. Redistribution via social security was originally intended to be a social integration process by and within the nation state. However, from the legal perspective, the roles and responsibilities of the nation state in the social security area should be divided into those for implementation and those for institutionalization similar to the analysis of the privatization process. In addition, the unit of redistribution, a state versus a non-state entity, should be considered.

This report shows the present conditions of the internationalization or globalization of social security law and examines legal theories that can handle the current situation. Here the redistribution unit is divided in two. First, redistribution in the nation state is considered with regard to internationalization or globalization ("international social security law"). Second, redistribution beyond or without the nation state ("globalized social security law"), which has yet to be realized, is evaluated. Concrete examples, which are in their infancy, are used to provide insight into whether redistribution beyond or without the nation state is feasible. This academic work should not

[1] Hiroki Harada, *Reikai Gyoseiho* [Administrative Law and Policy] (2013), p.230.

[2] The newest textbook of the Japanese social security law, Yoshimi Kikuchi, *Shakaihoshoho* [Social Security Law] (2014), p.43, shows international social security standards by ILO, international human rights conventions, international cooperation with ODA, foreign worker problems and bilateral social security agreements as examples for the internationalization of social security law.

only clarify the relationship between social security law and a multi-layered public sector, but also highlight the characteristics and problems of the Japanese social security law system.

II. International Social Security Law: the State as a Redistribution Unit

1. Responsibility for Implementing Redistribution

This section focuses on the responsibility of the state to implement redistribution in a globalized world using two examples: the social security agreement and the nationality clause. Similar to resolving issues with conflicting laws, the main point here is to adjust applications of national law. There are three typical coordination principles: the home-country principle, the territorial principle, and the principle of reciprocity. According to the home-country principle, the homeland should grant social security even if its citizens live abroad, which leads to denying foreigners' rights to receive. In the territorial principle, the state provides social security to anyone who lives within its borders without verifying nationalities and entitlements. The principle of reciprocity means that country A gives citizens from country B social benefits and vice versa.

A. Social Security Agreement

The social security agreement is one of the most famous examples of international social security law.[3] It is an international (mostly mutual) agreement, which aims to avoid the double imposition of insurance bills from the homeland and the residential country or to coordinate the right to receive pension and health insurance benefits under certain circumstances. Japan currently has agreements with 17 countries, including Germany, the United Kingdom, and the United States.

A social security agreement has three main characteristics:

- It is a form of institutionalized administrative cooperation that aims to solve conflicts in the laws, but it also contains information exchange, cooperative implementation, and arbitration clauses if a legal dispute arises. However, the arbitration process is rarely invoked because almost all of the uncertainties were solved during the administrative practice before concluding the agreement.[4]
- It has aspects similar to a tax treaty, which also contains clauses to coordinate the application of tax laws and to exchange information. However, the social security

[3] Ken'ichro Nishimura, *Shakaihoshoho Nyumon* [Introduction to the Social Security Law] (2nd ed., 2014), p.10.

[4] Jun Nishimura, "Shakaihoshokyotei to Gaikokujin Tekiyo" [Social Security Agreement and its Application to Foreigners], *Kikan Shakaihosho Kenkyu* [Social Security Law Quarterly] Vol. 43, No. 2 (2007), pp. 149-158.

agreement lacks clauses for cooperation to collect premiums coercively and to substantiate the legal conditions of the premium.[5]

- It allows a citizen of one country to carry his or her social security benefits to another country. However, portability is not allowed if the host country does not have a social insurance system. If a country uses a tax to finance social security, a foreign citizen who pays the tax cannot be regarded as a premium payer in his or her homeland because the country collecting the tax determines how to grant social security benefits, regardless of the amount of money he or she pays as a tax.

B. Nationality Clause

Nationality clauses in individual beneficial acts are also famous examples of international social security law. In a social security system based on the employment relationship (e.g., the Health Insurance Act and the Long-Term Care Insurance Act), a nationality clause has never been included. On the other hand, in a system based on the residential relationship (e.g., the National Health Insurance Act and the National Pension Act) or financed by a general revenue source (e.g., the Public Assistance Act), Japanese nationality was required to receive benefits. In 1981, when Japan joined the Convention Relating to the Status of Refugees (Refugee Convention), most of the nationality clauses were abolished because the Convention demands national treatment for refugees with regard to almost all social security benefits. However, these clauses remain in the Public Assistance Act and the Act for Supporting Families of the Ward Dead. In addition, the nationality or the visa status can be an issue when interpreting the domicile clauses in the National Health Insurance Act or the Long-Term Care Insurance Act.[6]

The Japanese Supreme Court has had to decide the compatibility between the nationality clause, the Japanese Constitution, and international treaties on the human rights in several cases. In the *Shiomi* case, which is the leading case on this issue, the plaintiff, who did not have Japanese nationality when the National Pension Act was enacted, insisted that the nationality clause at that time and the absence of a remedial clause for foreigners in the amendment violated Articles 25 (the right to a certain standard of living) and 14 (equal treatment) of the Japanese Constitution as well as international human rights conventions.[7] The court decided that the legislature had a wide discretion over actualizing the demand of Article 25 because its wording, "All people shall have the right to maintain the minimum standards of wholesome and cultured living," is so abstract that the legislature can and should take various elements

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[5] The social insurance premium is covered by international tax treaties, but Japan made reservation to that provision. *See* Yoshihiro Masui, "Maruchi-Zeimugyosei-Shikkokyojo-Joyaku no Chushaku wo Yomu" [Text of the Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters as Amended by Protocol, OECD], *Zeimu Kenkyu* [Taxation Business Review] No. 775 (2014), pp. 253-291.

[6] Takashi Yamazaki, "Gaikokujin Rodosha no Shuro, Koyo, Shakaihosho no Genjo to Kadai" [Present Circumstances and Problems on the Work, Employment and Social Security of the Foreigners], Refarensu [Reference] Vol. 56, No. 10 (2006), pp. 18-43.

[7] Supreme Court, Judgment, March 2, 1989, Hanrei Jiho (1363) 68.

such as financial circumstances into account. Hence, due to shortages in the revenue stream, an act that provides advantages for Japanese citizen or does not include a remedial clause for foreigners is within the legislative discretion. The court also said that "unequal" treatment for foreigners in the legal requirement for insurance benefits satisfies the requirement of Article 14 because this difference is reasonable. Additionally, the court demonstrated that the National Pension Act conforms to international human rights conventions since the Social Security (Minimum Standards) Convention of the International Labor Organization (ILO) clearly allows unequal treatment of foreigners for social security benefits financed by a general revenue source, and the International Covenant on Economic, Social and Cultural Rights admitted in Article 2 follows the principle of "progressive realization," which is not legally binding on a member nation, including Japan.

In the newest case, the court clarified the relationship between international human rights conventions and national legislation in the Public Assistance Act. The plaintiff, a permanent resident, applied for benefits under the act, but was refused because the act had a nationality clause and it was only correspondingly applied to foreigners, including permanent residents. Although there had been no such clause in the original version of the act, the law in force (amended in 1950) includes this clause. On the other hand, the Ministry of Health and Welfare revealed in a 1954 circular notice that the act shall be applied to foreigners correspondingly.[8] This interpretation with "mutatis mutandis" meant that the central government shared the cost of the benefits for the foreigners as if the local government had granted benefits to Japanese citizens, but foreigners do not have the right to make a claim for the benefits and cannot file suit. In 1981, when Japan joined the Refugee Convention, how to revise the nationality clause in the act so that it complied with the treaty was controversial. The Ministry felt that an amendment was unnecessary because the act had already been applied to the foreigners correspondingly and it had adequate budgetary appropriations. Consequently, the nationality clause was maintained. However in an intermediate appeal, the Fukuoka High Court found that the act protects the legal interest of foreigners with a long-term resident visa.[9] On the other hand, the Supreme Court decided that the act does not cover the interest of foreigners because only Japanese citizens have the right to apply for benefits and the act was not actually revised, even if a circular notice, which is not legally binding, admitted mutatis mutandis.[10]

This decision seems to be based on the strict literal interpretation in which the legislature would not approve foreigners' right to make a claim even after joining the Refugee Convention. This suits the basic line of the *Shiomi* Case where the court emphasized the wide legislative discretion and the non-binding effect of international human rights conventions. However, the Refugee Convention does not permit the unequal treatment of foreigners in social security benefits financed by the general revenue source or the principle of progressive realization and reciprocity on the right to

[8] Circular Notice on the Livelihood Protection Benefits for the Destitute Foreigners (May 8, 1954).

[9] Fukuoka High Court, Judgment, November 15, 2011, Hanrei Times (1377) 104.

[10] Supreme Court, Judgment, July 18, 2014; not yet reported.

receive. The Court's decision did not address whether the constitutionality of the nationality clause was breached in the Refugee Convention, which may be a departure from Article 98 Section 2 of the Japanese Constitution (obligation to observe international law). Below the effect of international norms of social security on national law is examined from the viewpoint of the responsibility of the state to institutionalize redistribution.

2. Responsibility for Institutionalizing Redistribution

A. International Human Rights Approach

There are two ways to coordinate or harmonize national social security standards: a policy coordination approach and an international human rights approach. In the policy coordination approach, an international entity sets the standard as a desirable goal for each state. The Social Security (Minimum Standards) Convention of the ILO is a typical example.[11] On the other hand, the international human rights approach demands that the state give a person the right to receive.

International human rights are often referred to in international treaties and conventions. According to a commonly accepted theory, international treaties are subordinated to national constitutional law but are predominant over national legislation.[12] Some scholars have proposed that treaties on international human rights should be used to help interpret human rights clauses in national constitutional law because treaties have more concrete content of rights compared to national constitutional law.[13] Others have insisted that the treaties only offer a guideline for national legislation because treaties require that the states to realize their provisions.[14] In the context of the relationship between treaties and national administrative law, the national legislation, which contravenes whether a treaty illegal and invalid, accepts a treaty as a part of the national law when it is ratified. According to the reservation of the law on the administrative law theory, it is impossible to construct a legal system using only treaties.[15]

Then what roles do treaties on international human rights play in social security law? Elements of international human rights have been introduced into the interpretation of the national constitutional law, especially in Article 25, assuming that treaties

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[11] Susumu Sato, "Shakaihosho" [Social Security], in Japan ILO Association ed., Koza ILO (Ge) [Course for ILO Part II] (1999), pp. 312-339; Yutaka Sumida, *Shakaihoshoho* [Social Security Law] (rev. ed. 1994), pp. 83-84.

[12] Akiko Ejima, "Kenpo to Joyaku" [Constitutional Law and International Treaties], *Hogaku Kyoshitsu* [Course on Law] No. 405 (2014), pp. 45-47.

[13] Nobuyoshi Ashibe, *Kenpogaku II* [Constitutional Law II] (1994), p. 36.

[14] Kazuyuki Takahashi, "Kokusai Jinken no Ronri to Kokunai Jinken no Ronri" [Differences between International Human Rights and Human Rights within the State], *Jurisuto* [Jurist] No. 1321 (2006), pp. 69-82.

[15] Takehisa Nakagawa, "Gyoseiho kara Mita Jiyukenkiyaku no Kokunaijisshi" [National Implementations on the International Covenant on Civil and Political Rights from the Perspective of Administrative Law], *Kokusaijinken* [Review on International Human Rights] No. 23 (2012), pp. 65-75.

are predominant over the national legislation. As previously mentioned, the provision of the Japanese Constitution on the social security acknowledges the legislative discretion and that treaties are deemed as guidelines for the national legislature. Thus, it may be true that granting social security benefits is not reserved for the law because this administrative function does not contain an infringement of the citizens' freedom and property. However, before benefits can be distributed, it is logical that the state collects money coercively, which may be perceived as an infringement. Hence, the national legislature must establish the social security system.

