

Judicial Justice: From Procedural Justice to Communicative Justice

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Abstract

Approaching the matter from the position of trying to bridge the gap between the theory of justice and the judicial institution, I explain in this paper the dilemma inherent in the idea of justice and point out that this dilemma is inevitable because we cannot completely rule out the question of "the good" in the question of justice. Based on this, I explain the problem of judicial justice from three points of view: the institutional, the discursive, and the subjective point of view of judges. From the institutional perspective, while looking at the relationship between the legislature, judiciary, and civil society, I propose the principle of the division of justice, touching briefly upon the problem of constitutional challenges and judge-made law. From the discursive perspective, after reflecting that the judicial process is necessarily a part of the social communicative process, I examine judicial justice as part of the problem of communication. Finally and from the subjective perspective, I comment on what justice could mean for an individual judge who has to find the right answers in hard cases and conclude by likening justice to the "vanishing point" of a painting.

KEY WORDS: judicial justice, procedural justice, communicative justice, constitutional trial, judge-made law, civil society

Manuscript received: Oct. 10, 2016; review completed: Nov. 21, 2016; accepted: Nov. 25, 2016.

Generally in Korea, there is more mention of judicial justice or judicial reform than legislative justice or legislative reform. What is the reason behind this? Is it because people are largely disillusioned with parliamentary politics, but still have hope regarding the judiciary? What is most certain is that, for ordinary people, the last image of "the rule of law" is "the rule of judgment."

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In most countries, people can see statues of Justice inside or outside courthouses. For example, at the entrance to the grand courtroom of the Supreme Court in Korea, one finds standing a statue of Justice. Beautiful and poised, it is supposed to represent equality and rationality. However, one can also find other statues of Justice outside the courts, in which Justice is expressed tragically, depicted as a wounded, bandaged goddess. For example, *Der Henker und die Gerechtigkeit* is a piece by the German artist John Heartfield, who in 1933 was prohibited from working on his art and forced into exile by the Nazis. This piece was re-enrolled in the list of his artwork in 2012, attracting a great deal of attention. *Survival of the Fattest*, by Danish sculptor Jens Galschiot, is a sculpture depicting a notably obese Lady Justice sitting on top of a famished third world male's shoulders. It was exhibited at the 2009 Climate Change Summit in Copenhagen. A 2010 piece by Htein Lin, an installation artist from Myanmar, is called the *Scale of Justice*. The artist examines many thousands of hands reaching out, as if begging for justice. In Gustav Klimt's famous painting *Jurisprudentia*, the Goddess Justice is drawn as a small figure in the upper part of the painting, easily missed by the casual observer. His painting from the early 20th century shows the marginalization of the question of justice during the era of positivism. Indeed, the history of the marginalization of the question of justice goes back much further. That history is in line with the flow that starts from the foundation of jurisprudence, initially termed "natural law" before being re-named "legal philosophy" and finally "legal theory."

I. The Gap between the Theories of Justice and Judicial Practice

There exists as much distance between the theories of justice and judicial practice as exists between the statue of Justice inside the courtroom and the statue outside. How are the theories of justice of great thinkers associated with actual judicial institutions? In other words, how do these theories contribute to judicial practice? What I find problematic is the gap between the theories of justice and judicial practice. For example, the concept of "the veil of ignorance" in Rawls's theory of justice puzzles me. In deriving his two principles of justice, Rawls uses this conceptual tool

whilst conducting a procedural and formalistic thought experiment. In doing so, he suggests hiding all the conflictual situations surrounding various interests, rights, and roles in real life, pretending that they are unknown; by going back to the “original position,” he tries to draw out principles of justice upon which everyone can agree. However, a situation of injustice or a situation in which justice is demanded, are actually situations of conflict between various interests and rights. In such situations, people seek a higher authority that can make a fair decision amidst various conflicting interests. This is the idea of justice as it is usually seen from an institutional perspective, and the institution that fits this idea best is the judicial one.

In a situation that demands justice, then, those things that Rawls covers up with his “veil of ignorance” rise inevitably to the surface. This is the reason why I have found it difficult to connect a procedural and formalistic conception of justice to actual judicial institutions. In front of judges are actual situations where the “veil of ignorance” has been removed. In this situation, the judiciary is asked to make a fair, correct, and acceptable decision, and by applying rules and procedures according to the principle of justice to give all parties their due by treating the relevant parties fairly, if not precisely identically. In doing so, judges must treat unlike cases differently, because among many different things some different things must be taken into more account than others. These granular decisions cannot be made when wearing the veil of ignorance.

