Control over Charities by a Grantor-*Comparative Study between the U.S., German, and Korean Laws*[1]

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Abstract

Control over charities by trustee is important for building a high level of trust in a society, especially within an organization where its constituents are unknown, such as a foundation or charitable trust. Any fraud or embezzlement cases could negatively impact charities and put them at risk by causing reduced amount of donation. According to the current Korean law, the competent authorities supervise incorporated foundations and charitable trusts; however, it is difficult for the authorities to effectively control them due to limited resources, lack of manpower, short-term rotations, and formalistic review on their legality. Moreover, in case of unincorporated foundations, they do not subject themselves to government supervision. On the other hand, even though charities can self-regulate, auditor that functions as an internal control agency is not a statutory agency according to Korean Civil Code and Trust Act. Especially, it is difficult to assure the integrity of a charity by an audit when directors/trustees have the power to appoint and dismiss the auditors. That is why intervention made by outside parties, such as stakeholders, could be a problem. In this context, we need to examine the issues that arise when founders, settlers, or donors ("grantors") try to personally exert control over the charities. For this purpose, this article examines claim performance of duty, claim for restoration, claim for compensation/indemnification, right to information offering in Germany and the United States. Furthermore, it analyzes the relevant and applicable aspects to the Korean law.

1. Introduction

Realizing public interest has been long recognized as a duty of the government in South Korea. Public interest activities carried out by private sector was not encouraged, but was rather an object of distrust. It is shown by the fact that charities are established only through permission[2] given by the competent authorities.[3] State monopoly on public interest activities has been a general phenomenon in civil law countries.[4]

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[2] This kind of permit system is based on state monopolistic idea. In the 19th century, public activities carried out by private organizations or parties were considered to be a rival and impediment to the centralized authoritarian rule. People distrusted them. Therefore, permit systems were understood as government's privilege and private parties could operate them only when they were transferred and granted by the government. Under such system, granting of permit is depended on the civil servants preference; therefore, there could be cases that may deem unconstitutional. Moreover, such permit systems make private activities rely on the administration which is inconsistent with the modern spirit of the age that encourages autonomy and creativity of the private sector. *See* Chin-Woo Kim, *Legal Structure of Public Trust*, The Journal of Comparative Private Law, No. 56 (2012), Korea Association of Comparative Private Law, 1 at 34.

[3] Competent authorities mean administrative body which supervises business carried out by incorporations. For example, the minister of education supervises education and academic scholarship. When incorporation has more than two areas of business, each relevant administrative body becomes the competent authority. Il-pyo Hong, Annotation to Civil Code Volume 1(1) at 555, Seoul 2006.

[4] *See* Chin-Woo Kim, *Study of Chronology of Permit System Regarding Establishing Non-Profit Organization*, Human Rights and Justice No. 383 (2008), Korean Bar Association, 94, 97 et seqq.

However, the duty should be no longer that of the government. Although the administration could supply public goods and services stably according to its statute and budget, rigidity and uniformity are an inherent problem because the government has to be equal and fair to everyone. Therefore, it is difficult for the administration to adapt to changes of circumstances or be able to accommodate a variety of needs in a quick and flexible manner. Moreover, relying solely on the government for public goods and services could cause the public sector to become enormously bloated, inefficient, and ossified. In addition, it makes it more difficult to cultivate independent civic society. Public finances, which have already been overloaded, can no longer meet the needs of public education, culture, arts, social welfare, consumer protection, international cooperation, sports, and et cetera. Consequently, increase in taxation and utility bills would also be a burden to the future generation. However, that doesn't mean that private corporations can stand in for the government because their primary objective is to seek profit. Likewise, under such circumstances, where state monopoly on public interest activities cannot be maintained, public interest activities led by the private sector and their role and importance are receiving more attention in Korea recently than before.[5]Korea has experienced rapid economic growth over the past half a century. Individuals and enterprises have subsequently built up unprecedented amount of private properties. However, the private sector has not lived up to its social responsibility in regard to its involvement in public interest activities, especially considering Korea's economic status in the international society. On the other hand, such a phenomenon also shows that nonprofit sector has a great potential for growth. Along with such stream of times, Korean justice department is reexamining charities law with the purpose of laying a legal foundation in order to vitalize donation and giving culture.

In Korea, there are three kinds of private organizations that carry out public interest activities based on funds granted by private parties: incorporated foundation (Stiftung)[6], unincorporated foundation (Unselbständige Stiftung)[7], and charitable trust[8]. These contributed properties should be distinguished and managed separately from inherent a property that belongs to the manager. Moreover, the contributed property should be used for a particular purpose that the grantor desires to achieve at the time of donation. Incorporated foundation and unincorporated foundations are originated from the civil law tradition, whereas charitable trust is originated from common law countries. These different organizations each have its strengths and weaknesses and thus *they should be utilized accordingly depending on the situation*. Incorporated foundation is superior to unincorporated foundation and charitable trust, in terms of clarity of legal relationships, such as secure transactions, limited responsibility and property devolvement. In addition, incorporated foundation can acquire property under its name which makes it easier, compared to unincorporated foundation and charitable trust where they have to change the name every time the manager changes. Incorporated foundation is therefore suitable for a large scale projects for public interest. On the other hand, unincorporated foundation and charitable trust are faster to set up even with a small sum of capital.

They are also easier to deploy into short term projects and their operating expenses are comparatively low. Especially, as to charitable trust, although it does not have legal personality, trust property can be protected from bankruptcy of the trustee and compulsory execution. Likewise, the three types of organizations each have pros and cons and they could complement each other. Nevertheless, unincorporated foundations are not yet prevalent in Korea. Charitable trusts are still dormant. There are a number of reasons behind the situation[9].

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[5] Chin-Woo Kim, *Proposal Regarding Legal Strategy on Public Trust Jurisprudence: Comparing with Public Foundation Incorporation System*, The Journal of Comparative Private Law, Korea Association of Comparative Private Law, No. 14 (2001), 81 at 81 et seq.; *id*., Germany, in: Chin-Woo Kim/Soo-Gon Park/Chul Kwon, Recent Trend on Foreign Legislation Regarding Corporate Body, Report by Ministry of Justice, Republic of Korea, Seoul 2009, 50 et seq.

[6] A foundation is a collection of property for a specific purpose that has legal personality. A foundation does not have members and is regulated by the Civil Act.

[7] Unincorporated foundation is similar in a sense that is a collection of property for a specific purpose. However, it differs because it does not have legal personality. It is not directly regulated by Civil Act but it is regulated by legal theories and case law due the influence of the German Civil Code.

[8] The current Trust Act regulates it. Nonetheless, the Korean Ministry of Justice enacted the Trust Act that regulates public trust apart from the Trust Act on March 18, 2014. This Act came into effect on Mar. 19, 2015.

[9]Chin-Woo Kim, *supra* note 5, 83, Footnote 8. The reason why public trusts are dormant in Korea: (1) Primarily business trust was disseminated; (2) Foundation was prevalent because of the direct influence of the European civil law, therefore, there was not much room for public trust to become widespread; (3) The administrative body did not prepare rules regarding public trust because of its indifference to it, even though the permit system should have been applied to both foundation and public

However, primary reason would be lack of jurisprudence[10] in regard to this matter.Charities ordinarily get an extensive tax preferential treatment (income tax, gift tax exemption) and they receive donations from the public. The role of charity managers (director or trustee) is particularly important for organizations which do not have members of their own[11] because it helps to maintain and build trust in society (between many and unspecified persons.) Profit organizations, such as corporations, have a mechanism to keep management in check by their members. Whereas organizations that do not have members, such as public charities, usually do not have such a structure.

In civil law, legal obligation is imposed on a private party who gets directly affected by the breach of that obligation. In case of public charities, they might encounter difficulties under such circumstances. Beneficiaries of public charities are many and unspecified persons. They do not have a right of claim for payments because their individual profits are relevantly small. Being a beneficiary in the past does not automatically extend their right of claim. Therefore, it has little incentive for potential or past beneficiaries to invest time and money to keep public charities in check. Furthermore, most beneficiaries do not recognize their status as a potential recipient, and breach of duty made by the management in a public charity does not come to light easily[12]. For that reason, a philanthropist "A" made a designated donation to "B" foundation. If "B"'s board of directors used the donation for a irrelevant purpose or the chairman of the board has embezzled the donation, such breach of duties may threaten the existence of the foundation or even negatively impact the public charities as a whole by causing decrease in the amount of donation.

Therefore, the current Korean law provides that the competent authorities supervise[13] incorporated foundations and charitable trusts; however, it is difficult for the authorities to effectively control them due to limited resources, lack of manpower, short-term rotations[14], and formalistic review on their legality. Moreover, the supervision is carried out by a number of different authorities[15]; therefore, it is hard to integrate and manage information efficiently[16]. That is why public charity corruption cases in Korea mostly rely on whistleblowers, such as managers or beneficiaries.

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trust; and (4) Lack of research and study in this area. In sum, public and private sector both did not pay much attention to the widespread of public trust.

[10] Regarding unincorporated foundation, *see* Chin-Woo Kim, *Legal Relationship of Incorporated Foundation: Dispostion Inver Vivos*, The Korean Journal of Civil Law, The Korean Association of Civil Law, No. 63-1 (2013), 161, at 162-164; Regarding public trust *see*, Chin-Woo Kim, *supra* note 2, at 3.

[11] This article excludes public activities that are carried out by incorporated association or unincorporated association.