B. Relationship between the Legislature and the Courts

Can a person who has suffered due to a violation of an obligation set forth by a treaty on international human rights file a lawsuit? The international human rights approach includes this option to resolve such an issue — the direct applicability of treaties or self-executing treaties.

In the international law scholarship, self-executing treaties must meet two conditions: complete content and clear wording.[16] The Refugee Convention, for example, clearly provides the duty of a nation even if social security is financed by a general revenue source, but it is not self-executing because the complete content is lacking as the national political process decides who receives benefits within the limited general revenue source.

Even if a treaty is not self-executing, breaching international duty may be unconstitutional due to Article 98 Section 2 of the Japanese Constitution. If a treaty clearly explains the duty of participating states, a national law departing from it could violate the treaty and observation of international law. In such a case, the court must initially try to interpret the clause in the national law to conform to the treaty (and the national constitutional law). If this is unsuccessful, the court can declare that a clause in the national law is unconstitutional and invalid.[17] For example, the Refugee Convention clearly outlines the duty of equal treatment based on the context of social security. The ministry, therefore, must insist on compatibility between national law and the treaty, using the corresponding application as a legitimizing clue. Accordingly, the court has leeway to interpret the wording of Sections 1 and 2 in the Public Assistance Act ("citizen") such that they include certain foreigners, especially refugees.

In addition, a multi-layered construction should be considered to protect human rights from an international human rights approach. Some treaties incorporate individual complaints mechanisms. For example, the European Convention on Human Rights has its own international court and the decision of this court greatly influences the national courts and legislatures in Europe. Around the world, national courts refer to the decisions of global institutions to adjudicate international human rights affairs,

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[16] Akira Kotera, *Paradaimu Kokusaiho* [Paradigm on International Law] (2004), pp. 63-66.

[17] Itsuo Sonobe, "Nippon no Saikosaibansho ni okeru Kokusaijinkenho no Saikin no Tekiyo Jokyo" [Practical Situations on Applications of International Human Rights Law in the Japanese Supreme Court Today], in Kentaro Serita et al. eds., *Kokusaijinkenho to Kenpo* [International Human Rights Law and Constitutional Law] (2006), pp. 17-24.

and the case law theories on human rights are gradually and synchronically being developed via judicial dialogue.[18]

To summarize, the legislature and the court should share the responsibility for materializing international human rights as follows:

- The national legislature has primary responsibility for institutionalizing an individual social security system because the function of redistribution is related closely to the national democratic process and encroachment on citizens' property to collect money to grant benefits. International standards for social security provide guidance to national legislatures when establishing the system as well as when coordinating national policy and the international human rights approach.[19]
- The national courts and its network should exercise restrain the influence of the legislature. International human rights are characterized by their effect to harmonize desired values and political tasks on the international level and to guarantee individual rights and interests.[20] The courts should introduce the demands of international human rights to continuously develop the legal system, declare the unconstitutionality of the national law or interpret the law so that it conforms to international norms based on the idea that the legislature has the discretion to establish the social security system.

III. Globalized Social Security Law?: the State as a Promoter for Redistribution

Globalization requires redistribution beyond the nation state. Here I briefly provide four examples: international foundations for compensation, a global tax, private insurance, and redistribution by globalized companies.

1. Responsibility for Implementing Redistribution

A. International Foundation for Compensation

To materialize redistribution across borders, a monetary pool that spans beyond the state must be established. Although such a pool for redistribution does not currently exist, an international monetary pool for compensation does. The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage created the International Oil Pollution Compensation Fund.[21] Oil

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[18] Hajime Yamamoto, "Kenpo Kaishaku ni okeru Kokusaijinken Kihan no Yakuwari" [Roles of International Human Rights Norms on the Interpretation of National Constitutional Laws], *Kokusaijinken* [Review on International Human Rights] No. 22 (2011), pp. 35-40.

[19] Takeshi Takahashi, *Kokusai-Shakaihoshoho no Kenkyu* [International Social Security Law] (1968), p. 525.

[20] Koji Teraya, "Kokusaijinken ga Michibiku "Ho" to "Kokka" Saiko" [Rethinking of "Law" and "State" with International Human Rights Norms as a Clue], *Kenpo Mondai* [Constitutional Law Issues] No. 17 (2006), pp. 20-35.

[21] Fumitoshi Yamashita, "Yudaku Songai Baisho Sekinin ni Kansuru Atarashii Seido no Kakuritsu" [A New System on the Compensation Liability for Oil Pollution Damage], *Toki no Horei* [New Legislation Review] No. 932 (1976), pp. 19-32.

receivers contribute to the fund, while victims of oil pollution due to an oiler can demand compensation from the fund if a ship-owner cannot pay for the damages. The Convention on Supplementary Compensation for Nuclear Damage expects a similar supplementary fund to be established to compensate for nuclear damage. Using this idea of an international foundation system, redistribution beyond the nation state could be realized if each state contributed to the fund and the fund granted benefits to a state when an event covered by the fund occurs. However, each state must collect a levy from its citizens and distribute benefits to each beneficiary.

B. Global Tax

The concept of a global tax proposes to impose a new kind of tax to globally finance and solve worldwide problems.[22] There are two big reasons for a global tax: coping with tax evasion and acquiring monetary resources. The Tobin-Tax (1972), which is imposed on foreign exchanges to control financial risks due to speculation on the currency market, was the first proposed global tax. In 2006 France introduced the solidarity levy on air tickets to supply developing countries with medicine for AIDS, tuberculosis, and malaria. The French government collects the levy from airlines and disburses it to an international organization, UNITAID, which buys and supplies medicine to developing countries.[23]

A global tax can be a brand-new tax, which is collected by an international organization that then decides how to spend the money. This scenario requires a new unit of redistribution apart from the nation state. From the viewpoint of the administrative law scholarship, this approach requires that the following issues be solved before the concept is realized:

- If a global tax is imposed and collected by the state similar to the French solidarity levy on air tickets, it can be regarded as a domestic tax with an international financial adjustment system, which is naturally dominated by legal theories on national public and tax law. If the tax requisites are clearly written in the tax legislations with respect to the principle of no taxation without law, problems should not arise. However, a global tax would entail a special account, which could be a sanctuary from democratic controls on reasonable expenditures. Hence, the democratic governance mechanisms of the entity determining how to spend the global tax must be regulated.
- If the global tax is imposed and collected by an international organization, it should adhere to the principle of no taxation without representation and democratic decisions on public finance matters such as the nation state. It is unrealistic that an international organization could collect the tax coercively by itself. Hence,

[22] Yoshihiro Masui, "Kokusai Rentai Zei" [International Solidarity Levy], *Jurisuto* [Jurist] No. 1413 (2010), pp. 42-43.

[23] Chika Mochizuki, "Kokusai Rentai Zei no Tenkai to sono Hoteki Kadai" [Development and Legal Problems on the International Solidarity Levy], *Sozeiho Kenkyu* [Tax Law Review] No. 42 (2014), pp. 51-73.

it would depute the states to collect tax, which may lead to the same issues as one state demanding another state to raise a compulsory tax.

2. Responsibility for Institutionalizing Redistribution

A. Private Insurance

There is another type of redistribution beyond the state where the state does not implement redistribution itself, but establishes a redistribution system run by other entities. One example is private insurance, which plays only a complementary role in Japan. Each citizen in Japan has a duty to be insured by the public medical insurer. The insurance benefit coverage is more comprehensive compared to other developed countries. This substantial public medical insurance system limits room for private insurance.[24] On the other hand, private insurance for medical services is widespread in the United States, and only two types of public medical services exist: Medicare and Medicaid. In the United States, the state is responsible for regulating but not operating private insurances.[25] In the German system, which is the model for public medical insurance in Japan, not all the citizens are insured under the public medical insurance system. Thus, Germany also has private insurance, especially for public servants and self-employment.[26]

Private insurance with control and supplementary benefit by the state could be a suitable model for redistribution beyond the state because private insurance can easily cross borders. This model is closely related to the strong objection to the Transpacific Partnership Agreement (TPP-Agreement) regarding the breakdown of the public medical insurance system.[27] To avoid improper proposals of medical treatment from a doctor and to keep the medical level (relatively) equal regardless of wealth, the Japanese system fundamentally forbids a patient from receiving medical treatment that is simultaneously financed by the patient's own expense and public medical insurance. If the TPP-Agreement removes this restriction, then private insurers, including United States' insurance companies, would have opportunities to acquire new customers. Although the social insurance system sets premiums based on income of the insured, the insurance benefit is fixed according to the need for medical treatment, whereas the premium in private insurance depends on the risks and future benefits of the insured, which does not have redistribution elements. Hence, private insurance may cross a border of the nation state, but it lacks a redistribution function. If the state, however, imposes a standard rate for a premium and a fixed benefit for the private insurers who

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[24] Takashi Nakahama, "Minkan Iryohoken no Yakuwari" [Roles of the Private Medical Insurance], *Hokengaku Zasshi* [Insurance Theory Review] No. 596 (2007), pp. 69-88.

[25] Michihiko Ishida, "Amerika no Minkan Iryo Hoken" [Private Medical Insurance in the USA], *Kenporen Kaigai Iryohosho* [Medical Service Overseas] No. 98 (2013), pp. 27-32.

[26] Kotaro Tanaka, "Doitsu no Minkan Iryo Hoken" [Private Medical Insurance in Germany], *Kenporen Kaigai Iryohosho* [Medical Service Overseas] No. 98 (2013), pp. 1-10.

[27] Satoshi Higashitani, *Machigaidarake no TPP* [TPP: Very Wrongful Way] (2011), p. 166.

are substitutes for the social insurance similar to the German system, then the private insurance system could result in a quasi-redistribution.[28]

B. Redistribution by Globalized Companies

Globalized companies may be another option for redistribution beyond the state. Debate has already begun on the compatibility of private global companies and public interests, including those on corporate governance, corporate social responsibility, and the United Nations Global Compact.

The Japanese corporate pension system should provide insight on redistribution by companies. If a company establishes its own corporate pension fund, then it is partly exempt from the obligation to pay a pension insurance premium to the government. This exemption is managed by the fund, which must pay an annuity to the insured in lieu of the government (vicarious payment).[29] In France, the "solidarity contract" on private health insurance, where the premium is independent of the risks of the insured, is exempt from the insurance contract tax that is normally levied on insurance contracts.[30] This "exemption" system where private entities are released from tax or other public charges if they promise a certain level of benefits to beneficiaries could be useful to construct a redistribution system run by private entities. With this system, the state could guarantee redistribution.

IV. Conclusion

Herein problems with the social security system due to internationalization or globalization are examined, and three main conclusions summarize the relationship between globalization and social security law with regard to characteristics of the Japanese social security system.

- Traditional Japanese social security law scholarship emphasizes the responsibility of the state, which causes internationalization problems to be regarded as coordination of the norms (international social security law as a conflict of norms). In the Japanese system, the state or local municipalities as a general government organization mainly assume the responsibility for redistribution. In addition, the autonomy of public insurance associations may not attract much attention, even if some public insurers are not the state and the local municipalities. On this ground, it is commonly accepted that the state is the responsible unit of redistribution.

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[28] Ikuko Mizushima, "Doitsu Shakaihokenho ni okeru Minkan Iryo Hoken" [Private Medical Insurance in the German Social Insurance Law], *Handai Hogaku* [Osaka University Law Review] Vol. 60, No. 2 (2010), pp. 293-320.

[29] Hiroki Harada, "Establishing Partnership between Public and Private Law in the Globalized Policy-Making and Enforcement Process: Focusing on Social Security Law", Japanese Yearbook on International Law 57 (2015, in Print).

