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Gunnar Duttge, Ji-Yun Jun (eds.)

## Comparative Law in a Changing World

Historical Reflections and Future Visions

Fünftes Symposium der Juristischen Fakultät  
der Georg-August-Universität Göttingen  
mit der Yonsei Law School (Seoul)



Universitätsverlag Göttingen



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Comparative Law in a Changing World

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## Preface

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Modern societies are undergoing an accelerated transformation that questions the organising and controlling function of the law in many fields of life. The legal system, with its claim to an adequate regulation of the conditions of life, is under considerable pressure to modernise. Giving in to this pressure, however, exposes the legal system to the danger of losing the connection to its value-related foundation. Thus the reflection on its historical foundations and cultural imprints gives rise to a certain degree of confidence, not to surrender to the arbitrariness of ad hoc demands based on the spirit of the zeitgeist, but to preserve the values of the existing law and to make it “weatherproof” for present and future challenges. However, this requires more detailed ideas and visions of what a future law could look like in postmodern societies.

The exchange of experience and assessment in international legal comparison is a valuable source of knowledge when developing new regulatory concepts. It is not uncommon for different legal communities to encounter similar or even the same questions and problems, but to which there is rarely only one way of answering them. For a decade by now, the Faculty of Law of the University of Göttingen has been in a continuous discussion with the Yonsei Law School (Seoul/South Korea) about both current and fundamental legal reform issues. In October 2018, a German-Korean symposium was held for the fifth time within this fruitful cooperation. The lectures and presentations on this occasion included highly important aspects of public environmental law, insolvency proceedings, criminal sanctions and criminal justice law, cybercrime and, more generally, the historical and philosophical foundations of the law. The main contributions are brought together in this volume and will be made available to the interested professional public.

The editors owe their thanks to all participants of the symposium for their active participation and in particular to the authors of this volume for the elaboration of the instructive manuscripts. Mr Dipl.-Jurist Niklas Pfeifer has rendered services to this volume by editing the in-depth contributions and preparing them for publication. The Faculty of Law of the University of Göttingen has kindly included this volume in its series of publications at the Göttingen University Press. May the good thoughts and innovative ideas of this volume be widely disseminated and heard.

Göttingen, Seoul, October 2019

# **Bartolus on the Beach: Rivers as Legal Persons, Now ... and Then**

*Nikolaus Linder*  
*University of Göttingen*

## **I. Vittel**

In spring 2018, the population of Vittel, a small town in the French Alps, had every reason to become angry and concerned. Vittel is best known for its mineral water, which is sold throughout the world under brand names such as Contrex and Vittel. These, in turn, form part of a larger group of brands, from Abyssinia Springs in Ethiopia to Zephyrhills in Florida/USA, all of which are owned by the world's largest bottled-water company, Nestlé Waters, based in Switzerland. Thanks to its brands Pulmuone Saemmul and Nestlé Pure Life, it is currently also the second-largest producer of such drinks in South Korea<sup>1</sup>.

Ever since the early 2000s, Nestlé Waters, which owns 3,000 hectares of land in the Vittel region, has extracted and sold up to one million cubic metres of water every year from the sources beneath the village, causing the groundwater table to sink by almost 20 metres. The deepest and most important of these sources has now almost been exhausted. However, rather than calling for the multinational company to lower its extraction rates, political representatives and industrial lobbyists have asked the inhabitants in the region to tighten their belts. They have also floated the idea of a pipeline which would bring in water from sources dozens of kilometres away. Whilst Nestlé has agreed to reduce the annual extraction by a quarter, i.e. by

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<sup>1</sup> Nestlé Water Brand List (2019).

250,000 cubic metres, the locals depend on water deliveries for their daily requirements. The inhabitants of one of Europe's most water-rich regions are thus forced to import the precious resource whilst their local water continues to be exported throughout the world<sup>2</sup>. For Western Europeans, this is a pretty novel, and somewhat disturbing, experience. Two exceptionally hot summers since have done little to allay their fears.

Vittel, however, is by no means the only place where the exploitation of water resources seems to have reached the limits of what can be deemed reasonable. In other regions, water shortages due to over-exploitation by large corporations have almost become the norm in recent years<sup>3</sup>. I would like to take up the Vittel case as a starting point for a short reflection on the evident overuse of environmental resources, the legal regimes that were historically put in place for their protection, and some very interesting recent developments.

## II. The rivers Whanganui, Ganges, Yamuna, ...

Water, obviously, has always been one of the most important and sought-after resources on our planet. Rules for its use and distribution were already recorded in the earliest legal texts, e.g. the *Codex Hammurabi* from around 1700 BCE, which defined the appropriate punishments for anyone who causes their neighbours' fields to flood by using inappropriate irrigation technology<sup>4</sup>. The most comprehensive of ancient European water laws was of Roman provenance. The Romans were the first to distinguish public from private bodies of water. Whilst the former allowed for public use, the latter was reserved for special use and individual ownership and was thus viewed as private property. So-called *riparian rights* could also be established with regard to land adjacent to a body of water such as alluvial land, known as *alluvio*, an island in a stream, *insula in flumine nata*, or a deserted riverbed, *alveus* in Latin. In the second century CE, the Roman lawyer Gaius formulated intricate rules for each of these cases which were ultimately laid down in the *Corpus Juris*, a large body of laws and doctrines compiled by Emperor Justinian the Great at the beginning of the sixth century CE<sup>5</sup>. Thus, wherever Roman law remained in use or was freshly introduced throughout medieval and early modern times, water rights were regarded as individual or collective property rights with non-human resources at the command of human actors. The same anthropocentric view applied to the disparate rules regarding

<sup>2</sup> Chaignon (2018); Chazan (2018); [Deutsche Welle] (2018); Lavocat (2018); Torgemen (2018); Supp and Weiss (2019).

<sup>3</sup> Gullberg (2013); Shimo (2018); Sainato and Skojec (2019); White (2019).

<sup>4</sup> *Code of Hammurabi*, Article 55: "If any one open his ditches to water his crop, but is careless, and the water flood the field of his neighbor, then he shall pay his neighbor corn for his loss", Pereira (2011) 12.

<sup>5</sup> The so-called *Lex Adea*, Dig. 41.1.7 pr. seqq., excerpted from Gaius' *Second Book of Everyday Matters, or Golden Knowledge*. Additional rules were established by land surveyors such as Frontinus, Agennius Urbicus, Hyginus and Siculus Flaccus, cf. Castillo Pascual (2012/2013).

water pollution and overfishing, as the protection of drinking water, fisheries and similar common goods mostly fell within the remit of local authorities<sup>6</sup>. With the introduction of large-scale industrial production regimes, water distribution was increasingly regulated by national legislation and international treaties. During the second half of the nineteenth century, increased water use and widespread pollution first led to enhanced enforcement of property rights and rules regarding liability and compensation, often followed by outright bans on harmful practices. Around 1900, the protection of water and other environmental resources had become an increasingly urgent matter of public law. For both jurists and the public at large, the “‘protection of nature’ via ‘ecological interests’”<sup>7</sup> now seemed to be the best solution to take control of the strained relationship between human society and its non-human living environment.

In recent times, this hierarchical and anthropocentric way of thinking has begun to change<sup>8</sup>. A few examples: Article 71 of the Constitution of Ecuador, introduced in 2008, gives nature “the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”<sup>9</sup>. Based on this provision, a court case was brought on behalf of the Vilcabamba River against the government in 2011, citing the massive environmental impact of a planned road project<sup>10</sup>. Three years later, the government of New Zealand and representatives of the Whanganui Iwi went a step further. In a ‘Deed of Settlement’, they declared the Whanganui River, the country’s third longest watercourse, an “indivisible, living whole”<sup>11</sup>. When the treaty was passed into national law in the spring of 2017, the river obtained “all the rights, powers, duties, and liabilities” of an individual<sup>12</sup> with two guardians, one appointed by the state, the other by the Whanganui Iwi, to act on its behalf<sup>13</sup>. In the same year, the Indian rivers Ganges and Yamuna were given the status of legal persons by the High Court of Uttarakhand, a decision which was, however, overruled by India’s Supreme Court<sup>14</sup>. In May 2017, the Colombian Constitutional Court declared the Atrato River in north-western Colombia a “subject of rights, which entails its protection, conservation, maintenance, and, in the specific case, restoration”<sup>15</sup>. In July 2019, Bangladesh granted all its rivers legal personhood<sup>16</sup>. In September of the same year, the Yurok Tribe of Northern

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<sup>6</sup> Marquardt (2003), 106 seqq., 136 seq., 219 seqq., 245.

<sup>7</sup> Teubner (2006), 515.

<sup>8</sup> Cf. Gorman (2013).

<sup>9</sup> Tanasescu (2017).

<sup>10</sup> Benöhr et al. (2017); Cano Pecharroman (2018); Gleeson-White (2018); Kauffman and Martin (2018).

<sup>11</sup> Hsiao (2012); Hutchison (2014) 179; Biggs (2017); O’Donnell and Jones (2018).

<sup>12</sup> Buder (2019); Freid (2019). Cf. also Charleix (2018); Warne (2019).

<sup>13</sup> Roy (2017).

<sup>14</sup> Kothari and Bajpai (2017); Benöhr et al. (2019); Biggs (2017). Cf. also Cano Pecharroman (2018); Gleeson-White (2018); Kalonaityte (2018); Kauffman and Martin (2018); Miller (2019); Rowe (2019).

<sup>15</sup> Benöhr et al. (2019). Cf. also Cano Pecharroman (2018); Gleeson-White (2018); O’Donnell and Horvath (2018).

<sup>16</sup> Samuel (2019); Westerman (2019).

California granted legal personhood to the Klamath River, making it the first river in North America to have the same legal rights as a human being, at least under tribal law<sup>17</sup>. Currently, further political and judicial initiatives are underway throughout the U.S. to secure legal personhood for water bodies such as Lake Erie in Michigan<sup>18</sup>, the Menominee River in Wisconsin<sup>19</sup> and the Colorado River<sup>20</sup>. Currently, the town of Frome in the county of Somerset in the UK is petitioning the government to grant the eponymous river Frome legal personhood<sup>21</sup>. What is more, this broad movement is not confined to rivers and other bodies of water: In December 2017, for example, New Zealand granted Mount Taranaki legal personhood<sup>22</sup>. There is also a growing number of endangered species – jaguars<sup>23</sup>, orcas<sup>24</sup>, certain primates<sup>25</sup> – whose continued existence is to be ensured in this manner<sup>26</sup>. A growing number of scholarly books and papers discuss aspects of substantive law<sup>27</sup>, procedural issues<sup>28</sup> as well as theoretical implications of this international trend toward legal personhood for non-human actors<sup>29</sup>, often with reference to Christopher D. Stone’s pioneering essay on the subject<sup>30, 31</sup>. And whilst some detractors condemn these initiatives<sup>32</sup>, others voice their support: “*Stop Fussing Over Personhood for Corporations and Chimpanzees. It’s Essential and Entrenched in the Law*”<sup>33</sup>.

It has become a truly global movement of environmental activism, one would like to think, within which legal considerations play a considerable role – and on the other hand a debate, from which one world region is conspicuously absent<sup>34</sup>: continental Europe, just the place where the town of Vittel is situated. Several reasons come to mind for this calculated self-restraint: the special emphasis on private property rights inscribed into neo-liberal legislation propelled by the EU, and the political influence of powerful players such as Nestlé, the planet’s largest food producer, to name but two. A third aspect may be found in legal culture, the rigidity of prevalent

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<sup>17</sup> Garcia-Navarro (2019); Smith (2019).

<sup>18</sup> McGraw (2019).

<sup>19</sup> Rowe (2019).

<sup>20</sup> Cano Pacharroman (2018); Kalonaityte (2018); Miller (2019).

<sup>21</sup> Green (2019).

<sup>22</sup> Roy (2017).

<sup>23</sup> Goñi (2019).

<sup>24</sup> Nowlan (2019).

<sup>25</sup> Yuhas (2008); Yuhas (2014); Yuhas (2015).

<sup>26</sup> Skopek (2013); Hegedus and Pennebaker (2014).

<sup>27</sup> Blake (2017); Exton (2017); O’Donnell (2018).

<sup>28</sup> Strack (2017); Miller (2019).

<sup>29</sup> Caillon et al. (2017); Kalonaityte (2017); Smith (2017); Youatt (2017), Gordon (2018).

<sup>30</sup> Stone (1972)

<sup>31</sup> Teubner (2006); Hsiao (2012); Caillon et al. (2017); Charpleix (2017); Gordon (2018); Cano Pecharroman (2018); O’Donnell et al. (2018); White (2018); Miller (2019).

<sup>32</sup> Horvat II (2019).

<sup>33</sup> Posner (2013).

<sup>34</sup> Cf., however, Teubner (2006).

legal concepts, many of which have their roots in the Roman legal tradition and are now deeply entrenched in national legal systems. Examples include the dogmatic distinction between persons and property (*persona/res*), the anthropocentric concepts of agency and representation associated with this doctrine and the categorical difference that is made between public and private law. Ironically, all these examples can be traced back, more or less, to the above-mentioned Gaius whose teachings have been regarded as a paragon of rational conceptualisation and presentation of legal matters since the Middle Ages<sup>35</sup>. They also stand firmly in the way of environmental personhood. Whilst some collective types of non-human actors such as foundations and corporations are commonly recognised and granted substantive and procedural rights in modern civil law, the old Roman dichotomy still holds true in most other cases, some recent and isolated changes with regard to pets and other animals notwithstanding<sup>36</sup>.

In the following chapter I would like to show how this reading of the Roman tradition is not without its alternatives; that Gaius' water law can, in fact, be understood as an astonishingly topical contribution to today's debate. To arrive at this interpretation, however, we must turn to one of the greatest minds in European legal history and a short vacation he spent on the banks of the Tiber close to his hometown in the summer of 1355.

### III. Bartolus on the beach

Bartolus was born in 1314 in Sassoferrato, a small town situated in the Marche region of central-eastern Italy. Raised in modest circumstances and educated by Franciscan monks, he began to study civil law at the age of fourteen in the nearby city of Perugia. From there he went to Bologna to attend the oldest and most distinguished university in Europe at the time. In 1334 he obtained his doctorate; he was barely 20 years old. Having served as a judge for a number of years, he became a professor of law at the University of Pisa in 1339, where Baldus de Ubaldis was among his students. From 1342 until his untimely death in 1357, Bartolus taught as a professor at the University of Perugia where he became a legendary scholar. In 1348 he was granted citizenship of Perugia for his legal services to the community.

A prolific writer, he penned extensive commentaries on several parts of the Digest and Codex and on a law concerning crimes against the crown (*lèse-majesté*) passed by Emperor Henry VII. Bartolus was also sought after as a legal expert and during his lifetime wrote almost 400 legal opinions. Last but not least, he was the author of many treatises covering a wide range of subjects from the law of proof to the legal significance of coats of arms to the foundations of political theory. Highly renowned during his lifetime, his writings continued to be indispensable works of reference for

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<sup>35</sup> Gaius' textbook *Institutiones* was the template for the eponymous part in Justinians' compilation. The original, written around 150 CE, was re-discovered by Barthold Georg Niebuhr only in 1816.

<sup>36</sup> § 90a German *Bürgerliches Gesetzbuch* (BGB), introduced in 1990.

jurists throughout Europe for centuries after his death. Whenever an explicit rule could not be found, legal practitioners followed the teachings of Bartolus, a practice which was, occasionally, even required by law. Without Bartolus, a famous saying went, no one could be a real jurist (*nemo jurista nisi bartolista*).

What is very obvious in all of Bartolus' works is his concern with the predominant legal and political issues of his time. A keen observer of the ascendancy of the Church and its rivalry with the Emperor, his writings on the theory of corporation were among the most important in secular law at the time; moreover, as an expert in the highly diverse legal landscape of the Italian city states, he became a pioneer in international private law. His treatise "On Rivers" (in Latin: *De fluminibus*), also named *Tyberiadis* due to its preoccupation with the river that flows through the Holy City of Rome, is a chief example of this theoretical and practical way of thinking. Having started out as a commentary on Gaius' water law, it developed into a wide-ranging reflection on the political predicaments of the time. For this, it has rightly been hailed as the "cornerstone on which he built his three most famous political and legal tracts"<sup>37</sup>, *De Guelphis et Gebellinis* ("On Guelphs and Ghibellines"), an analysis of political sectarianism in the city of Todi, *De regimine civitatis* ("On the Government of a City"), a critique of the government of the city of Rome, and *De tyranno* ("On Tyranny"), an account of the political problem of tyranny throughout Italy.

On closer inspection, *Tyberiadis* is unique in at least two respects: firstly, it presents us with the first application of the geometrical method (*mos geometricus*) of resolving a legal problem in European legal history, and secondly it is remarkable in its theoretical audacity. In a stunning feat of legal interpretation, Bartolus turns a question of property law into a matter of high political significance, deriving an original theory of popular sovereignty from his commentary on the legal (and metaphysical) properties of empty riverbeds.

The origins of the book lie in the spring of 1355 when Bartolus was appointed ambassador of the city of Perugia to the court of Charles IV in Pisa where the Emperor presented him with a special honour, the hereditary right to declare doctorate students of legal age. On his return to his hometown he resumed teaching. Soon thereafter he left for his estate in the Tiber Valley where, walking along the banks of the river, he discovered newly created alluvial deposits, recently formed islands and multiple courses of the river. He mentions this in his foreword:

*Thus, when I was resting from my lecturing and in order to relax, was travelling towards a certain villa situated near Perugia above the Tiber, I began to contemplate the bends of the Tiber, its alluvion, the islands arising in the river, the changes of the riverbed as well as a host of unanswered questions which I had come across in practice. There were also other matters, which came to mind from my own observance of the river.*

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<sup>37</sup> Cavallar (2004), 32.



*I began to consider in various ways what the legal position was, not believing that I would take it any further, lest not to spoil my vacation, the reason why I had come*<sup>38</sup>.

Bartolus was immediately fascinated by what he saw and, as a lawyer, began to ponder the legal questions posed by these discoveries. He did not conceal how much these questions vexed him and threatened the recuperation he was seeking in the countryside. One night, he had a dream vision, during which a man advised him to put his ideas down in writing and supplement them with drawings for clarification. Again, as recounted by Bartolus himself:

*And thus while I slept that night, I had a vision near dawn that a certain man, whose countenance I found gentle, came to me and he said the following: "Write down what you have begun to think about and since there is a need for illustration, provide mathematical diagrams: Look! I have brought you a reed pen to measure and draw circles as well as a ruler to draw lines and to construct diagrams"*<sup>39</sup>.

Bartolus, by his own admission, feared the ridicule of his own colleagues and of other experts since "there would be many more scoffers than supporters"<sup>40</sup>. Nevertheless, he began to write:

*I got up and trusting in the good will of Him who had promised that he would be with me in the execution, I started that work and named the whole treatise the Tyberiadis in order not only to discuss problems concerning the Tiber itself, but also many other problems occurring in the region of the Tiber. I reckoned that just as all laws originate from the city of Rome, in like manner, what is said about the Roman river Tiber, could also be applied to all other rivers*<sup>41</sup>.

And not just rivers; the rules that he developed should apply to all bodies of water, streams, ponds, lakes and even the oceans<sup>42</sup>.

The Tyberiadis owes its creation to Bartolus' meticulous attention to the peculiarities of the river. The work is divided into three sections: the first part deals with alluvial lands, the second with island formations and the third with the riverbed itself. As a learned jurist, Bartolus treats the issues outlined according to the rules and interpretative schemata of the Roman law of ownership and possession. His entire perception of the problems is predetermined by what Roman lawyers saw and described many centuries before his time. When dealing with alluvion, therefore, his main point of reference is the basic set of rules that applies to the resolving issues of ownership caused by three phenomena which typically occur in rivers and on which he gives his expert opinion. As mentioned above, these rules had mostly been

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<sup>38</sup> Du Plessis (1999), 35.

<sup>39</sup> Du Plessis (1999), 35.

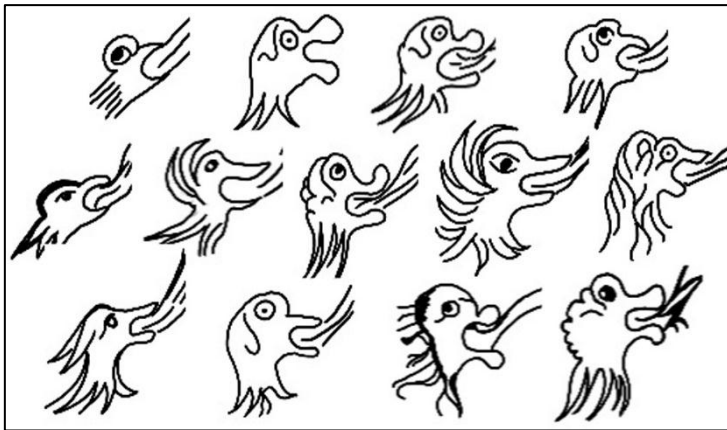
<sup>40</sup> Du Plessis (1999), 35.

