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The Functions of Principle as the Basis of Court Decision in Hard Cases

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Abstract

The task of court is to produce just decisions. A court decision may be just if it coheres moral. Principle is praxis of moral. This article is to articulate that principle has significant meanings in court's decisions. This is because principle is a moral standard that serves to be a reference for Court to settle hard cases equitably. In this writing, case approach is employed. In addition, it also uses comparative approach, in which court decisions of different countries are presented. The purpose of using comparative approach is to find similarities in referring to principle despite different jurisdictions and even different legal systems. From this study, it is found that principle may serve four functions to the court to reach equitable decisions. First, it may be a legal basis for the court to settle a case equitably in the absence of legal rule. In fact, not all human conducts are prescribed by law. It is frequently presumed that what is not prohibited is permitted to do. In this study, it is found that what is not forbidden is not necessarily permissible. The corner stone of determining whether or not it is permissible is principle. In this case, principle served to be legal basis directly applied by the court to avoid producing unjust judgment. Second, the principle has the derogatory function to supersede a statutory provision. In this case, applying such a provision may result in decision contrary to moral. This, certainly, contradicts the idea of the establishment of court of justice. It is justified, therefore, referring to the principle, the court supersedes such a statutory provision to bring about a just decision. Third, the principle serves to be a basis for the court to interpret obscure statutory provision governing the case. It is not unusual that statutory provision is obscure or ambiguous. Such a provision is hard to understand. Settling the case governed by such a provision appropriately, the court should interpret the provision sensibly.

Keywords: Principle; Basis; Moral; Decision.

Introduction

The concept of *principle* plays an essential role for courts in settling hard cases. Difficult cases are not easily decided for four primary reasons. First, there is no rule that governs the case. In fact, it is not unusual that an applicable

statutory provision is not available for a case. Faced with this situation, the judge who handles the case may apply principle directly to resolve the case. Relying on the principle, the court may make a decision notwithstanding the absence of legal rules. Second, the application of a statutory provision that is applicable to the case would result in an inequitable settlement. In this situation, a judge must weigh the potential outcomes and either apply the provision to the case for the sake of legal certainty at the expense of fairness or supersede the provision to reach an equitable decision. Since the purpose of a trial is to reach an equitable decision, the judge is justified in relying on the equitability principle and superseding the provision to settle the case equitably. In that case, the principle serves the derogating function. Third, the rule that applies to the case is obscure or ambiguous. Handling such a case, the judge shall interpret the provision in order to decide the case appropriately. The interpretation should be based on the principle that leads to an equitable decision. Fourth, reliance upon the textual wording of the rule will not produce justice. In such a case, the court may rely upon the principle or general idea behind the provision. In fact, it is an interpretative work of the judge.

Utilising a comparative approach, this article will examine courts' reliance on principle to reach decisions appropriately. Decisions in hard cases from different jurisdictions are presented to analyse the way judges have relied upon principle to resolve them. It is found that the courts have relied upon principle as a basis for deciding the cases equitably when there was no applicable rule provided for the case. If applying the statutory provision to the case would have resulted in injustice, the court superseded the rule and referred to the equitability principle to settle the case equitably. Likewise, in deciding a case upon which the applicable rule is obscure or ambiguous, the court employed the equitability principle and meticulously interpreted the rule to get a clear-cut meaning of the provision to decide the case properly. Finally, the court worked to find the principle behind the text of a statutory provision to reach an equitable decision since applying the text plainly would result in an inequitable decision.

This essay begins with the theoretical notion of principle. The first part discusses the definitions of principle that have been given by various authors. The second part deals with the direct application of principle for settling cases. This discussion will examine the judicial reasoning in settling a case in the absence of an applicable statutory provision. The third part discusses how a court supersedes a statutory provision when applying it would bring about an unjust decision. This approach is justified to prevent the statutory provision from being manipulated by one who has an evil scheme. The fourth part analyses a court's response in handling an obscure or ambiguous rule. Sometimes the wording of provisions is sufficiently unclear that the application of the provision would deviate from the lawmaker's intention; consequently, it may cause the court to hand down a decision that is contrary to the original legislative intent. It is the task of the court to interpret such a rule to reach the correct decision. The last part of this article discusses provisions containing language that, when applied strictly, would produce injustice. The court, therefore, relies upon the principle or basic idea behind the provision to hand down a just decision.