[12]Melanie B. Leslie, *The Wisdom of Crowds?Groupthink and Nonprofit Governance*, 62 Fla. L. Rev. 1179, 1203 (2010).

[13] On the other hand, unincorporated foundation is not supervised by competent authorities under the current law. However, competent authorities supervise public trust because it is without legal personality. However, an incorporation that is involved with public activity receives tax benefits or raises funds in public, it is not reasonable to exclude it from government supervision in view of public interest and protecting society. Moreover, there is no clear reason to treat unincorporated foundation and public trust in regard to government supervision. Under the U.S. legal system, public charities are under government supervision regardless of their legal personality. This is something that Korean legislature should consider in the future.

[14] The Korean Supreme Court [S. Ct.], 2006Da19054, May 17. 2007 (S. Kor.) (Supreme Court Decision en banc 2006Da19054 Delivered on May 17, 2007) held that "incorporated foundation, such as school or educational foundation, has constitutional right. Therefore, the Supreme Court held that government supervision over educational foundations should respect the by-laws that incorporate founder's purpose for the school. This means that the Court acknowledges that incorporated foundation have constitutional rights. On the one hand, it also means that the government should adhere to the very few exceptions regarding limitation of fundamental human rights, such as principle of statutory reservation, principle of excess prohibition, principle of prohibition of violation of essential content. (Seung-Soo Ha/Hyeon-Soo Kim, *Governance of Nonprofit Social Welfare Corporation and the Legislative Direction for Its Improvement*, Korean NPO Review Vol. 6 No. 2(2007), Korean Association of Nonprofit Organization Research, 41 at 48 et seq.), on the other hand, it means that government supervision over incorporated foundation is limited to regulation on legality only.

[15] This reminds of how the State Attorney General supervise public charities in the United States.

[16] The following article proposes founding of unitary supervisory body similar to the Charity Commission in the United Kingdom. Chin-Woo Kim, *supra* note 4, at 109; *id.*, *supra* note 2, at 37.Choong-Kee Lee, *Study on Improvement of Legal System on Public Trust*, Report by Ministry of Justice, Republic of Korea, Seoul 2009, 1, 51 et seqq.; *id*., *Regulating Charities and Establishment of Korean Charity Commission*, Hongik Law Review, Vol. 11 No. 3 (2010), The Law Research Institute of Hongik University, 481, 496 et seqq. supports the proposal.

Furthermore, supervision is carried out by an administrative body which makes it difficult to be detached from political consideration. That is to say, the competent authorities would try to avoid conflict with an influential public charity, or on the contrary, they may try to purposefully collide with a charity for a political gain. On the other hand, although charities can self-regulate, auditor that functions as an internal control agency is not a statutory agency according to Korean Civil Code and Trust Act.[17] Especially, it is difficult to assure the integrity of a charity by an audit.[18] That is why we need to examine intervention made by outside stakeholders, such as founder, settlor, or donor ("grantor").[19] The following are the example of control over public charities by grantors.

(1) Claim performance:
A grantor can demand public charity[20] to use the designated donation for the designated purpose. Here, namely, private control by a "Private Attorney General" can be a problem.
(2) Claim for return:
A grantor can demand public charity to return the donation when it is not used for the designated purpose.
(3) Claim for compensation:
A grantor can demand management of a public charity for compensation as a means of derivative suit.
(4) Right to information:

It is necessary to carry out the above-stated measures.

Control by grantor has not yet been discussed in Korean law; however, it has increasingly receiving attention because of lack of government supervision and internal control, and increase in number of public charity. For this purpose, this article examines related issues in Germany and the United States that are applicable to the Korean law.

II. The United States

Unlike in Germany and Korea, it does not have significance as to how much control a grantor has over public charity in the United States.[21] When it comes to form of organization, the U.S. law does not have anything equivalent to Stiftung that exists in German or Korean law. That is to say, the U.S. law does not recognize organizations without members. The U.S. law does not give much meaning to whether there are members in organizations. It also leaves the decision to founders.[22] On that score, the U.S. law is quite different from German or Korean laws which distinguish foundation/Stiftung and association based on whether there are members in the organization or not.

1. Claim performance

In common law, strictly speaking, grantor does not have any rights after making a donation to a public charity.[23] So do their heirs.[24]

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[17] Auditing institution is not a necessary part of public charity as well as in the United States and Germany.
[18] There could be occasions when director and auditor conspire together.
[19] Beneficiaries can be an interested party, however, as aforementioned, public charities' control over beneficiaries is not very effective.
[20] Public trust or unincorporated foundation claim performance against trustees or administrators.
[21] Restatement (Second) of Trusts § 348 (1959), cmt. F provides that rules on charitable trusts are also applicable to charitable corporations.
[22] Revised Model Nonprofit Corporation Act 1987 (RMNCA) § 6.03; Model Nonprofit Corporation Act 2008 (MNCA) § 6.01.
[23] Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. Pa. L. Rev. 497, 607 (1981); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 Md. L. Rev. 1400, 1430 (1998); Note, *Developments in the Law: Nonprofit Corporations II*, 105 Harv. L. Rev. 1590, 1596 (1992); Ronald Chester, *Grantor Standing to Enforce Charitable Transfers under Section 405(C) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?* 37 Real Prop., Prob. & Tr. J. 611, 613 (2003); Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An unfulfilled State Responsibility*, 73 Harv. L. Rev. 433, 445 et seq. (1960); Austin W. Scott, *The Law of Trusts*, § 391 (4th ed. Fratcher 1989) Footnote43. Regarding laws on trust, Restatement (Second) of Trusts § 391 (1959): "A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, *but not* by a person who has no special interest or *by the settlor or his heirs, personal representatives or next of kin.*" (emphasis added).
[24] Restatement (Second) of Trusts § 391 (1959).

This is how gift is different from contracts which requires consideration in order to become effective. In Anglo-American law, gift in principle gives rise to an unconditional transfer and does not leave any rights to donor.[25] The same applies to settlor for a trust fund.

In other words, creating a trust requires a "complete," although not "absolute" transfer of property as its basis.[26] Therefore, settlor only has a meaningless "sentimental interest"[27] in the legal sense with regard to his donation. Moreover, when settlor has designated the donation and trustee has not complied with it, it is clearly a breach of duty.[28] However, the case should be brought by beneficiaries, such as Attorney General as a representative of the society, not by settlor.[29] This is also the case[30] for restricted gift.[31] Especially, in case of small amount of donations, donor does not have a claim performance due to concern for lawsuit abuse that would be disruptive to public charities.[32]. However, grantor may put off carrying out gift instrument.[33] For example, when the gift instrument explicitly states that there will be legal action or claim for return in case where the designated donation has been used for a different purpose.[34]

Carl J. Herzog Foundation is a leading case[35] regarding this issue. In late 1980s, Herzog foundation made a donation of $250,000 that was designated to use for fostering nursing program in BridgeportUniversity medical school located in the State of Connecticut. By the time when Herzog made the donation, it did not explicitly reserve its right to carry out the restriction. Nonetheless, five years later, the University abolished the nursing program and diverts partial funds to other purposes. Thereupon, Herzog demanded for nonperformance. On the other hand, Herzog brought a lawsuit against the University seeking for performance to donate the remaining balance to another public charity which showed intention to use the donation for the designated purpose only. The Connecticut Supreme Court dismissed the case by ruling that Herzog does not retain any rights to the donation because it did not explicitly reserve its rights regarding the restriction. The court also held that deciding where to use the donation is within Attorney General's purview. The holding is founded on the common law principle that donor does not retain any rights after making the donation.[36]However, supervision by Attorney General over public charities is limited due to lack of resources.[37]

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[25]George G. Bogert/George T. Bogert, *The Law of Trusts and Trustees*, 2nd ed., 1991, § 415; Hansmann, *supra* note 23, 607; Susann N. Gary, *Regulating the Management of Charities: Trust Law, Corporative Law and Tax Law*, 21 U. Haw. L. Rev. 593, 616 (1999); Evelyn Brody, *Charitable Endowment and the Democratization of Dynasty*, 39 Ariz. L. Rev. 873, 880 (1997).

[26]Jonny Rex Buckles, *When Charitable Gifts Soar above Twin Towers: A Federal Income Tax Solution to the Problem of Publicly Solicited Surplus Donations Raised for a Designated Charitable Purpose*, 71 Fordham L. Rev. 1827, 1831 (2003); Brody, *supra* note 25, 880.

[27]Bogert/Bogert, *supra* note 25, at § 415.

[28]Restatement (Second) of Trusts § 348 (1959), cmt.f; Scott, *supra* note 23, at § 348.1; Buckles, *supra* note 26, at 1831.

[29]Buckles, *supra* note 26, at 1832; Brody, *supra* note 25, at 880.

[30] Usage designation should be done explicitly. Case laws only recognize conclusive usage designation for designated donation as an exception. (For example, regarding fundraiser for flood victims *see*Kerner v. Thompson, 13 N.E.2d 110 (Ill. App. Ct. 1938)). The rest of the case law *see*Buckles,*supra* note 26, at 1838 Footnote 58. Meanwhile, New York Not-For-Profit Corporation Law ("N.Y. N-PCL") § 102(a)(14) explicitly provides that designated usage for donation is binding.

[31]Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 Vill. L. Rev. 433, 485 (1996); Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. Corp. L. 655, 690 (1998); Buckles, *supra* note 26, at 1831.

[32]Karst, *supra* note 23, at 447.