[30] Eri Kasagi, *Shakaihoken to Shihoken* [Social Insurance and Private Insurance] (2012), p. 115.

- A social security system without the state can exist.[31] Social security can be separated from the nation state if the social security system is defined as a legal system for the solidarity of the people who live in daily society.
- The national legislature has discretion for molding the social security system. Currently the Japanese system has a state-centralized structure. Consequently in a system based not on employment but on residence, the element of nationality or residential entitlement tends to flow into the beneficial conditions, which is constitutional from a domestic law perspective. Hence, it is important for the domestic law scholarship to absorb the international harmonization movement of social security systems into policy coordination and international human rights approaches. In addition, academia must construct legal theories for redistribution that are beyond the nation state and its legal regulations and controls using the contract or exemption system as guides.

[31] Yuki Asano, "Shakaihosho Shisutemu no Saikoso" [Another Concept of Social Security System], *Jurisuto* [Jurist] No. 1422 (2011), pp. 58-66.

Comments on Prof. Harada's Report

Hiroshi Suzaki
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Thank you very much for allowing me to provide my comments. In the second part of Prof. Harada's report, he discusses the possibility of a non-state institutional structure as an international redistributing system under the promotion of the nation states. Prof. Harada's idea about using private insurance as a substitute for social insurance is very interesting to me as a private insurance law researcher.

Both private and social insurances are based on a system where the insured pay premiums in advance to form a fund, which is then used to pay individual claims. An important part of this system is to eliminate the so-called adverse selection, which is the situation where a party facing a high risk of loss is more likely to seek insurance than a party facing a lower risk. If adverse selection is not eliminated, many high-risk parties buy insurance and the average degree of risk of such insurance increases, causing the balance sheet of the insurer to steadily decline until the insurer becomes bankrupt. Thus, to properly operate such an insurance system, especially a medical insurance system, elimination of adverse selection is indispensable.

For social insurance, adverse selection can be eliminated by the mandatory entry principle, which requires that everyone buy insurance and pay the premiums. Under this principle, opting out is not an option. On the other hand, for private insurance, adverse selection can be eliminated if the insurer investigates the health condition of the insured, determines his or her degree of risk, and sets premiums accordingly. Here, this system is called the traditional risk rating system in private insurance.

Referring to German systems, Prof. Harada argues that the private insurance system could have quasi-redistributional functions if the state imposes a standard rate for the premiums and a fixed benefit on the private insurers. Prof. Harada seems to have assumed a private insurance without a traditional risk rating system.

In my opinion, Prof. Harada's plan is very attractive, but as mentioned above, elimination of adverse selection is crucial when an insurance system is used. If the traditional risk rating system cannot be used, it may be difficult to eliminate adverse selection. If so, the role of private insurance as a substitute for social insurance will be limited. For example, in a case where a foreigner who is already insured by social insurance in his home country comes to Japan and seeks insurance, giving him private insurance protection without the traditional risk rating system may be fine because he has paid premiums for social insurance in his home country and does not have an opportunity to make an adverse selection. However, in a case where a person who was not insured by social insurance in his home country comes to Japan and seeks new insurance, there is a risk of adverse selection. In my opinion, it is difficult to eliminate the element of adverse selection without a mandatory entry principle and the traditional risk rating system.

From the above discussion I would like to highlight two points:

- In the context of international social security, social insurance and private insurance could be interchangeable as Prof. Harada speculates, but in my opinion, this interchange is limited to specific scenarios due to adverse selection.
- If the mandatory entry principle is indispensable when structuring an international redistributing system by private insurance, is it really private? If the insurance business is operated by a private insurance company, it may be private insurance in the formal sense, but if the traditional risk rating system is prohibited and the mandatory entry principle is adopted, does it become social insurance?

Thank you very much for your attention.

Comments at the International Symposium

Keizo Yamamoto
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The Symposium on October 8, 2014 discussed various potentialities of non-profit transfers by the state and non-profit transfers by non-state entities. Because my expertise lies with the Civil Law of Japan, I was asked to comment from this perspective. Although these problems are complex in the domain of Civil Law, I would like to focus on one realistic matter that can provide an example of a non-profit transfer by the state: equal treatment between individuals.

Equal treatment between individuals became an issue in 2006 when Germany enacted the General Act on Equal Treatment and in 2013 when Japan enacted the Law for the Elimination of Disability Discrimination. I would like to point out some issues related to the Japanese Law for the Elimination of Disability Discrimination. This law makes it unlawful for employers in their pursuit of business to violate the rights and interests of people with disabilities by unfairly discriminating against them on the grounds of their disabilities.

This is a legal obligation of employers, and under the Civil Code as well as other laws, they are liable for suspension or compensation if they do not comply. According to the law, when employers give benefits to their customers, they must not unduly discriminate against people with disabilities on the ground of their disabilities. Consequently, employers are forced to give the same benefits regardless of disability unless there are justifiable reasons. This may be interpreted as the state enforcing non-profit transfers from employers to people with disabilities by imposing this obligation in accordance with Civil Code. On the other hand, because the resulting benefits are given by employers to people with disabilities on a contractual basis, this may technically be considered a market-based transfer. Regardless, it should be noted that this enforcement is actually a sovereign right not based on market principles because employers are forced to pay these contract-based benefits by the state.

The 2013 law also prescribes that administrative agencies in pursuit of their work must make necessary and reasonable accommodations to remove social barriers upon request according to the conditions of the people with disabilities. This is a legal obligation of administrative agencies. The law stipulates that employers must make efforts to make such reasonable accommodations, but does not apply when the implementation causes an excessive burden. This is an obligation to make the best efforts without immediate legal liabilities because imposing an obligation to make such reasonable accommodations for an individual would be an undue restriction of employers' rights. However, when the state requests such efforts by employers, the state is requesting non-profit transfers from employers to people with disabilities.

Thus, the question lies in the rationale for allowing such non-profit transfers by the state. This law recognizes and secures equal access and rights of people with disabilities. If such accessibility to society is stipulated to be a basic right under the Con-

stitution, then the equal treatment of individuals may be an example of making a private law part of the Constitution.

Although there are more examples, I just wanted to discuss one in this comment.

Comments on Redistribution and the Constitution

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I would like to comment briefly on redistribution and the Constitution of Japan. Although the constitutionalizing redistribution has been a challenge in judicial enforcement, I feel that constitutionalizing distribution would be better accomplished via a "partnership" between the political and the judicial branches. However, before arguing questions with respect to constitutionalizing redistribution, the differences between the judicial review system in Germany and Japan should be discussed. In addition, the history and development of constitutionalizing redistribution under the Constitution of Japan must be understood.

As Dr. Meinel mentioned[1], the Germany Constitutional Court has a series of remarkable case laws on social rights. These doctrines of the Constitutional Court have inspired Japanese constitutional scholars, especially those interested in social rights. However, an understanding between the differences in the German and Japanese judicial review systems is necessary before German case law can be even considered in Japan. The Constitution of Japan, which was enacted in 1946, has a judicial review system similar to the one in the United States Constitution, and consists of one Supreme Court and many inferior courts[2]. In contrast, Germany has a Constitutional Court. In Japan, the constitutionality of the Diet-enacted acts or executive acts are reviewed by the courts when the requirement of "cases and controversies" is met and parties involved in the cases raise constitutional issues. This kind of judicial review, namely review based on controversies and without a Constitutional Court, suggests that the role of the court differs between Germany and Japan. That is, being based on controversies, Japanese courts seem inclined to consider prudential factors, such as deference to the political branch or avoidance of constitutional adjudication, in deciding constitutional cases. Although the Japanese version of the traditional "passive virtues" may explain the difference in attitudes of the courts between the two countries, these differences are relevant when considering questions like constitutionalizing redistribution because legislative or executive/administrative discretions are emphasized in social rights cases.

The Constitution of Japan stipulates several social rights. Article 25 provides that "All people shall have the right to maintain the minimum standards of wholesome and cultured living" (sec. 1). The Constitution gives "all people" the right to receive

[1] Florian Meinel, "Constitutionalizing and De-Constitutionalizing Distribution: The Welfare State in German Constitutional Law" (The paper presented on International Symposium on Roles of the State in the Non-Profit Transfers, Oct. 7-8, at Kyoto University, Japan).

[2] *See* Art. 76, sec. 1 of the Const. of Japan ("The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law"); *See also* Art. 81 of the Const. of Japan ("The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act").

an equal education correspondent to their ability (Art. 26, sec. 1) and the right to work (Art. 27, sec. 1). The right of workers to organize and to collectively bargain is guaranteed (Art. 28). The constitution also demands that the government promote and extend welfare and security as well as public health, and requires the legislator to provide standards for wages, hours, rest, and other working conditions (Art 25, sec. 2 and Art 27, sec. 2).

Among these provisions, Article 25, sec. 1, which provides the right to a decent living, is viewed as a symbol for constitutionalizing redistribution and has been passionately discussed since the Constitution was enacted.[3] At first due to the influence of German doctrine in article 151 of the Weimar Constitution, Japanese legal scholars treated this right as "programmatic," and the Supreme Court declared that this article provides only the political responsibility of the government to arrange and implement the social legislation, but does not grant people legal rights to a decent living.[4]

In the seminal welfare rights case, *Asahi V. Minister of Health and Welfare (Asahi Case)*,[5] which contested the validity of reducing the welfare benefits in light of Livelihood Protection Act, the Supreme Court rejected the appellants' claim on judicial scrutiny and acknowledged the huge discretion of the Ministry in dictum. Since then, constitutional scholars have argued enthusiastically about constitutional welfare rights. However, in *Horiki V. Governor of Hyogo Prefecture (Horiki Case)*,[6] another landmark decision in which the constitutionality of the restriction on receiving welfare and pension benefits simultaneously (child support benefits and disability benefits in that case) was challenged, the Supreme Court resoundingly reaffirmed the huge discretion of the political branch, especially the legislative one. Although recent cases have shown a more robust judicial review on the decision-making process of administrative actions,[7] from the general viewpoint of case law, the Supreme Court has signified a strong deference to the political branch in welfare right cases. This has resulted in a major hurdle in constitutionalizing redistribution via judicial review on constitutional welfare rights.

Judicial deference to the political branch does not imply there is no way to constitutionalize welfare rights. From my perspective, the Constitution of Japan expects a "partnership" between the political and judicial branches[8]. The judiciary, especially in reviewing the constitutionality of government acts via a controversies-based approach,

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[3] On constitutional welfare rights in Japanese contexts, *See generally* Akira Ōsuka, "Welfare Rights," in Percy R. Luney, Jr. and Kazuyuki Takahashi eds., *Japanese Constitutional Law* (1993), pp. 269 -287.

[4] Supreme Court, Judgment, September 29, 1948, 2 Keishu 1235 (The Food Control Law Case).

[5] Supreme Court, Judgment, May 24, 1967, 21 Minshu 1043 (Asahi Case).

[6] Supreme Court, Judgment, July 7, 1982, 36 Minsyu 1235 (Horiki Case).

[7] The Court seems intensified the review of decision-making process of reducing additional public assistance benefit for elderly. *See* Supreme Court, Judgment, February 28, 2012, 66 Minshu 1240; Supreme Court, Judgment, April 2, 2012, 66 Minsyu 2367.

[8] *See* Takeshi Ogata, *Fukushi-Kokka tō Kenpō-Kōzou* [Welfare State and the Constitution] (2011), pp. 129-130, 156-157, 158.

has inherent limits to implement social justice due to institutional competence or judicial prudence. The Constitution initially assigns the role to realize social justice to the National Diet, the Cabinet, and executive/administrative branches or agencies. Thus, the political branch has the constitutional responsibility to lead the implementation of social arrangements. However, the Court should open the corridor for social justice and regulate the political branch in light of the ideal of the right to decent living articulated in Art. 25 of the Constitution. If the political branch errors in implementation, the Court must declare that it is constitutionally wrong and direct the legislature or executive/administrative branch to improve the institution in order to meet the constitutional mandates.