<sup>41</sup> Du Plessis (1999), 35 seq.

<sup>42</sup> Du Plessis (1999), 115 seq.

formulated by his venerable precursor Gaius in the second century CE<sup>43</sup>. Today, problems of this kind are subject to quite similar rules, cf. e.g. § 946 of the German Civil Code (BGB) or Article 256 of the South Korean Civil Act.

What sets the Tyberiadis apart from other commentaries, however, is the fact that its author is not entirely convinced that the method of textual interpretation is sufficient on its own; in fact, he sees “many questions surrounding the divisions of alluvial accretions [for which] it is impossible to supply an explanation [...] without the matter being *visually* inspected”<sup>44</sup>. The method chosen by Bartolus of making visual inspection possible, i.e. the mixing of the academic disciplines of law and of Euclidean geometry, was quite unheard of in fourteenth century Europe<sup>45</sup>. Using planimetric design instructions and geometrical figures he explains how an equitable distribution of the alluvion among the individual landowners can be achieved. As the topographical conditions become more complicated throughout the text, the geometrical drawings, too, grow more intricate<sup>46</sup>. In part two, island formation is treated in quite a similar fashion. The Roman sources referenced here are again taken from Gaius’ *lex Adeo* and from a fragment written by the jurist Pomponius<sup>47</sup>. Here too, the drawings gradually become more intricate due to changes in the course of the river, changes to property boundaries and the assignment of the islands to the individual fields. Throughout the drawings, the Tiber is presented as various animals’ heads spewing water, all different, yet similar, representing the diversity of the river as an entity of its own (cf. fig. 1).



**Fig. 1. Faces of the Tiber as drawn by Bartolus (BAV, Barb. Lat. 1398). Copied from Cavallar (2004), 121 seqq.**

<sup>43</sup> Fn. 5 above.

<sup>44</sup> Du Plessis (1999), 59, my emphasis.

<sup>45</sup> Walther (1992), 890 et passim.

<sup>46</sup> The holograph with 22 geometrical figures drawn by Bartolus is preserved in the Vatican Apostolical Library in Rome (BAV, Barb. Lat. 1398) and reprinted in part in Cavallar (2004), 119 seqq.

<sup>47</sup> Dig. 41.1.30 (Pomponius libro 34 ad Sabinum).

Bartolus only managed to master these advanced methods of geometrical construction thanks to the help of “a certain brother Guido of Perugia”, as he writes, “a well-respected theologian, learned in many fields, who had been my tutor and was a teacher in geometry”<sup>48</sup>. He was also fully aware that this solution was most uncommon and likely to be derided. Nevertheless, he stood by his method, referring to none other than the great philosopher Aristotle:

*Let nobody regard this [i.e. the use of Euclidean geometry] as unsuitable since the whole of science is subservient to this principle. It is indeed architecture that sets to order all other matters as Aristotle states in book I of the Ethics*<sup>49</sup>.

*De alveo*, the third and final section of the Tyberiadis, continues with a commentary on paragraphs 5 and 6 of the lex Adeo concerning the division of an abandoned riverbed. It was completed after Bartolus’ return to Perugia and does not contain any geometrical drawings but simply refers to the schemata presented in the previous sections. Here, Bartolus ponders the case of a river having temporarily abandoned its course versus its permanent abandonment and the establishment of a new course. Whilst a temporary abandonment, Bartolus maintains, does nothing to change the river’s identity, a permanent one does indeed so. This particular feature sets rivers and other bodies of water apart from ordinary superstructures whose legal status is, according to the Roman sources, determined by the plots of land of which they are a part<sup>50</sup>. Bodies of water, on the contrary, are seen by Bartolus as masters of their own legal destiny. Insofar as they occupy their own ground, he considers them as legally independent, albeit neither as persons nor as corporations. In his commentary on the words “cuius et ipsum flumen” in Dig. 47.1.7.5, he writes:

*Note this strange [fact]: whilst all other superstructures become part of the soil they rest upon, here, indeed, the soil cedes [its rights] to the water. Thus, whatever is covered by a river, the sea or other bodies of water becomes an accessory of the aforementioned bodies which, in the first book, have been said to be in possession of the ‘right of alluvion’*<sup>51</sup>

Subsequently, Bartolus uses the so-called *anima forma corporis* doctrine to develop his argument, a very unusual thing for a medieval jurist to do<sup>52</sup>. Originating from Saint Thomas Aquinas’ study of Aristotelian ontology, this doctrine maintained that the soul was indeed *forma substantialis*, the ‘true’ (if only potential) requisite of human existence. In *De alveo*, Bartolus draws a bold comparison between the human soul and the Tiber, both in search of their bodily form (*forma accidentalis*). Just as the soul

<sup>48</sup> Du Plessis (1999), 36.

<sup>49</sup> Du Plessis (1999), 59.

<sup>50</sup> Dig. 41.1.26 pr. (Paul.); 43.17.3.7 (Ulp.); Gai. Inst. 2, 73. Cf. Wenger (1933).

<sup>51</sup> Bottrigari et al. (1576), 106: “Nota mirabile: Nam quicquid alias superimponitur, cedit solo: hic vero solum cedit aquæ; cui superimponitur, est speciale in flumine, & mari, & in ceteris aquis; quas in primo libro diximus habere ius alluvionis”.

<sup>52</sup> “I do not use Aristotle’s words as the jurists do not know them”: Walther (1991).

is in need of a human body in order to reach its true self, the river requires a suitable bed – the author, quoting Huguccio, calls it the “belly of the river”<sup>53</sup> – to thrive. The river, in other words, is like the human soul a potential essence in need of an accidental form to inhabit. This juxtaposition of humans and rivers is crucial for Bartolus’ further reasoning which subsequently becomes eminently political. For men, he maintains, again quoting Aristotle, are by nature political animals. Without the freedom to act politically, they lose their true nature. Therefore, in order to protect human nature from depravation it is necessary to establish the appropriate political systems and institutions for men to inhabit, whereas Bartolus believes that systems without political freedom treat their people as nothing but brute beasts.

The political nature of the *Tyberiadis* becomes even more evident if we view it in the context of Bartolus’ subsequent writings on political theory, “On Guelphs and Ghibellines”, “On the Government of the City” and “On Tyranny”. Two of the three treatises expressly reference the *Tyberiadis* with its bold analogy between the natural course of a river and the appropriate form of government and its insistence on a lawyer’s duty to visually inspect the matters before him, whether they be legal or political. As they may be regarded as stopovers on an imaginary journey along the Tiber from Perugia to Rome, the *Tyberiadis* sets the stage for this journey. Bartolus makes his first stop about forty kilometres downstream from Perugia in the city of Todi whose political situation he is familiar with, having served there as an assistant judge (*adessor*). In “On Guelphs and Ghibellines”, he analyses this with special regard to the role of political factions in the community, comparing them to riverbeds subject to intermittent changes: “The materiality of a river, flowing water, became a metaphor of human life: just as a river abandons its old bed and takes up a new one, so the men of Todi change their political affiliations”, as Osvaldo Cavallar maintains<sup>54</sup>. The ultimate destination of Bartolus’ voyage is the city of Rome, the “Capital of the World” (*caput mundi*) whose sorry state of affairs he discusses in “On the government of the City”. Rome, in turn, becomes the starting point for an even more comprehensive political assessment of ‘the whole of Italy’, the subject of his final treatise “On Tyranny”. Each stage of the voyage, thus

*[...] presented a peculiar set of problems: Todi and On Guelphs and Ghibellines, that of a government based on two warring factions concomitantly ruling the city; Rome and On the Government of the City that of baronial factionalism; And On Tyranny, [...] that of a whole region plagued by tyrants*<sup>55</sup>.

The *Tyberiadis*, far from being a mere debate on certain intricacies of property law, is certainly no less concerned with the political life of the city than the three later treatises. In fact, it is an essential component in Bartolus’ political writing. Guided by

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<sup>53</sup> Bottrigari et al. (1576), 99.

<sup>54</sup> Cavallar (2004), 54.

<sup>55</sup> Cavallar (2004), 57.

philosophical concepts he presents us with a vision of popular government whose model is the river in its abundance, its ‘multitude’. What can it teach us today?

#### IV. Liquidity

A multitude of individuals not only acting as the constituents but forming the true essence of a political community – this notion has, of course, long been present in the history of political ideas, pictured perhaps most memorably in the famous frontispiece of Thomas Hobbes’ *Leviathan*. Hobbes’ concept most certainly differs from Bartolus’ earlier vision. For one, there is no contract; the community, in Bartolus’ sense, has no legal constitution but is a basic product of the Aristotelian ‘nature’ of its constituents. Also, there is a mythical aspect to his notion of the Tiber, which is quite alien to the sober rationality of *Leviathan*. The intrinsic connection between the two concepts, however, is their association with water, the most elusive and least controllable of elements – *Leviathan* as described in the book of Job is not just any giant creature, but a sea monster that brings “the deep to [the] boil like a pot: [and] the sea like a pot of ointment”<sup>56</sup>. To be sure, Bartolus’ account of the Tiber is less terrifying. With its capacity to shape and change its own riverbed, however, his Tiber equally conveys the idea of an autonomous entity that is endowed with governing rights of its own<sup>57</sup>.

The particular feature of watery elusiveness, then, seems to be an essential (and somewhat uncanny) ingredient of the political. The earliest examples of centralised power structures were societies built around water resources with vast networks for their management and distribution. These societies were based on state cults, usually run by a caste of influential priests, and a powerful bureaucracy specialised in hydraulic engineering. This applies to the empires of ancient China, Mesopotamia and Egypt with their early written culture, large cities, a highly developed system of division of labour and advanced skills in mathematics, astronomy and engineering<sup>58</sup>. A certain uncanniness also underlies the concept of liquidity in Zygmunt Bauman’s theoretical framework. It denotes “the growing conviction that change is the only permanence, and uncertainty the only certainty”<sup>59</sup>. “What all these features of fluids amount to,” he goes on,

*... is that liquids, unlike solids, cannot easily hold their shape. Fluids, so to speak, neither fix space nor bind time. While solids have clear spatial dimensions but neutralize the impact, and thus downgrade the significance, of time (effectively resist its flow or*

<sup>56</sup> Job 41, 31-34 KJV.

<sup>57</sup> With reference to sources from the Digest: “For rivers perform the duties of those officials who designate the boundaries of land [i.e. imperial tax officials in the provinces with almost unlimited powers], and adjudge them sometimes from private individuals to the public, and sometimes from the public to private individuals” (Pomponius libro XXXIV ad Sabinum, Dig. 41.1.30.3).

<sup>58</sup> Wittfogel (1957), 23 seqq. et passim.

<sup>59</sup> Bauman (2013), viii.

*render it irrelevant), fluids do not keep to any shape for long and are constantly ready (and prone) to change it; and so for them it is the flow of time that counts, more than the space they happen to occupy: that space, after all, they fill but 'for a moment'.<sup>60</sup>*

Liquidity, thus, seems to be the permanent state of the world at the beginning of the twenty-first century. Obviously, this also concerns the realm of law where hybridity, transient variability and a strong sense of communicative interconnectedness have become increasingly difficult to ignore.

One of the concepts that may catch up with these developments is reflexive law, initially developed by Gunther Teubner, who has stressed the need for the legal system to develop evolutionary features and increased learning abilities due to its inescapable entanglement with society. More recently, when dealing with Bruno Latour's critique of the division between the human and the non-human, which he deems to have become "superfluous, immoral and – to put it bluntly – anti-Constitutional!"<sup>61</sup>, Teubner has written an article on the "Rights of Non-Humans"<sup>62</sup> which states that the personification of "other non-humans is a social reality today and a political necessity for the future"<sup>63</sup>. Personification, he further writes, is just an invitation to a hitherto unknown entity to participate in the conversation – and thus a highly effective means of coping with uncertainty<sup>64</sup>. When it is extended to animals and other non-human life forms by affording them legal standing and thus introducing them into human society, it serves to protect them<sup>65</sup>.

This, finally, brings us back to where we began, the town of Vittel and the water flowing beneath it. Where if not in a place like this might civil law finally feel obliged "to re-engineer its procedural and conceptual machines for producing the new inhabitants of the political ecology", as Teubner maintains? In view of such cases, is it not high time to "change in legal language from the semantics of 'protection of nature' [...] to 'rights' of living processes"<sup>66</sup>, to give the giant subterranean river at Vittel its own seat at the table of law? Time will tell. Let us just hope that it will not be too late.

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<sup>60</sup> Bauman (2013), 2.

<sup>61</sup> Latour (2012), 142. Cf. also Latour (2018).

<sup>62</sup> Teubner (2006).

<sup>63</sup> Teubner (2006), 497.

<sup>64</sup> Lorentzen as quoted in Teubner (2006), 504.

<sup>65</sup> Teubner (2006), 521.

<sup>66</sup> Teubner (2006), 515.

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# **Environmental Protection by Means of Public-Law Contract**

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## **I. Introduction**

Environmental protection is one of the most important topics on the political agenda and, since 1994, a constitutional obligation (Art. 20a Basic Law). Meanwhile, a differentiated system of legal rules deals with environmental protection. Those rules primarily cover substantive and procedural questions. The choice of the instruments is left to the discretion of the administration. This gives rise to the question what instruments are useful to ensure environmental protection by law. Hereinafter, the public-law contract will be examined for its suitability.

## **II. Public-law contract**

A public-law contract, also known as an administrative contract, is an enforceable agreement ruled by public law. In particular, instead of issuing an administrative act, the authority may conclude an agreement under public law with the person to whom it would otherwise direct the administrative act (§ 54 cl. 1 Administrative Procedure

Act). Compared to the administrative act, the public-law contract and the relationship between the contracting parties are characterised by cooperation.<sup>1</sup> At the same time, it is legally binding for both parties<sup>2</sup> – an advantage over other instruments characterised by cooperation.<sup>3</sup>

A legal relationship under public law may be constituted, amended or annulled by agreement (public-law) contract as far as this is not contrary to legal provision (§ 54 cl. 1 Administrative Procedure Act). Unless prohibited by law, the decision for the contractual form is at the discretion of the authority.<sup>4</sup> The consent of the other party is always required to conclude the contract.<sup>5</sup> Furthermore, a public authority cannot lawfully rescind its contract without the contractor's consent.<sup>6</sup> So, the parties meet on equal levels.

If the agreement under public law infringes upon the rights of a third party, it shall become valid only when the third party gives their agreement in writing (§ 58 para 1 Administrative Procedure Act). That way, the third party is adequately protected although there is no possibility to bring an appeal against the contract before the courts.<sup>7</sup>

There is a distinction between compromise agreements and exchange agreements. Both can be suitable for environmental law, depending on the particular purpose. The compromise agreement is a contract which eliminates uncertainty existing even after due consideration of the facts of the case or of the legal situation by mutual yielding (compromise), if the authority considers the conclusion of such a compromise agreement advisable to eliminate the uncertainty (§ 55 Administrative Act). An exchange agreement binds himself to give the authority a consideration may be concluded when the consideration is agreed in the contract as being for a certain purpose and serves the authority in the fulfilment of its public tasks (§ 56 Administrative Act).

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<sup>1</sup> *Maurer*, Der öffentlich-rechtliche Vertrag, DVBl. 1989, 798 (806); *Krebs*, Verträge und Absprachen zwischen der Verwaltung und Privaten, VVDStRL 52 (1992), p. 248 (254); *Achterberg*, Der öffentlich-rechtliche Vertrag, JA 1979, 356 (358).

<sup>2</sup> *Brüning/Bosesky*, in: Mann/Sennekamp/Uechtritz (ed.), VwVfG, § 54 para 41.

<sup>3</sup> *Maurer*, Der Verwaltungsvertrag - Probleme und Möglichkeiten, DVBl. 1989, 798 (806); *Brüning/Bosesky*, in: Mann/Sennekamp/Uechtritz (ed.), VwVfG, 1st ed. 2014, § 54 para 39.

<sup>4</sup> *Hoffmann-Riem*, Rechtsformen, Handlungsformen, Bewirkungsformen, in: id./Schmidt-Aßmann (ed.), Grundlagen des Verwaltungsrechts, vol. 2, 2nd ed. 2012, § 33 para 104; *Gurlit*, Verwaltungsvertrag und Gesetz, 2000, p. 21 ff., 252, 272; *dies.*, Verwaltungsvertrag, in: Erichsen/Ehlers (ed.), Allgemeines Verwaltungsrecht, 14th ed. 2010, § 30 para 1; *Burmeister*, Verträge und Absprachen zwischen der Verwaltung und Privaten, VVDStRL 52 (1992), p. 190 (209).

<sup>5</sup> *Bauer*, Verwaltungsverträge, Rechtsformen, Handlungsformen, Bewirkungsformen, in: Hoffmann-Riem/Schmidt-Aßmann (ed.), Grundlagen des Verwaltungsrechts, vol. 2, 2nd ed. 2012, § 36 para 79; *Schliesky*, in: Knack/Henneke, VwVfG, 10th ed. 2014, Vor § 54 para 54, *Müggenborg*, Formen des Kooperationsprinzips im Umweltrecht der Bundesrepublik Deutschland, NVwZ 1990, 909 (914 f.).

<sup>6</sup> Compared to §§ 48, 49 Administrative Procedure Act concerning the administrative act.

<sup>7</sup> *Mann*, in: id./Sennekamp/Uechtritz (ed.), VwVfG, § 58 para 2.



### III. Selection of instruments in environmental law

The selection of instruments in environmental law is defined by its characteristics. First, it should be noted that environmental law is geared to one purpose: the protection of the environment, defined as the natural foundations of life,<sup>8</sup> e.g. soil, water, air, animals, plants and their relation to one another.<sup>9</sup> The selection of instruments depends on their suitability for that purpose. In many cases, protection measures cannot be enforced.<sup>10</sup> In those cases, the aim is to motivate the addressees to be ecologically aware and to contribute to protecting the environment by personal choice.<sup>11</sup> Consequently, administrative instruments must be suitable to achieve a change in attitude and behaviour with regard to the environment.

Furthermore, the environmental law relates to a variety of areas of life and areas of law.<sup>12</sup> Accordingly, environmental law is ruled by different legal regulations which are independent from one another. As a logical consequence, there is no specific instrument for environmental law. The spectrum of instruments includes unilateral measures of regulatory law, planning instruments, information, instruments relating to the business organisation and cooperative instruments including the public-law contract.<sup>13</sup>

In Art. 20a, the German Basic law contains an obligation of the state for environmental protection, defined as the protection of the natural foundations of life and animals, but it only provides the aim without prescribing specific measures.<sup>14</sup> The selection of instruments depends on the respective matter, the aim, and the pursued objectives. So, it is reasonable to ask for the advantages of different instruments, in particular the public-law contract.

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<sup>8</sup> Equally worded, the consitutional terminology in Art. 20a GG, cf. BVerfGE 102, 1 (18); *Bericht der Gemeinsamen Verfassungskommission*, BT-Drucks. 12/6000, p. 65; *Badura*, Staatszielbestimmungen, Gesetzgebungsaufträge, 1983, para. 144.

<sup>9</sup> *Kloepfer*, Umweltrecht, 4th. ed. 2016, § 1 para. 54; *Ramsauer*, Allgemeines Umweltverwaltungsrecht, in: Koch, Umweltrecht, 4th. ed. 2014, § 3 para 1; *Scholz*, in: Maunz/Dürig, GG, 79. EL December 2016, Art. 20a para 36; *Jarass*, in: id./Pieroth, GG, 13th ed.. 2014, Art. 20a Rn 3; *Peters*, Art 20a GG - die neue Staatszielbestimmung des Grundgesetzes, NVwZ 1995, 555 (555). Cf. the legally protected goods laid down in § 2 para 1 UVPG as well as regarding Union Law Art. 191 para 1 AEUV.

<sup>10</sup> *Bundesregierung*, Leitlinien Umweltvorsorge, BT-Drucks. 10/6028, p. 11; *Kloepfer*, Umweltrecht, 4th ed. 2016, § 4 para 129; *Schmidt-Aßmann*, Das Allgemeine Verwaltungsrecht als Ordnungsidee, 2nd ed. 2006, 3rd. ch.. para 11

<sup>11</sup> Cf. *Bundesregierung*, Leitlinien Umweltvorsorge, BT-Drucks. 10/6028, p. 13; *Ramsauer*, Allgemeines Umweltverwaltungsrecht, in: Koch, Umweltrecht, 4th ed. 2014, § 3 para 54.