The Notion of Principle

Whatever the precise definition of principle, it typically refers to a moral standard. According to Ronald Dworkin, a principle is a standard to be observed as a requirement of justice or fairness or to address another dimension of morality.¹ Prior to Dworkin, George Whitecross Paton stated:

“A principle is the broad reason which lies at the base of a rule of law: it has not exhausted itself in giving birth to that particular rule but is still fertile. Principles, the means by which the law lives, grows, and develops, demonstrate that law is not a mere collection of rules. Through the medium of the principle, law can draw nourishment from the views of the community, for the ratio legis is wide, and deduction from it a particular rule, regard may be paid to the circumstances to which the rule is to be applied”.²

¹ Ronald Dworkin (ed), *The Philosophy of Law* (Oxford University Press 1982).[42].

² George Whitecross Paton, *A Textbook of Jurisprudence, English Language Book Society* (Oxford University Press 1972).[236].

This statement indicates that before Dworkin stressed the importance of principle dealing with justice and fairness or another morality dimension, the concept of applying principles had been acceptable in jurisprudence as a fundamental idea upon which the legal system is established. Raul Narits, a Professor of Jurisprudence at the University of Tartu, stated:

“One of the shortest definitions could be ‘very important general rules’. Yet, not everybody understands why that is the case. One explanation is that principles of law have to do with values. Another opinion is that the importance of principles stems from their bond to the idea of law, the most important component of which is justice”. (Narits, 2007: 16)³

After identifying various meanings of *principle*, Jordan Daci summed up that the concept of *principle* is the collectivity of moral or ethical standards or judgements.⁴ As a matter of fact, under no circumstances is law separated from morality.

According to HLA Hart, it was John Austin, the founder of Legal Positivism, who separated law from morality.⁵ Prior to Austin, jurisprudence was treated merely as a branch of moral or political theory.⁶ In his work *The Concept of Law*, Hart identified that Legal Positivism does not include morality or justice in its criteria of legal validity.⁷ Hart himself tried to refer to morality when he introduced the rule of recognition in the legal system. To Hart, the legal system is different from other normative systems in that it consists of primary rules and secondary rules. According to Hart, primary rules are standards of behaviour that restrict certain actions or impose certain duties to perform services or make contributions to common life.⁸ Secondary rules are rules that create procedures through which primary rules can be introduced, changed or enforced. Secondary rules can be thought of as rules about the rules.⁹

³ Raul Narits, ‘Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts’ (2007) XII *Juridica International* <<https://www.etis.ee/Portal/Publication/Display>>.

⁴ Jordan Daci, ‘Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?’ [2010] *Academicus International Scientific Journal* <<http://www.academicus.edu>> 110.

⁵ Wayne Morrison, *Jurisprudence From the Greeks to Post-Modernism* (Cavendish 1998). [224].

⁶ John Austin, *The Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/austin-john>> accessed 27 December 2020.

⁷ HLA Hart, *The Concept of Law* (Oxford University Press 1997).[185].

⁸ *ibid.*[91].

⁹ *ibid.*[94].

The secondary rules are supplementary to primary rules because the primary rules have three defects. First, primary rules are uncertain since there is neither authoritative text nor officials to be referred if doubts arise about the essence and scope of the rules. Second, the rules are static since there is no method for introducing new rules for new circumstances. Third, there is no special agency to administer sanctions in case of rule violations.¹⁰ According to Hart, there is a remedy for each of these defects. The remedy for the uncertainty of primary rules is what Hart introduced as the rule of recognition.¹¹ The rule of recognition provides both private persons and public officials with authoritative criteria for identifying primary rules of obligation.¹² It is the rule of recognition that provides criteria for the validity of a rule.¹³ This validity, however, does not address the rule's morality. Hart did not explain how the criteria make the rule valid.

It was Lon Fuller who first identified Hart as a positivist. According to Fuller, Hart did not refer to morality as the foundation of law. Instead, Hart concluded that the foundation of the legal system is certain 'fundamental accepted rules specifying the essential lawmaking procedures'.¹⁴ Stephen Perry then commented on Hart's conception of the foundation of law. Criticising Hart's idea, Stephen Perry stated that Hart did not give an explanation of how standards of conduct actually are—or might be—binding for a person or a group.¹⁵ In his article, he differentiated the term *norm* from the term *normative*. *A norm deals with standards of conduct, while the term normative includes a moral obligation*.¹⁶ He keenly stated, 'For example, all of us are under the moral obligation not to enslave other human beings, but we do not have this obligation, or at least we do not exclusively have it, by virtue of

¹⁰ *ibid.*[92–93].