[33]Lisa Loftin, *Protecting the Charitable Investor: A Rational for Donor Enforcement of Restricted Gifts*, 8 B. U. P. I. L.J. 361, 363 (1999); AchimWestebbe, *DieStiftungstreuhand*, Baden-Baden 1993, at 102.

[34] Such reservation is not the reason for loss of tax benefit. Because in this case a gift without consideration is still a problem. For further explanation, *see*Chester,*supra* note 23, at 622 et seqq.

[35]*Carl J. Herzog Foundation, Inc. v. U. of Bridgeport*, 699 A.2d 995, at 1002 (Conn. 1997).

[36]Reid K. Weisbord/Peter DeScioli, *The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving*, 45 Gonzaga Law Review 225, 237 (2009-2010).

[37]Brody, *supra* note 31, 482; James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 Emory L.J. 617, 668 (1985); Hansmann, *supra* note 23, at 601; Note, *supra* note 23, at 1595 et seq.

Under these circumstances, it is difficult for Attorney General to allocate resources to fulfill individual donor's requests which would unlikely to bring out an immediate and visible outcome.[38] Compared to other obligations of Attorney General, fulfilling individual donor's requests is relatively less important. Therefore, in reality, transferring the designated donation for other purpose is overlooked, as long as it's been used for public interest. Generally speaking, if grantor cannot trust that the donation will be used for the designated purpose, it will cause the decrease in the amount of donation. Naturally, donors would be hesitant to make contributions when they realize that their donations could be diverted to other purposes. For this reason, some experts purport that grantor must retain a right to claim performance even when there has been no explicit reservation.[39] If there is no such possibility, manager's duty of obedience in a public charity becomes meaningless.[40]

There would be no feasible means to sanction them when there is a violation. In addition, some criticize that the traditional notion, which only recognizes grantor's sentimental interest, not the tangible interest, overlooks grantor's due right.[41] Moreover, in many cases, grantors do not know that they could actually reserve the right.[42] Against such a backdrop, the New York Supreme Court made a landmark decision in 2001.[43] One of the issues in this case was about a donation made by R. Brinkley Smithers, who was a son of the founder of IBM, to RooseveltHospital[44] in 1970, in New York, for the purpose of building an alcohol rehabilitation center outside of the hospital. The hospital carried out the plan accordingly. However, after 20 years, when the donor passed away, the hospital decided to sell the land where the rehabilitation center was located because the land value skyrocketed, and announced that the rehabilitation center will be moved into the main building of the hospital. The widow of the deceased donor brought a lawsuit to put a stop on moving the rehabilitation center into the main building. The New York Supreme Court acknowledges the widow's right to bring an action before the court.

It also held that the widow has a greater interest in realizing the purpose of donation than Attorney General and therefore the hospital shall carry out the purpose advertently. Related study literature acknowledges that this case is the first decision that relaxes its restrictive position on donor and heir's right to bring a legal action.[45]Besides, the Uniform Trust Code 2010 ("UTC")[46] made another step forward by providing in §405(c) that settlor can enforce trustee to carry out the obligation.[47] Settlor also has a right to request for dismissal of trustee when there is a grave breach of duty, according to §706(a).[48] Such a change of direction from the common law principle was necessary to have settlor function as a "Private Attorney General" because it is not enough to only have Attorney General supervise trustees.

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[38] Loftin, *supra* note 33, 380 Footnote 146; Paula Kilcoyne, *Charitable Trust: Donor Standing Under the UniformManagement of Institutional Funds Act in Light of Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 21 West. New Engl. L. Rev. 131, 178 et seq. (1999); Buckles, *supra* note 26, 1833.

[39]Chester, *supra* note 23, 628 et seq.; Hansmann, *supra* note 23, at 608 et seqq.; Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. Corp. L. 631, 652 (1998); John T. Gaubatz, *Grantor Enforcement of Trusts: Standing in One Private Law Setting*, 62 N. C. L. Rev. 905 et seqq. (1984); Karst, *supra* note 23, 445 et seqq.; Loftin, *supra* note 33, 380 Footnote146, 385; Kilcoyne, *supra* note 38, 178 et seq.; Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 227 Wisc. L. Rev. 227, 250 et seq. (1999).

[40] It means administrator of public charity has obligation to respect grantor's intent.

[41]Hansmann, *supra* note 23, at 609; Karst, *supra* note 23, at 446 et seq.

[42]Loftin, *supra* note 33, at 363.

[43]*Smithers v. St. Luke's-Roosevelt Hospital*, 723 N.Y.S.2d 426 (2001). Detailed analysis on this case, *see* Chester, *supra* note 23, 618 et seqq.; Iris J. Goodwin, *Donor Standing to Enforce Charitable Gift: Civil Society vs. Donor Empowerment*, 58 Vand. L. Rev. 1093, 1110 et seqq. (2005).

[44] On October, 1979, this hospital merged with St. Luke's Hospital and became St. Luke's-Roosevelt Hospital.

[45]Buckles, *supra* note 26, at 1832 Footnote 19.

[46] For state legislations regarding UTC, *see* http://www.uniformlaws.org/Act.aspx?title=Trust%20Code.

[47]UTC § 405(c): "The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust."

[48]UTC § 706(b) lists a few case when there are substantial changes: gross breach of duty, when dismissal of trustee would contribute to public interest because of lack of cooperation between trustees which cause unfitness; unwillingness, and persistent failure; when after trustee moves to another place; when qualified beneficiaries unanimously ask for dismissal of trustee. Here, qualified beneficiaries mean other public charities that have been designated as a beneficiary on the trust deed. (UTC § 110(b)).

Such a right to bring a legal action by settlor is based on a traditional common law principle that emphasizes elements that were derived from contract law.[49] Such perspective equivocates trust to a contract. In other words, if trustee breaches a duty to the public, he also breaches a duty to settlor at the same time. By contrast, donor's legal right to bring a lawsuit is still an exceptional case.[50] Even though for the literature that recognizes the right to bring a lawsuit in principle when there is no legal provisions, there is still a controversy about which donor should have such a right. There are two different opinions: one argues that only a large giver should have the right to bring a legal action in order to curb abusive lawsuits,[51] on the other hand, the other side argues only donors who made a designated donation in an explicit manner should have such right.[52] Some commentators who advocate the former view suggest imposing duty on Attorney General to give preliminary notice.[53]

2. Claim for Return

In common, law, settlor or donor cannot claim for return of the donation even though it has not been used legitimately.[54] UTC shares the same view. However, it becomes a different story if grantor reserves his right to withdraw donation at any time,[55] or grantor retains a reversionary interest when the designated donation is used for other purpose.[56] In this case, if the public charity does not carry out according to the purpose, Attorney General does not have a chance to take action.

Whether or not to make a claim for return of the donation is solely vested in grantor.[57] This right to claim for return can be inherited.[58] Nevertheless, in this case, it is difficult to receive tax benefits; therefore, in reality it happens infrequently. Surely, such a tax issue is not applicable when a person who claims for the return is not a grantor and is rather a gift over to a second charity. Because in this case, the donation continues to remain in the public sector. Some commentators state that although there are no contractual regulations grantor can claim for return of the designated donation when the charity did not use the donation accordingly.[59] In that case, grantor and his heirs could make a better use of the returned funds. Most commentators refuse such viewpoint, not even for a potential theory for legislation.[60] The reason behind is that, on one hand, the charitable contribution deduction could be a problem, and on the other hand, it cannot guarantee that contribution would remain in the public sector. If the right to claim for return of donation is granted to grantor, it will cause the funds to return to private sector, and consequently, the attempt to advance the public interest will be void. Hence, grantor should only retain a right to reallocation of the donation to another public charity.[61]

3. Claim for Compensation

In common law, donor cannot claim for compensation against the management of a public charity. However, several state laws recognize an exception to this rule. For instance, N.Y. N-PCL §720(b) provides that if a donor makes a donation of more than $1,000 and the bylaws provides donors the right to bring a legal action, donors are allowed to bring a lawsuit against incorporated nonprofit organizations.

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[49]Chester, *supra* note 23, 614 et seq., 622, 624. *See generally* John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 et seqq. (1995).

[50] In New York, when a donor donates to a non-profit organization for more than $1,000 and if the by-laws acknowledges donor's right to bring an action in a court, the donor has the right to bring a suit before the court. N.Y. N-PCL § 720(b)(4).

[51]Karst, *supra* note 23, 446 et seq.; Note, *supra* note 23, 1606; Deborah A. DeMott, *Self-dealing Transactions in Nonprofit Corporations*, 59 Brook. L. Rev. 131, 145 (1993).

[52]Chester, *supra* note 23, at 629 et seqq., 633.

[53] In Karst, *supra* note 23, at 447 et seqq., if the Attorney General refuses it, he can bring a suit, however, the donor has to bear the expenses of litigation.

[54]However, in practice, public charities try to reconcile with the donor and return the property to him in most cases (Loftin, *supra* note 32, at 368 and the examples therein).

[55]UTC § 602(a) provides that — unlike common law — unless trust instrument stipulates otherwise, trust can always be revoked by the donor. This is also true for public trust.

[56]Kilcoyne, *supra* note 38, at 132 Footnote6; Chester, *supra* note 23, at 622; Loftin, *supra* note 32, at 376 Footnote 112.

[57]Kilcoyne, *supra* note 38, at 170.

[58]Chester, *supra* note 23, at 616.

[59]Atkinson, *supra* note 31, at 668 et seqq.