<sup>12</sup> *Kloepfer*, Umweltschutzrecht, 2008, § 1 para 20; *Eijfert*, in: Schmidt-Aßmann/Schoch (ed.), Besonderes Verwaltungsrecht, 15th ed.. 2013, 5th ch. para 7; *Sparwasser/Engel/Vofskuhle*, Umweltrecht, 5th ed. 2003, § 1 para 30. As per Union Law this has been materialised normatively Art. 11 AEUV; cf. *Appel*, Europäisches und nationales Umweltverfassungsrecht, in: Koch, Umweltrecht, 4th ed. 2014, § 2 para 43.

<sup>13</sup> *Kloepfer*, Umweltschutzrecht, 2008, § 4 para 3.

<sup>14</sup> *Isensee*, Staatsaufgaben, in: id./Kirchhof, HStR IV, 3rd ed. 2012, § 72 para 9; *Scholz*, in: Maunz/Dürig, GG, 79. EL December 2016, Art. 20a para 47.

In principle, the public-law contract is legally permissible in environmental law.<sup>15</sup> There is neither a prohibition to conclude a contract nor conflicting higher-ranking law. According to environmental law the public-law contract is even explicitly mentioned in § 3 para 3 Federal Act on Nature Conservation and Landscape Management. Amicable agreements are further provided in § 13 para 4 Federal Soil Protection Act. Nevertheless, the legal admissibility of the public-law contract is subject to a case-by-case decision.

The public-law contract is primarily characterised by the idea of cooperation.<sup>16</sup> The advantage of the public-law contract over the administrative act is that it is the result of negotiations between the parties. Both the citizen and the authorities can bring in their ideas, hold a debate and discuss all aspects.<sup>17</sup> So, the agreement reached in the contract is usually more balanced than a unilateral administrative measure. This has several benefits: The balanced weight of the arguments, the strengthening of the citizens' position and the dialogue with the authorities. All this promotes the acceptance of the administrative measure.<sup>18</sup> This helps to achieve a change in attitude and behaviour with regard to the environment and motivate the addressees to contribute to protecting the environment by personal choice.

At the same time, the public-law contract is legally binding and thereby a real alternative to the administrative act as well as to other comparative instruments, which are just a declaration of intent.<sup>19</sup> Consequently, the public-law contract is permitted and certainly suitable to be used in environmental law.

#### IV. Meaning of the environmental law principles

Specifying application areas requires the consideration of the principles of environmental law. The public-law contract fits into the traditional principles of environmental law which are the cooperation principle, the precautionary principle and the polluter pays principle.<sup>20</sup>

<sup>15</sup> *Ramsauer*, Allgemeines Umweltrecht, in: Koch, Umweltrecht, 4th ed. 2014, § 3 para 132; *Kloepfer*, Umweltrecht, 4th ed. 2016, § 4 para 1594.

<sup>16</sup> *Schmidt-Aßmann*, Das Allgemeine Verwaltungsrecht als Ordnungsideo, 2nd ed. 2006, 6th ch. para 113; cf. *Krebs*, Verträge und Absprachen zwischen der Verwaltung und Privaten, VVDtSRL 52 (1992), p. 248 (253); *Kahl*, Das Kooperationsprinzip im Städtebaurecht, DÖV 2000, 793 (794); *Schliesky*, in: Knack/Henneke, VwVfG, 10th ed. 2014, Vor § 54 para 16.

<sup>17</sup> *Achterberg*, Der öffentlich-rechtliche Vertrag, JA 1979, 356 (358).

<sup>18</sup> *Appel*, Frühe Bürgerbeteiligung und Vorhabenakzeptanz, in: Heckmann/Schenke/Sydow (ed.), Verfassungsstaatlichkeit im Wandel, 2013, p. 345; *Holznapel*, Konfliktlösung durch Verwaltungshandeln, p. 92 f.; *Gurlit*, Der Eigenwert des Verfahrens im Verwaltungsrecht, VVDStRL 70 (2010), p. 227 (244).

<sup>19</sup> *Bauer*, Verwaltungsverträge, Rechtsformen, Handlungsformen, Bewirkungsformen, in: Hoffmann-Riem/Schmidt-Aßmann (ed.), Grundlagen des Verwaltungsrechts, vol. 2, 2nd ed. 2012, § 36 para 79; *Schliesky*, in: Knack/Henneke, VwVfG, 10th ed. 2014, Vor § 54 para 54, *Müggenborg*, Formen des Kooperationsprinzips im Umweltrecht der Bundesrepublik Deutschland, NVwZ 1990, 909 (914 f.).

<sup>20</sup> Instructive the environmental report of the *Bundesregierung* from the year 1976, BT-Drucks. 7/5684, p. 8 f.; cf. *Kloepfer*, Umweltrecht, 4th ed. 2016, § 4 para 1; *Ramsauer*, Allgemeines Umweltverwaltungsrecht, in: Koch, Umweltrecht, 4th ed. 2014, § 3 para 24; *Sparwasser/Engel/Vofskuble*, Umweltrecht,

## 1. Cooperation principle

The idea behind the principle of cooperation is that the protection of the environment is the responsibility of the society and the public authorities.<sup>21</sup> For the selection of instruments, it follows a preference of cooperative measures including the public-law contract.<sup>22</sup> Cooperation is particularly important, if a change in attitude and behaviour with regard to the environment shall be achieved. In contrast to other cooperative instruments, the public-law contract can be used if a legally binding regulation is pursued, rather than just a declaration of intend.

One possibility is to provide incentives for supplementary environmental protection, for example, an agreement about subsidies.<sup>23</sup> In this way, protection measures which go beyond the legal obligations can be agreed on. The adequate instrument is the exchange agreement.

Furthermore, if a legal obligation shall be substantiated and enforced, a third party can be included in the contract and the previous negotiation process.<sup>24</sup> This not only increases acceptance of the agreement but also prejudices the likelihood of complaints. Compromise agreements as well as exchange agreements are conceivable. But the public-law contract reaches its limits if numerous people are affected.

On the other hand, the admissibility of the contractual form is limited by the interests of third parties including the interests of the public. If the public-law contract infringes upon the rights of a third party, the agreement in writing is necessary (§ 58 para 1 Administrative Act). Above all, the planning instruments and the environmental impact assessment require a public participation in procedural matters. The choice of the contractual form is still possible, but the public participation must be performed beforehand.<sup>25</sup>

In general, the mandatory public participation is based on the idea that environmental protection is a matter of the society as a whole. The European Union supports this idea. Therefore, the European law determines procedural rules which are legally binding for the member states and influence the choice of instruments. As an agreement between at least two or more parties, the public-law contract is not unrestrictedly suitable to deal with this much integrated approach. So it will depend on

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5th ed. 2003, § 2 para 11. From the Union Law perspective these principles are now enshrined in Art. 191 para 2 AEUV.

<sup>21</sup> *Bundesregierung*, Leitlinien Umweltvorsorge, BT-Drucks. 10/6028, S. 11; *Kloepfer*, Umweltrecht, 4th ed. 2016, § 4 para 129; *Schmidt-Aßmann*, Das Allgemeine Verwaltungsrecht als Ordnungsidee, 2nd ed. 2006, 3rd ch. para 11.

<sup>22</sup> *Kloepfer*, Umweltrecht, 4th ed. 2016, § 4 para 131; *Sparwasser/Engel/Vofskuble*, Umweltrecht, 5th ed. 2003, § 2 para 192; *Schmidt-Aßmann*, Das Allgemeine Verwaltungsrecht als Ordnungsidee, 2nd ed. 2006, 3rd ch. para 11; *Rengeling*, Das Kooperationsprinzip im Umweltrecht, p. 63 *Schliesky*, in: Knack/Henneke, VwVfG, 10th ed. 2014, Vor § 54 para 15.

<sup>23</sup> Cf. BVerwG, NVwZ 1990, 665 (666); *Schlette*, Die Verwaltung als Vertragspartner, 2000, p. 300.

<sup>24</sup> Cf. *Kloepfer*, Umweltrecht, 4th ed. 2016, § 5 para 1614; BeckOK UmweltR/Spieth, 43. Ed. 1.5.2017, BBodSchG § 13 para 30 zur Altlastensanierung.

<sup>25</sup> Cf. *Hoffmann-Riem*, Selbstbindung der Verwaltung, VVDStRL 40 (1982), p. 187 (211) concerning third parties in general.

whether, in this specific case, the contractual form can take into account all the affected interests and groups of persons.

## 2. Precautionary principle

The precautionary principle generally defines actions on issues considered being uncertain. It can be used by the law maker or the administration to justify discretionary decisions in situations where there is the possibility of harm from making a certain decision when extensive scientific knowledge on the matter is lacking. The environmental law is one field where the law has to deal with uncertain facts. In those cases, the compromise agreement is an appropriate measure because its function is to eliminate any uncertainty existing even after due consideration of the facts of the case or of the legal situation.

Intervention is only justifiable if there is a relevant probability of danger. On the other hand, there is an obligation to protect the environment and the public from potential dangers. Therefore, the administration must perform a risk assessment.<sup>26</sup> In cases where forecasts proved wrong, an adjustment is required.<sup>27</sup> The public-law contract has the potential to provide a large variety of adaptation options right from the start. The advantage over other instruments is the possibility to create individual adaption options. Moreover, the addressee can better assume that applicable legal measures will be taken. Even though the administrative act can be withdrawn, supplemented, extended or otherwise adjusted, the contract offers more flexible options.

In light of the far-reaching effects on third-party rights and interests, the competent authority must consider the relevant facts and circumstances.<sup>28</sup> Where, having exhausted all possible options, there is still a lack of knowledge, the public-law contract offers design possibilities which make sense in ecological and in economic terms.

<sup>26</sup> *Ritter*, Von den Schwierigkeiten des Rechts mit der Ökologie, DÖV 1992, 641 (643).

<sup>27</sup> *Hoffmann-Riem*, Rechtsformen, Handlungsformen, Bewirkungsformen, in: id./Schmidt-Aßmann (ed.), Grundlagen des Verwaltungsrechts, vol. 2, 2nd ed. 2012, § 33 para 88; *Appel*, Methodik des Umgangs mit Ungewissheit, in: Schmidt-Aßmann/Hoffmann-Riem, Methoden der Verwaltungswissenschaft, p. 334;

Cf. *Brüning/Bosesky*, in: Mann/Sennekamp/Uechtritz (ed.), VwVfG, § 54 para 41; BeckOK VwVfG/Spieth, 36. Ed. 1.4.2017, VwVfG § 55 para 37; *Neumann*, in: Stelkens/Bonk/Sachs, VwVfG, 8th ed. 2014, § 55 para 37.

<sup>28</sup> BVerwG, NVwZ 1990, 665 (666). BeckOK VwVfG/Kämmerer, 36. Ed. 1.7.2017, VwVfG § 54 para 112.

### 3. Polluter pays principle

According to the polluter pays principle, the party responsible for producing pollution must compensate the damage done to the natural environment.<sup>29</sup> One difficulty is that in many cases the responsible persons are not identified. In case of uncertainty about the responsibility,<sup>30</sup> a contractual agreement can help to justify the payment obligation.<sup>31</sup> For this purpose, the proven causal contributions can be used as a starting point. If both parties agree, a further obligation can be included in the contract.

In addition, a third party who has an interest in measures for the restoration and clean-up of the environment can become involved in the agreement which justifies the payment obligation. Such an inclusion would not be possible without a contractual basis or without permission.

## V. Conclusion

As a conclusion it can be noted that there is no general priority for the contractual form in environmental law but there are interfaces between the principles of the public-law contract and the principles of environmental law. Used in a targeted fashion, the public-law contract may serve as a useful instrument as regards environmental protection. So, the administration has to decide upon the suitability of the public-law contract on a case-by-case basis. Thereby, consideration must be given to the limits set by national and European law. In particular, if third parties or the public are affected by the public-law contract, frequently their rights cannot be sufficiently ensured.

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<sup>29</sup> *Bundesregierung*, Leitlinien Umweltvorsorge, BT-Drucks. 10/6028, p. 12; Umweltbericht der *Bundesregierung* aus dem Jahr 1976, BT-Drucks. 7/5684, p. 8; *Eifert*, in: Schmidt-Abmann/Schoch (ed.), *Besonderes Verwaltungsrecht*, 15th ed. 2013, 5th ch. para 12; *Ramsauer*, *Allgemeines Umweltverwaltungsrecht*, in: Koch, *Umweltrecht*, 4th ed. 2014, § 3 para 35.

<sup>30</sup> Regarding this problem *Ramsauer*, *Allgemeines Umweltverwaltungsrecht*, in: Koch, *Umweltrecht*, 4th ed. 2014, § 3 para 36.

<sup>31</sup> Cf. *Schlette*, *Die Verwaltung als Vertragspartner*, 2000, p. 302.



# On the Overdue Reform of Criminal Sanction Law for Adult Offenders

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## I. The deficient status quo

The German criminal law for adults has traditionally and currently known two main sanctions only: fine and imprisonment. (§§ 38 f., 40 ff. GCC). Due to the constitutional principle of last resort, there is the suspended sentence (§§ 56 ff. GCC) as an “intermediate stage” between fine and imprisonment. This serves to avoid the execution of the imprisonment with all its harmful consequences for the future social rehabilitation of the offender. This suspension is de jure only a modification in the practical execution of imprisonment and not an independent punitive sanction;<sup>1</sup> the suspended sentence is rather perceived as a surprising mildness of the punishing state authority than as a punishment without any malady being perceptible to their senses. There are already further forms of sanctions in the German juvenile law but the legislator has not been making use of these further forms of sanctions in the adult criminal law for offenders from the age of 21 onwards (cf. § 1 par. 2 GYCL) until today. However, this can help to adapt the law to the self-images and pedagogical insights of a modern society. The last big debate on sanction law involved the

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<sup>1</sup> Cf. BGHSt 31, 25, 28: “modification of the execution of sentence” “regardless of its independence as a special means for the offender’s outpatient treatment”.

implementation of the “reparation”-idea as the third option in sanction law<sup>2</sup> in the early 1990s due to the international victim protection movement.<sup>3</sup> This debate has finally led to the introduction of the “victim-offender mediation” as a modern alternative to the traditional judicial access (“restorative justice”) with the prospect of a mitigation or even remission of punishment if the offender compensates the tangible and/or the intangible damage that was caused by him. (cf. § 46 GCC)<sup>4</sup>. Further ideas of reformation concerning alternative forms of sanctions below imprisonment were not seized on. The latest debate at the 72nd German Lawyers Conference was only about whether the judge’s discretion regarding the sentencing should be limited by sentencing guidelines in the future (which was rejected by the majority)<sup>5</sup>.

This image of a traditional “keep it up” is contrary to the undeniable realisation that, when it comes to small or intermediate crime, the punishing authority’s possibilities of responding are – on balance – reduced to a fine as the only option. This “monoculture”<sup>6</sup> in German sanctions law is hardly suitable to respond to the diversities of offenders and crimes in an appropriate and accurate manner. This could only be done through paroles which obligatorily require a conviction to imprisonment (§§ 56 ff. GCC) or an early abatement of action to conditions or instructions (cf. § 153a GCPC) with the waiver of a conviction.<sup>7</sup> Last, it was exactly this gap in the range of legal options which induced the German legislator to open the temporary driving ban (cf. § 44 GCC) for offences beyond traffic.<sup>8</sup> Because of the high importance and prestige of individual mobility through an own car, the driving ban is supposed to be an effective legal measure to teach somebody a lesson. Thus, it is

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<sup>2</sup> Fundamental: *Baumann* i.a. (ed.), *Alternativ-Entwurf Wiedergutmachung*, 1992; *Schöb* (ed.), *Wiedergutmachung und Strafrecht*, 1987 und Gutachten zum 59. Deutschen Juristentag, 1992, C 54 ff.; s.a. *Rössner*, in: *Marks/id.* (ed.), *Täter-Opfer-Ausgleich – Vom zwischenmenschlichen Weg zur Wiederherstellung des Rechtsfriedens*, 1989, S. 7 ff.; against the acknowledgement of a “third lane”: *Hirsch*, *Armin Kaufmann-GS* 1989, pp. 699 ff. and *ZStW* 102 (1990), 534, 537 ff.

<sup>3</sup> On the international “renaissance of the victim” in more detail *Eser*, *Armin-Kaufmann-GS* 1989, pp. 723 ff.

<sup>4</sup> A retrospective overview of the development in *Hartmann*, *Kerner-FS* 2013, S. 591 ff.; On the legal reality in more detail *Rössner*, *Böttcher-FS* 2007, pp. 357 ff.; On the internationality *Dünkel*, *Rössner-FS* 2015, pp. 499 ff.

<sup>5</sup> [https://www.djt.de/fileadmin/downloads/72/181130\\_djt\\_internet\\_72\\_beschluesse.pdf](https://www.djt.de/fileadmin/downloads/72/181130_djt_internet_72_beschluesse.pdf) (pp. 19 ff.); in detail *Kaspar*, *Gutachten C zum 72. DJT*, 2018, esp. C 76 ff., 82 ff.

<sup>6</sup> *Duttge*, in: *Höfler* (ed.), *Brauchen wir eine Reform der freiheitsentziehenden Sanktionen?*, 2015, pp. 111, 112.

<sup>7</sup> On the serious concerns regarding the theoretical legitimization against § 153a GCPC – also in virtue of the presumed innocence – more detailed *Brüning*, *ZIS* 2015, 586 ff.; judging milder *Beulke*, in: *Murmann* (ed.), *Recht ohne Regeln? Die Entformalisierung des Strafrechts*, 2011, pp. 45 ff. and v. *Heintschel-Heinegg-FS* 2015, pp. 33 ff. (with a reform proposal); on the shimmering legal nature of the “condition” see *Duttge*, *Beulke-FS* 2015, pp. 689 ff.

<sup>8</sup> Regulated by the law for a more effective and practical configuration of the criminal procedure from 17.8.2017 (BGBl. I, 3202).



suitable as some sort of “imprisonment of the modern age” (“driving imprisonment”)<sup>9</sup> to achieve the desired preventive effects on the offender and the whole society better than a sole fine.<sup>10</sup> For the legislator, it was yet important to maintain the previous classification as a mere “additional penalty” so that it can only be imposed in addition to the main penalty (usually to a fine). Thereby, the legislator wanted to counteract the constitutional concern regarding a possible unequal treatment of offenders because not everyone owns a car or has a driver’s licence.<sup>11</sup> It is hard to overlook the dominant “conservative” stand of the legal policy (beyond the reshuffles in the preventive detention law which were recently following in quick succession)<sup>12</sup> because the sanctions including the fine (notwithstanding the daily fine system)<sup>13</sup> affect every offender with a different toughness. This will also apply to the nevertheless great lack of intelligent alternative options *de lege lata*. This is all the more surprising, as nature and scope of penal sanctioning yet have to take the effects into account “which the sentence can be expected to have on the offender’s future life in society” (§ 46 par. 1 s. 2 GCC). The established sight that the current sanctions law has proved to be successful *cum grano salis*,<sup>14</sup> is not able to mask how limited the sanctioning options for German criminal judges actually are. The German penal law is lagging far behind the international trend to diversify the types of punishment.<sup>15</sup>

## II. More courage in innovations in sanctions law!

1. As early as 2000, a Reform Commission founded by the former German minister of justice stressed the necessity of adjusting the criminal sanctions system to “the changed social, technical and crime policy conditions”<sup>16</sup>. The reason behind this was the widely indisputable insight of the harmful effects of an imprisonment, such as social exclusion and isolation, the radical legal incapacitation in the penal institution<sup>17</sup>

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<sup>9</sup> Köhler, *Strafrecht Allgemeiner Teil*, 1997, Ch. 10, III., 5. (p. 658).

<sup>10</sup> BT-Drucks. 18/11272, pp. 1, 14 ff. and BT-Drucks. 18/12785, p. 44.

<sup>11</sup> See BT-Drucks. 18/11272, p. 17: “better dosing of the overall sanctioning”; on the contrary against a configuration as a primary sentence already *Schöbich*, DJT-Gutachten (fn. 2), C 119 f.; even as an alternative to the imprisonment endorsed by *Roxin*, *Zipf-GS* 1999, pp. 135, 146.

<sup>12</sup> Instead of many esp. *Jehle*, in: Höffler (fn. 6), pp. 65 ff.; on this topic see the articles in: *Kaspar* (ed.), *Sicherungsverwahrung 2.0 – Bestandsaufnahme – Reformbedarf – Forschungsperspektiven*, 2017.

<sup>13</sup> On this crit. *Verral*, *Bonner Rechtsjournal* 2014, pp. 135, 136.

<sup>14</sup> E.g. *Diinkel/Morgenstern*, *Juridica International* VIII/2003, 24, 25.

<sup>15</sup> Like that firmly e.g. *Kubiciel*, *Fahrverbot oder Gemeinnützige Arbeit für Steuersünder?* (Kölner Papier zur Kriminalpolitik 3/2014), pp. 5 and 7.

