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Creative Works of Judges in Handling Internet-of-Things (I-O-T) Cases

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Lack of clear-cut rules and the absence of statutory provisions concerning Internet of Things does not prevent judges from reaching equitable solutions on the subject matter. Information Technology including Internet of Things develops faster than legislative work. In reality, cases on Internet of Things needs judicial settlement. Under no circumstances, may a court reject to try the cases. Judges, therefore, should be creative to handle the cases, by which equitable solution may be reached. The creative works of a judge, in settling hard cases, may be in the form of interpretation of statutory provisions or creation of law based on legal principles, if neither statutory provision nor unwritten laws dealing with the cases is found. It is inevitable that judges interpret statutory provision if it is unclear, by which it may be applied aptly to the case. If a judge finds neither written nor unwritten rules applicable to the case, he/she uses his/her initiative to refer to legal principles to resolve the case. Both interpretation of statutory provisions and the creation of laws are acceptable in judiciaries throughout the world. Three cases, from different countries, prove that creative works of judges are successful to reach equitable solutions of Internet-of-Things (I-o-T) cases.

Key words: *creative works, interpretation, creation of law.*

Introduction

The objective of this study is to justify the creative works of judges in resolving hard cases when statutory provision is obscure or non-existent. In this study, Internet-of-Things cases are singled out, since the subject matter develops faster than the legislation. In real life, however, it is not impossible that legal problems arising out of or in relation to IoT cases going to court, which should be settled by judges. The obscurity or nonexistence of statutory provisions applicable to cases of IoT makes judges interpret the obscure provisions or create laws to decide the cases.

This study signifies that when facing hard cases, judges explore the essence of the rule rather than the wordings of it or rely upon legal principles as the basis of creating laws aptly applied to the case. It is the judge's task to resolve cases equitably. Either interpreting statutory provisions or creating laws is a creative work of judge to settle cases. In general, interpretation of statutory provisions is currently admissible for deciding a case if provisions pertaining to the case lack clear-cut meaning applicable to the case. Creation of law by a judge, however, is not generally acceptable as an appropriate endeavor to reach an equitable solution to the case.

From this study, it is found that judges may either interpret obscure statutory provisions or create laws due to the nonexistence of provisions concerning the cases. Interpreting statutory provisions or creating laws in reaching an equitable solution, a judiciary develops laws to encounter 21st century rapid development of information technology, including IoT. The creative works of judges, which becomes case law, fills in the gaps of uneven developments of legislation and technology.

Methods

This writing employs a comparative approach and a case approach to address the problem of whether the creative works of judges, in resolving hard cases due to obscurity or nonexistence of statutory provisions, is justified. In comparative approach, this study refers to jurists' standpoints from different countries (Netherlands, France, and the United States). The reason why it refers to those countries is because the jurists have held different opinions on interpretation of statutory provisions and the creation of law by judges. The Dutch jurists welcome both interpretation of statutory provisions and the creation of law by the judge; French conventional jurists rejected the creative works of the judge, but modern jurists accept the works; the American jurists mostly do not approve of the idea of creation of law by judges, but they insist on interpretation.

Case law relied upon in this study are Supreme Court decisions of the Netherlands, France, and the United States. Relying upon the decisions is aimed at proving that interpretation of statutory provisions and creation of laws by judges are admissible in the respective country.

Discussion

Interpretation of Statutory Provision

IoT is the network of physical devices, vehicles, home appliances, and other items embedded with electronics, software, sensors, actuators, and connectivity, which enable these things to connect and exchange data, creating opportunities for more direct integration of the physical world into computer-based systems. It includes extending Internet connectivity beyond standard devices, such as desktops, laptops, smartphones and tablets, to any range of traditionally *dumb* or non-internet-enabled physical devices and everyday objects (https://en wikipedia.org/wiki/*Internet of Things*, retrieved September 20, 2018). In fact, it is unusual that legislation cannot cope with the rapid development of technological information including internet. While, in real life, it is not impossible that legal problems arising out of or in relation to IoT go to court. It is the judge's task to resolve such cases equitably.