¹¹ *ibid.*[94].

¹² *ibid.*[100].

¹³ *ibid.*[106–109].

¹⁴ Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harv.L.Rev.[639].

¹⁵ Stephen Perry, 'Hart on Social Rules and the Foundation of Law: Liberating the Internal Point of View' (2006) 72 Fordham L.Rev. <<https://ir.lawnet.fordham.edu/flr>>.[1175].

¹⁶ *ibid.*[1175–1176].

a Hartian social rule or by virtue of any other kind of norm'.¹⁷ Hart, then, did not specify morality as one of the criteria provided by the rule of recognition for the validity of a law.

In his 1964 book *The Morality of Law*, Fuller entirely disagreed with Hart's idea.¹⁸ He insisted that there should be morality in law. His belief is in common with Ronald Dworkin's insistence. Dworkin, however, encountered Hart more aptly. He asserted the importance of principle in resolving hard cases to reach decisions based on morality instead of being based on statutory provisions.

Direct Application of Principle

Distinguishing principle from rule, Dworkin presented a unique case, *Riggs v Palmer*, which is also called the 'Elmer Case'.¹⁹ In that case, Mrs Riggs and Mrs Preston, the plaintiffs and daughters of Francis Palmer, sought to invalidate the will of their father that had given Elmer Palmer, grandson to the testator, the bulk of the estate. The plaintiffs, on the other hand, were given small legacies. At the time the will was created, the testator owned a farm and considerable personal property. The petition was filed with the court because Elmer had murdered the testator by poisoning him. Elmer had committed the murder because he was worried that his grandfather might change the terms of his will. In fact, the older man had a new wife, Mrs Bresee, with whom before his marriage he had entered into an antenuptial contract in which it was agreed that, in lieu of dower and all other claims upon his estate in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm.

The plaintiffs argued that permitting Elmer to inherit under the will would allow him to benefit from the crime he had committed. Although Elmer had been convicted of murder, there was no statute under either probate or criminal law that invalidated the will based on his role in the murder.

¹⁷ *ibid.*

¹⁸ Lon Fuller, *The Morality of Law* (Yale University Press 1973).[133].

¹⁹ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 2009).[23].

The court ruled in favour of the plaintiffs. Judge Robert Earl, who delivered the majority opinion of the court, wrote: ‘The principle which lies at the bottom of the maxim, *volenti non fit injuria* (to a willing person, no injury be done), should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created’. The court reasoned that the principles of universal law and elemental maxims would be violated by allowing Elmer to profit from his crime.

This decision demonstrates that the absence of a rule makes the court directly refer to principle as the basis of its judgment if the case deals with morality. The court set a framework for forbidden acts notwithstanding the absence of a written rule. The frame is moral and appropriateness. From this decision, it can be inferred that something that is not expressly prohibited by law is not necessarily permissible.

Derogating Function

In its derogating function, principle may supersede provision.²⁰ The principle may be relied upon by the court because applying the provision would bring about injustice. This would be contrary to the function of the court, which is to serve as a forum for disputing parties to seek justice. Justice is a manifestation of morality. Principle is the praxis of morality. Relying upon principle signifies that morality supersedes a statutory provision.

In a Dutch Supreme Court decision on December 7, 1990, the derogating function of principle was applied. The case, known as the *onwaardige deelgenoot* (unworthy spouse), was about the marriage of a 39-year-old man and a 72-year-old widow that did not include a prenuptial agreement.

On September 29, 1983, Mrs Dorothea van Wylick married her butler, Lodewijk. Lodewijk had been her nurse for many years, and over that time a relationship of trust developed between them. After the marriage, Lodewijk continued to care for her. There was no prenuptial agreement entered into by the

²⁰ Sanne Taekema, Jeanne Gakkeer and Marc Loth, *Recht in Context* (Boom Juridische Uitgevers 2011).[99].

couple. Lodewijk had few financial assets, while Mrs van Wylick was affluent. Five weeks after the wedding day, on November 5, 1983, Mrs van Wylick passed away. It was known that she had consumed soup with too much pepper that was intentionally provided by her husband, who knew that she was not allowed to consume pepper. Lodewijk was subsequently sentenced to imprisonment for premeditated murder.