<sup>16</sup> *Kommission zur Reform des strafrechtlichen Sanktionensystems*, Abschlussbericht, 2000, pp. 12 ff. (<https://www.bib.uni-mannheim.de/fileadmin/pdf/fachinfo/jura/abschlussber-der-komm-strafreform.pdf>).

<sup>17</sup> *Goffman*, *Asyle. Über die soziale Situation psychiatrischer Patienten und anderer Insassen*, 1973 (Originalausgabe 1961).

and the “risk of criminal infection” through other inmates. In reality, the aim to achieve a “warning” and “improvement” of the offender for a future “legal preservation” (§ 56 I GCC) remains a *fata morgana*<sup>18</sup> frequently. At least in the basic trend it applies even more, the longer the imprisonment’s duration lasts. In its core the German criminal law still is an “imprisonment-law”, because there is no offence without the possibility of imprisonment. Criminal policy has been focusing on the minimisation of imprisonments, even more: if possible, on the waiver of it, (cf. § 47 GCC) since decades. Important factors for this development are, on the one hand, the constitutional and humane demand for strict compliance with the principle of proportionality, on the other hand, politicians’ unwillingness and incompetence to guarantee the financing of a penal system that is orientated towards treatment and learning opportunities. Therefore, the reality of imprisonment is basically one of nonsense, frustrating detention. Statistically, there are 46,690 inmates in Germany at the moment (not including the preventive detention and the youth penitentiary system); the tendency has been decreasing for years.<sup>19</sup>

Given that, the fine has become the most important option of punishment: Latest statistics show a total number of 533,000 fined (adult) offenders per year<sup>20</sup> – 16 times more than imprisonments (2017: 33,068)<sup>21</sup>. Although the current system calculates the fine from the offender’s daily rate of income (cf. § 40 par. 2 GCC), there is a significant part of the society, which is not solvent at all. In this case – provided that none other “pays the bill” (and foils the sanctions purpose thereby)<sup>22</sup>, there is no more room for the intended forced reduced consumption: The at-risk-of-poverty rate lies at 16.1 % of the German total population<sup>23</sup>. Concurrently, these 16.1 % are over-represented regarding the fined offences against property (especially regarding shoplifting). But why fine someone who committed a crime out of economic difficulties when this fine just increases the existential problems and therefore perhaps leads to additional offences which then forces the criminal justice to choose between

<sup>18</sup> Cf. *Jebke/Albrecht/Hobmann-Fricke/Tetal*, Legalbewährung nach strafrechtlichen Sanktionen, 2016, p. 21: “The rate of relapse for ex-convicts is higher than for offenders who are sentenced to ambulant”.

<sup>19</sup> *Statistisches Bundesamt*, Rechtspflege: Strafvollzug (technical series 10, sequence 4.1.), 2018, p. 11.

<sup>20</sup> *Statistisches Bundesamt*, Strafverfolgung 2017 (<https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Rechtspflege/Tabellen/RechtskraeftigveurteiltePersonen.html>).

<sup>21</sup> *Ib.*

<sup>22</sup> Cf. *Streng*, Strafrechtliche Sanktionen, 3rd. ed. 2012, margin no. 122: “systemic weakness”; following the prevailing opinion however not within the meaning of § 258 par. 2 GCC: BGHSt 37, 222 ff.; *Fischer*, StGB, 65th ed. 2018, § 258 margin no. 32; MK-StGB/*Cramer*, 3rd. ed. 2017, § 258 margin no. 35; SSW/*Jahn*, Strafgesetzbuch, 3. ed. 2016, § 258 margin no. 44; different view. *Hillenkamp*, Lackner-FS 1987, pp. 455 ff.; differentiating Schönke/Schröder/*Hecker*, Strafgesetzbuch. commentary, 30th. ed. 2019, § 258 margin no. 29.

<sup>23</sup> *Statistisches Bundesamt*, Lebensbedingungen, Armutsgefährdung 2017 ([https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/EinkommenKonsumLebensbedingungen/LebensbedingungenArmutsgefahrdung/Tabellen/EUArmutsschwelleGefahrdung\\_SILC.html](https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/EinkommenKonsumLebensbedingungen/LebensbedingungenArmutsgefahrdung/Tabellen/EUArmutsschwelleGefahrdung_SILC.html)).

Scylla and Charybdis – inappropriate repetition of fines or infliction of a rather unreasonable imprisonment (if necessary, at first on parole to avoid the bad effects of imprisonment)?

Furthermore, there is the possibility of replacing the amount of one day of the fine by one day of imprisonment (§ 43 GCC). Necessarily, this leads to short-term imprisonment which should be avoided because of their strongly questionable use (§ 47 GCC). Out of all fined offenders, there are approximately remarkable 10 % unenforceable (which is likewise at least 10% of all arrested persons)<sup>24</sup> and the tendency is increasing steadily. For that matter, it does not depend on possible “fault” of the offender. Therefore, even a destitution which occurred without the offender’s fault can cause an imprisonment.<sup>25</sup> Moreover, attention must be paid to the fact that most of the fines are not imposed at an oral hearing, but through a written procedure by the public prosecutor’s penalty order (§ 407 GCPC). However, it has been known for a long while that the calculation of the suspect’s economic situation (contrary to No. 14 of the German Guidelines for Criminal Proceeding and Fine Proceeding (RiStBV)) is in deficient and often not realistic.<sup>26</sup> In other words, people have to endure an inappropriate sanction just because criminal justice is unable to impose a proper one. Additionally, the costs for the general public are out of proportion, for example, if the matter is a petty theft or a fraud of moderate extent and the treatment of one inmate costs around 100–150 EUR per day.<sup>27</sup>

2. This disillusioning discovery leads to the perspective follow-up question, which requirements would have to be met by a better way of criminal sanctions regarding their general purpose. The sanctioning reaction by the legal community proves to be – despite every “farewell songs” of scientific (“purposively rational”) inspired doc-

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<sup>24</sup> As the calculations by *Villmow* on basis of a statistics on convicts and criminal prosecution and an assumed average duration of detaining of 30 days: Geldstrafen – Gemeinnützige Arbeit – Ersatzfreiheitsstrafen: Aktuelle Probleme und Reformbedarf, speech from 16.10.2016, p. 4 ([http://www.sbh-berlin.de/wp-content/uploads/2017/10/20171016Villmow\\_Vortrag\\_Folien.pdf](http://www.sbh-berlin.de/wp-content/uploads/2017/10/20171016Villmow_Vortrag_Folien.pdf)).

<sup>25</sup> Cf. e.g. *Eisenberg/Kölbl*, Kriminologie, 7th. ed. 2017, § 33 margin no. 14: The frequency of executing the imprisonment as an alternative correlates with a low professional position resp. unemployment.

<sup>26</sup> See already *Heinz*, Müller-Dietz-FS 2001, p. 271, 297; *Kintzi*, DRiZ 2001, 198, 200: “Reality lags far behind the owed requirements.”

<sup>27</sup> The ministry of justice of Hessen calculated the average cost for a convict (without building costs and real investments) to the amount of 123,29 € per day for the year 2017 (Justizvollzug in Hessen, 2017, p. 49).

trines of prevention – admittedly can be seen as the reason of punishment considering the (culpable) interfering with society’s peace;<sup>28</sup> however, the particular sentence should above all respect special preventive aspects.<sup>29</sup> This is because the desired integrative effect for the offender is simultaneously the key to the question about his ongoing dangerousness and a successful resocialization is also having a social integrative effect on other risk carriers. Therefore, an imprisonment, which isolates the offender from society and the social relations taking place here and hence prevents positive experiences *within a social role*, cannot lead to a successful resocialization. Otherwise, there wouldn’t be such a strong need for support during the release process (cf. § 15 German Penal Systems Law [StVollzG]) of the inmates, namely by successively easing the detention, day-releases, special leave, helping the inmates gain an economic and occupational base (cf. § 74 German Penal Systems Law [StVollzG]) and social care after the release (supervision of conduct, cf. §§ 68 ff. GCC)<sup>30</sup>: because offenders have only the opportunity to simulate legal behaviour within the prison but because of the lack of real chances to fall back into the former, criminal behaviour, their learning process will never be under real life’s conditions. This is why such a sanction has only a positive effect on the public security interest because, in their reality, the offenders are removed in a pleasant way. However, there is a difference between strengthening the general *feeling* of security and *actually improving* security since the offender will be released at some point in the future for which there is a constitutional entitlement (out of art. 2 par. 1 in conjunction with art. 1 par. 1 from the Basic Law of the Federal Republic of Germany [GG]) in Germany.<sup>31</sup> The fact that the only interesting aspects for the public are the ideally low costs and the invisibility of the penal system is “depressing” for everyone, “who is defenceless against this system”<sup>32</sup>: But how should something good evolve out of this for the future?

Innovation should remember that an offence is generally defined as behaviour that violates substantial social rules and should be (basically) punished as a matter of public interest. Considering that the “social damage”<sup>33</sup> caused (or attempted) by the offence always – no matter what actual consequences – concerns society as a whole, the sanctions logically necessary also need to be focused on a “compensation” of

<sup>28</sup> Just see *Kühl*, Eser-FS 2005, pp. 149 ff.; *Pawlik*, in: Schumann (ed.), *Das strafende Gesetz im sozialen Rechtsstaat*, 2010, pp. 59, 78 ff.; *T. Walter*, *Strafe und Vergeltung – Rehabilitation und Grenzen eines Prinzips*, 2016; on the sociality which has to be taken into account in a legal community that is characterized by legal freedom more detailed *Kahlo*, Hassemer-FS 2010, 383 ff. and *Zaczyk*, Otto-FS 2007, pp. 191 ff.; on the relevance of the interest in satisfaction on the victim’s side primarily *Hörnle*, JZ 2006, 950 ff. and in: Neumann-FS 2017, pp. 593, 598 ff.

<sup>29</sup> On this view already *Duttge*, in: Schumann (fn. 27), pp. 1, 13 f.: “prevention within the repression”.

<sup>30</sup> On the negligible “likelihood to succeed” of the relapse aversion see though *SSW/Jebke*, Vor § 68 margin no. 7 and in detail *Jebke/Albrecht/Hobmann-Fricke/Tetal* (fn. 18), pp. 77 ff.

<sup>31</sup> Basically BVerfGE 35, 202, 235 ff.; 45, 187, 238 f.

<sup>32</sup> *Fischer*, *Über das Strafen*, 2018, S. 354.

<sup>33</sup> *Jakobs*, *Amelung-FS 2009*, pp. 37 ff., 46.

the negative effects for the public generality.<sup>34</sup> But the population cannot derive any positive benefit from the expensive custody with doubtful chances of future legal behaviour. Fines (in case of their collectability), however, at best eke out the nation's budget and do not restore the peace under law.<sup>35</sup> At the same time, there are a lot of socially important tasks, which are rarely covered by professionals which means that they suffer from a high lack of staff and are in urgent need of support: caretaking of elderly or disabled persons, postal delivery, environmental care (for instance, in gardening and landscaping) and in animal shelters, museums and in charitable institutions, cleaning of big cities and generally helping elderly, who need assistance in our modern, more and more technical society; this enumeration can be easily extended by many other working fields on second thought. If offenders were not to be "locked up" any more but to be given the opportunity to compensate their guilt – as long as it is not too grave – in a social way, there would not only be a positive effect for the society but also a reintegrating impulse for the particular offender. Undertaking socially relevant tasks would strengthen the offender's responsibility, which was defined as the central goal of custodial measures by the draft law "design of an alternative German Penal System Law" almost 45 years ago.<sup>36</sup>

Therefore, the offender does not owe his "invisibility to the public" and does not deserve his (transitionally) "social death" but a socially relevant, active compensation which does not exclude a – tangible and/or intangible compensation in favour of specific crime victims. The opportunities for this must not be stigmatising at all. Moreover, there should be varied possibilities considering the broad range of capabilities of different offenders. Additionally, there should be some "promotion opportunities" for the purpose of encouraging intrinsic motivation. It is not necessary to explain in more detail that the real confrontation of the society with offenders can also lead to a reduction of prejudices and naïve "black and white" images. Overall, it would have a positive effect on the of dealing with crime and delinquents which is borne by rationality and humanity. Not least, it should be called to mind that the legal policy has already made a specific attempt 15 years ago to substantially enlarge the scope and practical relevance of community service for the reasons outlined above.<sup>37</sup> In terms of a "reasonable addition to the victim-offender mediation", the

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<sup>34</sup> Already *Duttge*, in: Schumann (fn. 27), pp. 1, 10; s.a. *Kunz*, *Streng-FS* 2017, pp. 377, 379: "healing the breach of law" for the purpose of a "pacifying effect on the sanctioned offender as well as on the public community".

<sup>35</sup> See also crit. *Meier*, *Strafrechtliche Sanktionen*, 4th. ed. 2015, p. 463.

<sup>36</sup> Cf. *BT-Drucks.* 7/918, p. 45: "...to make clear that the treatment should not turn the convict into a mere object of state efforts but to enable him to act self-responsibly and in harmony with legal regulations"; crit. against this *Baumann u.a.* (*Arbeitskreis deutscher und schweizerischer Strafrechtslehrer*), *Alternativ-Entwurf eines Strafvollzugsgesetzes*, 1973, p. 55: "[...] because the ability to social responsibility can no longer be the legitimate purpose of an public penal system and because the execution has to be under the aspect of subsidiarity and prohibition of excessiveness".

<sup>37</sup> The following cites are taken from *BT-Drucks.* 15/2725, p. 17; previously already a draft law of the Bundestag regarding the introduction of community service as a crime sanction in combination with

community service brings the offender into “contact with positive role models namely humans who render a service for the community as part of their volunteering or full-time job.” Moreover, the community service would bring about the control of the delinquent of the mostly deficient “structuring of the daily routine”

3. There are fundamental objections against a widening of the range of sanction types: On the one hand, as critical voices emphasise, there is a lack of any factual connection with the offence. On the other hand, any coercion to “community service” is said to be unconstitutional, because article 12 sections 2 and 3 of the German constitution would only allow a general, equal service obligation or a dependent supplement to imprisonment. However, the former concern can be easily dissolved because “mirroring punishments”<sup>38</sup> belong to the past at the latest since the era of Enlightenment. A modern sanction system nowadays no longer punishes theft or perjury, insult (in the past also the blasphemy) and bodily harm with chopping of the perpetrator’s hand, cutting out his tongue and corporal punishment. The fines and imprisonment imposed today are not specifically (“internally”) linked to the actions sanctioned by them. Rather, they intend to enable an appropriate answer to the committed injustice for all possible offences. If the legislator is no longer concerned about generalising the driving ban’s field of application far beyond road traffic offences (cf. § 44 par. 1 s. 2 GCC reworked edition)<sup>39</sup>, such concerns cannot be formulated convincingly regarding community service.

The constitutional problem has largely lost its sharpness because the Federal Constitutional Court of Germany interprets the central terms “obligation to work” or “forced labour” in a restrictive manner: According to the court, the creators of the constitution wanted to prohibit the inhuman “total appointment order”<sup>40</sup> that was practised during the NS era, and also any other form of “labour enslavement”<sup>41</sup>. At the same time, however, measures which do not violate human dignity in rule of law systems and which can also exist before the constitution, should not be deprived of their legal basis. In the “General Editorial Committee” of the Parliamentary Council, from whose draft of 1949 the German constitution has emerged, there is explicit mention of the detention and the “welfare education”, provided that these

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or as an alternative to the fine: BT-Drucks. 14/762; also supporting this already *Dölling*, ZStW 104 (1992), 259, 281 f.

<sup>38</sup> Which “sensually and externally recognizable express in the manner and in the execution [...] the malady, through which the punishment was forfeited” (*Brunner*, Deutsche Rechtsgeschichte, vol. 2, 1892, pp. 588 f.).

<sup>39</sup> Already above. fn. 8 ff.; crit. *Zopfs*, DAR-Extra 2017, 737: covered introduction of a “third primary sentence”; in detail *Lüthge/Klein*, Recht und Politik 2017, 440 ff.; regarding the eligible offender groups *Schöck*, NStZ 2018, 15 ff.

<sup>40</sup> An overview of the concept and history: <https://www.zwangsarbeit-archiv.de/zwangsarbeit/zwangsarbeit/zwangsarbeit-2/index.html>. (with further citations).

<sup>41</sup> BVerfGE 22, 380, 383; 74, 102, 116 f.; 83, 119, 126; s. also *Gubelt*, in: v. Münch/Kunig, Grundgesetz-Kommentar, vol. 1, 5th. ed. 2000, Art. 12 margin no. 77: “in close relation with the respect of human dignity”; *Winkler*, in: Friauf/Höfling (ed.), Berliner Kommentar zum Grundgesetz, as of: 47. additional delivery 2015, Art. 12 margin no. 130.

measures are based on a judicial decision.<sup>42</sup> From this, the Federal Constitutional Court concluded on the basis of a historical-teleological interpretation, that not “every work a person is required to perform against his or her will” counts as prohibited “forced labour” within the meaning of article 12 sections 2 and 3 of the constitution. “Limited work obligations [...] which are imposed on the person concerned by a judge within the framework of a [...] legally-formed and graduated system of reaction and sanction as a result of a criminal offence committed by the person concerned” are exempt from the scope of the constitutional ban. This is because such “limited work obligations” “do not render the person concerned the object of an unlimited act of power and are also not an expression of a degradation or discrimination of the individual”<sup>43</sup>.

Thereby, it is the concrete design of the sanction that is of decisive importance and not the dogmatic classification as a secondary or principal penalty, term of probation or measure of improvement and security. No type of forbidden “forced labour” are especially those work obligations that can be “justified in the light of the sovereign duty of rehabilitation” by trying to impart the value of regular (permitted) working activity to the convict.<sup>44</sup> Whether there is a need for a “consent” of the person concerned, as some authors think,<sup>45</sup> appears to be rather doubtful: Because the desired “human rights protection” will hardly be achieved by forcing a formal consent, which can never be truly “voluntary” in the context of an otherwise imminent fine or imprisonment. Otherwise, the in virtue of the “principle of autonomy” legitimised “free labour” could merely be classified as a “punishment”. In context of medicine law, especially in the field of medical research, there is long known that the protection against “objectification” to the benefit of third parties requires a package of precautions of which the proband’s consent has proven to be neither sufficient nor necessary.<sup>46</sup> The insistence of the requirement of consenting should basically reflect the dark experiences of the past and attribute a not justified self-security potential to the right of self-determination.

In favour of the introduction and differentiated design of “community service” as an independent primary sentence, one must emphasise the high level of acceptance in the German population and the fact that this sanction has already been

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<sup>42</sup> Stellungnahme des Allgemeinen Redaktionsausschusses v. 13./16.12.1948 zur Fassung der 1. Lesung des Hauptausschusses, Parlamentarischer Rat Dr.-Nr. 370 and v. 13.12.1948, note 3 to Art. 12 GG, PR. 12. 48-370.

<sup>43</sup> BVerfGE 74, 102, 122 (esp. Margin no. 75).

<sup>44</sup> *Winkler*, in: Friauf/Höfling (fn. 40), Art. 12 margin no. 133 (with fn. 750); limited to a substitute function for the permitted deprivation of liberty, in accordance with the principle of proportionality: *Gusy*, JuS 1989, 710, 716.

<sup>45</sup> In this sense *Jung*, Sanktionensysteme und Menschenrechte, 1992, p. 180; *Schneider*, Kriminologie für das 21. Jahrhundert, 2001, p. 386; *Schöch*, DJT-Gutachten (fn. 2), C 98; *Streng*, ZStW 111 (1999), 827, 838 f.