Equitable solutions lead to justice. Court is a place where the conflicting parties seek justice. According to Gustav Radbruch, "the idea of law is no other than justice." (Wolf, 1950: 124) Then, he continued in Latin "*Est autem ius a iustitia, sicut a matre sua, ergo prius fuit iustitia quam ius"* (But law is derived from justice just as it is born out his mother, therefore, exists prior to law). Based on Radbruch's statement, it is arguable that law enforcement, by judges in a court, should be able to reach justice. Consequently, when statutory provisions applicable to acase are vague, a judge may interpret them, which makes the provisions apt to the case at hand. Interpreting provisions may lead to judges reaching equitable solution for the conflicting parties.

In European countries, interpretation of statutory provision was inspired by a book with the title *Vom Beruf Unsrer Zeit für Geseßgebung und Rechtswissenschaft (Legal profession and jurisprudence of our time)* written by Friedrich Carl von Savigny and published in 1814. In the book, Von Savigny asserted that despite incomplete legislation, judges produced case law (Von Savigny, 1814: 14).

Prior to Von Savigny publication, in 1803, in *Marbury v Madison*, John Marshall, Chief Justice to the US Supreme Court stated, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must

of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each" (Ring, 2016: 21). Referring to the statement, Justice Antonin Scalia stated, "Judges, we know, are given authority to interpret not only the Constitution but federal and state statutes and regulations as well" (Ring, 2016: 21). When Antonin Scalia passed away, (Antonin Scalia passed away on February 13, 2016), some Americans ask, "What is the appropriate role of the judge". Such a question arised because Scalia stated that judge should interpret law, not make it (Schaerer, 2016; Hossain, 2018).

Just as Justice Antonin Scalia is a theorist, as well as practitioner of what has been dubbed the new textualism, so all judges and theorists are textualists in the sense that all consider text of provisions as the starting point for statutory interpretation and follow the statutory plain meaning if the text is clear (Eskridge, 2013: 532). Scalia also stated that all theorists and judges are purposivists in the sense that all believe that statutory interpretation should advance statutory purposes to the extent that such interpretations do not impose on words they will not bear (Eskridge ,2013: 532).

Currently, interpretation is also carried out in France. In an interview conducted by Nicolas Bustamante under the title ""*Le juge n'est plus uniquement la bouch de la lois*", which was issued in *Blog de Doctrine.fr* of March 17, 2017, Chief of The Appellate Court at Versailles, Dominique Lottin, explained that *L'adage disant que "Le juge est la bouche de la loi", c'est terminé depuis longtemps* ..." (The adage saying that "judge is the mouth of law" has been abandoned for a long time ...). The explanation indicates that interpretation, which was regarded by Robespierre as plagues that destroy the law (The original words of Robespierre are *fléaux destruteurs de la loi)* (Scholten, 1974: 3), is now acceptable in France. Even, Claudia Ghica-Lemarchand asserts that interpretation is an essential element in legal reasoning. In a wide sense, interpretation is meant to refer to all types of legal reasoning that leads to resolve a case or find the real meaning of a rule. Interpretation, then, serves to be a central axis of legal reasoning; an element that forms jurisprudence and feedback for the rational understanding of law (Ghica-Lemarchand, 2006; Gu, 2018).

In the Netherlands, interpretation has long been conducted. The Dutch Supreme Court decision on May 23, 1921, in *Electricity Case* is a landmark decision concerning interpretation. This case is about electricity tapping, by which the actor, who was a dentist at Gravenhage, put a nail into the stand meter resulting in the stand meter. This meant that the stand meter did not work every time the electricity controller measured the utilization of the electricity. What the dentist had done qualified as multiple larceny. In his plead, the dentist argued that electricity is not a good; consequently, based on legality principles, Article 310 of the Penal Code is inapplicable to the act. He, then, asserted that he be set free. A question

arising out of this fact was whether electric power was a good, in the sense of Article 310 of the Dutch Penal Code. The article deals with larceny. In the article, it is stated that whoever takes another's good in a manner contrary to the law with the intent to convert its ownership thereof will be punished, under larceny, by a term of up to a five-years imprisonment. The Junior Attorney General to the Dutch Supreme Court at that time argued that the article is inapplicable to the act because larceny may only be committed with tangible goods. Since the conduct is not punishable by other statutes, he asserted that there had been a legal vacuum for such an act. An analogy may not be invoked since it violates Article 1 of the Dutch Penal Code. The Dutch Supreme Court, however, stated otherwise. The court considered that Article 310 of the Dutch Penal Code was applicable to the electricity tapping on the basis that the article is prescribed to protect another's good without defining clearly the meaning of a 'good'. As a result, the dentist was sentenced to a three-month imprisonment.