[60]Loftin, *supra* note 33, at 365; Kilcoyne, *supra* note 38, 152 Footnote 141; Chester, *supra* note 23, 632 et seqq.

[61]Loftin, *supra* note 33, at 366.

The only problem is that it is difficult to find actual cases. UTC takes a different stance. As above-mentioned,[62] generally settlor has a right to have trustee carry out their obligations according to §405(c). Settlor can make a claim against trustee for compensation regarding the trust. Wisconsin has a corresponding law with regard to this issue. According to the Wisconsin law, settlor or group of settlors whose donation made up more than 50% of the principal of the public charity retain the right to bring a legal action before the court.[63]Some commentators call on to extend such a right to all grantors in the form of allowing them to bring a derivative suit,[64] as a future legislation.[65] It is because the government supervision is currently not effective and it is impossible to have it reformed in a short time. Therefore, they assert that there should be another supervising mechanism other than relying on the role of Attorney General. In this case, the commentators claim that a derivative suit should follow "derivative suit cost-bearing" model, unlike the U.S. cost-bearing model. Therefore, if grantor wins a suit, his litigation expenses should be borne by the public charity. On the other hand, if grantor loses a suit, and at any rate, there was no prospect of winning the trial,[66] grantor should bear the litigation expenses.

Some critics claim that it should be a prerequisite for grantor to demand Attorney General to bring a lawsuit but was denied, before bringing a legal action on its own.[67] According to their opinion, in such cases, at any rate, if grantor loses a lawsuit, he should bear the cost of litigation. Because the fact that Attorney General refused to bring a suit shows that there was not much likelihood of success in winning the case. Besides, there has been a discussion on introducing measures to curb litigations that were aimed at harming others. For instance, they could link the right to bring a claim to the scale of donation or their share of the entire donation.[68] However, such recommendations have not been introduced in the legislature or judicial findings.

4. Right to Information

There has been rarely a discussion about what kind of individual right to claim information is granted to grantors in the United States. In the United States, since the 1969 tax reform, the Internal Revenue Code ("IRC") requires public charities to make public announcements on comprehensive content regarding Form 990[69] that has twelve parts (from Part I to Part XII). The important things to announce would be public charities' income, expense, net assets, management structure (governance), and wages of executives/staff. Public charities are obliged to publicly announce their financial status because they get tax benefits and receive donations from the public.[70] Anyone can look up the public announcements made by public charities through FoundationCenter website.[71] Therefore, for instance, it is easy to search for on the websitethe information about the wage of the chairman of the board. Public charities should disclose five highest salaries on Form 990 online. Moreover, most state laws require public charities to report accounting to Attorney General and register it on public roster on an annual basis. This helps and assure public interest work engaged by private parties be transparent on a high-level. Additionally, grantors' individual right to claim information is not recognized and it is not even demanded by those who advocate expanding grantor's rights.

5. Additional discussion: Visitation

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[62]*Supra* II. 1.

[63]Wisconsin Statutes & Annotations § 701.10(3)(a)3.

[64] Recent legislation explicitly regulates these issues and acknowledges grantor the right to bring a case before the court. With regard to New York, *see* N.Y. N-PCL §§ 623(a), 730(b)(3) & Brenda Boykin, *The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits*, 63 N. C. L. Rev. 999, 1006 (1985); Regarding California, Corporations Code (CC) § 5710 (public Benefit Corporation), § 7710 (Mutual Benefit Corporation) and Boykin, *Ibid.*

[65] Goldschmid, *supra* note 39, at 652; Karst, *supra* note 23, at 445 et seqq.; Hansmann, *supra* note 23, at 608 et seqq.

[66] When they bring a lawsuit to hurt defendant or for breach of principles of equity

[67]Karst, *supra* note 23, at 447 et seq.

[68]Note, *supra* note 23, at 1606; Karst, *supra* note 23, at 447.

[69]*See* http://www.irs.gov/pub/irs-pdf/f990.pdf. This form is a basis for statistics that are used by the U.S. public charities. Internal Revenue Service makes this form public.

[70]Joint Committee on Taxation, *Study of Present-law Taxpayer Confidentiality and Disclosure Provisions as Required by Section 3802 of the Internal Revenue Service Restructuring and Reform Act of 1998*, Vol. II: Study of Disclosure Provisions relating to Tax-exempt Organizations, 01.28.2000 (JCS-1-00), 63, at 80.

[71]http://foundationcenter.org/findfunders/990finder/

In 19th century Anglo-American law, founder of a charitable corporation could reserve its right to visitation in bylaws which gives him the power to extensive control over internal affairs. Visitation right can appoint directors, interpret bylaws, and acquire information. A visitator has a similar role as a mediator which is to mediate conflicts that rise between directors and other managers. In such cases, the court jurisdiction was excluded.[72] Later a settlor of a public trust also became able to explicitly reserve the right to control on the trust instrument.[73] This right was bequeathed to an heir of settlor, but settlor was also able to have it bequeathed to a third party. Settlor as a visitator can claim their rights to enforce manager to carry out their obligations in a trial. This system, which is originated from common law, respects the purpose of donation made by grantor.[74]

However, it is unclear as to the scope of authority, whether settlor can interfere with public charity management by giving orders to a manager.[75]The visitation system has gradually been forgotten over the course of time. Today, it is no longer recognized.[76] Somewhere along the line, it started to face opposition because of the fact that the right could be inherited. Usually, in most cases, an heir is more likely to be unfavorable to public charities because they viewed as they were deprived of their inheritance by those charities.[77] Therefore, heirs were known to be an obstacle to public charity management rather than a promoter.[78] On the other hand, in the United Kingdom, the system is still currently in use.[79]Especially in *Atkinson*, it was advocated that the visitation system should be revived.[80] It was suggested that "watchdog organizations"[81] should have a role as a visitator by providing information from incorporated foundations and charitable trusts regarding public charities to the public. The advocates assert that these independent watchdog organizations' interests do not conflict with the duty of public charities. Nevertheless, *Atkinson* does not mention what kind of authority should be given to them as a visitator.

6. Summary

Under common law, grantor and his heir do not have any rights regarding public charities even for designated donation, unless there has been an explicit reservation. However, some argue that supervision by Attorney General should play a role as a "Private Attorney General" by allowing interested parties, such as a grantor, to claim performance although there has not been an explicit reservation, due to lack of thoroughness caused by limited resources. UTC was legislated for such a purpose. In the United States, unlike in Germany, there has been a discussion about derivative suit through which grantors could claim for compensation against public charity's manager.

III. Germany

1. Claim performance

Whether grantor could claim performance against public charities to use the donation according to the designated purpose is intimately related to legal character of the contribution or organization of the nonprofit organization.

(1) Incorporated Foundation

As long as the law and bylaws do not say otherwise, founder does not by title itself hold any rights after establishing the foundation.[82]

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[72]Westebbe, *supra* note 33, at 104.
[73]Atkinson, *supra* note 31, at 695; Scott, *supra* note 23, at § 391; Westebbe, *supra* note 33, at 105.
[74]Fishman, *supra* note 37, at 646; Gaubatz, *supra* note 39, at 938.
[75]Atkinson, *supra* note 31, at 695.
[76]George G. Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 Mich. L. Rev. 633, 634 (1954); Brody, *supra* note 25, 879.
[77]Brody, *supra* note 23, at 1430 Footnote 141.
[78]Karst, *supra* note 23, at 446; Westebbe, *supra* note 33, at 105.
[79]Brody, *supra* note 23, at 1430 Footnote 141; Westebbe, *supra* note 33, at 105.
[80]Atkinson, *supra* note 31, 695 et seq.
[81] This is referred as "monitoring bodies," and is independent of the government or public organizations.
[82] Incorporated foundation is a separate legal entity from the founder that hold legal rights and obligation. Founder has a major influence over the structure and organization of the foundation. However, after the foundation becomes incorporated, the founder can interfere with the business of the foundation only when the law or by-laws allow to, just like the third parties. (Hagen Hof, in: Werner Seifart/Axel Freiherr von Campenhausen, *Handbuch des Stiftungsrechts*, 3. Aufl.,München 2009, § 8 Rn. 115 et seq.).

Therefore, founder cannot claim performance against the foundation and its organization to use the donation or contribution according to the purpose of the bylaws. It is supervising authority's job to overlook nonprofit's performance because supervising authority should protect the interest of foundation and society in general, not the interest of the founder.

Founder cannot ask the authority to cancel its administrative action of the foundation because the founder cannot claim that his right has been violated. Thereafter, founder and his heir could only unofficially ask the authorities to interfere.[83]

(2) Unincorporated Foundation

Founder's legal status in an unincorporated foundation is largely different from that of founder in an incorporated foundation. In an unincorporated foundation, founder and his heir have rights. An incorporated foundations are usually found by founder and Stiftungsträger, moreover, founder could claim property management based on the contract from Stiftungsträger.[84] Establishing an unincorporated foundation by disposition inter vivos is upon Treuhand, donation subject to conditions, whereas by disposition mortis causa is upon testamentary burden.[85]

First, when an incorporated foundation is established by Treuhand, Stiftungsträger bears the liability of contributed property that was used for the purpose of the foundation according to the contract or by the delegation of power by the founder.[86] Founder holds the right to claim performance.[87] The government does not supervise an incorporated foundation that was established based upon trust relationship.