Approaching the issue from the position of trying to bridge the gap between the theory of justice and the judicial institution itself, I explain in this paper the dilemma inherent in the idea of justice, and point out that this dilemma is inevitable because we cannot completely rule out the question of “the good” in the question of justice. Based on this, I explain the problem of judicial justice from three points of view: the institutional, the discursive, and the subjective, as embodied in the judge. From the institutional perspective, while looking at the relationship between the legislature, the judiciary, and civil society, I propose the principle of a division of justice, in relation to which I address the problem of constitutional challenges and “judge-made law.” From the discursive perspective, on reflecting that the judicial process is also a part of the social communicative process, I examine judicial justice, seeing it as part of the

broader problem of communication. Finally, from the subjective perspective, I comment on what justice could mean for an individual judge who has to find the right answer in a hard case, likening justice to a “vanishing point” familiar from the study of perspective in art.

II. The Dilemma Intrinsic in the Concept of Justice

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

The moment of tension that arises from the good and the right is also reflected in most principles of justice. From Aristotle to Rawls, the principle of justice has a dual structure that is not singular but works on two levels: like should be treated alike and unlike should be treated differently; numerical equality and proportional equality; first and second principles of justice, etc. This dual structure arises inescapably from the tension between what is right and what is good. For example, numerical equality is the concept of justice which states that like should be treated alike. The history of legal justice is also the history of the expansion of numerical equality. The expansion of suffrage, personal liberty, freedom of expression, and the like are all examples of numerical equality. As a realization of this idea in ancient times, public duties were even taken in turn by everyone. However,

treating everything as the same would harm the utility of the society as a whole. Therefore, the request that the unlike should be treated differently could not help but arise; this is known as proportional equality. The assertion that unlike should be treated differently, however, does not mean that anything goes; the manner of treating the unlike differently should be guided by something, such as a principle. This something is what provides the content and context when a thing is treated differently. The demand that the unlike be treated differently means that a certain conception of equality must be selected as a guide; out of many different things, some different thing is taken into greater account than the others. This is the very problem of the good or of value. Unlike numerical rules, proportional rules have some connection to the good. However, when we take into account the good, we cannot avoid uncertainty regarding what precisely is good or valuable. Aristotle tried to resolve this difficulty by approaching it with the golden mean; one should avoid both too much and too little. In any case, Aristotle firmly maintains that justice has a connection to the good.

When we maintain a link between the idea of justice and the good, some uncertainty must arise. In order to remove this uncertainty, we must follow complete proceduralism or formalism. If we do this, justice then becomes a question of the right and is disconnected from the question of the good. However, thoroughgoing proceduralism or pure formalism brings criticism. Firstly, total proceduralism boils down to legal positivism. For example, according to Kant's categorical imperative, one should "act only in accordance with that maxim through which you can at the same time will that it become a universal law." However rules that can be derived from this kind of abstract categorical imperative are few indeed. Therefore the many detailed rules that imply duty in the real world must be crafted by lawmakers, and it is here that "the radical change" from transcendentalism to legal positivism occurs.¹⁾ Secondly, complete proceduralism is unrealistic. In Kafka's novel *Der Prozess*, the very title of which implies procedure, is about how unrealistic proceduralism is, and how a lack of humanity results from it. When a judge interprets legislative provisions, the method of teleological interpretation is undoubtedly applied, and there are

1) PAUL RICOEUR, VOM TEXT ZUR PERSON: HERMENEUTISCHE AUFSÄTZE (1970-1999) trans. and ed. by Peter Welsen. 278-80 (2005) (in German).