This may be an idealistic picture for constitutionalizing redistribution, especially with Japanese history of judicial reluctance, but I believe this method of constitutionalizing welfare rights seems as close as possible to the constitutional justice implied in the Constitution of Japan. On this point, German experiences should provide valuable perspective and insight.

Panel 3:
Changes of the State in Redistribution

The remaining Role of the Nation State in Redistribution

Hans Christian Röhl
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The topic of this conference proposes an interesting shift of our focus of attention away from the distribution of services by the state to the transfers of goods and services by individuals to secure and promote their own well-being, that is, transfers not intended for profit. The perceived role of the state varies as his role changes to a "provider of services that enable autonomous non-profit transfers, using lifelong well-being as the evaluation criterion." I will try to address this interesting shift of focus in three steps. In a first step I would like to have a short look at the concept of well-being in law. I would like to ask why this concept has been reluctantly applied so far in German law and what could be the reasons for a more thorough look nowadays. In a second step I would like to take a look at the changing role of the state if he is seen "as the provider of services that enable autonomous non-profit transfers" and some challenges for public law which arise from this role. This leads me lastly to a description of the remaining Role of the Nation State in Redistribution.

I. Well being as a concept in law

1. Well being and the liberal state

Well being as a concept has traditionally not been thoroughly recognized in Germany neither in public law nor in private law. The first reason may be that there has been no provision in the German basic law as in the Japanese or the U.S. constitution which guarantee a "right to maintain the minimum standards of wholesome and cultured living" or the "pursuit of happiness". An at least equally important explanation may be seen in the reason that the core of German law in both public law and private law has been forged in the 19th century. The main aim has been to secure the individual sphere from the intrusion of the state. The aims individuals were following had to be of no interest for the state as well as the for the law ("Privatautonomie"). Therefore the aims of individuals are regularly not recognized as important in private law neither in public law because the individual is seen as an autonomous person.

In the same time German law started to provide for support for persons in need (homeless, sick, elder people) by social security codes. But these have been situations which were seen as deficiencies so the focus was not on the individual's well-being but on the aim to tackle these deficiencies. Therefore at least for a traditional view of German law taking the well-being of people into account has been part of a history of law ("Wohlfahrt"; "gute Polizey") which has been overcome on the road to a liberal society.

2. Well-being as a new concept

Lately the focus of other sciences has been directed to the individual's well-being as a relatively new concept. Could there be a reason for law to address this perspective, too?

A. The state's shrinking capacity to distribute

There is a shrinking capacity of the state to distribute goods. A provision of services by the state encompasses a new distribution of goods as the funds for providing these services have to be generated by taxes. Only if services would be provided on a full cost basis the element of distribution would be missing. But in this case the service could be provided by private parties as well.

Examples for these distributions are not only the public provision of services but also social security (health, pensions, care), infrastructure (streets, ports etc.) or general security. These decisions on distributions of goods have a need for legitimation. Therefore such measures are more easily implemented inside closed systems of legitimacy on the basis of solidarity (municipalities, nation state). This may be one reason for the reluctance of nation states to transfer system of social security on the international level. Internationalisation causes problems in this respect, though, if persons who are no member of this group of solidarity want to participate. Either they are charged and this is found to be discriminating or they are able to use these systems as free rider which results in a perception of unfairness at home. This causes the state more and more to quit systems which are founded via solidarity and charge the services to the individual user (toll systems) or even encourages private people to provide the needs for themselves (private pension funds). Education systems which are funded by the state as they are in Germany are not under competitive pressure yet. But as soon as they shift to a paying mode the state monopoly will be tested by private competitors.

In the moment the nation state abandons systems in which he provides services for himself but only enables individuals to look for their needs on their own the focus of the state and the law may shift from the provision of services as a task of the state to the individual's needs as a matter of concern for the state: well-being comes into sight. This way the personal reach of the state's focus is enhanced. As the services mostly have been provided for exceptional cases (sick, elderly people) now the focus lies on the needs of everybody.

B. The state's shrinking capacity to distribute goods

The budgets of most nation states are constantly under strain, demographic developments will lead to a sinking ability of the state to provide for long-term social security. Therefore the individual will have to take precautionary measures by himself. Individual pension arrangements, individual health care contracts are closed. Comparable developments may probably be seen in education if shrinking budgets and internationalization lead to a system where the use of schools and universities will be charged for.

II. The changing role of the state as enabling state

The central approach of this research agenda is "to regard the state as the provider of services that enable autonomous non-profit transfers, using lifelong well-being as the evaluation criterion." Which services are needed to this end? I will try to make at least three points.

- Firstly the state will have to provide for a general knowledge basis for the individuals so that they are able to make sound decisions.

- Secondly, as a lot of autonomous non-profit transfers are conceived as investment in the future, the state has to provide for stability; the material basis for trust in future developments has to be secured. This causes a responsibility of the state for the stability of the finance system and of insurance firms.

- Lastly, for specific goals autonomous actions by individuals will not suffice. This is especially the case if a coordination between individuals is necessary which will not work on a voluntary basis or goods have to be distributed which cannot be easily duplicated. Most important examples are infrastructure services such as planning and infrastructure, providing education and maintaining a general level of security.

1. Information and knowledge structures

Self-provision by individuals will need a sufficient information basis. Therefore it may be necessary for the state to either install a general knowledge and information structure or to generate a sufficient level of information. I would like to explain what I mean by this with the topic of social security: As long as the state or employer of an individual provided for compulsory social security, especially for health insurance or a retirement scheme there was no need for the individual to decide which form of security and on which level was necessary. If the task to provide for individual security is left in the individual's hands, he will need sufficient information on a wide range of questions: The fact that he needs social security or has to provide for his retirement at all. The question to which amount security is needed, how high the different risks are and what will follow if these risks realize themselves. He will have to know by which means these risks can be taken care of and who, for example, which insurance, can provide security. Lastly he has to be informed about the quality of the service he is looking for, an evaluation of the different suppliers is necessary. Therefore not only the change to an information society but also the lesser means of the state to distribute services on his own will lead the state to install structures of information and knowledge to provide for the necessary basis for decisions.

A. Instruments

(1) Information by the state

The state provides for information e.g. on matters of health[1] or financial matters[2].

[1] In Germany Bundeszentrale für gesundheitliche Aufklärung

(2) Obligation to inform

Even more important than information by the state himself are obligations for private parties to inform the individual and therefore improve his abilities to make sound decisions. One example may be the obligation of banks to inform customers about the risks of securities they are selling[3] or of telecommunication or power supply companies[4]. In social security matters private companies are obliged to provide information. For example homes for the elderly have to provide information[5]. Insurance companies will have to explain the expectation for return of life ensurance contracts over the years[6].

(3) Production of information: quality management

Simple information provided for by companies often does not suffice as a basis for a sound decision. Individuals will need sound comparison between different offers. For this reason the state firstly has to force the companies to provide the necessary information and secondly to install a mechanism which guarantees a comparison. This may be a branch of the state itself or private companies which are funded or at least supported by the state.

(4) Limits of the information model

(a) Insurance aspects

The future is dark: As nobody knows about his needs in the future individuals will be forced to buy insurances for health, living and care or to insure themselves by saving money. Different risk adversity will lead to different levels of insurance. If a personal risk scheme fails, e.g. because a chronic disease strikes a person and there are not enough private funds left the state will have to step in as "insurance of the last resort". At least in Germany the principle of the social state will force all branches of government to take sufficient care of people in need. This scenario may lead the state to oblige the people to provide for a form of obligatory insurance so that the individual well-being has not to be guaranteed by the funds of the state.

(b) Use of information

The information model follows a very simple ideal: With sufficient information of a high quality the individual will be able to take care for himself and provide for his own well-being. But studies show that there is a wide gap between the information and the action. The World Health Organization estimates that about 50 % chronical ill patients do not follow the advice of their physician[7]. The same effect can be observed

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[2] Bundesanstalt für Finanzdienstleistungen; Rentenversicherungsträger.

[3] Cf. the new rules the MiFID 2 (Directive 2014/65/2014 on markets in financial instruments, OJ 2014, L 173, 69) esp. Art. 24 ff.

[4] § 45n TKG [Telecommunications Law], §§ 39 ff. EnWG [Law on Supply with Electricity and Gas].

[5] § 3 WBVG (Wohn- und Betreuungsvertragsgesetz) [Law on contracts of residents and care].

[6] §§ 153 VVG [Law on insurance contracts].

[7] Eduardo Sabaté ed., Adherence to long-term therapies: evidence for action (2003).

with private investors in financial instruments, they, so to say, choose the wrong turn on the last mile[8]. For this reason the state has to evaluate the usefulness of the information thoroughly so that is able to intervene if other measures seem appropriate.

B. Information and research

If at the bottom of the individual's decision is the need for information it follows that the state has the task to generate information and knowledge wherever it is missing. Ministries and other government bodies are handed the task to gather information on risks; universities have the task of research to provide for new knowledge so that sound decisions can be made.

2. Stability of the future

As a lot of autonomous non-profit transfers are conceived as investment in the future, the state has to provide for stability; the material basis for trust in future developments has to be secured. This causes a responsibility of the state for the stability of the finance system and of insurance firms. The banking system is not only an indispensable part of the economy, as it secures the exchange of goods and services via the money system. Through its banking services, in particular deposit taking and lending it makes the buildup of production facilities possible. For the individual it provides financial services especially savings and investments which enable him to make transfers to himself in the future. This will only work, though, if there is a guarantee that these investments will be returned in the future. Therefore the state has to secure the banking system as such and protect it against systemic risk. Additionally there have to be security for deposits. Otherwise investments in the future would be impossible because the individuals are lacking the necessary trust.

The same applies for insurances. Especially life insurances are vulnerable against financial crisis as well as against internal mismanagement of the funds. A great amount of trust is needed because instead of an actual return for the investment there is only a promise for the future. Therefore the state provides for a strict insurance law and supervision which is especially strict for life insurance. The same applies to a lesser degree to health and care insurance plans as these have to save funds for future risks.

3. Infrastructure

If we are on the lookout for the remaining role of the state we will have to think about effects which cannot be realized by autonomous non-profit transfers of individuals. Most important is the lacking possibility of coordination between individuals which will not work on a voluntary basis. Some examples consist of planning and infrastructure, providing education and maintaining a general level of security.

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[8] *Hackethal* / *Meyer*, ZRVGl. 2014, Heft 4.

A. Planning and infrastructure

Planning, esp. urban planning provides the infrastructure which is prerequisite for realizing the benefits collected by the individual transfers. E.g. urban surroundings have to be adjusted to the needs of elder people, living, medical and care facilities have to be situated in the area and so on. This goal can only be reached by a joint effort on the basis of a comprehensive planning.

Infrastructure, meaning roads, railways, airports or sewage systems needs public space which cannot be acquired completely. Therefore the state has to provide planning instruments and means of public force to realize these plans. At the core of this task is the use of land: As land cannot be duplicated, planning implies a distribution of a good which cannot be (easily) duplicated. Therefore market mechanisms would fail as they are not able to fulfil complex planning tasks.

B. Education system

Even if the state would not provide for the education system on his own in the interest of the general public he would have to install at least a system of quality checks setting general standards and implementing them in the education system. This education forms the basis for individual decisions. Well-being cannot be reached or at least strived for if the basic abilities to handle information are missing.