<sup>46</sup> E.g. regarding the new § 40b Abs. 4 AMG (drug research which is useful for third party groups in virtue of a “research decree”) more detailed *Duttge*, Jahrbuch für Recht und Ethik vol. 24 (2016), pp. 223 ff.

successfully practised in many European neighbouring countries. Recurrence rates predominantly are significantly lower compared to traditional sanctions.<sup>47</sup> If in doubt whether these experiences can be transferred to Germany, one must remember that there are already practical experiences in Germany, in particular in meanwhile every federal state on the basis of art. 293 EGStGB and the respective regulations fixed by each state. Of course, there is – even with strengthening of community service – no total success in rehabilitation guaranteed because there will certainly be quite a few delinquents whose motivation and perseverance to the performance of the work owed will be rather limited. In this respect, voluntariness is, of course, a relevant factor, but in practice with respect on crime pedagogical meaningfulness and not de jure. For this reason, community service cannot completely replace fines and imprisonment in the lower area. However, it can help to ensure that the gap in the existing sanctioning arsenal does not lead to the surrender of the criminal justice system. This is particularly true regarding perpetrators who are not impressed with a fine or cannot be sanctioned by it properly. In addition, the practical implementation in the various areas of work will not be carried out without difficulties and conflicts,<sup>48</sup> which is why intensive social-pedagogical care, a well-considered organisation and a regular evaluation seems indispensable. However, it would be a sign of great dependency to renounce such an ambitious and basically on all sides supported means from the very start just due to a “not insignificant administrative burden”<sup>49</sup>. As far as the Reform Commission of the year 2000 said that community service “cannot be inserted without systematic breaks in the existing sanction dogmatics”<sup>50</sup>, this only applies if one accepts the voluntariness as a mandatory legal requirement, because then the term “punishment” would not be suitable anymore. However, a preventive direction of punishment is not in conflict with the perpetrator’s fault being the basis of any punitive sanction.<sup>51</sup>

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<sup>47</sup> The pioneer was the UK with its Criminal Justice Act 1972; there, the share of community service in the total of penalties has been around 10% since the beginning of the 1990s. (more detailed *Morgenstern*, Internationale Mindeststandards für ambulante Strafen und Maßnahmen, 2002, pp. 23 f.); on the Dutch concept with “community service” and “court education” s. *Peters*, in: Hilgendorf/Valerius (ed.), Alternative Sanktionsformen zu Freiheits- und Geldstrafe im Strafrecht ausgewählter europäischer Staaten, 2015, pp. 12 ff.

<sup>48</sup> See the report from the director of the Ministry of Justice *Bendel* (BMJ), in: Kommission zur Reform des strafrechtlichen Sanktionensystems (fn. 16), p. 108: Work disturbances “in numerous cases”.

<sup>49</sup> *Laubenthal*, Strafvollzug, 7th ed. 2015, margin no. 4.

<sup>50</sup> *Kommission zur Reform des strafrechtlichen Sanktionensystems* (fn. 16), p. 108: “The German Criminal Law is based on guilt; compared with this, the community service will be seen as an preventive measure”.

<sup>51</sup> See the fn. above.



### III. Prospects

With “community service”, the range of possible alternatives to the existing “monoculture” of criminal-law reaction is still far from being exhausted. It rather opens up a window for brisk wind and a new world of creative ideas which are much-needed to modernise the socially highly relevant sanctions law.<sup>52</sup> The special advantage of community service is that the inflicted burden coincides with socially inclusive compensation. This makes this kind of sanctioning far more intelligent and more successful than the ankle monitor<sup>53</sup> which is now widely preferred in Europe. This is because the ankle monitor only causes a technology-based “house arrest”<sup>54</sup> with the hope of deterrence after *Orwell’s* motto: “Big brother is watching You”! Mere deterrence, however, has never been a suitable mean in human history to attract people permanently for a respectful social behaviour. The criminological findings in Germany give reason for great scepticism about ankle monitors because this means is based on the belief in technology rather than personal interaction. This does not solve the problem of reintegration into society but delays it.<sup>55</sup> Moreover, the family members of the offender are equally considered “jointly liable” (“kin liability”)<sup>56</sup>. Furthermore, experience in the European neighbouring countries shows that ankle monitors are more likely to undermine existing important social assistance systems, such as probation. Also, this technology can only be used with delinquents who have a fixed place of residence.<sup>57</sup>

There is, therefore, an urgent need for creative concepts and the testing of new criminal sanctions. Certainly, in the past, the abolition death penalty was a major step forward in the humaneness of punishment. But as society’s development and social psychology are progressing, the criminal sanctions regime should not stop at the level of the 19th century. This applies even more so since the international criminal-philosophical debate has long been putting forth other ideas, which particularly envisage the use of originally medical neurotechnology in sense of diversification of the medical progress.<sup>58</sup> Before such “neuro-sanctions” gain a realistic perspective, the traditional criminal law should, at an early stage, seek to fill the gaps in the existing system with humane forms of sanctioning that respect human dignity. In order

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<sup>52</sup> Selected “modern” penal sanctions in the German-Austrian-Polish legal comparison at *Hochmayr*, ZStW 124 (2012), 64 ff.

<sup>53</sup> In an overview *Önel*, Verfassungsmäßigkeit und Effektivität der „elektronischen Fußfessel“, 2012, pp. 11 f.; more detailed *H.-J. Albrecht*, in: Schöch/Jehle (ed.), *Angewandte Kriminologie zwischen Freiheit und Sicherheit*, 2004, pp. 109 ff.; German-Austrian-Polish legal comparison at *Hochmayr/Malolepszy*, in: *Plywaczewski* (ed.), *Aktuelle Probleme des Strafrechts und der Kriminologie*, vol. 6 (2014), pp. 31 ff.

<sup>54</sup> Cf. *Petersilia*, *Criminal Justice* 2 (1987), H. 4, p. 17: “a man’s home is his prison”.

<sup>55</sup> *M. Walter*, in: *Kommission zur Reform des strafrechtlichen Sanktionensystems* (fn. 16), p. 160: “technical control”; regarding the current usage *Fünfsinn/Kolz*, StV 2016, 191 ff.

<sup>56</sup> See also *Streng*, ZStW 111 (1999), 827, 849: “Hauskoller”.

<sup>57</sup> Cf. *Schöch*, DJT-Gutachten (fn. 2), C 101.

<sup>58</sup> Related to this an overview by *Duttge*, in: Höffler (fn. 6), pp. 111 ff.

to combine the urgently needed innovations and existing experiences, it is necessary to set up a “major reform commission”, which is not limited to experts in criminal law practice and criminology but involves sociologists, social pedagogues and ethicists. The existing expertise of many individual sciences must be brought together to give space to creativity. Of course, the international experiences and ideas must not be excluded.<sup>59</sup> Also the Korean criminal law sees the “community service” only as a term of probation (art. 62-2 Korean Criminal Code) or as a substitute for uncollectible fines (insofar admittedly not in the Korean Criminal Code itself but in a special law from the year 2009)<sup>60</sup>, thus not as an independent sanction (“primary sentence”). Consequently, there is another common theme for the future in the Korean-German criminal law dialogue.

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<sup>59</sup> On the meaningfulness of international comparisons e.g. *Jehle*, Yamanaka-FS 2017, pp. 653 ff.; esp. on criminal sanctions in comparison between Germany, Austria and Switzerland *id./Fink/Pilgram*, JSt 2015, 81 ff.

<sup>60</sup> Applicable crit. *Jehle*, in: Ambos/Duttge/Jehle/Murmann, Begutachtung des Regierungsentwurfs des koreanischen Strafgesetzbuchs (2011) aus deutscher Perspektive (Forschungsberichte des KIC, vol. 12-B-08), 2012, pp. 215 f. in contrast to the “labor camp” in accordance with Art. 69 par. 2, Art. 70 kCC.

# The Status of Cybercrime in Korea and the Criminal Code Reform Plan

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## I. Introduction

The criminal code of South Korea was established 66 years ago in 1953<sup>1</sup>. Since the criminal code was enacted, scientific technology, especially ICT technology, has rapidly developed beyond our imagination. Particularly, the development of ICT technology in the last 20 to 30 years is quite explosive. Computer-generated information processing devices made it possible to effectively store vast amounts of data on small media storage through electronic methods. Also, they enabled us to search for and transmit the necessary data in a short time despite the vastness of the data. In addition, the widespread distribution of personal computers and the development of information and communications technologies have led to the popularization of the Internet<sup>2</sup>.

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<sup>1</sup> Refer in detail on the revision of Korean Criminal Code to Ji-Yun JUN, History and Prospects of the Reform of Korean Criminal Code, *Journal of Comparative Criminal Law*, 14/2(2012), p. 113.

<sup>2</sup> The Korean Criminal Code has been almost unchanged since its enactment. In the event of a change in society, a special criminal act was enacted or amended rather than a revision of the Criminal Code. Accordingly, a wide variety of special criminal laws apply in practice, such as the Act on the Aggravated Punishment of Specific Crimes, the Act on the Punishment of Violent Activities, the Act on the Promotion of Information and Communications Network Utilization and Information Protection, and the Act on the Special Cases for Punishment of Sexual Violence.

Since the Internet was commercialized in 1994, the number of Internet users in Korea has been reported to have reached 46 million in 2018. 91.5% of about 50 million people aged 3 or older use the Internet, an increase of 15.0% over the past decade (76.5% in 2008 → 91.5% in 2018). Almost all households have access to the Internet (Internet access per household: 99.5%), and Internet users use the Internet for ‘communication’ (94.8%), ‘acquisition of data and information’ (93.7%), and ‘leisure activities’ (92.5%). In terms of age, 99.9% of teenagers and people in their 20s and 30s, and 99.7% of those in their 40s use the Internet. In particular, the proportion of Internet users in their 50s increased from 52.3% in 2008 to 98.7% in 2018, which is a whopping rate for just 10 years<sup>3</sup>.

Such advances in ICT technology have created another world, cyberspace, which is different from the real world. Early cyberspace was a place for processing and exchanging information among experts and state institutions. However, the rapid spread of computer communication networks and the widespread use of personal computers and the Internet have transformed cyberspace into a forum for anyone to access as well as a venue for information exchange. Cyberspace has enabled individuals to exchange information limitlessly, form a sense of fellowship across the borders, and gain profit without organizational power. Namely, in cyberspace, individuals are expressing their individuality or desire, and businesses and educational institutions are using the Internet as a means of pioneering new markets or information delivery. The success or failure of an individual or society is directly affected by how effectively one can obtain the necessary information in such a deluge or how efficiently one can organize the flood of information. Therefore, the country is making every effort to build an infrastructure and create an efficient information exchange system.

Now, after the third industrial revolution through the development of computers, PCs and the Internet, we are preparing for the fourth industrial revolution that is based on the previous revolution. Here, the fourth industrial revolution is expected to lead our society into a more intelligent one by interconnecting and converging humans and objects through information and communications technologies, such as the Internet of Things (IoT) and the Cloud<sup>4</sup>. Thus, the cyberspace will be expanded even further than today.

On the other hand, however, sometimes cyberspace becomes a new crime scene and an open space that increases the risk of crime. For example, a variety of illegal activities have occurred in cyberspace, including insults or defamation of an individual, the sending of stalking or indiscriminate advertising spam mail, the spread of viruses, hacking, and the illegal leakage of personal or business secret information through hacking.

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<sup>3</sup> Ministry of Science, Technology, Information and Communications/Korea Internet Promotion Agency, 2018 Internet Usage Survey Summary Report, 2019, pp. 13-17.

<sup>4</sup> Klaus Schwab (translated by Song Kyung-jin), *The Fourth Industrial Revolution*, New Current, 2016, p. 12.

Given these circumstances, this paper provides a statistical insight into the types of cybercrime and the status of cybercrime in Korea (II) and examines the criminal regulatory processes for cybercrime in Korea (III). It then briefly examines how cybercrime affects criminal theories, over-criminalization and over-imposition of punishment, the application of the Criminal Code in the offenses provoking abstract danger, and the criminal responsibility of ISPs (IV). It is also intended to propose a revision of the Criminal Code to incorporate provisions of various special acts on cybercrime into the Criminal Code (V).

## II. Concepts, types, and status of cybercrime

### 1. Concepts of cybercrime

In addition to the term cybercrime, various terms such as computer crime, Internet crime, information crime, information and communications crime, and high-tech crime are used. Here, the terms differ somewhat in the content or range of their meanings. That is, the concept may vary in part depending on which terms or expressions are used, and it may highlight certain aspects of the crime involved.

Cybercrime can be defined as a criminal act centered on a computer system connected by an information and communications network such as the Internet, or all the criminal phenomena playing in cyberspace including computer crimes, or a crime committed by means of or targeting Internet sites or computer networks that are linked to them<sup>5</sup>.

Here, we would identify cybercrime as any criminal activity that occurs in the cyberspace. Cyber space refers to an information world in which computers are connected (networked), which is a virtual space separated from the physical reality. Such crimes that occur in the cyberspace should be viewed as encompassing both computer crimes in the traditional sense we have dealt with and crimes committed using the connectivity of the computer networks. Thus, cybercrime is understood as a crime involving the traditional computer crimes and the crimes using information and communications networks.

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<sup>5</sup> For the concept and definition of cybercrime, refer to Ji-Yun JUN, *Vergangenheit, Gegenwart und Zukunft der Cyberkriminalität, Studie über das Strafrecht*, 19/3(2007), p. 4; see Dieter Kochheim, *Cybercrime und Strafrecht in der Informations- und Kommunikationstechnik*, 2. Aufl., 2018, S. 15 Rn. 34.

## 2. Types and status of cybercrime

In practice, until 2013, cybercrime was mostly sorted into cyber-terror type crime and general cybercrime<sup>6</sup>. However, since 2014, cybercrimes have been classified into three categories: the crime of information and communications network violation, the crime of information and communications network utilization, and the crime of illegal contents. The three types of cybercrimes are described below.

First, the crime of information and communications network violation refers to cases in which a computer or an information communications network (computer system) has been breached without due access or beyond the allowed access authority, cases in which a system or data program has been damaged, destroyed, or changed, and cases in which an information and communications network has been disrupted (performance degradation and inactivity). These crimes include hacking (simple intrusion into information and communication networks, data leakage, data reduction), denial of service (DDoS, etc), delivery and distribution of malicious programs, and obstruction of work (Article 314 paragraph 2 of the Criminal Code).

Second, the crime of information and communications network utilization refers to the use of information and communications network as the main means of performing acts that constitute an essential element of a crime. It includes Internet fraud, Internet shopping mall fraud, game fraud, ransomware<sup>7</sup>, cyber financial crime (phishing, pharming, smishing, memory hacking, bodycam phishing, etc.), personal and locational information infringement, cyber copyright infringement, spam, and Fraud by Use of Computer, etc. (Article 347-2).

Third, the crime of illegal contents is an act of distributing, selling, leasing, and displaying illegal services or information through the information and communications network. It includes cyber pornography, child pornography, cyber gambling, sports Toto, cyber defamation and insult, and cyber-stalking.

The occurrence and arrest status of cybercrime according to the types are shown in the following table<sup>8</sup>.

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<sup>6</sup> Cyber-terror crimes are illegal acts that target the information and communication network itself, and they are acts that attack computer systems and information and communication networks using electromagnetic devices such as hacking, virus distribution, mail bombs and DOS attacks. On the other hand, general cybercrimes are common illegal acts using cyberspace, such as cyber gambling, cyber stalking, cyber sexual violence, cyber reputation and intimidation, e-commerce fraud and personal information leakage.

<sup>7</sup> This is a term that combines ransom and software. Ransomware refers to malware that blocks access to the system or encrypts stored data to render it inoperable and uses it to demand money (Kochheim, *Cybercrime und Strafrecht in der Informations- und Kommunikationstechnik*, S. 212).

<sup>8</sup> See <http://cyberbureau.police.go.kr/share/sub3.jsp?mid=030300>.

**Table: Cyber Crime Occurrence and Arrest Status<sup>9</sup>**

Year	Total			Information and Communications Network Violation Crime			Information and Communications Network Utilization Crime			Illegal Content Crime		
	Occurrence	Arrest		Occurrence	Arrest		Occurrence	Arrest		Occurrence	Arrest	
		Number of Cases	Number of People		Number of Cases	Number of People		Number of Cases	Number of People		Number of Cases	Number of People
2014	110,109	71,950	59,220	2,291	846	1,171	89,581	56,461	38,579	18,299	14,643	19,470
2015	144,679	104,888	75,250	3,154	842	1,098	118,362	86,658	50,777	23,163	17,388	23,375
2016	153,075	127,758	75,400	2,770	1,047	1,261	121,867	103,172	42,871	28,438	23,539	31,268
2017	131,734	107,489	59,369	3,156	1,398	1,141	107,271	88,779	36,103	21,307	17,312	22,125
2018	149,604	112,133	60,138	2,888	902	1,048	123,677	93,926	35,738	23,039	17,305	23,352

### III. Periodization of cybercrime

#### 1. The period before the Computer Criminal Code (before the revision of the Criminal Code in 1995)

This period stretches from 1953, when the Criminal Act was enacted, until the criminal law was revised with respect to computer-related crimes in 1995. Although social and economic conditions changed and the development and dissemination of computer technology caused serious side effects, the Criminal Code had existed until this time without major revisions since its enactment in 1953. Rather, to cope with computer crimes, the government chose to enact a special act whenever necessary on the keynote of its hardline legal polices<sup>10</sup> in a repressive way, without sufficient deliberations on the criminal theories or considerations of criminal policies. By creating a number of similar regulations in different laws, such governmental action gave rise to problems in the legal system and an imbalance of punishment between laws.

First, to summarize the criminal legal position concerning cybercrimes in this period, computer-related crimes first appeared in this period when the traditional criminal law attempted to discipline the crimes through the enactment of special laws. Second, because the information and communications technology was not fully developed yet, the criminal law was mainly applied to computer crimes rather than Internet crimes or information and communications crimes.

<sup>9</sup> Source: The National Police Agency Cyber Security Agency

<sup>10</sup> Bo-Hak SEO, Information distribution and criminal responsibility on the Internet, Korean Criminological Review, 12/3 (2001), p. 10.

2. The period of the Computer Criminal Code (from 1995 to the enactment of the Information and Communications Network Act)

This period is the time before the Information and Communications Network Act was enacted when the criminal code on computer crime-related regulations was revised. To deal with computer crimes, the Criminal Code was partially reformed while the enactment and revision of various special acts began to regulate Internet crimes, which started to emerge besides computer crimes. The period is named as such because the revised criminal code, applied during this period, mainly targeted the contents of traditional computer-related crimes rather than information and communications-related crimes<sup>11</sup>.

The revised criminal law of this period stipulates that computer crimes are not organized and constructed based on the computer functions but are added to the existing elements. Accordingly, the types of computer crimes included in the revised Criminal Code contain destruction of electromagnetic records, falsification or alteration of (private and public) electromagnetic records, interference with computer business, fraud by use of a computer, etc., and violation of secrecy.

3. The period of the Cyber (Mobile) Criminal Code (from the enactment of the Information and Communications Network Act to the present)

The crimes in this period require different criminal and legal approaches than before in that information is distributed in large quantities through the information and communications network, instead of simply infringing on computers or data within the computer. Given that crimes occur in a networked Internet space beyond the seemingly simple computer space and that these kinds of crimes constitute the majority, it would be appropriate to call this period “the period of the cyber criminal code.” Moreover, as the IT environment changed to the wireless Internet and mobile devices reflected this change, cyberspace has been expanded by mobile or smart phones, and mobile crimes quickly emerged. In this regard, cybercrimes have evolved into ubiquitous ones, given that cybercrimes are more likely to be committed anytime and anywhere without limits.

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<sup>11</sup> The National Police Agency started working under the name “Hacker Investigation Team” in 1995 in order to cope with new crimes, and reorganized it into the Computer Crime Investigation Team in 1997, and then the Cyber Terror Response Center was established and operated in July 2000. The process of changing the names of these investigators could also be understood in a similar context to the process of changing the timing here.



## IV. Theoretical problems of the Criminal Code on Cybercrime

### 1. Over-criminalization and over-imposition of punishment

#### a) The causes of over-criminalization and over-imposition of punishment

The regulations on cybercrime are enforced through several special acts as well as the criminal code. Meanwhile, with respect to punishing cybercrimes, the special acts are more often applied than the criminal law. Because it was necessary to respond quickly to crimes appearing in cyberspace and was not easy to revise the Criminal Code every time when needed, the regulations were enforced through the special acts. In addition, the views of information-and-communications network operators, Internet service providers, and computer-related agencies or government agencies played a major role in defining the types and targets of cybercrimes and determining legal penalties. Consequently, the general principles of criminal law, punishability, and equity with other crimes were not thoroughly considered, but the need for swift legal action and the fact that enormous legal infringement occurred came to the fore. Based on this, the attempts to prevent cybercrime through strict punishment of deviant behaviors in cyberspace produced overlapping punishment rules and strict regulations on cybercrimes, resulting in the problem of over-criminalization and over-imposition of punishment.

#### b) Over-criminalization

In cybercrime, there are two types of problems with over-criminalization. One type arises when various laws are applied since the same elements of an act are redundantly or overlappingly stipulated. The other type refers to the case in which it becomes problematic whether the corresponding elements of crime should subsist.<sup>d</sup>

First, an example of over-criminalization due to redundancy would be the destruction of electronic data in cyberspace<sup>12</sup>. The provision of the Criminal Act on Destruction and Damage, etc. of Property (Article 366) punishes the cases in which the utility of “special media records, such as electromagnetic records” is harmed. The Act on the Information and Communications Network punishes the cases of damaging the information stored by the information-and-communications network and the information processed or transmitted through the network. Depending on the type of the data, overlapping regulations exist in various laws, including the Personal Information Protection Act, the Goods Distribution Promotion Act, and the Act on the Utilization and Protection of Credit Information.