several legal concepts that allow judges some space for making value judgments. For example, indeterminate concepts, normative concepts, discretion, and general clauses all offer this room to maneuver. Terms like noise and dangerous objects are examples of legal concepts that have subtle connotations and lack transparent exterior meaning, especially to the layperson. Normative concepts also allow the judge to have some space for making a judgment. Obscenity and dishonor, for example, are concepts which, in comparison to concepts that can be perceived easily, are only grasped when making a judgment based on evaluation and are hence normative. Discretion also allows a certain amount of variability in judgment. Furthermore, a general clause, as the term itself suggests, contains a high degree of generality and allows the judge to apply the case before him or her to the broad scope of other cases to ensure a lasting legal effect.²⁾ In their various ways, all these concepts allow judges to make decisions based on value judgments. Judges also sometimes faces situations in which they are is expected to supplement or make up for flaws in the law or to make corrections to errors that are sometimes found in the legal order. The general principle of a law, the spirit of the law, the average person criterion, interest-balancing, etc. are all devices of thought on which judges depend, and when using these devices value judgments are inevitable. This manner of applying uncertain concepts, normative concepts, discretion, and the general clause allows the judge to have some space for making judgments, and such judgments are unimaginable without reference to the good.

This problem is apparent especially in hard cases, in which the judge is caught between the requirements of the general rules and the requirements of a particular set of circumstances. Judges are required to chart a difficult course in such a contradictory situation. That is to say, the commodities considered on neutral terms in general rules now need to be considered in terms of the meaning (or value) they hold for a particular person or particular stakeholder. In this way, the abstract procedural justice paradigm is no longer maintained.

In the end, pure proceduralism is not compatible with judicial justice.

2) About uncertain concept, normative concept, discretion, and general clause *see in more detail* KARL ENGISCH, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN* 188 (11th ed. 2010) (in German).

The conception of justice that fits the judicial institution should be one that stays within the confines of proceduralism, yet at the same time avoids the extremes that can result from proceduralism. It is inevitable that judicial justice, because of its link to the good, holds room for uncertainty and dilemmas. We cannot avoid carrying this burden with us.

III. Division of Justice

On the institutional level, this burden can be dispersed through a division of labor. In other words, a division of justice is possible. It can be achieved in three arenas: the legislature, the judiciary, and civil society. At the very top is the stable example of the legislature, which lays down the content and ranking of the most important values, while on the very bottom are the dynamic instances found in civil society, in which appraisals are constantly being made concerning the contents, meanings, and values of particular persons or objects. Between these extremes, there is the procedurally focused institution of the judiciary. On a relatively independent stage acquired from the political body above and endorsed, but also shaped, by the mediation of the civic dynamism below, the conditions required for realizing procedural justice are qualified.

When representative democracy is working at least somewhat successfully and civil society is healthy, the procedural arena can be a catalyst for the development of democracy and for social dynamism. In the Korea of the last two decades or more, successes in upholding rights through the judiciary were due to continual discussions with and interventions by civil society.³⁾ The increase in civil activist groups since the 1990s is apparent in diverse fields such as human rights, consumer rights, welfare, gender equality, eradication of corruption, and the environmental movement, among others; in all these fields, these groups make the best use of the laws to further their goals, often with the assistance of lawyers working pro bono.⁴⁾ Their efforts to gain and uphold rights through the

3) UN JONG PAK, OE BEOP-UI JIBAE-INGA [WHY RULE OF LAW] 265-67 (2010) (in Korean).

4) SUKTAE LEE & INSUP HAN eds., HANKUK-UI GONG-UK INKWON SOSONG [KOREAN PUBLIC LAWSUITS ON HUMAN RIGHTS] (2010) (in Korean).

judiciary captured the public imagination, and eventually formed a consensus regarding the need for legislation; thus, many of the laws proposed with passion by NGOs later became entrenched in the statute books. In Korea, the elevation of the status of the judiciary was of course due in part to the efforts of the judiciary itself, but more than anything else, the urging of the NGOs played the key role, which surely needs to be acknowledged.⁵⁾ In short, the participation of civil society, in the form of demonstrations of energy exuded by democratic autonomy by civil societies continually re-oriented judicialization, urging it toward a more mature social goal.

In the pages above, I have argued that the judiciary as a procedural arena would work properly if it were faithful to the division of justice. Let me now apply this argument to cases of judicial reviews of constitutionalism. Judicial review is spreading worldwide with the growing catalogue of fundamental rights enshrined in constitutions. Constitutional cases are as active in Korea as they are in Germany. Supra-positive values being written in as fundamental rights under the constitution are no longer declarations of programmatic creeds but work as directly effective and enforceable laws.