When an incorporated foundation was established by donation subject to conditions,[88] founder can claim performance on the conditions from Stiftungsträger according to the German Civil Code Article 525, section 1.[89] This right could be inherited[90] and also could be transferred to the third party based on the contract between founder and Stiftungsträger.[91] Conditions pertaining to inheritance, heir of founder has the right to claim performance.[92]

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[83] Hagen Hof/Maren Hartmann/Andreas Richter, Stiftungen, München 2004, 158; Klaus Riehmer, KörperschaftenalsStiftungsorganisationen, EineUntersuchungstiftungsartigerKörperschaften in Deutschland, England und den USA, Baden-Baden 1993, 26.

[84] Sabine Selbig, *Förderung und FinanzkontrollegemeinnützigerOrganisationen in Großbritannien und Deutschland*, Tübingen 2006, 291; Westebbe, *supra* note 33, at 101 et seq.

[85] Wolfram Backert, in: *Beck'scher Online-Kommentar BGB*, Buch 1, Edition: 40, 2016, Vor § 80 Rn. 22; Hof, *supra* note 82, § 36 Rn. 10, 30 et seqq.; Georg Wochner, *Die unselbständigeStiftung*, ZeitschriftfürErbrecht und Vermögensnachfolge (ZEV) 1999, at 125-126.

[86] Administrator has a right to possession and a few others, as a trustee. However, internally, he has an obligation pursuant to a trust contract with the trustor. Administrator holds rights and obligations along with performing his duty to manage the foundation, however, the purpose is to realize the goal of the foundation, not his personal interest. Unless the contract provides otherwise, with regard to a fiduciary relationship, when the administrator is volunteering for free, the German Civil Code §662 is applied (Rules on mandate), when the administrator is getting paid, the German Civil Code §675 (Rules on contract for the management of the affairs of another) is applied by inference. Because the German Civil Code does not acknowledges fiduciary relationship at all.

[87] Westebbe, *supra* note 33, at 101 et seq.

[88] Founder who is also a donor can transfer the donation to the administrator, subject to the conditions as such: (1) that donation to be used according to the designated purpose; and (2) that donated property will be managed separated from administrator's private property. The German Civil Code §525 (Donation subject to conditions): (1) Anyone who makes a donation subject to a condition may demand that the condition is fulfilled if he himself has performed. (2) If fulfilment of the condition is in the public interest, then the competent public authority may also demand fulfilment after the death of the donor.

[89] Westebbe, *supra* note 33, at 102; Wochner, *supra* note 85, at 128.

[90] Susanne Wimmer-Leonhardt, in: Staudinger, Kommentarzum BGB, Berlin 2005, § 525 Rn. 9. 38.

[91] Peter Rawert, *Die StaatsfreieStiftung*, Festschrift für Klaus J. Hoptzum 70. Geburtstag, Band 1, Berlin 2010, 185; Wochner, *supra* note 85, at 125–128.

[92] The German Civil Code §2194(Claim for fulfilment): *The fulfilment of a testamentary burden may be demanded by an heir, a co-heir and any person who would directly benefit from the end of the involvement of the person initially charged with the testamentary burden*. If the fulfilment is in the public interest, the public authority responsible may also demand fulfilment.

If the fulfillments of the conditions are for public interest, the competent authority could claim performance according to the state law, after the death of donor.[93] Therefore, in order to realize public interest, with regard to an incorporated foundation, the competent authority could claim performance from Stiftungsträger after the death of donor. This is different from the unincorporated foundation founded upon trust relationship.

Likewise, founder of an incorporated foundation could personally supervise management during his lifetime. After the establishment of the foundation, if founder does not show interest in supervising management, the government does not step in to fill the void. Competent authority could intervene after the death of founder, however, this is only limited to cases regarding foundations that were founded by donation subject to conditions or testamentary burden. Besides the heir of founder also has the right to claim performance. Nonetheless, since heirs are not always interested in supervising Stiftungsträger,[94] founder should have a backup plan for such situations. For example, founder could grant the right to claim performance to the third party other than the heir. Usually, the claim performance is granted to the third party from the beginning, in case where an incorporated foundation is established by disposition inter vivos(testamentary burden).[95]

(3) Donation or Additional Contribution to Public Charities

Donation is a contribution[96] that is expected to be used for realization of public interest in the short run which does not augment the permanent property of a foundation.[97] Disposition inter vivos is considered as gift, where disposition mortis causa is considered as legacy.[98] These donations are used for the designated purpose made by the donors.[99] When there are no designated purposes, donations are used to realize the purpose of the foundation provided in the bylaws. Reichsgericht, which was formerly Bundesgerichtshof, held that when donor did not specify the use and purpose of the donation, the foundation could use it according to its bylaws. The Court also denied the conditions because it does not have special benefit as long as it abides with its bylaws.[100]

Because the donations were not designated for a special purpose, the federal court found that they are donations without any conditions attached. However, the common view is that the donations cannot be used other than for the purpose stipulated in the bylaws. In short, when the donor designated a purpose for the donation, the donation should be used for that purpose only. Whereas when the donation does not have any attached condition, then it should be used within the purpose of the bylaws. Endowment contribution[101] that increases their original property is also a donation that is subject to conditions.[102]

Likewise, donation to public charities and endowment contribution are regarded as a donation that is subject to conditions, donor and the person who is making endowment contribution have the right to claim performance[103]with regard to the conditions. Although the donor and the person who make the endowment

[93] The German Civil Code §525, Section 2, §2194, sentence 2.

[94] This is because the heir of the founder is not interested in public interest or founding of the foundation has reduce his estate of inheritance.

[95]Wochner, *supra* note 85, at 125-128.

[96]Jens Koch, in: MünchenerKommentarzum BGB, 6 Aufl.,München 2012, § 516 BGB Rn. 99.

[97] In Germany, there is no legal instrument that is equivalent to trust. Public organization that are operated by donations for public interest: incorporated foundation (Stiftung) and unincorporated foundation (UnselbständigeStiftung)

[98]Markus Gehrlein, in: Beck'scher Online-Kommentar BGB, 40. Ed., 2016, § 516 BGB Rn. 5; Dominique Jakob, *Schutz der Stiftung*, Tübingen 2006, 119, 124; Wimmer-Leonhardt, *supra* note 90, § 516 BGB Rn. 29.

[99] *See*von Hippel, Thomas, Grundprobleme von Nonprofit-OrganisationenGrundprobleme von Nonprofit-Organisationen, Tübingen 2007, 191 (this is considered a common theory); Jakob, *supra* note 98, 163 et seq.; Koch, *supra* note 96, § 516 BGB Rn. 100, § 525 BGB Rn. 5; LotharPues and Walter Scheerbarth, GemeinnützigeStiftungenimZivil- und Steuerrecht, München 2001, 66; Stephan Schauhoff, in: Stephan Schauhoff, Handbuch der Gemeinnützigkeit, 3. Aufl., München 2010, § 11 Rn. 15, 141; Wochner, *supra* note 85, at 128.

[100] The factual basis regarding tax law, *see*ReichsgerichtJuristischeWochenschrift (JW) 1913, 640.

[101] With regard to the abovementioned concept, *see* Koch, *supra* note 96, § 516 BGB Rn. 99.

[102]von Hippel, *supra* note 99, at 193; Jakob, *supra* note 98, at 124; Heinz-Peter Mansel, in: Jauernig (ed.), Kommentarzum BGB, 15. Aufl., München 2014, § 516 Rn. 7; KarlheinzMuscheler, *Stiftung und Schenkung*, Archivfür die civilistische Praxis (AcP) 203 (2003), 478; *id*., *Der ZuwendungsvertragzwischenStiftung und Destinatär*, NeueJuristischeWochenzeitschrift (NJW) 2010, 343; Andreas Schlüter/Stefan Stolte, Stiftungsrecht, 2. Aufl.,München 2013, Kapitel 2 Rn. 137; Rainer Hüttemann/Peter Rawert, in: Staudinger, Kommentarzum BGB, Berlin 2011, Vorbem. zu §§ 80 ff. BGB Rn. 265.

[103]*See* II. 1. (1).

contribution did not designate a particular purpose to the donation, it should be use within the purpose of the bylaws. In such cases, for practicality, the public charity does not have to inform the donor as to how the donation has been used.[104] The only thing that donor can do is to claim performance against the public charity to use the donation within the purpose of the bylaws.[105] Having such restrictions, public charity can be protected by frivolous suits.

2. Claim for Recapture of Property

Grantor's claim for recapture of property hinges upon the nature and structure of a legal act that constitutes the basis of donation; however, it can be also influenced by tax law.