Lodewijk claimed his right to the joint marital property because the marriage had been without a prenuptial agreement. In the petition, he referred to article 1:100 (1) of the Civil Code concerning Persons and Families. The provision specifies:

“The spouses have an equal share in the dissolved community of property, unless provided otherwise by a prenuptial agreement or by an agreement concluded between the spouses in writing with a view to the imminent dissolution of the community of property other than by death or as a result of termination prenuptial agreement”.

According to Mrs van Wylick’s family, the convicted person did not deserve to inherit any portion of Mrs van Wylick’s assets because he had murdered her. The family’s lawyer emphasised the fact that Mrs van Wylick died shortly after the wedding. Because Lodewijk was convicted of the murder, it would be unfair for him to receive any money. It was supposed that Lodewijk had married Mrs van Wylick solely to take her money. It should be taken into account that Lodewijk was involved in a homosexual relationship with someone else. Furthermore, the family’s lawyer noted that Lodewijk maintained that relationship even after he married Mrs van Wylick. According to the lawyer, it is contrary to the general principles of law if Lodewijk could be entitled to get money from someone he had murdered. It would also be contrary to the reasonableness and fairness that is essential to the sense of justice.

Unfortunately, the family’s lawyer failed to argue that article 1:100 (1) of the Civil Code is inapplicable to the marriage. The validity of the law served to be a point of departure for Lodewijk’s lawyer to insist that Lodewijk has the right to inherit his share. Pursuant to the provision, after entering into a marriage in community of property, a community of property is created and both persons are entitled to their share, even if one later regrets the decision and even if one obtains a divorce. Lodewijk’s lawyer further argued that Lodewijk has a universal

human right to a private life and that everyone is equal before the law, and that the couple's significant age difference, financial inequality and Lodewijk's extramarital relationship were all entirely irrelevant to the case.

Indeed, there was no statutory provision prohibiting Lodewijk from getting the money. However, allowing him to inherit the estate would be contrary to moral law. As a result, on December 7, 1990, the Dutch Supreme Court decided that Lodewijk did not deserve to inherit Mrs van Wylick's wealth. The basis of the decision was not a statutory provision, but reasonableness and fairness.

In referring to reasonableness and fairness, the Dutch Supreme Court undoubtedly superseded article 1:100 (1) of the Civil Code. This decision exemplifies that when the application of a provision would bring about injustice, the court may refer to a principle to produce justice. This is the derogating function of principle.

The second case depicting the derogating function of principle is *Kücükdeveci v Swedex*. In this case, the Dusseldorf Higher Labor Court asked the European Court about the applicability of article 622 paragraph (2) of the German Civil Code, presumed as containing discriminatory provision. Two significant points can be derived from the case. First, in the case of a contradiction between a statutory provision and a general principle of community law, the general principle of law shall prevail. Second, the decision of the European Court has become case law concerning discrimination.

The case was initiated by Seda Küçükdeveci. Ms Küçükdeveci was born on February 12, 1978. In June 1996, when she was 18 years old, she worked with Swedex. After about ten years of service, on December 19, 2006, she was informed that she would be dismissed by the employer. The job termination would be effective on January 31, 2007. The employer gave her notice based on article 622 paragraph (2) of the German Civil Code. The article prescribes:

- (1) The employment relationship of an employee can be terminated with due observance of a period of four weeks starting on the 15th day or at the end of calendar month.
- (2) In the event of dismissal by the employer, the notice period is, if the employment relationship in the company or enterprise:
 - has lasted two years, is one month to the end of a calendar month;

- has lasted five years, is two months to the end of a calendar month;
- has lasted eight years, is three months to the end of a calendar month;
- has lasted ten years, is four months to the end of a calendar month.

[...]

When calculating the duration of the work, periods of work completed by the employee before reaching the age of 25 years are not counted.

Ms Küçükdeveci began her employment before she was 25 years old. Consequently, notwithstanding her ten-year service and pursuant to the article, she was given only one month's notice. Alleging that article 622 (2) of the German Civil Code contains discriminatory provisions, which is contrary to European Community law, she filed a lawsuit with the Monchengladbach *Arbeitsgericht* (Labor Court). She argued that she should have been given at least a four-month notice period. The court granted her petition. Swedex appealed, and the case was brought before the Dusseldorf *Landesarbeitsgericht* (Regional Higher Court, which retains jurisdiction in settling labour disputes).