When introducing supra-positive values, i.e. fundamental rights, into the constitution itself, the application of the constitution becomes in itself an act of realizing values, and the interpretation of the constitution becomes a problem of balancing values. The articles of fundamental rights are positive law in terms of their form but are rooted in terms of their contents in highly intellectual and social movements. That is, the content of the constitution is filled by intellectual and social movements outside positive law, and they receive vitality from it. Therefore, applying the constitutional provision debate is essential in the balancing of values.⁶⁾ This is the reason why securing a free space for public opinion or a *sensus communis* is a key premise for successful constitutional challenges.

The constitutional problem is not just a problem of the legal but of a “political-legal problem.”⁷⁾ The constitution is basically a structure

5) On this see UN JONG PAK ed., NGO-WA BEOP-UI JIBAE [NGOS AND THE RULE OF LAW] CHAPTER 4 (2006) (in Korean).

6) JOHANN BRAUN, EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE 55 (2d ed. 2011) (in German).

7) LARRY D. KRAMER, *The People Themselves, Popular Constitutionalism and Judicial Review* 31

embodying the autonomy of the political process. Therefore, although a constitutional problem is a legal problem, it must at the same time be backed by the people's authority to resolve that problem. The act of conducting a constitutional challenge is an act that combines the rule of law and the exercise of democracy. The political-legal nature of the constitution includes not only the constituent power but also the interpretation and implementation of the constitution. In constitutional politics, the view that confines the participation and role of the people to solely the constituent power and states that the interpretation and application of the constitution is a non-political field dominated by legal experts runs against the very spirit of constitutionalism. In ordinary courts, there is a governmental authority that can execute decisions, forcefully if necessary. In constitutional courts, however, there is no such authority to enforce decisions. There is no choice for judges of constitutional courts but to assume that their decisions are respected as being self-evidentiary; they have no alternative but to depend upon trust. This is the reason why a failure of judicial justice can be more dangerous than a failure of legislative justice in a democratic society.

The judges of lower courts cannot help but cast a furtive glance toward higher courts, because it is the judges of those higher courts who can overturn their decisions. The relationship between lower court judges and higher court is in some respects akin to the relationship between the Supreme Court and the people. In that case, the judge's superior is the people. The judges of a constitutional court, when interpreting the constitution, must study the reaction of the people, who can, if sufficiently motivated, overturn their decisions.

There is no doubt that in constitutional issues, the legislature, executive, and judiciary are all subordinated to national sovereignty, and none of these authorities can assert a higher position than the others or the nation itself. Therefore, even if the authority to judge whether some laws are unconstitutional or not lies in a constitutional court, this should not be understood as giving the judiciary an unassailable superiority in interpreting the constitution. Indeed, once superiority is emphasized, the problem of an

imperial judiciary or a political judiciary arises. Once laws are established by the legislative body, it is the people who grant the judiciary the authority to interpret them. In other words, it is the people who have employed the two authorities, the legislative body and judicial body, in order to reveal what the constitution ultimately means and to ensure that all efforts are put toward protecting the rights of the people. One body is in charge of making through legislation and the other in charge of interpreting through judging, and making both continually intervene in the workings of other bodies is to make them “compete for loyalty towards the people.”⁸⁾

In the name of democracy, there is in some sense room for judiciary to shape social practices, but the core decision-making that protect the interests and rights of the many remains the responsibility of the legislature. It is the role of the judiciary to make small reforms through additional development of the law. If one is to depend, however, upon judicial justice as an alternative to political failure, this is indeed ominous, because a monopoly on justice is as dangerous as a monopoly on truth. In terms of reform, legislative justice is a large justice while judicial justice is small justice.

There is a general tendency to believe that the role of the judge requires creativity. The increasing speed of social change, the explosive number of laws being made, and changes in the style of legislation are all influencing the legal binding mechanism of judges in a way that alleviates it. Especially over the past few decades, there has been an expansion in the scope of legislation into social welfare, health promotion, gender equality, protection of teenagers, protection of the disabled, affirmative action, etc. Such ambitious legislation demands that judges consider what the most desirable policies might be. This introduces a new interpretive method that moves away from judicial interpretation in the narrow sense and more in the direction of formative and creative adjudication.⁹⁾ This tendency is sometimes explained as a tendency to create judge-made law. Ever since the “Free Law Movement” in the early 20th century that opposed legal or especially legislative positivism, the view that no laws can fully rule out the creative aspect vested in the judge is now prevalent and even generalized.