(1) Incorporated Foundation

As for the founder's claim to recover of property from a foundation, when formality for establishment does not have a legal effect or there is a provision from the bylaws, exceptions are allowed in limited cases where the purposes of the bylaws are met.[106]

(2) Unincorporated Foundation

As for the unincorporated foundation, the issue here is whether the founder can claim to recover the property from the management under certain conditions. First, when an unincorporated foundation was established with a naked trust, formality of establishment is equivalent to delegation contract, the German Civil Code Article 671,[107] section 1, provides that it can be withdrawn by the founder or his heirs at any time. In that case, the foundation gets dissolved and the property should be returned to the founder or his heirs.[108] Therefore, unincorporated foundation is depended upon the will of its founder or its heirs. However, this does not conform to the idea of corporation that exists continuously and independently of the founder.[109] In reality, the founder's right to withdraw is limited to making up for the defect.[110] Some people would regard it as the founder having relinquished his rights to withdraw even though a contract does not exist, for the durability of the foundation.[111] However, some think the founder's right to withdraw should be enforced in the case of administrator's nonprofit activity.[112]Case laws hold that even though delegating parties had a provision to relinquish the right to withdraw, delegating parties can cancel a delegating contract.[113]
Moreover, trustor holds a right to withdraw[114] under special circumstances.[115]Next, when a donation subject to conditions becomes an issue, founder can claim return of the property and abolish the foundation, in case of withdrawing donation[116] due to failure to fulfill the conditions[117] and impoverishment of the donor.[118]

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[104] When there are a big number of donors, disclosing information on small contributions could interfere with the job performance of a public charity.
[105] For example, Franz-Christoph Furche, *Die Kontrolle der FinanzenspendenfinanziertercaritativerVereine*, Bonn 1988, 156.
[106]Riehmer, *supra* note 82, at 26.
[107] The German Civil Code §671 (Revocation; termination): (1) The mandate may be revoked by the mandator at any time and may be terminated by the mandatary at any time. (2) The mandatary may only give notice in such a manner that the mandator can make other arrangements for the transaction to be carried out, unless there is a compelling reason for premature termination. If he gives premature notice of termination without such a compelling reason, then he must compensate the mandator for the damage thus incurred. (3) If there is a compelling reason, then the mandatary is entitled to terminate the mandate even if he has waived the right of termination.
[108] The German Civil Code §667 (Duty to return): The mandatary is obliged to return to the mandator everything he receives to perform the mandate and what he obtains from carrying out the transaction.
[109] Peter Reuter, in: MünchenerKommentarzum BGB, 6. Aufl.,München 2012, Vor § 80 BGB Rn. 98; *id.*, *Die StiftungzwischenVerwaltungs- und Treuhandmodel*, in: Festschrift für Walter Haddingzum 70. Geburtstag am 8. Mai 2004, 2004, 241.
[110]Wochner, *supra* note 85, at 126.
[111]Westebbe, *supra* note 33, at 154 et seq.
[112]Peter Reuter, *Die unselbständigeStiftung*, in: von Campenhausen/Kronke/Werner (Hrsg.), Stiftungen in Deutschland und Europa, Düsseldorf 1998, 210.
[113]Bundesgerichtshof (BGH) Wertpapier-Mitteilungewn (WM) 1971, 956, 957.
[114] The German Civil Code §314(Termination, for a compelling reason, of contracts for the performance of a continuing obligation): (1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual

Claim to recover property according to German Civil Code Article 527, Clause 1, especially has significance in terms of regulating the administrator. According to this clause, founder has the right to claim the return of the property when the administrator does not fulfill the condition in case when the element to exercise his right to cancel[119] has met under the contract.

Thereafter, founder can choose if he wants to claim fulfillment according §525 (1) or to exercise his right to claim return of the property for not fulfilling the conditions according to §527 (1). This could be used as a means to pressure donee to meet the conditions. When founder and his heirs receive the property back by revocation of the contract, they will lose tax benefit retroactively. Therefore, when founder and his heirs revoke the contract and dismantle the foundation, it does not happen most of the time. Moreover, when the founder gets a tax deduction, the remaining property does not go to the founder or his heirs.[120](3) Donation to Public CharityDonation to public

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relationship until the agreed end or until the expiry of a notice period. (2) If the compelling reason consists in the breach of a duty under the contract, the contract may be terminated only after the expiry without result of a period specified for relief or after a warning notice without result. Section 323 (2) applies with the necessary modifications. (3) The person entitled may give notice only within a reasonable period after obtaining knowledge of the reason for termination. (4) The right to demand damages is not excluded by the termination.

[115]Westebbe, *supra* note 33, at 155; Wochner, *supra* note 85, at 126.

[116] The German Civil Code §527(Non-fulfilment of the condition): (1) If fulfilment of the condition fails to occur, the donor may demand the return of the gift under the conditions determined for the right of revocation of reciprocal contracts under the provisions on return of unjust enrichment to the extent that the gift would have had to be used to fulfil the condition. (2) The claim is excluded if a third party is entitled to demand fulfilment of the condition.

[117] The German Civil Code §528(Claim for return due to impoverishment of the donor): (1) To the extent that the donor, after fulfilment of the condition, is not in a position to maintain himself reasonably and to meet the maintenance obligation incumbent upon him by law in relation to his relatives, his spouse, his civil partner or his previous spouse or civil partner, he may demand return of the gift from the donee under the provisions on the return of unjust enrichment. The donee may avoid return by paying the amount required for maintenance. The provision of section 760 and the provision applicable to the maintenance obligation of relatives under section 1613, and in the case of the death of the donor also the provision of section 1615, apply to the duty of the donee with the necessary modifications. (2) Among more than one donee, the earlier donee is liable only to the extent that the later donee is not obliged.

[118] For cases that involve unincorporated foundation, revocation due to ingratitude, the German Civil Code §530 (Revocation of donation): (1) A donation may be revoked if the donee is guilty of gross ingratitude by doing serious wrong to the donor or a close relative of the donor. (2) The heir of the donor only has the right of revocation if the donee has intentionally and unlawfully killed the donor or prevented him from revoking) is excluded (Westebbe, *supra* note 33, 153 et seq.). Namely, the German Civil Code §530 is based on the idea that a person who did a serious wrong to the donor cannot maintain dispensation, because as for unincorporated foundation, the beneficiary is society, not the administrator.

[119] The German Civil Code §323 (Revocation for nonperformance or for performance not in conformity with the contract): (1) If, in the case of a reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure.

(2) The specification of a period of time can be dispensed with if

1. the obligor seriously and definitively refuses performance,
2. the obligor does not render performance by a date specified in the contract or within a specific period and the obligee, in the contract, has made the continuation of his interest in performance subject to performance being rendered in good time, or
3. there are special circumstances which, when the interests of both parties are weighed, justify immediate revocation.

(3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

(4) The obligee may revoke the contract before performance is due if it is obvious that the requirements for revocation will be met.

(5) If the obligor has performed in part, the obligee may revoke the whole contract only if he has no interest in part performance. If the obligor has not performed in conformity with the contract, the obligee may not revoke the contract if the breach of duty is trivial.

(6) Revocation is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to revoke the contract or if the circumstance for which the obligor is not responsible occurs at a time when the obligee is in default of acceptance.

[120] The Basic Tax Law (Abgabenordnung, The Fiscal Code of Germany) §55, Article 1, para. 4 ((1) Advancement or support shall be provided altruistically if it does not primarily serve the corporation's own economic purposes, for instance commercial or other gainful purposes, and the following requirements are met: ... 4. Where the corporation is dissolved or liquidated or where its former purpose ceases to apply, the assets of the corporation in excess of the members' paid-up capital shares and the fair market value of their contributions in kind may be used only for tax-privileged purposes (dedication of assets). This requirement shall also be met if the assets are to be assigned to another tax-privileged corporation or to a legal person under public law for tax-privileged purposes. ...

charity is construed as donation subject to conditions. As to founder and donor's right to claim to return, the same rules apply as unincorporated foundation.

3. Claim for Compensation

(1) Incorporated Foundation

Grantor's legal counsel cannot bring a suit against a director to claim for compensation. So long as articles of association do not provide otherwise, whether or not to exercise the right to claim for compensation against the director who incurred losses, is within the purview of the board of directors.[121]

(2) Unincorporated Foundation

It is not easy to hold the administrator accountable for the loss incurred to the foundation, especially in the case of conditional donations. Founder of a foundation that is established with conditional donations can ask administrator for cooperation, however, the administrator is not responsible for restoring the lost property due to his liable mistake. Here, the administrator is the owner of the foundation; therefore, founder's loss is not recognized as substantive. Moreover, loss incurred to unincorporated public foundation is regarded as public loss, many and unspecified public do not hold the right to compensation, thus the loss cannot be transferred.[122] After all, unincorporated public foundations that are founded by conditional donations cannot claim for compensation against the administrator. On the other hand, as for unincorporated foundation established by trust, when administrator incurs loss due to his liable mistake, it is deemed that he has not carried out the obligation as a trustee. In other words, according to German Civil Code Article 314,[123] founder or his heirs may have right to termination in certain cases other than having right to compensation. (3) Donation or Additional Contribution to Public Charities. As for donors, they do not have a right to compensation against public charities. In case of conditional donations, as long as the ownership has been transferred over to the foundation/administrator, donor's loss is not recognized.[124]

4. Right to Information

Unless articles of association do not provide otherwise, founder of the foundation cannot ask the foundation for his access to information. It is because there is no statutory basis. On the other hand, the founder of unincorporated foundation can ask for access to information or accounting reports based on German Civil Code Article 666.[125] This provision is applied directly when formality of establishment is based on trust agreement, but it is also applied in other cases by inference.[126] However, accounting reports are about the control agency (audit) according to the Articles of association, not about the founder.[127] Donations made to public charities are conditional, thus donor's right to access to accounting reports is based on German Civil Code Article 666 by inference. Nonetheless, donors, unlike founder, do not have a right to access to information on details of usage.

If there are a large number of small contributors, this could disrupt their business and increase management expenses. In Germany, regardless of the type of organization, public charities do not have obligation to disclose information to the public.[128] As a result, it is difficult for donors to obtain necessary information on the activities of public charities. However, since public charities get tax benefits and receive support from the public (volunteer works and donations), this is one of the things that German law should consider improving.

[121] Some state laws allow competent authorities to claim for compensation against directors, however, this article focuses on control by the grantor, therefore, excludes it from the discussion.