The Higher Labor Court asked two questions of the European Court. First, it asked whether a notice period that takes into account years of employment prior to reaching 25 years of age is contrary to primary EC law or Directive 2000/78/EC. Second, it asked whether article 622 (2) of the German Civil Code violates European Community law.

In answering the first question, the European Court determined that the general principle of non-discrimination shall be the basis for reviewing article 622 (2) of the German Civil Code. According to the Court, Directive 2000/78/EC should be seen as a concrete expression of the general principle of non-discrimination on the basis of age, which is rooted in various international instruments, the common international traditions of member states and the Charter of Fundamental Rights of the European Union. The European Court viewed article 622 (2) of the German Civil Code as containing a discriminatory provision that was contrary to Directive 2000/78/EC. According to the European Court, however, the directive may not be applicable directly by the national court. Since the directive was a concrete expression of the general principle of non-discrimination on the basis of age, then the European Court answered the second question that the national court should

rely upon the general principle of non-discrimination. Consequently, article 622 (2) of the German Civil Code containing the discrimination provision was found inapplicable because it was contrary to the general principle of non-discrimination. Relying on that general principle, article 622 (2) was superseded.

Vagueness Doctrine

At times, the meaning of a statutory provision is vague, and a vague provision can lead to legal uncertainty. If a vague provision is within the realm of criminal law, it may on the one hand make people confused about what behaviour is prohibited, and on the other hand, lead to arbitrary enforcement by law enforcers. According to Carissa Byrne Hessick, since 1914 the United States Supreme Court has insisted that the Due Process Clause requires that a criminal statute ‘clearly define the conduct it proscribes. Using the vagueness doctrine, the Court strikes down or significantly limits a criminal statute.’²¹ Similarly, Emily M. Snoddon stated that this doctrine permits the Court to strike down legislation that violates due process because it either (1) fails to give ‘a person of ordinary intelligence fair notice of what is prohibited’, or (2) is not standard, by which it ‘authorizes or encourages seriously discriminatory enforcement’.²²

Dealing with vague law, two United States Supreme Court decisions are presented in this article: *Skilling v United States* and *Johnson v United States*. In both cases, the Court did not invalidate the vague statutory provisions; instead, it simply did not apply the vague rules to the individual cases. The difference between invalidating a rule and not applying a rule is that, when a rule is invalidated, it cannot be applied to future cases; on the other hand, not applying the rule means that the rule is not applied to the case but that it may be applied to future cases.²³

²¹ Carissa Byrne Hessick, ‘Vagueness Principle’ (2017) 48 Ariz. St. L.J. <https://arizonastatelawjournal.org/wp-content/uploads/2017/03/Hessick_final.pdf> accessed 13 February 2021.

²² Emily M. Snoddon, ‘Clarifying Vagueness: Rethinking the Supreme Court’s Vagueness Doctrine’ (2019) 86 U.Chi.L.Rev. 2302 <https://lawreview.uchicago.edu/sites/Snoddon_Clarifying/Vagueness.pdf>.

²³ *ibid.*[2304–2305].

When addressing cases in which the applicable provisions are vague, the Court referred to principle, especially in these two cases, that is developed in criminal law.

Skilling v United States was decided on June 24, 2010. Jeffrey Skilling, who was the Chief Executive Officer of the Enron Corporation from February until August 2001, was charged with, *inter alia*, conspiracy to commit ‘honest-services’ wire fraud. He was indicted for violating 18 U.S.C. §§ 371, 1343 and 1346 by depriving Enron and its shareholders of the intangible right of his honest services. After a 4-month trial, the jury found Skilling guilty of 19 counts, including conspiracy to commit honest-services fraud. Skilling appealed to the Fifth Circuit. He alleged that the jury had improperly convicted him of conspiracy to commit honest-services wire fraud. Skilling also argued that the honest-services statutory provision should be invalidated as unconstitutionally vague. The Court of Appeal rejected his argument and did not address his contention concerning the vagueness of the statute.