C. Maintaining a general level of security

Still at the core of the public task of the state is its general obligation to maintain a general level of security. Two connected reasons are behind this obligation: The necessary use of force and the missing possibility to implement a sufficient level of security and the impossibility to reach this goal via individual actions. Use of force does not only encompass physical force but perhaps even more important the possibility to set information duties and enforce them against private parties. Only this way it will be possible to gather enough knowledge on the risks and dangers stemming from private activities.

4. Questions of Law

A. Discrimination in a Multi-Level-System

Service provision by the state which excludes inhabitants of other municipalities, regions or states is in danger of colliding with rules which prohibit discrimination and are a regular element of multi-layer system. As Professor Harada has tackled this topic already I will refrain from an in-depth analysis her.

B. Individual autonomy

One good reason for law and therefore the state not to touch the topic of individual well-being has been the impossibility to measure individual decisions on preferences. “Well-being” is a concept which everyone has to define for himself in a free society. It has been a main character of the dictatorial regimes in the former East of Europe that they aimed to define the well-being of their subjects. So one has to look very carefully whether actions of the state imply an own evaluation by the state of in-

dividual preferences. As far as the aim is to use "lifelong well-being as the evaluation criterion" one has to keep the individual definition of well-being in mind.

This may particularly be the case as the state undertakes the task to provide for information to make sound decisions about transfers. By this information the possibility arises to influence the decision on personal preferences in financial, medical and others matters. The high impact of information given by the states stems from the amount of trust people invest in the state. Naturally it would be no remedy to reduce the trust but it will be necessary to structure the public information infrastructure in a transparent and open way.

C. Unjust results of one-dimensional transfers

If the legitimacy of the state to redistribute becomes precarious in international surroundings where there is no reason to a financing of the provision of goods based on solidarity, the distribution of goods is left to private parties. This redistribution between private parties may work between families or small groups with mutual trust where no "just return" is expected. Beyond these scenarios the goods which are to be distributed anew will have to be evaluated along common measures, mostly in money so that an exchange is possible In these evaluation schemes may lie reasons for unfairness which have originally been one of the reasons why the state employed the redistribution by itself.

III. The remaining Role of the Nation State in Redistribution

Globalisation and the following internationalization of law are leading to ever growing difficulties for the nation states to implement redistributory measures. Therefore it is only logical to change the perspective to the real addressee of the services, the individual, and ask by which means he arrives at a status of well-being. The role of the state is not ending, though, as there are basic functions to fulfil which reach far beyond the old days when theory was trying to reduce the state to the role of a night watchman. By guaranteeing the information and knowledge base, providing for planning and infrastructure and finally supplying the general security the nation state remains indispensable.

Redistribution by the State and Changes in Public Law in Japan

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I. Introduction

The Constitution of Japan, which was promulgated in 1946, introduces the right to a decent life as a fundamental right in Article 25.[1] Since then, this right has been viewed as one of the striking merits of this Constitution. Article 25 says

[(1)] All people shall have the right to maintain the minimum standards of wholesome and cultured living.

(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

This article declares not only that the state should develop its social policies to promote the welfare of the nation, but also that each person has the fundamental right to a decent life. The state should guarantee this right by its disbursements. Under the Japanese Constitution, redistribution by the state is seen not only as good policy, but also as an obligation to realize people's right to a decent life. Therefore, this article is often seen as a symbol of the progressiveness of the Constitution of Japan.

The right to a decent life also constitutes the theoretical background of the other social rights in the Constitution, [e.g., the right to receive education (Article 26) and the rights of workers (Article 28)]. These articles suggest that Japan is a social or welfare state. Moreover, the article of property rights (Article 29) expressly admits that these rights may be restricted for the "public welfare." Article 29 states

[(1)] The right to own or to hold property is inviolable.

(2) Property rights shall be defined by law, in conformity with the public welfare.

(3) Private property may be taken for public use upon just compensation therefor.

The Constitution provides the limitation by "public welfare" expressly for economic rights [e.g., property rights and the right to choose occupation (Article 22)]. This attitude of the Constitution signals that economic rights are subject to stricter

[1] In Japanese, this right is usually abbreviated to "*seizon-ken*," which means only the right to live. However, the often used English abbreviation "right to a decent life" should not be condemned as a mistranslation, because the right guaranteed in Article 25, paragraph 1 claims really the "wholesome and cultured" life of the people. *See* Akira Ōsuka, "Welfare Rights," in Percy R. Luney, Jr. and Kazuyuki Takahashi eds., *Japanese Constitutional Law* (1993), p.269.

limitations than other rights (e.g., freedom of expression) in order to fulfill the demands of the social state. The Constitution legitimizes the sacrifice of economic rights for redistribution by the state.

The aforementioned structure of the Constitution has influenced constitutional theories in Japan. Legal scholars have been debating the meanings of Articles 25 and 29 intensely since their inception. In this report, I will illustrate representative theories that interpret the economic and social rights of the Constitution. Interpretations of the Constitution vary due to different perceptions on the value of the rights and democracy, which should work together to realize the ideal of the social state. Hence, I want to clarify that herein "public law" in this article means the *Wissenschaft des öffentlichen Rechts*, especially of constitutional law.

II. Point of Departure from the "Freedom from the State" to the "Right to a Decent Life"

In the shock of defeat in the Second World War and the hope of democratic reconstruction of Japan with the new Constitution, Sakae Wagatsuma documented in 1948 how the characteristics of fundamental rights in the new Constitution changed from the classic "bill of rights." He taught civil law at The University of Tokyo, but had already taken a great interest in the social character of the Weimar Constitution of Germany. He found that the new Japanese Constitution also "modernized" the constitutional guarantee of rights. According to him, "constitutions of the 19th century" guarantee freedom from the state, especially property rights, in order to provide people with the material means to pursue their own happiness. However, "20th century constitutions" consider the enormous inequality in wealth distribution in real capitalistic economies where many workers lack sufficient property to support their independent lives, and the state must show concern for their concrete demands to live a decent life. Property rights have lost their essential status and are guaranteed so far as they contribute to "public welfare." Because property rights provide means to pursue one's own happiness, they are subject to restrictions to democratize economic conditions.

Wagatsuma emphasizes the meaning of this change as a "transformation of the character of the whole fundamental rights." Now the active intervention of the state is required to realize the claims of fundamental rights. He pointed out that in 20th century constitutions, the antagonism between the state and individuals, which is the basic concept in classic freedom rights, is surmounted by the idea of the state as *Gemeinschaft*, in which the both are "combined organically." Here freedom does not mean an egoistic manner of life, but a contribution to cultural development of the whole community. It implies that individuals have a responsibility to use their abilities for the community. On the other hand, it is the duty of the state to help them to do so. Ac-

cording to concrete situations, the state must play an active role to allow citizens to fulfill their individual responsibility.[2]

Wagatsuma clearly notes that his idea of the state as *Gemeinschaft* differs from National Socialism. He believed that this theory and democracy in Japan would coincide. I suppose that he had too much faith in the future of Japanese democracy, leading him not to fully recognize social rights of the Constitution, which allegedly played a crucial role in the transformation of the basic character of fundamental rights, as legal rights. He states that to realize the claims of social rights, the parliamentary government must decide the appropriate path while "taking the financial conditions of the nation into account." Only the Diet may decide active policies by statutes, and the courts could not relieve the shortage of provisions that the social rights normatively demand, "even though it is unconstitutional." In this sense, these rights belong to *Programmvorschrift*, which proclaims the important principles of the state, but does not provide the cause of action.

Unfortunately, Wagatsuma in 1948 could not see the weaknesses in this theory to realize social rights. He believed that social rights could be saved if the people were, as the Constitution expects them, conscious of their responsibility to realize it.[3] This demonstrates his confidence in the future of Japanese democracy. Moreover, his idea of *Gemeinschaft* enabled him to escape the difficult problem of how to reconcile the demands of social rights with democratic policy making in the real world.

His hope for democratic reforms in Japanese society was betrayed soon. When he republished this article in 1970 as a part of a collection of his works, he added a preface in which he regretted that its content was too optimistic. He admitted that he believed the democratic reforms after the war would result in a peaceful welfare state corresponding to the idea of *Gemeinschaft*. However, between 1950 and 1970, only conservative parties governed Japan, and many progressive policies were retracted. Laws to heighten the welfare of the nation rarely passed. He conceded that the idea of *Gemeinschaft*, which weakened the significance of freedom from the state, would play a dangerous role in this political situation. He wanted readers to construe this article as a record of an illusion that a lawyer held in an exceptional period immediately after the Second World War.[4] As explained in the next section, this "illusion" greatly influenced the actual jurisprudence of the right to a decent life and property rights, however.

III. Disputes About the Legal Nature of the Right to a Decent Life

Wagatsuma's characterization of the right to a decent life as *Programmvorschrift* became the *herrschende Meinung* in the early interpretations of the

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[2] Sakae Wagatsuma, "Shin-kenpo to Kihonteki-jinken" [The New Constitution and the Fundamental Human Rights] (1948), in Wagatsuma, *Minpo Kenkyu* [Studies on the Civil Law], Vol. VIII (1970), p.89, pp.107-13, 168-82, 222-25.

[3] *Id.* at 180, 183-89.

[4] *Id*. at 2-4.

Constitution.[5] It was said that to realize the claim of this right, the Diet must prepare laws that include concrete causes of action. If it is negligent in this duty, even the Supreme Court could not order the state to pay the necessary costs of life. The text of Article 25 seemed too abstract to be interpreted as a guarantee of a concrete right.

Japanese scholars might have been confused by the new type of fundamental rights. Initially, they were unfamiliar with the judicial review system introduced by the new Constitution and could not imagine the courts ordering the Diet to enact certain statutes necessary for social rights. At the same time, Japanese scholars respected the political power of the Diet, which gained the full legislative power under the new Constitution. Consequently, the right to a decent life was initially interpreted as a political duty of the government and the Diet to secure the life of the people.

The Supreme Court decided in 1948 that the right to a decent life means that the state should be responsible to realize the minimum standards of wholesome and cultured living of the people. The state should fulfill this obligation by enacting social laws, and Article 25 itself did not grant concrete rights to each person.[6]

This attitude of scholars began to change in the 1960s after the enthusiasm for the new democracy disappeared. The attack against the conservative LDP (Liberal Democratic Party of Japan) government intensified. LDP was said to accept only the demands of businesses and ignore the poverty of the workers and unemployed persons. At the same time, many people became victims of heavy environmental pollutions. Moreover, the idea of a welfare state itself was criticized severely even from the left-liberal side because conservatives used this idea to weaken the significance of the freedom rights in modern societies. Conservatives said that the real wishes of the people are not liberty from interventions from the outside, mainly from the state, but a safe life that only a strong state can guarantee. They used this argument to justify their wishes to revise the articles guaranteeing freedom rights in the Constitution of Japan.

To confront this "new" type of attack on the Constitution, the left-liberal side abandoned its confidence in the welfare state, or at least the belief that social rights could be realized through democracy in harmony with freedom rights. The idea of *Gemeinschaft* lost its appeal. The constitutionalists tried to clear the legal meaning of the right to a decent life as the right *against* the state by proposing a theory where social rights are built not from the state-centered, but from a "bottom-up" perspective.[7]

On the other hand, the statutes for social security were gradually prepared. The Livelihood Protection Act enacted in 1950, which corresponds to the right to a decent life, guarantees all the people minimum standards of life, and anyone can bring a suit against the state if he or she is not satisfied with its decisions. Therefore, the statutes

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[5] *See e.g.* Hogaku Kyokai ed., *Chukai Nihonkoku-kenpo, jo-kan* [Commentary on the Constitution of Japan, 1st part] (1953), pp.487-89.

[6] Supreme Court, Judgment, September 29, 1948, 2 Keishu 1235.