The Dutch Supreme Court decision on May 23, 1921 in *Electricity Case*, is a reference for the same court in its decision entered into on January 31, 2012 on the use of credit and Short Message Service of cellular phones. In this case, the accused was a former technical manager who was fired by his employer in the Hague. When he cleared up his personal belongings at his work place, he found two SIM Cards. One was unusable and the other was inserted into his own phone, which he used for a while. He, however, acknowledged that he did not get permission from anyone to use the SIM Card. Then, came Vodafone's bill for the SIM Card number in the amount of € 2.549.07 for chatting and € 100.24 for SMS. The bill was addressed to the accused's former boss.

In the trial, the accused was charged with larceny. In that case, the Dutch Supreme Court considered that credit for a cell phone and SMS are goods, in the sense of Article 310 of the Penal Code, as the High Court clearly and undoubtedly so regarded economically that it was an infrastructure unit that could be quantified. Using the interpretation, the Dutch Supreme Court fills out the absence of statutory provisions defining credit and SMS as goods. Since credit and SMS are included in the internet of things, the interpretation is carried out to resolve the case dealing with IoT despite the absence of clear-cut provisions that provides the subject matter.

Law Creation

Interpretation is carried out by judges if statutory provisions are not clearly understood. In the absence of statutory provisions, concerning cases he/she is handling, the judge may turn to best practices or customary laws. However, if it is a brand-new case and the judge can find neither statutory provisions nor unwritten laws, referring to legal principles, the judge may

create law to settle the case. Regarding law creation, Maarten Feteris, Chief Justice to the Dutch Supreme Court, in his paper under the title '*Nieuwe Ruimte voor de Hoge Raad*' at *Cassatie Conferentie* held in Leiden 2015, stated that the Montesquieu caricature about a judge as a speaking doll explaining about law is obsolete. Furthermore, he stated that indeed, *mille questions inattendues* (thousands of unexpected problems) come to a judiciary and the problems should be used to develop new laws (Feteris, 2005; Guirguis, 2018). He asserted that in a decision on *Lindenbaum v Cohen;* the Dutch Supreme Court for the first time sent a judgment that coped with a situation about an unlawful act (In this case, Lindenbaum whose business was a printing company sued Cohen, his competitor for having committed an unlawful act. Lindenbaum has lost his customers. It was proven that Cohen has hired a Lindenbaum's employee to disclose a list of Lindenbaum's customers. Statutory provision did not provide for such conduct; as a result, it was debatable whether such conduct was contrary to law. The Dutch Supreme Court on January 31, 1919, despite the fact that Cohen violated no statutory provision, stated that he had acted unfairly, which is against proper business activity). This landmark decision signifies that the Dutch Supreme Court has created law to resolve hard cases.

Prior to Feteris' statement, J.B.M. Vranken delivered his opinion that legislature is not the only agency of making law; legislature and judiciary are partners in the business of law in their task of creating law. This idea is based on his finding that judicial decisions in western countries today are regarded as law creation conducted by judges. To encounter the modern society, law creation by judge is inevitable (Vranken, 2013: 11).

Actually, it is acceptable in the Netherlands that the Dutch Supreme Court creates law. The Dutch Supreme Court decision of February 24, 2017 deals with an Internet-of-Things case. The case is about an inmate's petition against Google. In this case, the Dutch Supreme Court should balance the petitioner's interest and the public interest. In its judgment, the court, in principle, prioritizes protection for privacy and personal identity over Google's economic interest and the public's interest to obtain the petitioner identity through the search engine.