Second, a crime in which the necessity of maintaining the elements of crime is questionable would be, for example, an unauthorized intrusion into the information and

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<sup>12</sup> In case of data manipulation, data change, and electronic data or information leakage, a number of elements of the crime overlay as in the case of data deletion.

communications network, called simple hacking. However, it was controversial whether such action could be punished because hacking itself could not be said to have (1) interfered with others' work by destroying the networks or computer systems, or (2) deleted, forged, and altered the stored electronic data or documents, or (3) infringed on secrets, or (4) acquired property interests.

Some say that because such intrusions are only preliminary to actions such as Interference with Business or Violation of Secrecy, it is reasonable to leave them unpunished unless there is a provision of punishment for the preliminary actions in each of the similar clauses under the Korean Criminal Law. On the contrary, others argue that the act of unauthorized personnel intruding the system against the will of the system administrator refers to the prerequisite for other criminal activities (Data Manipulation, Interference with Business by damaging or destroying computers, etc., and Violation of Secrecy), and that even if the actions are due to a mere curiosity, it is necessary to punish such actions in that this type of hacking is increasing explosively and its risk is considerable.

In the recognition of the need to punish hacking, the legislator prepared a regulation prohibiting acts of intruding into the information and communications network. In other words, one must not break into the information and communications network without access authority or beyond the allowed access authority (Article 48 of the Information and Communications Network Act), and those who violate this regulation (Article 63, Paragraph 1, No. 1 of the Information and Communication Network Act) are punished under the Information and Communications Network Act. Also, new regulations were established to punish criminal attempts (Article 63, Paragraph 2 of the Information and Telecommunication Network Act).

But there seems to be a problem with the indiscriminate punishment for hacking and the expansion of the range of punishing attempted crimes. If a person intends to commit a particular crime or to break into the information and communications network with an opportunity to realize or try to realize the consequences of that crime, he or she may be punished for the corresponding crime. However, although a criminal purpose does exist, the act of simply breaking into the information and communications network does not have a direct link to the actual consequences. Nonetheless, punishing the act would be bearing a burden of preventing the risk of future infringement of legal interest in advance. This is not a general duty of criminal law, but rather a task of the police law<sup>13</sup>. In addition, unauthorized entry under the Information and Communications Network Act does not require a protection to be in place for the network or system. Thus, simply accessing an unprotected infor-

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<sup>13</sup> Sang-Don YI, *Das strafrechtliche Regulierungsschema des Hackens*, Bubjo, 2002/3, p. 121.

mation and communications network, that is “not allowed to the public,” is unauthorized access<sup>14</sup>. Furthermore, it is concluded that the act of trying to access a connection or entering an ID or password is also subject to punishment. Therefore, in the case of trespassing, it is deemed that (1) the deletion of the punishment regulation on attempted crimes, or (2) restrictions based on the subjective elements, which would be the purpose of committing a particular crime, or (3) restrictions of providing a protection are needed<sup>15</sup>.

### c) Over-imposition of punishment

In cases where the same illegal activity occurs in cyberspace and offline, the statutory punishment for the crimes in cyberspace is usually similar to or somewhat higher than that for the general crimes. For instance, the statutory penalties for fraud and computer fraud, and those for interference with business and interference with computer business are the same. However, the amount of fines for disruption to the information and communications network through the transmission of large volumes of data is slightly higher than that for interference with business (Article 62, No.5 of the Information and Communications Network Act)<sup>16</sup>. Such differences in the statutory punishment can be justified in that crimes in cyberspace, in addition to general crimes, endanger the reliability and stability of the information and communications network, or that the extent or range of the damage caused by the crime can be large<sup>17</sup>.

Nevertheless, if there is a gap in the statutory penalties when a similar criminal act is carried out offline and through an information and communications network, the punishment will have to be adjusted in light of the principle of equity or the principle of proportionality. In case of Violation of Secrecy by Computer, etc., in which a person detects the contents of another person’s special media records or electromagnetic records, the person who committed the act shall be “punished by imprisonment or imprisonment with prison labor for not more than three years or by fine not exceeding five million won (Article 316, Paragraph 2 of the Criminal Code).” On the other hand, if a person detects other people’s secrets that are trans-

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<sup>14</sup> Originally, hacking is based on the premise that the term itself is ‘by special technical means’. Thus, while connecting simply against directions and not through technical means, or by using the term ‘intrusion’ without access, Korean law does not believe that it is a hacking attack.

<sup>15</sup> Agreeing to the argument that attempted trespass should be criminalized, Seok-Joon RYU, Research on regulation of hacking, *Journal of comparative criminal law*, 6/2, p. 202; Sang-Don YI, *Das strafrechtliche Regulierungsschema des Hackens*, Bubjo, 2002/3, p. 116 (even if the virus is released, it should also be decriminalized).

<sup>16</sup> The situation is similar in the case of the crime of cyber reputation and the crime of defamation by publication.

<sup>17</sup> Ji-Yun JUN, *Vergangenheit, Gegenwart und Zukunft der Cyberkriminalität*, Studie über das Strafrecht, 19/3 (2007), p. 21; Sang-Don YI, *Das strafrechtliche Regulierungsschema des Hackens*, Bubjo, 2002/3, p. 121.

mitted via the information and communications network by packet sniffer technique, the person shall be “punished by imprisonment for not more than five years or by fine not exceeding fifty million won (Article 62, No. 6 of the Information and Communications Network Act).” Similarly, unauthorized eavesdropping of other people's telecommunications constitutes “an imprisonment for not more than ten years and a suspension of qualifications for not more than five years”. This wide gap in the statutory penalties demonstrates an excess of the Special Act.<sup>18</sup> Therefore, the problem of over-imposition of punishment should be dealt with by reviewing and comparing the statutory penalties for the offline crimes and the crimes occurring in cyberspace.<sup>19</sup>

## 2. The limit of applicability of the criminal law to offenses provoking abstract danger

In the case of cybercrime, the problem of the application of the criminal law arises because criminal activity takes place beyond time constraints and national boundaries. In general provisions with regard to its scope, the Korean Criminal Law takes the position of the territorial principle, the nationality principle, and protectionism, and applies cosmopolitanism in the case of certain crimes (such as kidnapping, human trafficking).<sup>20</sup> Whether criminal law can be applied to crimes in cyberspace depends largely on the determination of the site of crime under the territorial principle. Regarding the offenses that require the occurrence of results, the site in which the results took place, including the transitional phenomenon, as well as the place where the crime was committed are recognized as the site of crime<sup>21</sup>. However, since most crimes in cyberspace constitute the offenses provoking an abstract danger<sup>22</sup> and since those offenses do not require the occurrence of results, the place where the crime was practiced is the sole criterion for a site of crime. Here, the place of crime committed refers to the place where the offender was located at the time of the act<sup>23</sup>. Thus, if an uploaded or transferred content is illegal in a foreign country, the criminal

<sup>18</sup> Sang-Don YI, *Das strafrechtliche Regulierungsschema des Hackens*, Bubjo, 2002/3, p. 121.

<sup>19</sup> Cyber-stalking and virus delivery and distribution charges also raise the issue of over-punishment (see Dong-Bum KANG, *Die Probleme der strafrechtlichen Vorschriften über Cybercrime und ihre Lösung*, Korean Journal of Criminology, Korean Association of Criminology, 19/2 (2007), p. 51, p. 53).

<sup>20</sup> In the case of the principle of world law, this is not provided for in the general section of the Criminal Code, but in the context of special trafficking and special criminal law such as “Gesetz zur Bestrafung der unter die Zuständigkeit des Internationalen Strafgerichtshofs gelegten Delikte”.

<sup>21</sup> See Ji-Yun JUN, *Die Betrachtungen über den räumlichen Geltungsbereich des Strafrechts und Reformvorschlag*, Journal of Criminology, 24/1(2012), S. 123 ff. Übereinstimmend KOGH 1998. 11. 27., 98Do2734.

<sup>22</sup> In the case of the distribution of obscene materials or defamation crimes, which are many of the crimes committed in cyberspace, the crimes are usually based on an abstract danger.

<sup>23</sup> Schönke/Schröder/Eser/ Weißer, StGB, 30.Aufl., 2019, § 9 Rn. 4; Fischer, StGB, 66.Aufl., 2019, § 9 Rn. 3; Ji-Yun JUN, *Modification, limitation of criminal application scope in cyberspace*, Bubjo, 2003/11, p. 78.

law cannot be applied regardless of whether the location of the server or site is at home or abroad. As a result, because the determination of the site of a crime occurring in a cyberspace would be unreasonable or flawed in punishment if it is determined according to the conventional place where the crime was committed, the need for new restrictions and revisions on the criminal code became an issue.

The methods to modify these include expanding the concept of the place where a crime was committed and expanding the place where the result occurred<sup>24</sup>. First, the position to expand the place where the crime was committed is to view the execution site as a crime site, recognizing not only the location where the offender was located at the time of the act, but also the location of the server where the actor intentionally stores the data under his or her control<sup>25</sup>. However, this view is criticized for applying domestic law because the site is located with the country even though the act does not constitute a crime at the location of the offender. Second, the position to expand the site where the results of the crime occur interprets the location where an abstract danger may occur as a scene of the crime just as in cases of a specific danger<sup>26</sup>. However, an attempt is made to limit using the location of the potential risk as the criterion for criminal sites to avoid excessive expansion of the penal power. The following stances are examples of this attempt: (1) “restrictions by subjective aspects,” which apply the criminal code of the country only when the owner or user of the website with illegal contents has a direct goal-oriented intent (so-called first-degree intent) to cause an influence through the Internet in the country (2) “restrictions by the punishability of an act at its scene,” which rule out the application of domestic criminal law when the act is unpunishable in the country where it was committed, (3) “restrictions by the connection with the country,” which try to apply domestic criminal law only when there is a particular connection with the country, and (4) “restrictions by the global principle,” which limit the application of the country’s criminal code to the cases of violating specific legal interests among the offenses provoking an abstract danger.

It is not desirable for any country to become “the dominator of cyberspace,” or “the sheriff of the computer network,” or “the guard of the Internet” by applying its own law indiscriminately in cyberspace. Therefore, in terms of the scope of application of the criminal code, it is not reasonable to apply the existing territorial principle as it is to cyberspace. Rather, it is appropriate to deem that when regulating the manifested products, the criminal law of the country should be applied only

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<sup>24</sup> See Heinrich, GA 1999, 80; Hilgendorf, NJW 1997, 1877; Schönke/Schröder/Eser/ Weißer, § 9 Rn. 46 ff.; Jeong-Whan KIM, International Criminal Law in Internet, Journal of Internet Law, 37 (2007), p. 157.

<sup>25</sup> Sung-Cheon KIM, Internetkriminalität und Anwendung des Strafrechts, Journal of Internet Law, 9 (2001), p. 35; in Germany see Cornils, Der Begehungsort von Äußerungsdelikten im Internet, JZ 1999, 396.

<sup>26</sup> Seung-Hee JOO, Cybercrime and International Criminal Law, Korean Criminological Review, 16/3(2006), pp. 139-140. In Germany see Heinrich, Der Erfolgsort beim abstrakten Gefährungsdelikten, GA 1990, 80 f.; BGHSt 42, 242, 253.

when a danger may occur in the country's territory, and when the danger threatens a certain amount of legal interests protected by cosmopolitanism<sup>27</sup>.

### 3. ISP (OSP) responsibility issues

Punishment for cybercrime has been discussed mainly with regard to posting illegal contents in cyberspace. Nonetheless, as the information and communications network has become the universal means of use for the public and the posting or distribution of illegal contents has increased, it was noted that the possibility of punishing the operators of the network should be considered.

As of now, there are no laws that explicitly and directly stipulate the general principles of the Internet Service Provider's (ISP's) criminal responsibility, but the Information and Communications Network Act lays down the ISP's "Obligation of Personal Information Protection" (Article 27, Paragraph 1 and Article 28) or "Obligation of Securing the Safety of the Information and Communications Network" (Article 45). However, these regulations only confirm the existence of certain responsibilities to ISPs, and specific requirements for holding the operators accountable are not yet legislated<sup>28</sup>. Therefore, the ISP's criminal responsibility for cybercrimes, such as posting illegal contents by users or others, can be reviewed based on the criminal law theories to examine the criminality of the crimes committed through omission or aiding and abetting.

The information and communications network provided by ISPs and the services based on them are social 'sources of risk in that they can pose an unusual and unacceptable danger to others. At the current level of technology, the ISP 'controls' those hazards since it is able to recognize the existence of stored illegal contents and thus prevent or eliminate them. Consequently, the ISP has safety obligations, namely the obligation of the guarantor, from which a guarantor position to prevent the violation of other people's legal interests is created.

If such a contribution to the crime by omission is recognized, it could be problematic whether the omission of an ISP makes him a principal offender or an accessory. In this regard, there are conflicts among various stances: (1) the view that acknowledges the criminality of accessories through omission (the theory of accessories)<sup>29</sup>, (2) the view that understands it is differentiated by the type of guarantor position (the theory of obligation)<sup>30</sup>, (3) the view that thinks a principal offender and an accessory are distinguished by the degree of their equivalence with the criminal

<sup>27</sup> Ji-Yun JUN, Modification, limitation of criminal application scope in cyberspace, *Bubjo*, 2003/11. pp. 78-110.

<sup>28</sup> Tae-Jeong WHANG, A Comparative legal Study on the Responsibility of ISP, *Journal of Internet Law*, 28 (2005), p. 22.

<sup>29</sup> J.S.LEE/Y.M.JANG/D.B.KANG, *Strafrecht*, AT, 9.Aufl., 2017, S. 140; I.S.KIM/B.H.SEO, *Strafrecht*, AT, 13. Aufl., 2018, S. 497; In-Yong LEE, Eine Betrachtung über die strafrechtliche Verantwortung des OSPs in Bezug auf Cyberkriminalität, *Journal of Comparative Criminal Law*, 19/4 (2018), p. 574.

<sup>30</sup> Schönke/Schröder/Heine/Weißer, *StGB*, 30. Aufl., 2019, vor § 25 Rn. 101 f.

conduct (the theory of equivalence)<sup>31</sup>, (4) the view that exceptionally acknowledges the criminality of accessories in cases when the constituent elements for the principal offender require additional conditions (additional subjective elements of mark, such as a status offender, a self-denunciated offender, etc.) exceeding the duty of generating a result, under the ground rule that the principal offender exists (the theory of the principal offender), (5) the view that argues that the criminality of accessories through omission should be denied and that only the principal offender exists (the theory of the single principal offender).

Although the case does not specifically address the dissemination of obscene cyber-pictures, it acknowledges the accessory's liability for a crime based on his or her duties<sup>32</sup>. However, it is questionable whether these results are reasonable, and regarding this topic, the valid stance would be the theory of the principal offender given that the existence of a guarantee obligation becomes the only issue in principle.

## V. Proposal for the integration of punishment regulations for cybercrime

### 1. A revision of the Criminal Code

Cybercrimes are punished by the divided measures of the criminal code and the special acts, and since the special acts exist in many laws, they need to be organized.

The measures suggested for organizing the regulations of the criminal code for cybercrime include (1) incorporating all provisions on cybercrime, such as the Special Act on Cybercrime, into a single special act<sup>33</sup>, and (2) punishing cybercrime under the criminal code in principle and under the Special Act if necessary<sup>34</sup>.

It seems appropriate to regulate cybercrime as much as possible in the criminal code for several following reasons. First, because cybercrime occurs frequently in our society, it is essential to make the public aware that the punishment for cybercrime is not "special", but "general", so that the general preventative function will become more effective. Second, the scope of punishment will be justified and the equity with other crimes can be considered by comparing and reviewing the degree

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<sup>31</sup> Yong-Sik LEE, Die Abgrenzung zwischen Täterschaft und Teilnahme bei der Unterlassung, *Journal of Law in Seoul National University*, 40/2(1999), p. 281. In Germany see Schwab, *Täterschaft und Teilnahme bei Unterlassungen*, 1996, S.189.

<sup>32</sup> KOGH 2000.03.23, 2000Do326; 2006.4.28, 2003Do4128; 2006.4.28, 2003Do80; see Kwang-Min PARK, *Criminal law regulation on defamation on the Internet*, *Studie über das Strafrecht*, 24 (2005), p. 107.

<sup>33</sup> Hye-Uk WON, *Eigenschaften und Bestrafung nach Art in Internetkriminalität*, *Korean Criminological Review*, 11/2 (2000), p. 113.

<sup>34</sup> Dong-Bum KANG, *Die Probleme der strafrechtlichen Vorschriften über Cybercrime und Ihre Lösung*, *Korean Journal of Criminology, Korean Association of Criminology*, 19/2 (2007), p. 54.; Yong-Kun OH, *Eine Studie über die Internetkriminalität*, *Korean Criminological Review*, 14/2 (2003), p. 330.

of punishment for such actions with other crimes, through the incorporation into the criminal code or the enactment and revision of the criminal law<sup>35</sup>. Third, with respect to the practical importance of cybercrime, the law students or the prospective legal profession will need to be sufficiently educated on cybercrime, and researchers will be asked to conduct in-depth research. Fourth, the current legislative attitude against cybercrime seems somewhat systematic in that crime involving the information and communications network are regulated under the Special Act and general computer crimes are regulated under the criminal code. Nevertheless, as computer crimes are stipulated in the criminal code, the crimes against the information and communications network can be defined in a similar way in the criminal law, regardless of whether the network is mediated. Yet, there are no similar related regulations because the unique crime types in cyberspace are different from the existing ones. This, however, can be dealt with by identifying and applying the crime in the criminal code that is analogous to the violation of legal interests due to the corresponding act; if there is no analogous regulation to be applied, making a new chapter or clause would also be plausible.

## 2. The incorporation of the Special Act into the Criminal Code

It is impossible to look at all the regulations of the Special Act to figure out how to include the contents of the Special Act into the criminal code. It is, therefore, more effective to divide the methods that are prescribed in the Criminal Code into two types: defining crimes as (1) the crimes that include the contents of the special law in the clauses of the existing law (which occur in cyberspace but are related to the same manner or legal interests of the traditional crimes defined by the existing law), (2) the crimes of the special law that should be defined in a way that is completely independent of the existing clauses.

### a) Integrating regulations

The distribution of obscene pictures could be an example of the former type. More precisely, one could combine the provisions of Article 243<sup>36</sup> of the existing criminal code with the provisions of Article 74 paragraph 1, No.2<sup>37</sup> of the Information and Communications Network Act. Such integration into the criminal code will be explained in <Alternative 1> and <Alternative 2> below.

<sup>35</sup> Dong-Bum KANG, Die Probleme der strafrechtlichen Vorschriften über Cybercrime und Ihre Lösung, Korean Journal of Criminology, Korean Association of Criminology, 19/2 (2007), p. 54.

<sup>36</sup> Art. 243 of the Corean Criminal Code: Those who distribute, sell, rent or display obscene documents, paintings, film and other objects for sale, or show or display without performance shall be sentenced to not more than one year in prison or fined not more than 50 million won.

<sup>37</sup> Information and Communications Network Act, Art. 74 (1) Those who fall under any of the following shall be sentenced to not more than one year in prison or fined not more than 10 million won: (2) Persons who distribute, sell, rent or display obscene symbols, sentences, sounds, images or images in violation of the provisions of Article 447 paragraph 1. No.1.



*Alternative 1*

## Article 243 (Distribution of obscene pictures)

A person who distributes, sells, rents, displays or screens obscene documents, paintings, films, etc. shall be sentenced to not more than one year in prison or fined up to five million won.

## Article 243-2 (Distribution of obscene pictures and videos)

A person who distributes, sells, rents, displays obscene code, words, sounds, images or moving pictures through the information and communications network shall be sentenced to not more than one year in prison or fined up to ten million won.

*Alternative 2*

## Article 243 (Distribution of obscene pictures)

- (1) A person who distributes, sells, rents or otherwise displays or screens obscene documents, paintings, films, etc. shall be sentenced to not more than one year in prison or fined up to five million won.
- (2) A person who distributes, sells, rents, or displays obscene code, text, sound, images or moving pictures through the information and communications network shall be sentenced to not more than one year in prison or fined up to ten million won.

## b) Establishment of new regulations

The example crimes of the latter type are the act of trespassing the information communications network and the act of illegal collection of personal information by deceit. Article 71, Paragraph 1, No.1 and No. 9, and Paragraph 2<sup>38</sup> of the Information and Communications Network Act shall be provided in the Criminal Code as follows.

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<sup>38</sup> Information and Communications Network Act, Art. 71 (1) Those who fall under any of the following shall be sentenced to not less than five years in prison or fined not more than 50 million won: 1. Those who have collected personal information without consent of the users in violation of Article 22 paragraph 1. [...] 9. Those who break into the information and communication network in violation of the provisions of Article 48 paragraph 1.