[7] *See e.g.* Yozo Watanabe, *Gendai-kokka to Gyosei-ken* [The Modern State and the Administrative Power] (1972), pp.153-57; Yoichi Higuchi, *Kindai Kenpo-gaku ni totteno Ronri to Kachi* [Logic and Value for the Modern Constitutionalism] (1994), pp.125-41; Mutsuo Nakamura, *Shakai-ken no Kaishaku* [Interpretations of the Social Rights] (1983), pp.26-37.

recognized the right to a decent life as a concrete right. However, the task of interpreting the Constitution had yet to be settled. Applicants for the provisions often complained about decisions when they were rejected or the authorized amount did not seem sufficient to live a decent life. In these cases, lawyers tried to garner more generous interpretations of the Act by strengthening the significance of the constitutional right to a decent life, which should control the understanding of the statutes. The lawyers interpreted that Article 25 not only expresses a policy of the state, but also guarantees a legal right as the text of paragraph 1 says clearly, and even if nobody can bring a suit only with this paragraph due to its lack of concreteness, this right could and should control the interpretation of the statutes. The legal demand of the Constitution should be followed to guarantee each person's minimal standards of a decent life. This assertion is called the "abstract right" theory.

This theory was stimulated by a judgment of a district court that withdrew a decision applying the Livelihood Protection Act. It declared that this Act made the right to a decent life justiciable and should be interpreted to realize its claim. In this case, the court concluded that the authorized amount did not correspond to the demand of this constitutional right. This decision in the famous *Asahi*-case received great attention because it clearly states that the judgment about the minimum standards of life should not be entrusted to the discretion of the administrative power and that the judgment should not depend on the fiscal conditions of the state. The state must always guarantee the minimum standards of decent life as this is not an issue of policy, but a legal obligation.[8]

However, the Supreme Court did not follow this decision. It declared that the case became moot due to the plaintiff's death, and confirmed as *obiter dictum* that the right to a decent life is not a concrete right. It was true that the Livelihood Protection Act made this right justiciable, but the minimum standards of wholesome and cultured living could be determined only after due consideration of many different social elements. The determination on the provision is therefore entrusted, in principle, to the discretional decisions of the administration.[9]

Whether this decision supported the *Programmvorschrift*-theory or the abstract right theory at least as the legal characterization of the right is unclear. Regardless, the wide discretional power of the administration minimalized the legal meaning of this right. Since then the Supreme Court has repeated its passive position about this right.

The "concrete right" theory appeared in response to this stagnation of court decisions. It emphasizes that the text of the Constitution is always somewhat abstract and Article 25, paragraph 1 is not so abstract that its justiciability should be denied. Because a decent life is written in the Constitution as a "right," it should be interpreted as a justiciable right. Financial conditions and other political considerations may not twist this clear logic. This theory says that if the provision is unlawfully denied or the amount is insufficient to live a decent life, plaintiffs can bring a suit on the basis of

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[8] Tokyo District Court, Judgment, October 19, 1960, 11 Gyoshu 2921.

[9] Supreme Court, Judgment, May 24, 1967, 21 Minshu 1043.

the constitutional right to a decent life. According to a type of the concrete right theory, courts could declare the negligence of the Diet unconstitutional and force it to enact new laws that enable constitutional provisions. In this way, the legislative power of the Diet is somewhat respected because it does not deny the principle that the financial aid of the state should be formally allowed by statutes.[10] Another professor further advanced this theory by stating that direct claims for monetary provision should be possible under Article 25.[11]

Perhaps the *herrschende Meinung* in the *Wissenschaft* of constitutional law remains the abstract right theory. Although Japanese professors do not believe that poor people are protected enough, they are not convinced that the courts have enough legitimacy to subrogate the power of legislature to decide how to use fiscal resources.

As the Japanese economy has grown and the misery of poverty has disappeared at least as an important social problem, the interest of scholars in the dispute on the right to a decent life has weakened. A professor stressing the value of democracy criticized the theoretical tendency to slight the discretional power of the Diet on financial matters. According to him, there is no reason to believe that the courts are more adapt to decide the level of "the minimum standards of the wholesome and cultured living" than the political branches. Democratic politics can and should determine how to develop national welfare.[12] This theory has restored confidence in democracy and, therefore, need not stress the legal character of social rights. Although his theory is similar to the position of the Supreme Court, it does not appear to be widely accepted. How to situate the social rights in the modern Constitution and how to reconcile the constitutional obligation of redistribution with democracy, which is another important demand of the Constitution, remain difficult issues.

IV. Different Evaluations of Property Rights

Wagatsuma's characterization of property rights as means to pursue each individual's happiness which is therefore subject to restrictions to democratize the economic conditions influenced later theoretical analyses on them. Using his theory of *Gemeinschaft*, he justified agricultural land reform after the war in which farmland of big landowners was expropriated despite the low compensation and sold to tenant farmers in order to make them owner-farmers. This reform, which was directed by the occupation powers, executed compulsory redistribution on an unparalleled scale. Wagatsuma believed that the reform contributed to the great ideal of democratization of villages, and so 20th century constitutions had no reason to hinder it.[13] After the war, agricultural land reform was the biggest problem with regard to property rights.

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[10] Akira Osuka, *Seizon-ken ron* [Studies on the Right to a Decent Life] (1984), pp.71-113. *See also* Osuka, *supra* note 1.

[11] Toshiyuki Munesue, *Kenpo-gaku Sairon* [The Second Studies on Constitutional Law] (2001), pp.348-62.

[12] Shigenori Matsui, "Fukusi-kokka no Kenpo-gaku" [Constitutional Law in the Welfare State], *Jurisuto* [Jurist] No.1022 (1993), p.69.

[13] Wagatsuma, *supra* note 2, at 222-25.

Wagatsuma's theory caught attention due to its straightforward justification of this policy. The denial of the intrinsic meaning of property rights for individuals was not opposed at that time as the Soviet Union still seemed attractive.

When the era of the democratic reforms was over and caution against the state returned, this optimistic attitude disappeared. However, most scholars felt compelled to justify wide legal restrictions on big corporations. To resolve this dilemma, Kenji Takahara proposed a distinction between two types of property rights. In "Property Rights in the Social State," Takahara states that property rights include an intrinsic contradiction between the character of egoistic rights and the social negative effects. If only egoistic rights are realized in modern capitalism, severe social problems (e.g., poverty, unemployment, etc.) will arise. However, he also criticizes the position that comprehensively restricts property rights. He distinguished "small property" from "large property." The former means property necessary for people to live their ordinary lives and the latter means the capital for profits in a capitalistic economy. Small property must be protected even in the social state because it is the basis of each individual's cultural life and has negligible social influences. On the other hand, the strong social effects of "large property" demand wide restrictions.[14]

His distinction between "small" and "large" does not differentiate the size of a property, but its quality and social role. His theory aims to secure the basic wealth of the people against interventions of the state and to guarantee their independent manner of lives while simultaneously allowing ample regulations of industrial corporations. This distinction has been very influential because it corresponds very well to the mission of establishing a solid theory on property rights in a social state.[15]

However, the Supreme Court has not followed the tendencies of scholars. In principle, the Court respects the discretional power of the Diet because the Constitution allows for wide restraints on economic rights for the purpose of public welfare. I must nevertheless refer to the fact that the Court once declared restraint on the ownership right unconstitutional. Although the Civil Code of Japan states that each co-owner may demand the partition of the property in co-ownership at any time (Article 256, paragraph 1), the Forest Act denied this right to any person who owns forest jointly but whose share is not more than the half. The Supreme Court saw sole ownership as "the principal form of ownership in the modern civil society" and the right to claim partition as "an essential attribute of the co-ownership." Although the Forest Act aimed to stabilize forest management by hindering subdivisions, the Supreme

[14] Kenji Takahara, "Shakai-kokka ni okeru Zaisan-ken" [Property Rights in the Social State], in Jiro Tanaka ed., *Nihonkoku-kenpo Taikei* [The Constitution of Japan, Comprehensive Studies], Vol.7 (1965), p.239.

[15] *See e.g.* Hideya Kageyama, "Dai 29-jo" [Article 29], in Ryokichi Arikura ed., *Kihon-ho Kommentar Kenpo, Sinpan* [Commentaries on Basic Laws, Constitution, revised version] (1977), p.131; Yozo Watanabe, *Zaisan-ken ron* [Studies on the Property Rights] (1985), pp.141-48; Kenji Yamashita, "Property Rights and Their Raison d'être in the Japanese Constitution," in Yoichi Higuchi ed., *Five Decades of Constitutionalism in Japanese Society* (2001), p.89.

Court ruled that the concrete restraint in it was not a rational and necessary means for this purpose.[16]

Constitutional scholars have been discussing why the Supreme Court took such a strict attitude in this case. It is uncertain whether the "restraint" here is really a restraint on constitutional rights.[17] The concrete contents of ownership rights are unclear in the Constitution. Is the demand for partition of a co-owned property so important that it should be protected as a constitutional right? Perhaps the key to this decision lies in its declaration that the sole ownership is "the principal form of ownership in the modern civil society." This characterization seems to have heightened the meaning of that right at the constitutional level.

If this understanding is correct, we can conclude that the Supreme Court persists in its classical understanding of property rights, although it generally recognizes the need to reconcile these rights with various demands of society. As a result, it has not taken the position that property rights in the social state should be distinguished according to their social roles.

Today, it is true that this theory is not very popular; court decisions do not follow it and the ideological antagonism toward big monopolized capital has mostly disappeared. Moreover, how to distinguish between the two types in concrete cases is unclear. This rather technical problem seems to be important in a post-ideological period.[18] Nevertheless, many scholars hesitate to treat all property rights as equal, perhaps because they cannot deny that these rights have very different relationships with human dignity, and this fact should be reflected in the review of the constitutionality of the restraints on them.[19] At least, the theoretical value of this distinction is widely recognized.

I must concede that most scholars today do not recognize sincere problems in the field of property rights, although many statutes regulate them. Undue expropriation of "small property" does not usually occur in today's Japan. As a result, regulations on property rights are normally justified by the necessity for "public welfare." Additionally, scholars generally respect democratic decisions.

V. Comparison with German Law

It is well known that the list of fundamental rights in the Basic Law of Germany is consciously limited to classic freedom rights. After a series of decisions on "human dignity" (Article 1, paragraph 1) and the "social state" principle (Article 20, paragraph

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16 Supreme Court, Judgment, April 22, 1987, 41 Minshu 408.

17 *See* Junji Annen, "Kenpo ga Zaisan-ken wo Hosho-suru koto no Imi" [What Does the Constitutional Guarantee of Property Rights Mean?], in Yasuo Hasebe ed., *Readings Gendai no Kenpo* [Readings in Contemporary Constitutional Law] (1995), p.137.

18 *See e.g.* Shigenori Matsui, *Nihonkoku Kenpo* [The Constitution of Japan] (3rd ed. 2007), pp.585f.

19 *See e.g.* Toshiyuki Munesue, *Jinken-ron no Shin-kosei* [New Construction of the Theory of Fundamental Rights] (1992), pp.256-71; Kazuyuki Takahashi, *Rikken-shugi to Nihonkoku Kenpo* [Constitutionalism and the Constitution of Japan] (3rd ed. 2013), p. 256.