The case began with a TV program. On May 27, 2012, SBS6 showed an episode of a program under the title 'Crime Reporter', directed by Peter R. de Vries. In the episode, in camera images, a discussion was shown between the petitioner and someone suspected as an Assassin (which is hereinafter called A) about the best way to eliminate a competitor in the sex business. Snapshots were made secretly by A with the help of a ballpoint pen that contained a camera. The petitioner is recognizable in the video records that are shown in the program and no image or sound distortion is used. His full name was not shown. However, the initials of his first and family names were made known.

On August 15, 2012, the petitioner was sentenced to six-years imprisonment for being guilty of an attempt to incite the Assassin to commit murder. He was declared guilty based on evidence in the form of the pictures from A. Some mass media organisations had made reports on the sentence and Peter de Vries' program previously. In addition, the case inspired an author to write a book, published in 2013. In the book, it is stated that the murder actually happened. The petitioner's full name is cited as the murderer. When someone types the petitioner's full name in a Google Search, the name promptly gives rise to the websites of *amazon.com*, *book.google.nl*, and *abebooks.com* that contains the book that was published in 2013 and the *Algemeen* website that contains news about the murder published by mass media organisations.

The Petitioner's attorney lobbied Google to cease to display the URL of the petitioner's full name from the designated websites when anyone types the petitioner's full name in the Google Search. Google, however, refused the request. Both first and appellate courts dismissed the petitioner's claims. The first-instance court ruled that the petitioner has been charged with a severe felony and has been declared guilty by the trial court. Therefore, he has no right to be protected from the Google Search results; the public, therefore, can relate him to the crime. Consequently, there is no ground to order Google to remove his name from the Google Search results.

In this case, the court is faced with opposite interests; the personal data of an individual, and the public interest to obtain information about the individual and the economic interests of the search engine. The court needs to evaluate which interest prevails over the other. The Supreme Court granted the petitioner's claim and imposed a penalty on Google.

In France, it was debatable whether judges were permitted to create law. The starting point of prohibition for judges to create law is Article 5 of the French Civil Code. The article says, "*il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*" (It is prohibited for judges to pronounce law that is applied generally and regulations for cases they handle). The essence of the article is that the judge is not permitted to create law. The idea is indispensable from Montesquieu's idea on the separation of power (Montesquie, 1995: 328). In his idea, the judicial power is not allowed to interfere with legislative and executive powers. The task of a judge is no other than to apply legislative work as what is.

Article 4 of the French Civil Code, however says, *Le juge refusant de juger pour ne pas interpréter une loi insuffisante, obéissant strictement au principe de la séparation des pouvoirs, se rendrait coupable de déni de justice*." ("Judge, who refuses to try for not

interpreting inadequate statute due to strictly held theory of separation of powers, is declared guilty of denial of justice"). By virtue of the provision, not only may the judges interpret obscure statutory provisions, but they can also create law in the event of nonexistence of statutory provisions applicable to the cases they handle. They have to be creative to avoid being declared guilty of denial of justice.

The French Supreme Court decision of September 30, 2015 indicates that the creation of law by a judge is permissible in France. In this case, protection of individual life confronts freedom of expression. Both individual personal life and freedom of expression are protected equally. Handling such a case, the French Supreme Court should decide which protection prevails over another.

The case began with a petition against *Arte France* group, who collaborated with *Maha* production group to show a TV program titled *Intime Conviction*. The program, which is a telefilm, is broadcasted on the *Arte* TV channel. The program is about a police investigation conducted in the aftermath of the death of a woman, and it leads to her husband, who is a forensic doctor, Paul X, being placed under arrest. In addition, in a videos placed on a website made by *Groupement Européen d'Intérêt Economique Arte* (GEIE *Arte*) between February 14, 2014 and March 2, 2014, users are informed that every user may request information about the file made by the production service and every visitor may deliver their opinion as to whether the defendant is guilty or not guilty as decided by fictive *cour d'assises* (*Cour d'assises* is criminal court in France designated for severe felony that bears more than ten years. It is the only court that is attended by jury). The video is about the day to day trial of Paul X at *cour d'assises*. The site announced that the opinions of the users will be broadcasted on March 2, 2014.