(2) The attempt of paragraph 1 No. 9 shall be punished.

## Chapter O Violation of the Information and Communications Network

### Article 000 (Trespassing or Unauthorized Intrusion)

A person who trespasses or intrudes into the information and communications network without due access or by exceeding the permitted access authority, shall be sentenced to not more than five years in prison or fined up to 50 million won.

### Article 000 (Collection of Personal Information without Consent)

A person who intends to use personal information without the consent of its users through collecting the personal information by fraud or deceit or entice others to provide it shall be sentenced to not more than three years in prison or fined up to thirty million won.

# Citizen Participation in Criminal Trials in South Korea from the Perspective of Legal Paradigm Shift

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## I. Introduction

South Korea introduced a form of jury trials for serious criminal cases in 2008, which was the first jury system in the history of Korean criminal justice. The purpose of the jury trial system in Korea is to raise and promote democratic legitimacy and confidence in judicial process (Art. 1, Act on Citizen Participation in Criminal Trials, hereinafter “the Act”). According to the statistics, over 2000 cases were tried with a jury from 2008 to 2017.

Although the jury trial system in Korea has received positive reviews so far, constitutional issues remain. First, some argue that the jury trials violate the constitutional right of trial by judge that is stipulated in Article 27 sec. (1) of the Korean Constitution. Critics also state that jurors are not able to consider and decide difficult or complicated cases and/or are more susceptible to personal biases or prejudices than professional judges. Thus, they argue that jury trials endanger the fairness of the trial.

Contrary to their concerns, however, after the institution of the jury trial system, it has gained more support and trust than expected. As a result, in 2012, a revision of the Act went into effect, which expanded the scope of eligible cases for jury trials

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<sup>1</sup> The author would like to thank Ms. Gina Rhee, Ph.D. candidate at Yonsei University, for her assistance in translating the Korean manuscript into English.

to all the collegiate 3-judge panel cases. A 3-judge panel decides, in principle, criminal cases punishable by imprisonment of one year or more.

While working for the “Presidential Committee on Judicial Reform” (PCJR), a governmental body which was organized to design and draft bills for reform of criminal procedure, graduate law school system, jury trials, etc, I frequently received inquiries from a few scholars in the U.S. Their major concern was why Korea would implement such a problematic institution. We were aware of the controversies over the jury trial system in the U.S., and that one of the famous cases was O. J. Simpson’s trial in 1995. After careful deliberation, however, we concluded that the jury system itself was not problematic and, instead, the ‘trial by jury’ model would provide more benefits to the Korean criminal justice system than the existing model of ‘trial by judge only’.

In this paper, I would like to discuss citizen participation trials, also known as jury trials, in South Korea from the perspective of legal paradigm shift. First, main features of the Korean jury trials will be examined and then jurors’ and judges’ views on the jury trial system will be explored. Lastly, further analysis of jury trials in connection with the concept of “legal paradigm change” will be discussed.

## II. Main features of the citizen participation trial system in South Korea

### 1. Overview

The “Judicial Reform Committee” (JRC, 사법개혁위원회 in Korean), an ad hoc committee established by the Supreme Court, decided to adopt a package of reforms including the jury trial system in 2004. Two years later the “Presidential Committee on Judicial Reform” (PCJR, 사법제도개혁추진위원회 in Korean), a presidential commission, affirmed the decision and drafted a bill to introduce a jury trial system in two stages. The first stage was that the jury verdict has an advisory effect rather than binding force. For the preparation of the second phase, Art. 55 of the Act provided that the Supreme Court shall establish a committee for citizens’ participation in the judicial system in order to decide on the final form of the participatory system through an in-depth analysis on the progress of the participatory trial system.

Accordingly, in 2013, a proposal to the final form of jury trials in Korea was approved by the “Committee for Citizens’ Participation in the Judicial System” (hereinafter CCPJS, 국민사법참여위원회), an ad hoc committee established by the Supreme Court.

In the meantime, the Ministry of Justice of Korea (MOJ) made public a revision bill of the Act on Citizen Participation in Criminal Trials, which was partly modified from the original proposal of the CCPJS in 2013. After the announcement, the second revision of the bill was issued by the MOJ to exclude the cases of the Public

Official Election Act from jury trials. The reason for that was thought to be the acquittal of poet Ahn Do-Hyun who was indicted for violations of the Election Act. This revision bill, however, was discarded automatically due to the expiration of the National Assembly term.

## 2. The defendant's request for jury trial

Originally, the framers of the South Korean Constitution did not consider including criminal jury trials in the Constitution and subsequent revisions of the Constitution did not reflect the idea of participatory justice in the criminal justice system.<sup>2</sup> Articles 9 and 11 of the Act grant the court broad discretion to deny the defendant's request for a jury trial. Article 9(1) states that a court may "decide not to proceed to a participatory trial" given particular conditions and these conditions are fairly broad.<sup>3</sup> Furthermore, Article 11(1) provides that the court has a discretion to hear a case eligible for jury trial by judge only.<sup>4</sup> Therefore, even if the defendant wants to proceed the case to a jury trial, the court may decide not to accept the request on several grounds.<sup>5</sup> While the jury trial can be initiated only upon the defendant's request, the court shall make a decision whether to accept or decline the defendant's motion for jury trial.

To be tried with a jury, the defendant shall submit a written application, describing whether he/she requests a participatory trial, within seven days from the date on which a duplicate of the indictment is serviced or before the first day of the pretrial proceeding (Art. 8 of the Act). If the defendant fails to submit a written statement

<sup>2</sup> Yong Chul Park (2017), "Advance Toward People's Court in South Korea", 27 WASH. INT'L L.J. 177.

<sup>3</sup> *Id.*

<sup>4</sup> Article 11(1) of the Act reads: "If proceedings of a trial have been suspended for a long time due to the defendant's illness or any other cause, if the period of confinement of the defendant expires, if a court is to protect a victim of a sexual crime, or if it is considered inappropriate to continue a participatory trial in view of circumstances of a trial due to any other cause or event, the court may decide to remove the case, at its discretion or at the request of the prosecutor, the defendant, or defense counsel, so that a collegiate panel of the competent district court can make a judgment on the case without a participatory trial." *Id.*

<sup>5</sup> Art. 9 (Decision to Exclude) of "the Act".

(1) A court may decide not to proceed to a participatory trial for a period beginning after an indictment is filed and ending on the day after the closing of preparatory proceedings for a trial in any of the following cases: <Amended by Act No. 11155, Jan. 17, 2012>

1. If a juror, an alternate juror, or a prospective juror has difficulties in attending a trial or is unlikely to be able to duly perform his/her duties under this Act because of a violation or likely violation of the life, body, or property of the juror, alternate juror, prospective juror, or any of his/her family members;
2. If some of the accomplices do not want a participatory trial and it is considered difficult to proceed to a participatory trial;
3. If a victim of any offence prescribed in Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes is committed, or his/her legal representative does not want a participatory trial;
4. If it is considered inappropriate to proceed to a participatory trial due to any other cause or event.

of request, it is assumed that the defendant does not want to proceed the case to a participatory trial. Additionally, the defendant may change his/her previously stated intention before the preparatory proceeding of the trial begins.

### 3. Eligible cases for a jury trial

As stated earlier, criminal cases under the jurisdiction of a 3-judge panel are eligible for jury trials – crimes with a punishment of imprisonment of one year or more. In addition, if a collegiate panel believes that a particular case is either proper or significant, it may decide to try the case at their own discretion.

A defendant who confesses to the prosecuted crimes can also be tried by a jury and the jurors can give an advisory opinion on the proper sentence to the panel of judges. Among the 574 participatory trials that have been concluded, in 167 cases (29.1%) the defendant confessed to the primary offense. The percentage of the confession cases was 28.1% in 2008, 29.5% in 2009, 22.2% in 2010, and amounted to 50.9% in 2011.

### 4. Number of jurors in a jury trial

A jury in a criminal trial consists of either 5, 7, or 9 jurors. The number of required jurors depends on the severity of the crime and the defendant's admission of essential points of the prosecuted crime (Art. 13 of the Act).<sup>6</sup> The court may have five jurors if the defendant or defense counsel admits essential elements of prosecuted facts during the preparatory proceedings.

In the jury selection procedure, the defendant and the prosecution have a right to question potential jurors and challenge biased prospective jurors. This procedure bears a resemblance to the system of *voir dire* in the U.S. (Art. 28 of the Act).

### 5. Rights of the jurors

Korea adopted a 'hybrid form' of the common law/American jury system and the continental law/German mixed tribunal system. After deliberation, the jury delivers the verdict whether the defendant is guilty or not guilty, and when they find the defendant guilty each juror gives an advisory opinion on the sentencing to the court (Art. 46 of the Act).

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<sup>6</sup> Art. 13 (Number of Jurors) of the Act

(1) Nine jurors shall participate in a participatory trial for an eligible case the statutory punishment for which shall be death penalty or life imprisonment with or without prison labor, while seven jurors shall participate in a participatory trial for an eligible case other than those set forth above: Provided, That a court may have five jurors if the defendant or defense counsel admits essential elements of prosecuted facts during the preparatory proceedings.

(2) Notwithstanding paragraph (1), a court may determine the number of jurors, either seven or nine, by decision, only if it finds that extraordinary circumstances exist in view of the substance of a case and the prosecutor and the defendant or defense counsel consent.

The jury may deliver a verdict if it reaches a unanimous verdict on the guilt of the defendant. When the jury fails to reach a unanimous verdict, it is required to hear the opinions from the judge. Also, the jury may hear opinions of the judge when a majority of jurors requests to do so. After hearing the opinions of the judge, the jury may decide on a guilty or not guilty verdict by a simple majority.

During trial each juror may request the presiding judge to examine a defendant or witness on necessary matters. Furthermore, Jurors may take their notes to the deliberation chambers, but must take all caution to ensure that the contents of their notes are not disclosed to other fellow jurors except during deliberation (Art. 41 of the Act).<sup>7</sup>

## 6. Jury verdict

Pursuant to Article 46(2) of the Act, jury verdicts, as well as sentencing opinions given by the jury, are not binding on judges.<sup>8</sup> However, in 93% of the cases tried with a jury, judges rendered deference to the verdict by accepting the jury's guilty/not guilty verdicts and their sentencing opinions.

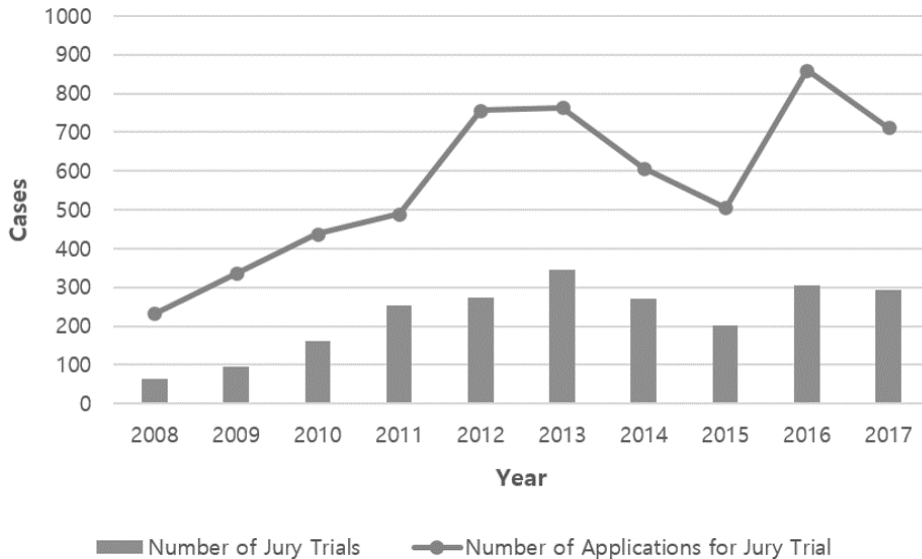
## III. Data on citizen participation trials

Since 2008 a number of criminal cases have been tried by jury in Korea. The line chart below (Graph 1) denotes the number of requests for jury trial by defendants and the bar chart indicates the number of jury trials by year. The charts demonstrate that the number of applications fluctuated through the years while the number of jury trials increased in the beginning and then remained steady since 2013. From January 2008 to December 2017, a total of 2,267 jury trials took place. Before 2012, the number of eligible cases for jury trial were about 5,000 per year, but after that year, the number quadrupled to 20,000 per year. The ratio of participation trials to the total eligible cases dropped below 2% after 2012.

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<sup>7</sup> Valerie P. Hans, "Reflections on the Korean Jury Trial", 14 J. Korean L. 81 (2014)

<sup>8</sup> Art. 46 (5) of the Act: No verdict and opinions under paragraphs (2) through (4) shall be binding on the court.



**Graph 1: The Number of Applications and Jury Trials in South Korea.<sup>9</sup>**

Funded by the Court Administration Office, I previously conducted a research project on the Korean jury trial system with psychologists. According to the research, 69 of the jurors responded that they sufficiently expressed their opinions on guilt or non-guilt of the defendant during the deliberation (Table 1).

93% of the jurors provided positive reviews on jury trials. The results also show that the jurors were able to deliberate and discuss freely during the procedure.

**Table 1<sup>10</sup>**

Juror: Did you express your opinion sufficiently during the deliberation on guilty/not guilty?			
	Number of cases	Percentage (%)	Cumulative percentage (%)
Strongly disagree	11	2.5	2.5
Somewhat disagree	20	4.6	7.1
Somewhat agree	105	23.9	31.0
Strongly agree	303	69.0	100.0
Total	439	100.0	

<sup>9</sup> Source: Court administration, Performance Analysis of Citizen Participation Trials from 2008 to 2017, 2018. 6.

<sup>10</sup> Source: Han, Sang Hoon & Woo Young Jeon, A Study on Citizen Participation Trials from the Perspective of Procedure Participants, 2012



56.7% of the jurors that responded agreed strongly that citizen participation trials would increase the transparency of criminal trials. Total 96% of the jurors viewed the effect of jury trials positively (Table 2).

**Table 2<sup>11</sup>**

Juror: Will trials become more transparent with citizen participation trials?			
	Number of cases	Percentage (%)	Cumulative percentage (%)
Strongly disagree	6	1.4	1.4
Somewhat disagree	9	2.1	3.4
Somewhat agree	174	39.9	43.3
Strongly agree	247	56.7	100.0
Total	436	100.0	

56% of jurors believed that they could trust the outcome of the jury trials more than the bench trials by professional judges. A total of 94% responded positively to the question (Table 3).

**Table 3<sup>12</sup>**

Juror: Will the outcome of trials with citizen participation be more trusted?			
	Number of cases	Percentage (%)	Cumulative percentage (%)
Strongly disagree	5	1.1	1.1
Somewhat disagree	20	4.6	5.7
Somewhat agree	166	38.1	43.8
Strongly agree	245	56.2	100.0
Total	436	100.0	

93% of the jurors said that, ‘Criminal trials seem to be much or somewhat fairer than they had thought before they served as a juror.’ (Table 4).

<sup>11</sup> Source: Han, Sang Hoon & Woo Young Jeon, A Study on Citizen Participation Trials from the Perspective of Procedure Participants, 2012

<sup>12</sup> Source: Han, Sang Hoon & Woo Young Jeon, A Study on Citizen Participation Trials from the Perspective of Procedure Participants, 2012

**Table 4**<sup>13</sup>

Juror: Has your perception on the fairness of criminal trials changed after serving as a juror?			
	Number of cases	Percentage (%)	Cumulative percentage (%)
They seem to be much fairer than before serving as a juror.	213	50.4	50.4
They seem to be somewhat fairer than before serving as a juror.	180	42.6	92.9
Not changed	22	5.2	98.1
They seem to be somewhat less fair than before serving as a juror.	4	0.9	99.1
They seem to be much less fair than before serving as a juror.	4	0.9	100.0
Total	423	100.0	

78% of the judges strongly or somewhat agreed that ‘jury trials are desirable to enhance the fairness of trials.’ (Table 5).

**Table 5**<sup>14</sup>

Judge: Do you think citizen participation trials are desirable to further fair trials?			
	Number of cases	Percentage (%)	Cumulative percentage (%)
Strongly agree	182	25.4	25.4
Somewhat agree	377	52.6	78.0
Somewhat disagree	82	11.4	89.4
Strongly disagree	42	5.9	95.3
Do not know	34	4.7	100.0
Total	717	100.0	

The table below (Table 6) demonstrates Korean judges’ agreement with jury verdicts. In Korea, 89.5% of the judges agreed with the jury verdicts strongly or somewhat.

<sup>13</sup> Source: Han, Sang Hoon & Woo Young Jeon, A Study on Citizen Participation Trials from the Perspective of Procedure Participants, 2012

<sup>14</sup> Source: Han, Sang Hoon & Woo Young Jeon, A Study on Citizen Participation Trials from the Perspective of Procedure Participants, 2012

**Table 6**<sup>15</sup>

Judge: Do you agree with the jury verdicts?			
	Number of cases	Percentage (%)	Cumulative percentage (%)
Strongly agree	524	73.4	73.4
Somewhat agree	115	16.1	89.5
Somewhat disagree	44	6.2	95.7
Strongly disagree	31	4.3	100.0
Total	714	100.0	

In the U.S., 88% of the judges in Los Angeles County, California, agreed with the jury verdicts and the percentage is even higher in Maricopa County, Arizona, reaching 89%. However, in Bronx County, New York, only 66% of the judges agreed with the jury verdict and the number goes down even lower for Washington D.C, marking 64%.<sup>16</sup> It is interesting to see a comparison between Korean and American judges' different perceptions. At least, according to the research, the percentage of Korean judges' agreement with jury verdicts seems to be as high as the one in LA, CA and Maricopa, AZ.

#### IV. The Paradigm Theory and the trial by jury

##### 1. The Paradigm Theory in general

In his seminal book "The Structure of Scientific Revolutions" (1962), Thomas Kuhn describes a paradigm as a "disciplinary matrix" or an "exemplar".<sup>17</sup> He further addresses that scientists perceive and comprehend natural phenomena based on the mechanism of the paradigm. The concepts are intended to explain the nature of normal science and the process of crisis, revolution and renewal crisis, revolution and renewal of normal science.<sup>18</sup> The flow chart below (Graph 2) illustrates how science develops: once a paradigm becomes dominant, the science at the time is the

<sup>15</sup> Source: Han, Sang Hoon & Woo Young Jeon, A Study on Citizen Participation Trials from the Perspective of Procedure Participants, 2012

<sup>16</sup> Eisenberg, Theodore; Hannaford-Agor, Paula L.; Hans, Valerie P.; Waters, Nicole L.; Munsterman, G. Thomas; Schwab, Stewart J.; and Wells, Martin T., "Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury" (2005). Cornell Law Faculty Publications. Paper 343. <http://scholarship.law.cornell.edu/facpub/343>

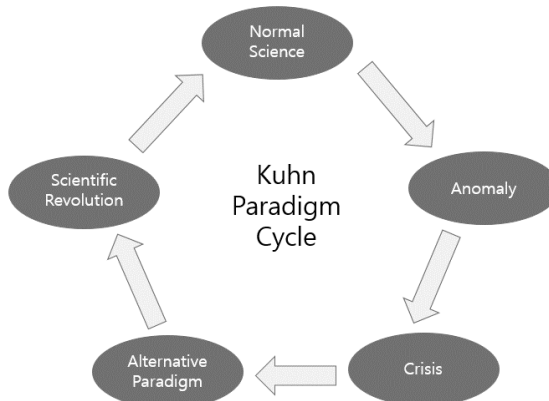
<sup>17</sup> Thomas S. Kuhn (1996) *The Structure of Scientific Revolutions*, 3rd ed., The University of Chicago Press

<sup>18</sup> Alexander Bird (2018), "Thomas Kuhn", *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.) <https://plato.stanford.edu/archives/win2018/entries/thomas-kuhn/>. Accessed 2 June, 2019.

normal science, and scientists devote themselves to solve puzzles within the paradigm.

Before Kuhn's theory came out, there was an assumption that scientific change is necessarily progressive and the progress was considered being cumulative, objective, and linear.<sup>19</sup> When a majority of scientists in the field share a paradigm, the agreement is deemed to be in the stage of so-called "normal science".

Based on the theory, as anomalies accumulate scientists have difficulties in explaining them within the dominant paradigm or theory, resulting in a crisis. Once an alternative paradigm spreads out, the new paradigm gains more and more support from the community until it eventually replaces the old one. At that point, a 'scientific revolution' is completed, and a new normal science is established. Thus, Kuhn asserts that the science undergoes periodic revolutions, or paradigm shifts, rather than developing through linear accumulation of knowledge.