1), however, the Federal Constitutional Court in a 2010 decision recognized "the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity." We must pay attention to the explanation of the Court with regard to the content of this right. "Minimum" needs should contain not only "the physical existence of the individual," but also "the possibility to maintain inter-human relationships and a minimum of participation in social, cultural, and political life, given that human as persons of necessity exist in social relationships."[20]

This right must be "safeguarded by a statutory claim." The Court admitted that the "legislature's margin of appreciation" often limits its own competence of material review to "whether the benefits are evidently insufficient." However, it emphasized the significance of "a review of the basis and of the method of the assessment of benefits in terms of whether they do justice to the goal of the fundamental right." Therefore, the legislature must "disclose the methods and calculations used to determine the subsistence minimum in the legislative procedure."[21]

We should point out the similarity between the right to a decent life in the Constitution of Japan and "the fundamental right to the guarantee of a subsistence minimum" recognized in this decision. The latter also includes claims for a cultural life. It is ironic that the Japanese courts, which can refer to that right as an expressly constitutional right, have not used it positively, whereas the German Constitutional Court has developed a right not found in the text of the Basic Law and used it to declare some statutes unconstitutional. The German Constitutional Court's viewpoint of distinguishing a procedural review from a material review seems helpful for the jurisprudence of social rights. In the latter, the courts cannot but respect the judgments of the legislature, whereas in the former, they can play a substantial role in controlling the method of appreciation. In general, the theory of procedural control of the discretional legislative power has yet to be developed in Japan. In the future, Japan should find a balance between the importance of the right to a decent life and the value of democracy.

As for the property rights, the Federal Constitutional Court has announced its concern to a distinction similar to the Japanese theory mentioned above. In the "co-determination decision (*Mitbestimmungsurteil*)" in 1979 the Court stated that "so far as the function of property as an element of securing the personal freedom of individuals is in question, it is worth especially outstanding protection." "By contrast, the competence of the legislature to determine the content and restraint is wider, when the property has more social relationship and more social function." This attitude has contributed to the acceptance of the Court that employees have the legal right to participate in management decisions. It is true that this co-determination restricts the rights of shareholders of corporations, but they have only small personal character in general and their social function is far-reaching.[22] The Constitutional Court has kept

[20] BVerfGE 125, 175 (222 f.) (Hartz IV). I have quoted the English translation from the web page of the Court.

[21] *Id*. at 223-26.

[22] BVerfGE 50, 290 (340, 347f.).

this viewpoint since then.[23] Strictly speaking, it does not clearly distinguish the two types of property rights, but does refer to the differences in the degree of solidity. Nevertheless, we can find the same attention in interpreting the clause of property rights in the social state.

It is ironic again that the Constitutional Court of Germany, where the theory of distinction of property rights is not as popular as in Japan,[24] has accepted it, while the Japanese courts remain indifferent. The attitude of the Constitutional Court might show that this theory really corresponds to the demand to interpret the clause of property rights in a balanced way with requests of the social state. I believe, however, that the general respect of the Japanese courts and, at least in the field of economic freedom, scholars for the political process will not disappear in the near future.

[23] *See e.g.* BVerfG, AG 2014, 279.

[24] Walter Leisner used once the expression "smaller property (kleineres Eigentum)" to emphasize its meaning for individuals. However, he did not support the wider regulation on "larger property," but demanded the overall guarantee in order to save the former type enough carefully. Walter Leisner, „Kleineres Eigentum", in Otmar Issing/Walter Leisner, *Kleineres Eigentum* (1976), S.51. Also after that, I guess, this type of distinction has not played a substantial role in German literature. Otto Depenheuer stresses "the unity of the concept of property." Depenheuer, „Eigentum", in Detlef Merten und Hans-Jürgen Papier eds., *Handbuch der Grundrechte, Band V* (2013), S.3, Rn.30.

The Potential of Monetary Instruments in Improving Public Services

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I. Introduction

In principal state expenses in Germany are rendered by tax revenue. It is sometimes said that Germany is a tax state. This does however not mean that other compulsory payments imposed on citizens by the state are barred. But they are in need of a justification in each case and are only permissible under certain conditions. These compulsory payments play an important role when it comes to providing public services. That is hardly surprising.

Public Services are costly. Given the current state deficits, governments and legislators in many countries are looking for additional means to finance essential public tasks. Often various monetary instruments are chosen to supplement tax revenues. Economists and many other policy analysts emphasize their potential to bring about public benefits at lower cost than other legal instruments. But political and regulatory negative and positive side-effects must be taken into consideration. What can be learned from the German experience?

II. Monetary Instruments and Public Services

1. Overview

Monetary instruments have a long history in Germany. In the last decades the self-executing character of such instruments was generally seen as beneficial over command-and-control approaches, especially in the field of environmental protection. An environmentally friendly tax system was and is discussed, but there is still a long way to go. New regulations entered into force such as emission trading schemes and several kinds of special "non-tax" levies. We will have a deeper look on some of these in a minute as they are seen as an adequate means to improve and finance Public Services. But first let me add a few words on local monetary instruments.

2. Local Instruments

Basically local fees are a perfect means to put the polluter pays principle into effect.[1] Even if there is still room for improvement there are some good examples for the positive environmental impact of local taxes and fees in Germany. The local water, waste and waste water fees might be called the oldest environmental taxes. Thus economically reasonable behaviour can result in ecologically sensible consumption habits.

[1] In detail: Böhm, „Environmental Environmental Impact of Local Taxes and Fees in Germany", Chalifour, Milne, Ashiabor, Deketelaere, Kreiser (Eds.), "Critical Issues in Environmental Taxation" (Vol. VII, Oxford, 2009, 547 ff.).

If people want to dispose waste and waste water, they have to pay for it. Ideally the fee should recover all the costs necessary for providing the local services mentioned above. The principle of recovery - or principle of cost coverage as some say - therefore is fundamental for all local fees. It includes the fact that all estimated costs for waste and sewage disposal are covered by the fees. These costs include general operating costs, therefore, costs for staff, equipment, collection, transport and the dealing and deposition of waste. Amortization for the depreciation of the public facility can also be considered. But usually environmental and resource costs such as costs for

- the decline of fisheries
- the efforts for drinking water treatment and water purification
- the ground water remediation
- the extinction of animals and plants (endagered species)

(just to mention some of the major cost factors regarding water pollution control/ water protection)[2]

are not taken into account.

3. European Law

On the European Level one can find monetary instruments as well, for example in the Water Framework Directive 2000/60/EG.[3] The recovery of costs for water services is stated in Art. 9 that provides that Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III,[4] and in accordance in particular with the polluter pays principle.

The Member States should have ensured by 2010 that the water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive and that an adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services, based on the economic analysis conducted according to Annex III and taking account of the polluter pays principle.

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[2] Beispiele aus Wicke, Die ökologischen Milliarden, München 1986, S. 58 ff., Angaben zu den Kosten der Luftverschmutzung auf S. 30 ff., zu Bodenzerstörung, Lärm etc. ab S. 88 ff.

[3] ABl. EG Nr. L 327 S. 1, available at:

http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1425803473706&uri=CELEX:32000L0060

[4] Annex III – Economic Analysis "The economic analysis shall contain enough information in sufficient detail (taking account of the costs associated with collection of the relevant data) in order to: make the relevant calculations necessary for taking into account under Article 9 the principle of recovery of the costs of water services, taking account of long term forecasts of supply and demand for water in the river basin district and, where necessary: estimates of the volume, prices and costs associated with water services, and estimates of relevant investment including forecasts of such investments; make judgements about the most cost-effective combination of measures in respect of water uses to be included in the programme of measures under Article 11 based on estimates of the potential costs of such measures."

Furthermore the Member States may only do so while having regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected.

III. In Particular: Special Levies

1. Federal, State and Local Level

In principal local fees are a good instrument to reinforce a more reasonable handling of drinking water, waste water and waste. On the federal level and the state level it is important to create a tax system that works in a way that public services can be financed within the framework of the general state budget. In addition it has to be made sure that there are no incentives that are undermining public interests. In Germany an often discussed example would be the tax privilege for less environmentally pollutive and climate friendly company cars. Special levies are often used to promote public interests or services. Allthough Germany is a tax-state in his constitutional strucutre, special levies are nonetheless permissible following a well established jurisdiction by the constitutional court. Therefore the tax-legislator does not need a special competence or jurisdiction for these monetary regulations. The subject-matter jurisdiction is rather seen as sufficient. However there are narrow limits for regulation to ensure that public tax financing of public services remains the rule.

2. Constitutional Requirements

The Federal Constitutional Court established narrow boundaries for special levies in its case-law:[5]

- In contrast to taxes, their imposition must remain a rare exception.
- The legislator may avail itself to a levy only when pursuing an objective which goes beyond mere fundraising.
- Only a homogeneous group which has a specific relationship (factual proximity) to the objective which is pursued by the collection of the levy and which can therefore be attributed special responsibility for funding can be considered as its addressees.
- The yield from the duty must be used for the benefit of the group.
- In the interest of democratic parliamentary legitimization and control, the legislature must in addition fully document the special levies collected pursuant to budgetary law.

As the following examples show, special levies are not that rare an exception as one would expect.

[5] Press release 10/2009 of 3 February 2009, 2 BvL 54/06. Also: FCC (BVerfG)-judgment 06/05/2014 – 2BvR 1139/12, section 110ff.with further references.

3. Waste Water Fee Law

The Fees were the first nationally applicable environmental fees designed to have a steering function.[6] It followed the legislators`intentions to provide incentives to:

- Improve wastewater treatment techniques;
- Develop production procedures and products which generated no wastewater or which reduced the amount; and
- Put into effect the polluter pays principle by requiring producers of polluted discharges to pay at least part of the cost for using water.

The federal Wastewater Fee Law regulates:

- who has to pay for the discharge of treated wastewater into a water body (everybody responsible for the point source),
- how much they have to pay (the charge per pollutant has been raised to 35.79 Euro in 2002, which is less than the German Environmental Council thought appropriate as the starting fee in the 1970s),
- which parameters are relevant (too), and
- which exemptions are allowed (too many, for example reductions in cases in which certain minimum requirements are met).

Charges are to be used to finance measures to protect quality in water bodies, including:

- the construction of wastewater treatment plants,
- research on and development of suitable facilities and techniques for improving water quality and
- training of operating staff for wastewater treatment plants.

What are the Consequences of the Statute and its implementation? At least in the early years, the statute had its desired effect. Many industries invested in additional treatment facilities, adopted alternative production technologies and were thus able to reduce their level of pollution. But all in all too many concessions have been made. The fee levels are too low to have the desired "steering effect", too few pollutants are covered, too few incentives are set to lower pollution at all times. Some critics complained that the Waste Water Fee Law constitutes a licence to pollute. On the other hand, due to the polluter pays principle set into effect by the law the State was able to create extra funds to finance effective environmental protection and thus improving public services.

4. Compulsory charge for not employing disabled persons

Intended purpose is to employ disabled persons.

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[6] In detail: *Böhm*/*Williamson*, "An Analysis of the Effectiveness and the Side-Effects of the German Wastewater Fee Law", *Chalifour, Milne, Ashiabor, Deketelaere, Kreiser* (*Eds.*), "Critical Issues in Environmental Taxation" (Vol. V, Oxford, 2008, 527 ff.).

The compulsory charge for not employing disabled persons has to be paid by every private and public employer with at least 20 jobs, if they do not employ the minimum number of disabled persons required by law. It falls due if there are not at least 5% of jobs occupied by disabled persons. A waiver or a reduction are not provided for.

The charge amounts:

- 115 € at an employment rate from 3% to under 5%
- 200 € at an employment rate from 2% to under 3%
- 290 € at an employment rate under 2%.

For employers with less than 60 employees discounts are provided for. A compensatory levy as a compensation is meant for employers who fulfil their employment-duty and therefore (e.g. because of additional holiday required by law or disability-friendly facilities at the work place) have higher costs. Besides that the compensatory levy is supposed to coerce employers to fulfil their employment-duty.