[122] Peter Reuter, *Neue Impulse für das gemeinwohlorientierteStiftungswesen? ZumEntwurfeinesGesetzeszurModernisierung des Stiftungsrechts*, Non Profit Law Yearbook 2001, 27 at 41; Westebbe, *supra* note 33, at 113 et seqq., 186. Different opinion: Selbig, *supra* note 84, at 291 et seq.

[123] *Seesupra* note 114.

[124] Gehrlein, *supra* note 98, at § 527 BGB Rn. 1; Koch, *supra* note 96, at § 527 BGB Rn. 1.

[125] The German Civil Code §666 (Duty of information and duty to render account): The mandatary is obliged to provide the mandator with the required reports, and on demand to provide information on the status of the transaction and after carrying out the mandate to render account for it.

[126] Westebbe, *supra* note 33, at 101.

[127] Westebbe, *supra* note 33, at 99.

[128] Furche, *supra* note 105, at 147.

5. Summary

(1) In case of incorporated foundation, there is no statutory basis for regulating founders or his heirs. Therefore, unless articles of association do not provide otherwise, after the incorporation, founder and his heirs cannot exert influence over the foundation. They become a third party. Thus, founder's influence over the foundation is a matter of what articles of association provide.
(2) Cases of unincorporated foundations are different from those of incorporated foundations. Founders play a crucial role in regulating the foundation. If a founder wants to get taxable income after contribution, he cannot claim return of property to himself. This is to prevent using the property for private interests.
(3) When donation or contribution to public charities becomes a problem, grantor has the right as a donor who made a conditional donation. In this case, grantor's legal status is equivalent to that of unincorporated foundation by conditional donation. However, as for individual donors, public charities do not have a duty to disclose information on the details of usage. Therefore, donor's right to claim performance and access to information is related to the entire property that the foundation used.

IV. South Korea

1. Claim for Performance

(1) Incorporated Foundation

Unless articles of association do not provide otherwise, founder and his heirs cannot claim for performance in regard to use of property. Moreover, they can only unofficially press competent authorities to interfere. The current civil law does not have a statutory provision that allows founder and his heirs to urge competent authorities to interfere and claim performance. Therefore, it is a matter of whether articles of association has the provision.

(2) Unincorporated Foundation

As mentioned above,[129] in Germany, founder and his heirs establish unincorporated foundation based on a contract. Sometimes public charities are founded by donation subject to conditions. In any case, German Civil Codes (Article 80 and so on) regarding incorporated foundation do not apply to unincorporated foundations (by inference). Unincorporated foundations differ from incorporated foundations that they do not have legal personality. In this sense, Germany maintains the pure "unincorporated foundation." On the other hand, Korean Civil Code allows the president/administrator of the foundation to be the party to a lawsuit (Article 52).[130] In addition, the Real Property Registration Act provides that in case of registration of the unincorporated foundation's property, the foundation is entitled to registration (Article 26, Section 1).[131]

As a result, in Korea, unincorporated foundation can have legal rights and obligations in a civil lawsuit or in a legal dispute over property matters.[132] On the other hand, the majority of scholars recognize that regarding the legal relationship other than unincorporated foundations, the Civil Law provisions that requires legal personality in connection to incorporated foundations, are applied by inference. However, the explanations vary.[133] In my previous article,[134]

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[129] *See* III. 1. (1).
[130] The Civil Procedure Act §52 (Capacity for being Party in Case of Other Association, etc. Than Juristic Person): Other association or foundation than a juristic person may, in case where it has a representative or administrator, become a party to a lawsuit in the name of such association of foundation.
[131] Registration of Real Estate Act §26 (Applicants for Registration of Association, etc. other than Juristic Person): (1) As for registration of real estate belonging to an association or foundation, other than families of the same clan, family members of the same clan, a juristic person which has the representative or manager, such association or foundation shall be a person entitled to registration or an obligatory for registration. (2) Applications for registration under paragraph (1) shall be filed in the name of such association or foundation by its representative or manager.
[132] Chin-Woo Kim, *supra* note 10, at 162. In Korea, unincorporated foundation functions no differently than incorporated foundation in regard to real estate, although it is not incorporated. This suggests if they can be still called as "unincorporated" foundation.
[133] For example, as for property excluding real estate, there are two conflicting theories: (1) According to rules on trust, the property can only be under the administrator's name; and (2) Based on the fact that it is a foundation, the unincorporated

I expressed that Korean law should restore a complete form of "unincorporated foundation." On the other hand, with regard to establishment of unincorporated foundation by disposition inter vivos, Korean law recognizes it as a conditional donation or a contract (bond) that is considered as a trust under the civil law, not as a unilateral act by founder. Such contractual relationship is applicable to overall legal relationship regarding unincorporated foundation. Alternatively, the article suggests that the Real Property Registration Act Article 26 and Civil Procedure Act Article 52 should be repealed to be harmonized with Civil Law Article 31.[135] According to the suggestion, founder and his heir of the unincorporated foundation can claim performance. Whereas according to the majority of scholars, unless the article of association provide otherwise,[136] founder and his heir cannot claim performance against the unincorporated foundation, because claiming to fulfill conditions is a separate issue from having legal personality. However, this opinion in inconsistent with the recent case law[137] that respects grantor's intention and with the majority view in the United States and Germany.

(3) Donation or Additional Contribution to Public Charities

Donation[138] should be used to fulfill conditions attached to the donation, and in the absence of such, the purpose of the articles of association.[139] With regard to this, the Law on Collection and Usage of Donations provide special rules on collection of donations. According to the Article 12, collected donations cannot be used for other purposes besides the original objectives in principle,[140] except for situations under Article 13. Besides, donations made for public interest are regarded as conditional donation or donation subject to conditions[141]

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foundation is the sole owner. Within the former theory, there are two different opinions regarding the definition of "Trust," whether it is referring to trust under civil law (Treuhand) or trust according to the Trust Act (Trust)

[134] See *supra* note 9, at 161.

[135] The Korean Civil Code (Rule to Formation of Juristic Person): No juristic person can come into existence other than in accordance with the provisions of the Acts.

[136] Chin-Woo Kim, *Possibility of Founder's Participation in Incorporated Foundation: Liberty and Limitation of Establishing the By-Laws*, Hongik Law Review, Vol. 13 No. 4 (2012), The Law Research Institute of Hongik University, 323, 349 et seqq.

[137] The Korean Supreme Court decision, 2011DA61370 Delivered on Oct. 15, 2012 held that "Grantor's intent should be respected as much as possible, when he donated his property without consideration for public interest and designated specific usage of the donation. The board of directors cannot use the donation for other purposes."

[138] Donation is generally given without consideration for public interest, (Yoon-GikKwak, Law of Obligations, Special Part, 6th ed., Seoul 2006, p.122; Cheol-Hong Yoon, Annotation to Civil Law) Law of Obligations, Special Part(2), 3rd edition, Seoul 1999, p.163; Yeon-Gab Lee, Donation Law and Trusts, *The Korean Journal of Civil Law*, Vol. 39-1 (2007), The Korean Association of Civil Law, 377 at 378. According to organizations law,at least it tries to differentiate between additional increase in public charities' permanent property and increase in donation for the short term public interest.

[139] In contrary, in Cheol-Hong Yoon, *supra* note 137, 164, when donation is not designated for certain usage, it is deemed as simple gift.

[140]Law on Collection and Usage of Donations §12, Section 1 ① When donation cannot used to realize the purpose of the fundraiser; ② When there is remaining donation after using for designated purpose, the remaining donation can be used for a similar purpose according to the presidential decree after obtaining approval from the Register.

[141] On the other hand, Yoon-GikKwak, *supra* note 138, 17; Annotation to Civil Law(XIV)/Young-Han Ko, Seoul 1997, 17; Cheol-Hong Yoon, *supra* note 137, 164. When doneeand the person who benefitted by the donation are different, donee does not gain interest, therefore, it is not a gift. This should be considered as something similar to trust transfer that accompanies obligation to use it for the public interest. Nevertheless, even though it is considered as a trust transfer, substantially it is the same as gift because donor made the donation gratuitously. Thus, under the civil law system, the rules regarding gift is applied. (Precisely, it is applied by inference.) Individual donors agreed to the purpose of the fundraiser, therefore, they have the right to claim performance. The author tries to question the majority view that treats donation as a gift. He also tries to find ways to apply trust law. The fact that whether donee gains interest from the donation cannot be used to determine if the donation should be treated as a gift. There is no legal basis in civil law. (the German Civil Code §516, Section 1 [A disposition by means of which someone enriches another person from his own assets is a donation if both parties are in agreement that the disposition occurs gratuitously] For the donation to be treated as gift, it requires that the donation should benefit the third party, however, the Korean Civil Code §555 (Contract of Gift not in Writing and its Rescission) "A contract of gift which is not in writing may be rescinded by either party (The law defines that a gift comes into effect when one party expresses his intention to make a donation gratuitously and the other party accepts it.). Furthermore, to establish a gift, the German Civil Code and its related common theory and case law, which requires the donation to benefit the third party, regards the use of donation pursuant to the by-laws as benefit to the public charity. (*See* von Hippel, *supra* note 99, 192, the literature and case law that are mentioned therein.) Moreover, legal issues in relation to donation can be resolved according to

Under Korean Civil Code Article 561,[142] 562,[143] and 1088.[144] Accordingly, donor and his heirs can claim performance and ask the foundation to use the donation to meet the conditions. The Korean Supreme Court in a case 72Da909, July 25, 1972 held that "in case of donation subject to conditions, it imposes an obligation ondonee to carry out the conditions. However, simply designating an objective to a gift is not a case of donation subject to conditions. Nonetheless, the Korean Supreme Court in 2011Da61370 (Oct. 25, 2012) case, does not mention the previous 72Da case. It rather held that if the donation is made for the public interest free of charge, and it designated the purpose, and if the contract provides as such, grantor's intention and purpose should be respected. The Court abandoned its precedent. In its 2011Da61370 holding, the following facts became a problem: Plaintiffs donated 30.5 billion won to PusanNationalUniversity while attaching a specific condition. They first donated 19.5 billion won to the University and later claimed that the University failed to fulfill the conditions attached to the donation. They expressed their intention to revoke their offer to make the donation.