Mr. Y, who was charged with murder by firearm in 2001, was released by *cour d'assises* in 2013. Character Paul X in the show refers to Mr. Y. This is the reason why Mr. Y sued *Maha* Production group, *Arte* and *GEIE Arte*, to stop the broadcast of the program. He also sued for damages because of the show and the publication of the court decision on *Arte* TV Channel and two *Arte* websites. The respondents, however, argued that the telefilm investigation bears imaginary elements of fictitious work. For example, the character's name is not Jean-Louis Y but Paul X. It is possible that the author of the fictive work was inspired by the real fact. Since the trial has been disclosed publicly, broadcasting the event is not an unlawful act. However, having considered the statutory recognition of freedom of expression, which is not unlimited, on the one hand, and the honour of individual privilege of Mr. Y, the French Supreme Court affirmed the Appellate Court decision, which concluded that what *Maha*, *Arte*, and GEIE had done was a serious violation that should be terminated. In addition, they

should pay € 5000 collectively to Mr. Y.

The French Supreme Court judgment answered the question about which legal protection shall prevail over another in a case of equal protection of two rights. In such a case, no statutory provision may be a reference. Inevitably, judges may create law to settle the case.

In the United States, where jurists, including Antonin Scalia, do not recognize the work of judge made law, the Supreme Court of the state created law in its decision on June 25, 2014 in *Riley v California*. The case was decided unanimously; Scalia joined the decision. The case is about whether the search and seizure of a cellphone, without a warrant, violates the Fourth Amendment. The Amendment states,

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

Riley v. California is significant to the legal issue of whether the search and seizure of a cellphone without a warrant is justified. In the decision, the Supreme Court decided that, before searching and seizing a cellphone, police should obtain a warrant. The Court pointed out that the search of a digital object is different from that of a physical object.

The case began when, in the early morning of August 22, 2009, petitioner David Riley, a local college student, who was driving his Lexus close to his home in the Lincoln Park neighbourhood of San Diego, was stopped by Charles Dunnigan. The reason why the officer stopped the petitioner was because he was driving with expired registration tags. The officer also found that Riley's license had been suspended. Pursuant to Police Department policy, the officer impounded Riley's car. Another officer carried out an inventory search of the car. Riley was arrested for possession of a concealed and loaded firearm, when the search turned up two handguns.

Dunnigan placed Riley under arrest. He also seized a cell phone from the petitioner's pants pocket. According to Riley, his cellphone is a smart phone, which is capable of accessing the internet, capturing and storing photos and videos, providing and storing GPS location information, and capturing and storing both voice and text messages, among other features. Scrolling the phone's "text entries" at the scene, the officer noticed some words began with the letters "CK" – a label that, he believed, stood for "Crip Killers", a slang term for members

of the Bloods Gang. Having already noticed the indication, the officer presumed that the petitioner might be connected with a criminal gang,

About two hours after the arrest, at the police station, detective Duane Malinowski, who specialized in gangs, further examined the contents of the phone. He testified that he "went through" and downloaded "a lot of stuff" on the phone to "look for evidence." It is unclear how many different digital files Detective Malinowski reviewed, but at a minimum, he looked through the digital files containing photographs, watched numerous videos, and reviewed the phone's collection of phone numbers. Although there was "a lot of stuff", on the phone, the particular files caught his eye were videos of "street boxing" – that is, friends sparring with each other with bare hands, taking care not to really hurt each other. The police also found a photograph of Riley standing in front of a red Oldsmobile they suspected had been involved in a shooting a few weeks earlier. In that incident, three individuals fired several shots at a passing car before reportedly fleeing in the red old car. The police believed the shooting was gang related. From the photos on his phone, it is found that Riley was the owner of the red Oldsmobile. This is the reason why he was connected to gang activity, and after ballistics testing, it is suggested that the firearms seized during the petitioner's traffic stop were used in the shooting incident. The police, therefore, came to believe that Riley had been involved in that assault.