The compensatory levy mainly finances aids for severely disabled persons at their work place and employers who have higher costs because of employing a severely disabled person. Some governmental data:[7]

- in 2012 the revenue of the compensatory levy was at 486 mio€
- 9.963 jobs of severely disabled persons were saved due to disability-friedly equipment of existing work places and apprenticeship places.
- with the aid of benefits and loans given to employers 2501 new jobs and apprenticeship positions were created.
- 9.494 severely disabled people were granted benefits in the amount of 36 mio€

Considering the amount of revenue of the levy it suggests the assumption that many employers pay a ransom for their duty.

5. Social Security Contribution for Artists

Intended purpose is to offer secure health care and pension insurance in opposition to unsteady job offers, fluctuating remunerations and bad coverage.

Basically artists are part of the german system of social security as well. A major feature compared to other self-employed people is that half of the dues are paid as a flat social security levy for artists.[8] The contribution has to be paid by publishers or galleries on the products of an artist or writer. It finances a special branch of social security for artists and writers, which provides them with health care and pensions.

In 2012 there were 177.219 people insured in the artists‘ social insurance (ASI). They split into the areas fine arts (35%), music (28%), speech (24%) and performing

[7] http://www.rehadat-statistik.de/de/berufliche-teilhabe/Ausgleichsabgabe/index.html.

[8] Gesetz über die Sozialversicherung der selbständigen Künstler und Publizisten vom 27.7.1981, zuletzt geändert durch Gesetz vom 30.7.2014.

arts (13%). The reported annual average income of insured self-employed artists in the ASI / artists‘ social insurance was 14.557 Euro on 1 January 2013.[9]

The aim of the law was to offer a secure health care and pension insurance in opposition to unsteady job offers, fluctuating remunerations and bad coverage.

In the view of the ASI / artists‘ social insurance the state is promoting a professional group with this that is „normally socially worse covered than other self-employed people. This is not only a socio-political, but a cultural political archievement as well. With the institution oft he artists‘ social insurance the creative task of artists and publicists is recognised as important for society.”

The federal association of self-employed persons is critical of the support under equality aspects. The association of tax payers is complaining over their bureaucratic expense. The association of artist however sees the artists‘ social insurance as important social coverage.

The Federal Constitutional Court already affirmed the legitimacy of the levy in 1987.[10] The ECJ affirmed its conformity with Union Law in 2001.[11]

6. Agricultural Marketing Fund

Duties collected for the Agricultural Marketing Fund as an institution under public law for the marketing of the German farming and food industry has been found incompatible with the Basic Law by the Federal Constitutional Court.[12] The duty was seen as an impermissible special levy because a responsibility of the German farming and food industry for providing the funding of the state-organised marketing is missing. According to the court there was no justifying connection between group homogeneity and factual proximity on the one hand and a special responsibility of those liable to make payment for providing the funding for the exercise of the function on the other hand. The European Court of Justice decided a failure to fulfill the obligations of the free movement of goods.[13]

7. Miscellaneous

Other monetary instruments are being discussed at the moment, e.g.:

- A fee to finance roadmaking and –maintenance
- A fee for police operations at football matches
- A banking levy / banks’ contribution[14]

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[9] http://www.kuenstlersozialkasse.de/wDeutsch/ksk_in_zahlen/statistik/durchschnittseinkommenversicherte.php

[10] B. v. 8.4.1987, 2 BvR 909/82 u.a. = FCC-case (BVerfGE) 75, 108 ff.

[11] ECJ (EuGH) - judgment 8.3.2001, C-68/99.

[12] BVerfGE 122, 316.

[13] Judgment of 3 February 2009, 2 BvL 54/06.

[14] http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2014/2014-07-09-package-of-measures-for-european-banking-union.html;

IV. Conclusions

All in all one can conclude that monetary instruments play an important role in Germany when it comes to financing and improving public services and the tax system should not give any incentives that are undermining public interests. Individual aims can be achieved with special levies but constitutional requirements have to be met.

If public services are actually improved by introducing special levies depends on their specific design. As always the devil is in the details.

http://www.internationaltaxreview.com/Article/3352677/Bank-levies-A-step-toward-harmonisation.html

Comments

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I would like to take this opportunity to share a tentative summary of my thoughts on "Changes of the State in Redistribution," which are based on critical socio-legal theories.[1]

Firstly, Professor Röhl's talk suggests to me the decline of nation states. Concretely speaking, through economic globalization, which is driven by multinational corporations, capital now moves beyond the borders of nation states. Today, nation states are no longer the subjects that regulate national economies, especially with regard to their own redistributive agenda, but are objects in the sense that multinational corporations, which compare neo-liberalist deregulation efforts of each nation state, choose their favorites as their business location(s).[2]

Secondly, Professor Böhm's talk reminds me of a loss of integrity of the law. For example, Law & Economics (its guiding principle, which is efficiency, resonates with neo-liberalist economic policy) seems to be rapidly infiltrating Japanese legal academia, especially studies on corporate law. Thus, contemporary jurists are beginning to be influenced by the distinctive Unitedstatesean mode of legal thought, which can be characterized as policy analysis rather than doctrinal analysis based on the traditional notion of the "rule of law" (law / politics distinction).[3]

Lastly, Professor Mouri's talk implies to me of a passivity against redistribution in the judiciary, especially in Japan. As nation states begin to decline, the judiciary plays a central role in managing the legal system.[4] It is difficult even for the Unitedstatesean type of the judiciary, which engages in policy analysis, to carry out redistribution, because the redistribution-motivated policy argument, which is not universal (in contrast with efficiency), is partisan in nature and is not convincing within legal communications.[5] Consequently, redistribution through the law might be very diffi-

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[1] In particular, I am indebted to Duncan Kennedy's "three globalizations" narrative. *See* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* The New Law and Economic Development: A Critical Appraisal 19 (David M. Trubek and Alvaro Santos ed., 2006). For my general construction using Kennedy's socio-legal theory, *see* Motoaki Funakoshi, *Taking Duncan Kennedy Seriously: Ironical Liberal Legalism*, 15 Widener Law Review 231 (2009); Motoaki Funakoshi, *Hihan-hogaku no kozu: Dankan Kenedi no aironikaru riberaru rigarizumu* [The Structure of Critical Legal Studies: Duncan Kennedy's Ironical Liberal Legalism] (2011).

[2] *See* Seigo Hirowatari, *Hikaku-hoshakai-ron-kenkyu* [Comparative Study on Law and Society] (2009), pp. 84-87.

[3] *See* Kennedy, *supra* note 1, at 63-71; Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (1997), ch. 4.

[4] *See e.g.*, Kennedy, *supra* note 1, at 65.

[5] See Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought, 55 Hastings Law Journal 1031, 1073 (2004).

cult in Japan. If mainstream legal sociologists' observations are correct, the highly bureaucratic Japanese judiciary emphasizes following precedents instead of realizing substantive justice.[6]

[6] *See e.g.*, Daniel H. Foote, *Na mo nai kao mo nai shiho: Nihon no saiban wa kawaru no ka* [Nameless Faceless Justice: Will Japan's Courts Change?] (2007).

Comments and Questions

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I. On Prof. Röhl's Paper

Prof. Röhl provided a clear analysis about the changing role of the state under pressure of globalization and its impact upon administrative-legal science. Roughly speaking, his perspective seems to be summarized as a reincarnation of the German method of state-science (*staatswissenshaftliche Methode*), which was initially rejected by Otto Mayer who hastily deleted the sectoral theory of administrative law (*besonderes Verwaltungsrecht*) in his textbook. Prof. Röhl successfully combines several specific sectors of administration with his universal theory of administrative law (*allgemeines Verwaltungsrecht*) using the phenomenon of a shrinking state as a consistent viewpoint.

Upon listening to his lecture, the following three questions come to my mind. First, to what extent is the evacuated sphere due to the retreat of the state filled with a non-profit transfer? I wonder if the more important alternative to the state distribution might be a profit-based transfer. In Japan, typical legal schemes for non-profit transfers are those of mutual companies for life insurance, cooperative society (*Genossenschaft*), a juridical person for public interest, and a trust for public interest. However, almost all mutual companies have changed their organization into stock companies, most cooperative societies are managed mainly by relying on the profit from transactions with non-members, and juridical persons for public interest are greatly supported by their commercial-based side-work. I suppose Prof. Röhl's argument of the importance of information instruments for non-profit transfers may be applicable to profit-based transfers. I would like to know more about concrete German legal schemes for non-profit transfers that are actually substitutes for the shrinking role of the state.

Second, would more distribution allow the state to escape from distribution? The responsibility of the state to stabilize the financial system sounds slightly paradoxical to me. Despite many efforts for preventive surveillance, banks and insurance companies often go bankrupt. As Japan experienced at the end of the last century, a tremendous amount of money is necessary to overcome a financial crisis, and there is no greater distribution.

Third, what kind of impact does the re-unification of the sectoral and universal theories raise for our theoretical system (*Rechtsdogmatik*) of administrative law? For instance, should the general notion of an administrative act (*Verwaltungsakt*) be modified by the impact of Prof. Röhl's thesis?

II. On Böhm's Paper

I am deeply appreciative to Prof. Böhm for providing curious and interesting materials for comparative legal studies. Among the examples of extra-tax levies in

Germany, the following three seem to be important. Here, I would like to make several remarks regarding each legislation and compare them to Japanese institutions.

1. Waste Water Fee Law

In Japan, few legislations on extra-tax levies exist because a strict connection between the burden and benefit on an individual level is required to justify them. A rare exception is the extra-tax levy to construct sewage facilities to purify wastewater where the beneficiaries can be individually specified. This problem of synallagma may be related to Dr. Meinel's comment yesterday about Prof. Okamura's paper.

However, our legislator demands a much lesser degree of juridical connection on the group level. Therefore, the same objective as this German federal law is actually pursued not as extra-tax levies but by taxes for special purposes. For example, a lot of prefectures have introduced an industrial waste tax, most of which are 1,000 yen per ton of waste emission. In the legislation of taxes for special purposes, the connection between burden and benefit on the group level is regarded as factual rather than juridical, which is why our legislator often reforms a tax for special purposes into an ordinary general tax without changing the range of groups who are burdened by the tax, such as the road-construction tax (*Doro-tokutei-zaigen*). Currently, the theoretical difference between extra-tax levies and taxes for special purposes does not seem to be sufficiently discussed from a juridical viewpoint, although Prof. Okamura may object to my impression.

2. Compulsory charge for not employing disabled persons

Japan introduced similar legislation in 1977 (*Shintaishogaisha- koyo-sokushin-ho*), which mainly relied on this German act. In our country, if an employer violates his or her obligation to employ disabled persons, in addition to this charge, his or her name can be publicized as an administrative punishment for the breach of order (*Ordnungswidrichkeit*).

On the other hand, the compulsory charge does not have the nature of an administrative punishment, according to the legislator's official explanation. However, some scholars have asserted that the compulsory charge should be discounted when the employer's name is publicized because the compulsory charge has a similar effect as an administrative sanction with respect to prevention in the future.

3. Social Security Contribution for Artists

The Japanese system of the compulsory health insurance is composed of two parts: one for employed workers and one for self-employed workers. In the employed workers' system, the insurance fees are allocated equally to both the workers and their employers, whereas in the self-employed workers' system, all the insurance fees are paid by the workers because they do not have employers.

If we select one group among the self-employed and allocate part of their insurance fee to their contractors (e.g., publishers), then this group would receive special privilege. To justify such legislation two conditions are indispensable. First, the type

of contract used by this specific group must be almost the same as the employment-type contract. Second, that group must have the highest risk, which should be secured by compulsory insurance among all the groups of self-employed workers. It will be impermissible to establish a similar institution in Japan because the fact that artists meet the above requirements for special treatment has not been proven.