8) *Id.* at 59.

9) On the roles of the judge due to the social changes, see Pak, *supra* note 3, at chapter 6.

The contention that the job of the judge is a creative one should be understood not as “surpassing the boundaries outlined by the law” but “overcoming the knowledge and methods that one is already aware of.”¹⁰⁾

If we go as far as to the stage at which the laws do not guide interpretation but interpretation guides the laws instead, the law moves into a gray area and the question of the balance of power between the legislative body and law-applying body arises once again. This balance of power is in peril, considering the fact that it is mediated solely by individual judges. If the assertion of judge-made law means that the judge can independently supplement deficiencies in the law and by so doing render the law perfect, this would surely damage that principle of the division of justice. Even if it can be supplemented by judge-made law, the positive law will never be perfect. The positive law does need to pass through the process of formation and declaration through the acts of judges, but that does not mean that law itself is translated directly into justice simply because it undergoes judge-made law.

In the legal systems of Germany and Korea, it cannot be denied that the term “judge made-law” creates unnecessary disputes over the problem of that gray area. Professor Matthias Jestaedt tries to use this term (*Richterrecht*) to describe all legal activities (*Spruchstätigkeit*) of judges from the stance that law is produced and declared individually and specifically. In this way, “judge-made law” is not used as a term to describe an exceptional duty to supplement or revise deficiencies in laws, but rather as an inevitable attribute of producing law through the normal activities of judging.¹¹⁾ If this is so, since the term “case law” already exists, there appears to be no need to continue using the term “judge-made law”, which has become redolent with violating the appropriate division of justice.

10) YOUNGRAN KIM, PAN-GYEOL-UL DASI SAENG-GAK-HANDA [RETHINK THE JUDGEMENTS] 295 (2015) (in Korean).

11) MATTHIAS JESTAEDT, *Richterliche Rechtsetzung Statt Richterliche Rechtsfortbildung: Methodologische Betrachtungen zum sog. Richterrecht*, in RICHTERRECHT ZWISCHEN GESETZESRECHT UND RECHTSGESTALTUNG 69 (Christian Bumke ed., 2012) (in German).

IV. Justice as a Communicative Procedure

In judicial procedures, the term “procedure” does refer to a formal, even unrealistic, series of steps. Rather, it refers to an organic and fluid arrangement in which laws, courts, litigants, judgment, and other governmental authorities rule together. The judicial procedure itself is a long discursive process. The decision of a judge is not a mark of a monopoly on power but a declaration of the close of a discursive procedure. In a situation where fists await, conversation is impossible. The introduction of a judicial procedure involves codifying a “distancing” that allows for conversation. The judge leads a “disciplined discussion” through “proper distancing,” where distancing does not imply anything indiscriminate. The judge is a person who exercises “reflective judgment” on the affairs of third parties as an “observer” while simultaneously serving as an “actor” who decides on a legal effect through judgment.¹²⁾ Therefore, distancing cannot be indiscriminate. “Proper” distancing can differ in content according to the specific legal area to which it is applied.

If judgments are made solely based on evidence, we do not need to concern ourselves with discourses. However, it is impossible to rely solely on evidence. All legal assertions of the truth involve to some degree the principle of assumption. That is, until there is counterevidence, we can only provisionally assert that something is valid and if the situation changes, that assertion can change. Therefore, evidence is importance in courts, but so is rhetoric. The Civil Procedure Act is a primary example of codifying the rules of conversation. Depending on the legal field, either evidence or rhetoric can be more important. However, what really determines the quality of judgment is rhetoric combined with evidence. Rhetoric has elements of risk, because it tries to convince without evidence and in principle can go on indefinitely. The rule of the division of the burden of proof can terminate rhetoric. In an ordinary conversation, it is possible to say, “I don’t know,” but a judge cannot say this, and the rule of the division

12) HANNAH ARENDT, *DAS URTEILEN: TEXTE ZU KANTS POLITISCHER PHILOSOPHIE* 76 (R. Beiner ed., trans. by U. Lutz, 1998); STEFANIE ROSENMÜLLER, *DER ORT DES RECHTS: GEMEINSINN UND RICHTERLICHES URTEILEN NACH HANNAH ARENDT* 234 (2013) (in German).

of the burden of proof can help a judge bring a conversation successfully to an end. If the quality of the judgment depends on the quality of the discussion, fundamental justice means conducting a better conversation. A long conversation or discussion can lead to universality, and there is nothing that was universal from the beginning.