Skilling appealed to the US Supreme Court, which stated that section 1346 is properly confined to cover only bribery and kickback schemes. Skilling was charged with conspiracy to commit honest-services wire fraud; he was not charged with bribery and kickbacks. Consequently, the § 1346 proscription did not apply.

Responding to Skilling’s claim that § 1346 is unconstitutionally vague in context, the Court reviewed the origin and application of the honest-services doctrine. Having learned a series of decisions, the Court found that Congress had intended § 1346 to reach *at least* bribes and kickbacks. Because reading the statute to proscribe a wider range of offensive conduct would raise vagueness concerns, the Court held that § 1346 deals only with bribery and kickbacks. The Court also found that there is no consensus in interpreting § 1346 concerning honest-services fraud. Dispelling doubt, the Court relied upon the principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’.

The Supreme Court reasonably limited the construction of § 1346 to deal only with bribery and kickbacks. Skilling was charged with conspiring to defraud Enron’s shareholders by misrepresenting the company’s fiscal health for his

own financial benefit; it was never alleged that he had solicited or accepted side payments from a third party in exchange for making the misrepresentations. The indictment, therefore, alleged three objects of the conspiracy: honest-services wire fraud, money or property wire fraud and securities fraud. The allegation did not deal with bribery and kickbacks. Consequently, the Supreme Court decided that Skilling had not violated § 1346.

The second case dealing with a vague rule was the US Supreme Court decision on June 26, 2015, in *Johnson v United States*. In this case, Samuel Johnson pleaded guilty to being a felon of possessing a firearm in violation of section 922 (g). He was a felon with a long criminal record. Having monitored him since 2010, the Federal Bureau of Investigation found that he was involved in a white-supremacy organisation that the FBI suspected of planning to commit acts of terrorism. During the investigation, Johnson told undercover agents that he had manufactured explosives and that he planned to attack ‘the Mexican consulate’ in Minnesota, ‘progressive bookstores’, and ‘liberals’.

Johnson’s guilty plea made the Government ask for an enhanced sentence under the Armed Career Criminal Act (ACCA), which imposes an increased prison term when a defendant has three prior convictions for violent felonies. A ‘violent felony’ under § 924 (e) (1) is defined by § 924 (e) (2) (B)’s residual clause to include any felony that ‘involves conduct that presents a serious risk of physical injury to another’. The Government alleged that Johnson’s previous offences—including unlawful possession of a short-barreled shotgun—qualified as violent felonies. The District Court held that the residual clause covers unlawful possession of a short-barreled shotgun and sentenced Johnson to a 15-year prison term under the ACCA. The Eighth Circuit affirmed (*per curiam*).

The US Supreme Court, however, reversed the Eighth Circuit’s ruling and held that imposing an increased sentence under ACCA’s residual clause violated due process. The Court presented four reasons in support of its decision. First, the Government violates the Due Process Clause when it takes away someone’s life, liberty or property under a vague criminal law because the law either does not

give ordinary people fair notice of the proscribed conduct or it encourages arbitrary enforcement. If a court decided that the residual clause covers a crime, the court would envisage the kind of conduct that the crime involves ‘the ordinary case’ and to judge whether that abstraction presents a serious potential risk of physical injury. Second, tying the judicial assessment of risk to a judicially imagined ‘ordinary case’ of crime rather than to real fact or statutory elements leaves grave uncertainty about how to estimate the risk posed by a crime. This uncertainty would produce more unpredictability and arbitrariness than the Due Process Clause tolerates. Third, in this case, the riskiness of an idealised ordinary case of crime was measured instead of the riskiness of an individual’s conduct on a particular occurrence. Fourth, experience has clearly demonstrated the unavoidable uncertainty and arbitrariness of adjudication under the residual clause.

Principle Behind the Text

To reach an equitable decision, a court may not strictly rely upon the textual wording of a statutory provision. Rather, it must broadly interpret the text to find the intention of the lawmaker. In some cases, the subject matter may not be explicitly covered by the text of the provision because, when the statute was enacted, the subject matter was not manifest. In principle, however, the subject matter is also the essence of the provision. The principle is the basis for settling the case equitably.

This is the case about the discriminatory treatment of homosexuality. *Bostock v Clayton County, Georgia* was decided by the United States Supreme Court on June 15, 2020. Gerald Bostock, a Clayton County child welfare advocate,²⁴ was fired by his employer because of being homosexual. He sued his employer, alleging sex discrimination under Title VII of the Civil Rights Act of 1964.