The State ultimately charged Riley with shooting at an occupied vehicle, assault with a semi-automatic firearm, and attempted murder. The State also alleged that Riley committed these crimes for the benefit of a criminal gang – an allegation that significantly enhanced the sentence, under California law. Prior to trial, Riley moved to suppress all of the evidence the police had obtained during the searches of his cell phone. As is pertinent here, he argued that the search of his cell phone violated the Fourth Amendment because it was performed without a warrant and without any exigency otherwise justifying the search. The trial judge rejected this argument, ruling that the searches were legitimate searches incident to arrest. Riley was convicted, and he received an enhanced sentence of 15 years to life in prison (Article 186.22 (b) of California Penal Code on Gang Sentencing Enhancement). The California Court of Appeal affirmed the judgment.

The US Supreme Court asserted that cellphones have become an important tools in facilitating coordination and communication among members of criminal enterprises, by which they can provide valuable incriminating information about dangerous criminals. Furthermore, the court held that, if a cellphone is seized incident to arrest, there should be warrant required before the search of it. According to the court, the information on a cellphone is not immune from the search. The court stated that such cases have historically

recognized that the warrant requirement is “an important working part of our machinery of government,” not merely “an inconvenience to be somehow ‘weighed’ against the claims of police efficiency.” In addition, recent technological developments made the process of obtaining a warrant itself more efficient. The case required the Supreme Court to decide whether the incident to arrest doctrine applies to modern cellphones, which are such a pervasive and insistent part of daily life. According to the court, the type of smart phone taken from Riley was unheard of ten years ago (The case was decided on June 25, 2014). Today, a significant majority of American adults own such phones.

The courts held in both a qualitative and quantitative sense, that cellphones differ from other objects that might be kept on an arrestee’s person. The term “cellphone” itself is misleading because in reality, many of the devices are minicomputers that can be used as telephones. They can also be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps or newspapers. One of the most notable distinguishing features of modern cellphones is their enormous storage capacity. Before the cellphone was invented, a search of a person was limited by physical realities and tended, as a general matter, to constitute only a narrow intrusion of privacy.

In the court’s opinion, cellphones raise privacy concerns far beyond those implicated by the search of cigarette pack, a wallet, or a purse. The inspection of the contents of an arrestee’s pocket works no substantial intrusion on privacy beyond the arrest itself. The search of a cellphone, on the contrary, should be carried out meticulously. The court considered that a cellphone is not just a technological convenience. Since cellphones have immense data storage, they may contain an Americans private life. Consequently, the information needs protection. Technology today enables an individual to carry information in the hand, but this does not make the information any less worthy of the protection for which the founding fathers fought. Then, reversing the California Court of Appeal decision, the Supreme Court ordered, before searching cellphone seized in an arrest, police should obtain a warrant.

Deciding *Riley v California* as such, the US Supreme Court has created law. Chief Justice John Roberts, Jr., who read the reasoning to the decision, stated that cellphone is a minicomputer. The consequence of the statement that the Supreme Court has created a new rule that to search a minicomputer, a warrant is required. The lower courts, in the meantime, fight for applying the old principle of the Fourth Amendment to computer (Orin Kerr, 2014). The Supreme Court decision has made the lower courts’ desire come true.

Conclusion

The creative works of judges in settling cases may not be opposed where statutory provisions are unclear or nonexistent. The idea of settling cases is to reach an equitable decision for the conflicting parties. Subsequently, judges who handle similar cases may refer to such an equitable decision. The creative works of a judge, then, becomes law for the similar cases notwithstanding unclear or the absence of legislation.

The creative works of judges may either be in the form of statutory interpretation or in the form of a creation of law by a judge. When statutory provisions, applied to a case, is unclear, a judge carries out interpretation, to allow the provision to be aptly applied to the case. However, when there are no statutory provisions concerning the case, the judge may refer to legal principles. Doing as such, a judge may create laws for reaching equitable solutions for the parties to the lawsuit.

Internet of Things (IoT) is a new subject matter. Legislation may sometimes lag behind the rapid development of information technology. In social reality, there may be some controversies concerning the IoT that go to court. Under no circumstances can the court reject the trial of such cases. It is the task of a judge to find an acceptable legal basis for reaching an equitable solution for the parties. Despite a lack of clear-cut statutory provisions or nonexistence rules, through interpreting the provisions or creating law, the judge may reach a solution to IoT cases.

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