They filed a suit for a declaratory action claiming that they are not obligated to donate the remaining 11 billion won. The district court held that "as for donation subject to conditions, donee is obligated to give donor a consideration. However, when the donor simply designated where to use the donation cannot be considered as donation subject to conditions. The court followed their own decision in 72Da909[145] and held that it is not a donation subject to conditions even when the donee promised to use the donation for a certain purpose. The district court held that the donation is not subject to conditions because the donors simply suggested where to use the donation. The court refused to look into the Plaintiff's claim that they had revoked their stipulation to make the donation because the donation was subject to conditions. The appellate court found that PusanNationalUniversity had abided by the donor's suggestions as to how to use the donation. Therefore, the court found that Plaintiff's factual assertions were without support.[146] The Supreme Court based on this factual finding of the appellate court dismissed the case finding that PusanNationalUniversity used the donation subject to the conditions, although the court disagreed with some factual findings of the appellate court. Both parties presented and argued different facts. Thus, the finding of the facts determined the outcome of the case without engaging in substantive legal analysis.

However, the court's decision regarding the grantor's intent for the donation be respected as much as possible,[147] is in line with the prevailing view of the United States and Germany. The court's decision will serve as a guideline for future cases. In the case above, because PusanNationalUniversity is a public university therefore it is not a public charity. However, it is technically identical with public charities.

2. Claim for Return

(1) Unincorporated Foundation

An unincorporated foundation is similar to that of Germany[148] in terms of claim for return of property, when it comes to trust or donation subject to conditions. Therefore, founder of an unincorporated foundation had a right to claim for return of property as a means to compel the administrator to lawfully manage the property. Nevertheless, claiming for return of the property does not accord with the purpose of public charities that serves

traditional principles on gift and principles on bequest, without much difficulty. Thus, unless the parties explicitly establish trust under the Trust Act, principles on trust under the Trust Act should not be applied.

[142] The Korean Civil Code §561 (Gift subject to Charge): The provisions relating to bilateral contract shall apply to a gift subject to a charge, in addition to the provisions of this Section.

[143] The Korean Civil Code §562 (Gift Effective upon Death): The provisions relating to testamentary gifts shall apply mutatis mutandis to a contract of gift which is to become effective upon the death of the donor.

[144] The Korean Civil Code § 1088 (Testamentary Gift subject to Charge and Responsibility of Testamentary Donee): (1) A person who has received a testamentary gift subject to a charge is bound to perform the duty which he has assumed only to the extent of the value of the testamentary gift. (2) Where the value of a testamentary gift is reduced by reason of a qualified acceptance of the inheritance or a separation of property, the testamentary donee shall, in proportion to such reduction, be relieved of the duty which he has assumed.

[145] Pusan Appellate Court, 2008GaHap12371, May 7, 2009.

[146] Pusan Appellate Court, 2009Na7601, June 22, 2011.

[147] In the Supreme Court case, 2006Da19054, May 17, 2007, en banc, the majority opinion shared the similar view. It held that "Educational foundation is a type of incorporated foundation that is founded for the purpose of establishing private educational institution. The purpose and intent of the founder at the time of establishment should be respected.

[148] *See* III. 2. (1).

the public interest. Thus, founder is not allowed to claim for return of the property for his private interest. It would be more beneficial to the society if the founder can only ask for replacement of the administrator or transfer the property to another public charity. However, according to the prevailing view, in this case, grantor's claim for return of the property will not be recognized in principle because the rule on foundation is applied.

(2) Incorporated Foundation

In case of incorporated foundations, grantors can claim for return of the property only when the establishment of the foundation is void or there is a provision in the articles of association, together with the achieving the purpose of the foundation.[149]

(3) Donation or Additional Contribution to Public Charities

Donation to a non-profit foundation is deemed donation subject to conditions. Thus, in regard to grantor's right to claim for return of the property follows the same rule as that of unincorporated foundation.

3. Claim for Compensation

Korean law on claim for compensation[150] against the administrator of a public charity closely 1mirrors German law on the matter.[151]

4. Right to Information

When there is no provision in the articles of association, founder of the foundation cannot ask the foundation for his access to information. In case of unincorporated foundation, according to the prevailing view, the founder does not have a right to information. However, the founder can ask the administrator to disclose the report on management according to Korean Civil Code § 683.[152]

Donation to a public charity is deemed donation subject to conditions, therefore Korean Civil Code § 683 is applicable. Nonetheless, a small contributor does not have a right to access the information. When there are a large number of small contributors, it may cause inconvenience to the business and increase the management cost.

On the other hand, whereas the U.S. public charities do not have a burden to report their activities to the government, public charities in Korea have an obligation to report their accounting activities to the competent authorities under their civil and tax law. This has some drawbacks. First, public charities do not have inducements to be more efficient and effective. In other words, they do not experience any pressure to be transparent. Next, foundations are supervised by competent authorities and it is almost impossible to be monitored by the society. Therefore, it is difficult to monitor their operations in reality in Korea. Korea should enact a law that requires public charities to disclose information to the public if they receive tax benefits or social support so that they could improve transparency.[153] Information on public charities will be informative to potential donors and volunteers when they make a decision to donate or volunteer. Therefore, it is crucial that the public easily access their information online.

V. Conclusion

In Germany and the United States, it is a recent trend to allow grantors or founders to have more control over public charities.

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[149] The Korean Supreme Court, 2001Da1171, Oct. 1, 2003. Regarding educational foundation, "In the matter of establishing a school foundation, the fact that a person is relevant to the case does not necessary mean that the case has merit. Moreover, without a special reason, the founder cannot ask call for confirmation of invalidity of the board of directors' resolution."

[150] Responsibility of the members of foundation, *see* Chin-Woo Kim, *Internal Responsibility of Directors of Incorporated Foundation*, The Korean J. Civil L., Vol. 51 (2010), 3, 3 et seqq.; *id.*, *Structure of Incorporated Foundation: Discussions in Context of European Civil Law and Application to Korean Law*, Kyung Hee L.J., Vol. 48 No. 1 (2013), The Institute of Legal Studies of Kyung Hee University, 53, 77 et seqq.

[151] *See* III. 3.

[152] The Korean Civil Code §683(Mandatary's Duty to Report): A mandatary shall upon demand by the mandator report on the status of the management of the entrusted affairs, and upon the termination of the mandate he shall make a full report on the entire developments with respect to the management of the entrusted affairs without delay.

[153] For example, Choong-Kee Lee, Regulating Charities and Establishment of Korean Charity Commission, *Hongik Law Review*, Vol. 11 No. 3 (2010), The Law Research Institute of Hongik University, 481 at 490.

In the United States, it has been manifested through the enactment of UTC. The reasoning behind this is that it would be more beneficial to the public interest if public charities use the donation according to the grantor's intent. It is a lame excuse for a lawmaker to say to a potential grantor that he does not have a countermeasure when the donee does not use the donation according to the grantor's intent. It will discourage people from making donations for the public interest. Moreover, respecting grantor's intent and expanding grantor's power to influence over public charities would also complement the insufficient government supervision.However, it is quite difficult to assess and predict how effective the grantor's rights to claim performance, compensation, return, and access to information would be.

Foremost, it would be difficult for grantors to have direct control over public charities with a large number of small contributors, such as Amnesty International, Greenpeace, etc. In 1945, Wisconsin granted donors a right to claim for compensation by bringing a lawsuit, when there are more than ten donors. Nonetheless, there was not a single case that this right was exercised.[154] Maybe it is because most cases were settled through other means other than lawsuit. However, it is more likely that there were hardly any lawsuits regarding the matter. Why was not there any lawsuits then? Small contributors probably would have less incentive to invest time and money in gaining greater control over public charities. Most of the small contributors take the public charities' reputation into account when they make donations.[155] When they discovered that their donation is not used as they wished, most small contributors would stop making donations. In that sense, donor has most power the moment before they make donations. This could operate as an indirect control over public charities. Therefore, it will be more effective for donors to have more access to information and make them easier to donate, rather than giving them the right to bring an action in court. Ultimately, whether a grantor has power to control the public charity is a separate issue from how often the grantor would use the power once they have it, although the case would be different with major donors. In the United States, most lawsuits on donations were brought by large contributors.[156] It is the same with the decision made by the Korean Supreme Court in case 2011Da61370. It is more applicable in cases that have large contributors.[157]

[154]Hansmann, *supra* note 23, 610 et seq.

[155] This kind of reputation is established through advertising and there are cases that their reality is very different from what they advertise.

[156]*Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 669 A.2d 995, 997 et seq. (Conn. 1997); *Smithers v. St. Luke's-Roosevelt Hospital*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001).

[157]*See supra* note 137.