As a child welfare advocate, Bostock helped Clayton County win a national award for its work. After working for the county for a decade, he began participating in a gay recreational softball league. Not long after, influential community members

²⁴ The Child Advocate is a Social Worker who specialises in placement of children into adoptive and foster homes.

made comments about his sexual orientation that damaged Bostock's reputation. His conduct was considered unbecoming of a county employee, and he was fired from his job.

He brought suit under Title VII of the Civil Rights Act of 1964, alleging unlawful discrimination on the basis of sex. Title VII makes it 'unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin'. The employer did not challenge that the employee had been fired because he was homosexual. The dismissal, according to the employer, did not violate Title VII.

The employer argued that in a daily conversation the plaintiff was fired for being gay, not because of sex. According to the employer, intentional discrimination based on homosexuality or transgender is not intentional discrimination based on sex, and thus there is no liability under Title VII. The employer stressed that the concepts of homosexuality and transgender status are different from the concept of sex. The defendant argued further that if Congress wanted to address these matters in Title VII, it would have referenced them specifically. Bostock's suit proceeded to the Eleventh Circuit. That court held that firing an employee based on his gay status does not violate Title VII, and that the case should be dismissed.

The case was appealed to the US Supreme Court. In reviewing the case, the Court addressed the historical perspective and examined the key statutory terms from when the statute was adopted in 1964. The employer argued that the term sex in 1964 referred simply to the status as male or female as determined by reproductive biology. Bostock argued, however, that even in 1964 the term encompassed a broader scope that dealt not only with anatomy but also included gender identity and sexual orientation.

As the point of departure of its analysis, the Court assumed that the employer referred to the term sex as the biological distinction between male and female. The Court, however, stated that the question is not just what 'sex' meant but what Title VII said about it. According to the Court, the statute's message for the case

was simple and momentous: It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Imagine an employer who has a policy of firing any employee who is homosexual. The employer hosts an office holiday party and invites employees to come with their spouses. An employee attends and introduces a manager to Susan, the employee's wife. Imposing the policy of firing homosexual employees, the employer will fire the employee whose wife is Susan if that employee is a woman. Obviously, the ultimate goal of such a policy is to discriminate against a person on the basis of sexual orientation.

Furthermore, the Court stated that Title VII of the Civil Rights Act of 1964 does not deal with male and female. Instead, the law deals with individual employees. The Court agreed that homosexuality and transgender are distinct concepts of sex. However, that discrimination based on homosexual or transgender status necessarily entails discrimination based on sex: The first cannot happen without the second.

According to the Court, since its enactment, Title VII has prohibited all forms of discrimination based on sex. The Court held that in Title VII of the statute, Congress adopted broad language making it illegal for an employer to rely upon an employee's sex when deciding to fire that employee. The Court concluded that an employer who fires an employee for being gay or transgender defies the law. Consequently, the Eleventh Circuit judgment dismissing Bostock's suit was reversed. It can be inferred, therefore, that the principle behind the language prevailed over the text.

Conclusion

A principle is a moral standard that should be observed by courts to reach equitable decisions. It has been acceptable in jurisprudence as a fundamental idea upon which legal systems are established. When a court faces hard cases, it will rely upon principles to reach equitable decisions.

The absence of a legal rule does not prevent a court from reaching an equitable decision. The court may apply the principle directly as the basis of deciding the

hard case equitably. The court's decision may imply that even if something is not expressly prohibited by law, it does not mean that it is permissible.

A court may supersede a case's governing rule if applying that provision would result in a decision that is contrary to moral law or that would bring about injustice. The principle, then, is relied upon to produce a decision that is consistent with moral law. A principle in this case serves the derogating function to a statutory provision.

Vague rules in criminal law can lead to legal uncertainty. On the one hand, a vague rule makes people confused as to whether an act is prohibited; on the other hand is the arbitrariness inherent in applying such a rule. When deciding a case involving vague rules, a court relies upon the principle that if there is ambiguity in a criminal statute, the case should be resolved in favour of lenity.

If applying the textual wording of a statutory provision produces injustice, the court should find the principle that lies behind the text. In doing so, the court can uncover the essential purpose of enacting the statute. Instead of applying the text plainly, the court relies upon the principle behind the text to reach a just decision.

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