The judge, in hard cases, is simultaneously requested to abide by general rules and to consider special circumstances. This situation is a process of pushing through the conflicts that arise from applying the rule of justice itself. Historically, the wisdom used in this process was known as applying “equity,” which is another word for a sense of justice. A judge with a sense of justice is one who is skilled at communication, because equity, or *phronesis* is not an individual wisdom but the collective wisdom of the many. If the judiciary encourages a more discussion-oriented culture internally and opens itself up to the outside world such as the perspective of and even criticism from academia, a much fairer judgment can be made in the context of a more favorable interpretative community.

V. Justice as a Vanishing Point

Several years ago, I happened to come across Professor Johann Braun’s book on legal philosophy, and I was pleasantly surprised. Not only was his legal philosophical perspective familiar to me, but several metaphors that he used were in line with those I employed to teach my classes. One of them was comparing justice to a “vanishing point” (*Fluchtpunkt*).¹³ I would like to explore this metaphor in more detail.

In viewing a painting drawn using perspective, we can find the vanishing point. When we look with our eyes, the two parallel lines run far into the distance and meet at a certain point that is known as the vanishing point. This is the dead end; in other words, when we project the real world onto our eyes it is the image that forms at the very edge of our vision. The judge’s objective to achieve judicial justice through legal decision-making can be seen as the vanishing point of justice. The vanishing point always

13) JOHANN BRAUN, RECHTSPHILOSOPHIE IM 20. JAHRHUNDERT: DIE RÜCKKEHR DER GERECHTIGKEIT 314 (2001) (in German).

changes when the position of the onlooker changes. At the same time, from the viewpoint that it allows for recognition of the direction in which I am moving, the vanishing point is always unchanging. It is never a starting point of cognition of which we can be sure with certainty. However, to know and accept that a legal decision made was made correctly, we always need to be moving in this direction. If this vanishing point did not exist, judges would lose direction. If the vanishing point of justice disappears, judges would focus on an entirely different point, such as pure power or what the majority wants.

The vanishing point can be contrasted with the Archimedean point. The Archimedean point forms the most definite starting point of cognition. Archimedes is reputed to have said the following: "Tell me the spot where I can lift up the Earth and give me a large lever; then I will lift up the Earth." The Archimedean point is a hypothetical point at which the researcher is able to perceive the subject of research in a total and objective manner. In addressing the question of justice, Hans Kelsen held that justice was such a hypothetical Archimedean point, viz. absolute justice. This conception of justice creates an illusion that the demands of justice in society can be rendered free from the academic and practical application of the law by legal practitioners.

Justice as a vanishing point shows the direction in which the judge should always move in the real world. I believe that justice as a vanishing point can be linked to the problem of Ronald Dworkin's right answer thesis. Judges are unable to assert that their interpretation of the law is the absolute truth and is eternal, but they still cannot help but engage in pursuit of the truth, of the right answer. The model that can justify the decision of a judge is the truth model.¹⁴⁾ In today's world, in which we explain the law as a language of democracy, it is impossible to justify the authority model, especially from the perspective of civilians who must abide by the law, who can demand the reason they were sentenced directly to the secular judge who made that decision, and who make this demand as a matter of course. In relation to this, Dworkin asserts that one best or

14) ULFRID NEUMANN, *Wahrheit und Autoritaet im Rechtsdenken* (Apr. 6, 2013) (Korea University Invited Lecture – unpublished manuscript, on file with author) (in German).

correct interpretation exists in legal judgments.¹⁵⁾ This argument, known as the right answer thesis, should not be understood, as many scholars have already pointed out, as an assertion of the existence of an eternally right answer, but rather as a regulatory idea. That is, Dworkin's right answer thesis is not an ontological excursus demonstrating that there exists a right answer, but rather a conception that matches the judge's subjective attitude in practice. The judge should use all methods available at hand, believe that there is only one decision for each case that can be justified, and must do everything to try to reach that answer. The assertion that a decision should be made based on the best reasoning available under the premise that there is no right answer is self-contradictory. The metaphor of the vanishing point best reflects judges' necessary belief that there is a right answer that they must try to reach in practice.

15) RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 126 (2011).