**Graph 2: Kuhn Paradigm Cycle**

## 2. Law as a paradigm

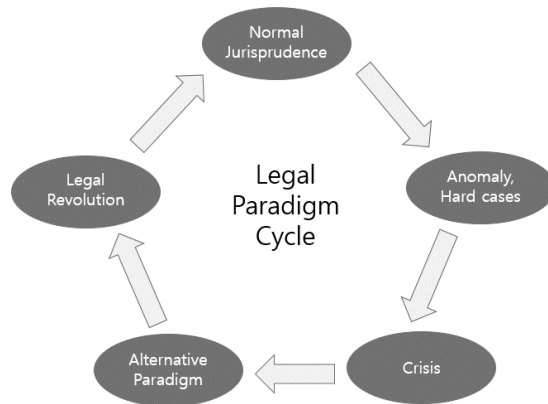
The paradigm approach can provide insights for analyzing the structure of changes in legal perspectives and institutions.<sup>20</sup> The effective statutes or acts can be deemed to as the standards of behavior in society. Normally they reflect shared values and common views of the public, and they appear to function just like paradigms. In

<sup>19</sup> Turkan Firinci Orman (2016), "Paradigm as a Central Concept in Thomas Kuhn's Thought", *International Journal of Humanities and Social Science*, Vol. 6, No. 10.

<sup>20</sup> For the application of the paradigm theory to social sciences, see Sheldon Wolin (1968), "Paradigms and Political Theories", in P. King and B.C. Parekh (eds.), *Politics and Experience*, Cambridge University Press, pp. 125 – 152; Edwin Lemert (1970), *Social Action and Legal Change*, Aldine Publishing Co., for jurisprudence, see C. M. Campbell (1974) "Legal Thought and Juristic Values", *British Journal of Law and Society*, Vol. 1, No. 1, pp. 13-30; Randy E. Barnett (1977), "Restitution: A New Paradigm for Criminal Justice", 87 *Ethics* 279; Nigel Stobbs (2011) "The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence", *Washington University Jurisprudence Review*, 4(1), pp.97-150.

continental law countries, like Korea and Germany, the decisions of the Supreme Court are not regarded as law in themselves, but as interpretations of the law. Nonetheless, they still function like paradigms because they reflect widely shared values and have an enforcing power. In this regard, every provision, precedent and legal institution can be seen as a legal paradigm, regardless of its level, significance or scope. Under the operative legal paradigm, practitioners and academic scholars solve a great deal of puzzles of routine cases consistently and efficiently.<sup>21</sup>

Once a precedent or provision is settled, normally it is not subject to change until anomalies or hard cases increase, resulting in the emergence of an alternative legal paradigm. Even a small revision to a legal rule or institution can be viewed as a partial paradigm change. Hence, by applying Kuhn's paradigm theory to a legal field, the approach can be named as a "Legal Paradigmism".<sup>22</sup>



**Graph 3: Legal Paradigm Shift Cycle**

### 3. Paradigm shift from trial by judge to trial by jury

The implementation of jury trials in Korea can be perceived from the perspective of legal paradigm shift. As stated earlier, the Korean Constitution stipulates the right to be tried by judges who are qualified under the Constitution and Acts (Article 27 (1) of the Constitution) since 1948. The constitutional right to trial by judge was believed to protect citizens from the arbitrary influence of political power on trials. Accordingly, the Constitutional Court of Korea ("CCK") ruled that the several provisions in different acts were unconstitutional on the ground that they infringed the right to trial by judge.

<sup>21</sup> This objective can be achieved through the application of legal syllogism. See Frederick Schauer, *Thinking Like a Lawyer: a New Introduction to Legal Reasoning*, 2009, p. 20.

<sup>22</sup> The author coined this term "Legal Paradigmism" for its appropriateness and usefulness in describing the structure of legal developments and paradigm shifts. See Sang Hoon Han (2017), "Paradigm and the Changes of Law", *Justice*, vol. 158 (1), pp. 240-265.

According to the Constitutional Court's decision, guaranteeing the right to be tried by a judge means the right to be tried by judge both in finding facts and in interpreting and applying the law at least at one instance.<sup>23</sup> Thus, no restriction or constraint shall be imposed to make it difficult for the defendant to access the trial by judge, and if such guarantee is forfeited, the deprivation violates the essential aspect of the constitutional right to be tried by a judge.<sup>24</sup>

Art. 186 (1) of the Patent Act, which originally provided for only an immediate appeal to the Supreme Court as an appeal of a decision of the Patent Office, has been announced unconstitutional in violation of the constitutional right that guarantees the person's right to be tried by a qualified judge in fact-finding and application of the law.<sup>25</sup>

This decision and similar ones imply that the right to trial by judge is one of the commonly shared values and has an enforcing power as to who ought to find facts and apply the law in trials. Therefore, the right to trial by judge seemed to function as an operative legal paradigm.

However, over the past few decades, Korean people witnessed a series of corruption scandals involving judges, prosecutors, defense lawyers and law brokers. These scandals took place recurrently. Moreover, many Koreans viewed that wealthier defendants and conglomerates, so-called *jaebol* company owners convicted of embezzlements, tax-evasions, or mainly other white-collar crimes were sentenced too leniently for the crimes they had committed.

Repeated corruption scandals and disproportionate punishments for the wealthier defendants led to a public outrage, resulting in a decline in judicial trust which ultimately led to a crisis. Since 1999 many people have come to think that trials by jury would be fairer than trials by judge. To the contrary, judges in general, were opposed to the jury trials, for the fear of losing traditional judicial power and discretion. However, some reformative judges tried to democratize the court and judicial decision-making by implementing a jury trial system. They were aware of the severity of the persisting system's hazard.

Reformative scholars, civil activists and defense lawyers supported the jury trials because they thought they were a feasible solution. The line chart below indicates the number of publications on jury trials in South Korea. Before 2000, publications on jury trials were very rare; however, after 2000, the number increased dramatically. This implies that the academic attention and interests have focused on the issue of jury trial to further introduce new suggestions or solutions.

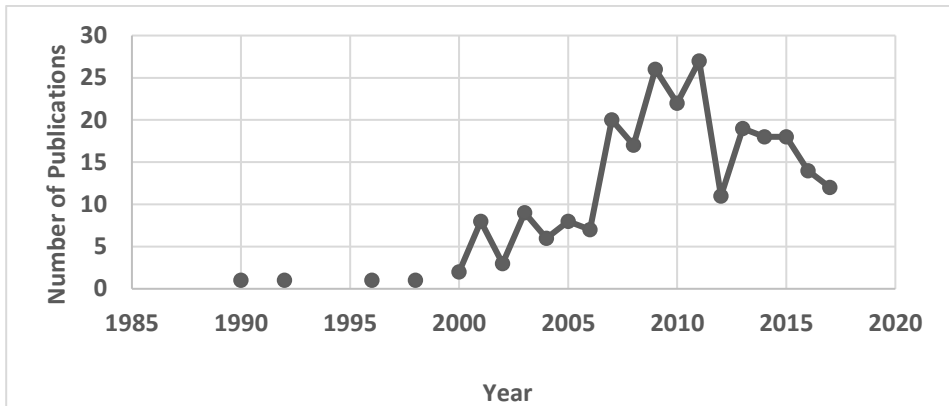
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<sup>23</sup> The Constitutional Court decision on Sep. 28, 1995, case no. 92 Hun-Ka 11(a case on violation of the Art. 186 (1) of the Patent Act).

<sup>24</sup> Art. 37 (2) of the Constitution: The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order, or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

<sup>25</sup> The Constitutional Court decision on Sep. 28, 1995, case no. 92 Hun-Ka 11(a case on violation of the Art. 186 (1) of the Patent Act).

Accordingly, a growing number of relevant research would be “an evidence of an emerging [paradigm] shift”.<sup>26</sup> Consequently, in 2004, a Presidential Committee was formed to implement a judicial reform, and in 2007 the National Assembly passed the Citizen Participation Act.



**Graph 4: Number of Academic Publications on Jury Trials in Korea by Year**

The constitutional issues, such as the right to trial by judge, are remaining unresolved. A revision bill of the Korean Constitution was submitted by the President in 2018. It contains, among others, an express provision on jury trials. If the revision bill becomes law, a stronger form of jury trials will be institutionalized, including jury verdicts that are binding on judges. Interestingly, however, there is a strong public belief in the ability of professional judges in Korea and thus, the current hybrid system of jury trial system will probably not be revised for the time being.

## V. Discussion

### 1. Current situation

In the fourth session of the “Judicial Development Committee with the People” (June 5, 2018), several recommendations for the improvement of the citizen participation trial were introduced to the Supreme Court of Korea as follows:

- A. With regard to the improvement of the defendant’s motion (whether the mandatory case should be introduced), the cases of intentional homicide shall be considered as mandatory ones for jury trials (majority opinion).

<sup>26</sup> See Stobbs (2011), p. 148.

B. Recommendation for expanding the jurisdiction of jury trials to district court branches.

C. Restriction on prosecution's appeals in the event of acquittal by the unanimous verdict of the jury (majority opinion).

The above resolution of the Judicial Development Committee is different from that of the CCPJS in 2012, as to introducing mandatory jury trials and limiting prosecution's appeals. In the current 20th National Assembly term, the bill on the revision of the Citizen Participation Act submitted by Rep. Jung Sung-ho and others provides the resolution to the CCPJS. Recently, Rep. Kim Jong-min submitted a bill that would enable jury trials without the defendant's motion, addressing the resolution of the Judicial Development Committee. Eligible cases for jury trials were expanded to all 3-judge cases in 2012 and since then, no other significant legislative revisions that could amount to the second phase of the participatory trial system have come into sight. Thus, one can highly appreciate this active discussion at the National Assembly.

## 2. Expansion of the scope of the eligible cases for jury trials

Currently, only about 1.5% of the eligible cases (ca. 300 cases per year) are carried out in jury trials. This is not satisfactory in terms of the quantity and quality to enhance confidence in the judiciary. In the case of high-profile cases where public attention is drawn and concentrated and fair trials are of common interest (such as white-collar crimes or bribery cases), the objective of the participatory trial is often tarnished as the defendant tends to avoid a jury trial. In addition, the defendant is inclined to move for a participation trial, sometimes after consultation with the attorney, when he/she thinks it is advantageous for him/her in the determination of the guilt or in the sentencing. This kind of "forum shopping" would endanger the public confidence in integrity and impartiality of the judiciary.

In the case of the U.S. Federal law, the defendant may waive his/her right to a jury trial, only if the prosecutor agrees, and the court approves. Then, the defendant is allowed to proceed the case to either bench trial or to plea bargain (opt-out system).<sup>27</sup>

Art. 27 (1) of the Constitution of Korea provides that all citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act. Thus, if a jury trial is carried out against the defendant's will, an issue of unconstitutionality arises. Chung Sung-Ho's bill allows the court to refer a criminal case to a jury trial *ex officio* or upon the prosecutor's motion even in the absence of the defendant's motion, if it is deemed necessary to promote the democratic legitimacy and transparency of the judiciary (Art. 5 of the bill). Kim Jong-min's

<sup>27</sup> See Section 23 (a) of the Federal Rules of Criminal Procedure.



bill stipulates that crimes involving intentional deprivation of life (killing with malice aforethought), such as murder, robbery and rape murder, are subject to the mandatory jury trials.

It is noteworthy that the Constitutional Court considered the constitutionality of the Art. 27 of the Discipline of Judges Act<sup>28</sup> and announced that the section did not violate the constitutional right to be tried by a qualified judge.

The CCK clarified that according to Art. 27 of the Discipline of Judges Act, the Supreme Court shall try the case of a request for revocation based on the single-trial system, and that in consideration of the special nature of the status of judges exercising their judicial power independently and the distinct nature of the disciplinary proceedings against judges, the Supreme Court has authority to find facts and to apply appropriate law in the case at hand. Therefore, unlike other judicial review cases, in which the Supreme Court has a restricted power to find or correct facts in issue, in the case of a request for revocation of discipline against judges, the right to be tried by the qualified judges under the Art. 27 paragraph 1 of the Constitution was not violated.<sup>29</sup>

From these precedents, it can be inferred that even if a jury trial is conducted ex officio or upon the prosecutor's request for a participation trial in the absence of the defendant's opinion, this does not infringe the defendant's right to be tried by qualified judges. The reasons for the inference are as follows: First, the trial court has the legal authority to disregard the jury's verdict and to decide the case by its own judgment, since the jury verdict has only an advisory effect on judges. Secondly, the appellate court is authorized to examine and review the case on the facts as well as the applicable law. Therefore, the defendant is not deprived of the right to be tried by judges in its essential aspect. In other words, a revision of the Citizen Participation Act that would enable a jury trial against the defendant's will would be constitutional because it does not deprive the defendant of the right to a trial by judge in fact-finding and in applying the law.<sup>30</sup>

Once the issue of unconstitutionality is resolved, then the proceeding of jury trials in the absence of the defendant's application becomes constitutional, legitimate and practicable. Such a procedure is indeed necessary in order to enhance the public trust and transparency especially when the case concerns an issue of strong public interest.

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<sup>28</sup> Article 27 (Procedures of Raising Objection) of the Discipline of Judges Act

(1) Where the respondent intends to raise an objection against a disposition of disciplinary action, etc., he/she shall request the Supreme Court to revoke the disposition of disciplinary action, etc. within 14 days from the date he/she learned that the disposition of disciplinary action, etc. existed without going through procedures for pretrial.

(2) The Supreme Court shall try the case of request for revocation according to the single-trial system.

<sup>29</sup> Constitutional Court decision on Feb. 23, 2012, case no. 2009Hun-ba34.

<sup>30</sup> See Sang Hoon Han (2008), "Civil Participation in Criminal Trials and Human Rights", *Justice* vol. 102, p. 7; Sang Hoon Han (2012), "An Analysis and Suggestion of Binding Force of Jury Verdict in Korea", *Korean Criminology and Public Policy*, 24(3), pp. 9 - 20.

Moreover, according to the current Citizen Participation Act, serious criminal cases presided by a collegiate panel of three judges are eligible for jury trials.<sup>31</sup> When the court finds it appropriate to proceed a single-judge case with a jury, then it has to first decide to judge the case by a collegiate panel (Art. 32 of the Court Organization Act).

One of the revision bills to the Participation Act seeks to expand the eligible cases for jury trial to all criminal cases despite the severity of the crime.<sup>32</sup> If the revision bill passes the National Assembly, however, it would substantially burden the judiciary with an enormous amount of caseload. That is why even in the U.S., where the Sixth Amendment provides the right to trial by jury, the right to trial for non-petty crimes are limited while no offense can be deemed “petty” for the purposes of the right to trial by jury where imprisonment for more than six months is given.<sup>33</sup>

Because it would be too burdensome and infeasible for the court to try every criminal case with a jury, there needs to be a cap on the eligibility of cases based on its severity, seriousness and the possible range of punishment, etc. In determining the requirements, several factors shall be considered as well; for instance, the number of eligible cases, public interest, caseload of the court, and financial resources, etc. In my opinion, when the defendant is punishable by more than 3 years of imprisonment, he/she should be entitled to a jury trial.

### 3. A case for a legal paradigm shift?

In jurisprudence there is a particular provision or interpretation of law that receives prevailing support from both the court and a majority of legal scholars. This legal opinion is to be ‘dominant opinion’ (*herrschende Meinung* in German).<sup>34</sup> Such a ‘dominant opinion’ has a similar status as the prevailing paradigm in science, which serves as an exemplar or disciplinary matrix. Just as numerous puzzles are solved based on

<sup>31</sup> Art. 5 (Eligible Cases) of the Citizen Participation Act (1) A case enumerated in any of the following shall be eligible for a participatory trial (hereinafter referred to as “eligible case”):

1. Cases in the jurisdiction of a collegiate panel under Article 32 (1) (excluding subparagraphs 2 and 5) of the Court Organization Act;
2. Cases of aiding, abetting, counseling, and procuring any person to do or attempt any of the acts described in Subparagraph 1;
3. Cases falling under subparagraph 1 or 2, and those falling under Article 11 of the Criminal Procedure Act, which are consolidated for a trial as a single case.

<sup>32</sup> Also see Mi-Sook Park, et al. “A Study on Jury Trial System in Korea II”, Korean Institution of Criminology, 195 (2008) “...all criminal cases shall be eligible for the jury trial and the court may prioritize the cases and reject the requests on its own discretion.

<sup>33</sup> *Baldwin v. New York*, 399 U.S. 66 (1970): “defendants accused of serious crimes must, under the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment, be afforded the right to trial by jury, *Duncan v. Louisiana*, 391 U. S. 145, and though “petty crimes” may be tried without a jury, no offense can be deemed “petty” for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”; See *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989).

<sup>34</sup> Martin Rath, “Das ist hM und kann nicht angezweifelt werden: Schluss der Debatte mit zwei Buchstaben”, *Legal Tribune Online*, 2011. 10. 23.

a prevailing paradigm in the field of science, legal professionals and academics solve a great amount of legal cases efficiently under the legal paradigm or dominant opinion. Once a dominant opinion or dominant legal theory is formed, it becomes normal jurisprudence and solves most of the routine cases. However, a 'normal jurisprudence' is disturbed when anomalies or non-routine cases emerge and accumulate. They cannot be resolved by existing dominant opinion or legal theory, and then a legal crisis looms.

With the growth of anomalies, an alternative legal theory or a competing legal paradigm appears and finally replaces the existing dominant paradigm or dominant opinion. That means, the new dominant legal paradigm accomplished a 'legal revolution.' In this regard, the application of paradigm theory in the field of law may be termed as 'legal paradigmism'.

With regard to the jury trials in South Korea, in applying the legal paradigmism, a revision of an article in the Constitution from trial by judge to trial by jury would be the completion of a legal paradigm shift. Until then, the legal paradigm shift appears to be still underway in Korea.

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### **Korean Acts (in English)**

- ACT ON CITIZEN PARTICIPATION IN CRIMINAL TRIALS (국민의 형사재판 참여에 관한 법률)  
<[http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=46745&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=46745&lang=ENG)>
- CONSTITUTION OF THE REPUBLIC OF KOREA (대한민국 헌법)  
<[http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=1&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG)>
- COURT ORGANIZATION ACT (법원조직법)  
<[http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=48257&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=48257&lang=ENG)>
- DISCIPLINE OF JUDGES ACT (법관징계법)  
<[http://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=46404&lang=ENG](http://elaw.klri.re.kr/eng_service/lawView.do?hseq=46404&lang=ENG)>



# Contaminated Soils in Insolvency Proceedings

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## I. Classification

Not infrequently, the environmental consequences of a debtor's former business operations also have to be dealt with in insolvency proceedings. The phenomena are extremely diverse and range from waste to be disposed of and contaminated soil to buildings to be renovated or demolished.<sup>1</sup> One should equally think of the small petrol station on whose property mineral oil residues have seeped into the soil as of a large company whose chemical production has led to residues which are stored on the company property. A central question here is who has to bear the costs of the environmental hazard elimination.

In the situations described, two conflicting legal systems, environmental law and insolvency law, collide. Both areas of law follow their own guiding principles and thus different methods of resolution.<sup>2</sup> Both areas of law are subject to the jurisdiction of different supreme courts, which is particularly important in practice. In the area of administrative law, the Federal Administrative Court (“BVerwG”)<sup>3</sup> is responsible for environmental law issues, and in the area of private law, the Federal Court of Justice (“BGH”)<sup>4</sup> is responsible for insolvency law issues. Both supreme courts

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<sup>1</sup> MüKoInsO/*Hefermehl*, 3. Aufl., § 55 Rn. 88.

<sup>2</sup> *Pape*, FS Kreft, 445, 447.

<sup>3</sup> BVerwG NZI 1999, 37, 38; 1999, 246.

<sup>4</sup> BGHZ 148, 252, 259; 150, 305, 317 f.

have already had to rule on the relevant problems on several occasions. The starting point of their jurisdiction is shaped by the different perspectives on the legal situation. In spite of the resulting controversies, meanwhile the discussion has calmed down to a certain extent. In fact, this is probably less due to a consensus on content that has been reached than to a consensus on dissent in which both jurisdictions have defined their respective terrain.

In the following, the conflict between public environmental and regulatory law and insolvency law that is structured under private law will first be analysed under II. It is to be discussed whether the stipulations of legal consequences of one of the two areas of law take precedence over the other or what a properly drawn systematic dividing line might look like. Point III then deals with the regulatory responsibility of the insolvency administrator. In particular, it must be clarified under which conditions the insolvency administrator is subject to the regulatory obligation (“Ordnungspflicht”) for a hazard arising from an asset involved in the insolvency proceedings.

By employing the categories provided for under insolvency law, IV. then determines how regulatory obligations are to be treated in insolvency proceedings.<sup>5</sup> The focus here is on the quality of the costs resulting from a regulatory obligation under insolvency law, which is decisive for the prospects of settlement. It must therefore be decided whether the costs of substitute performance for a regulatory obligation are to be regarded as insolvency claims (“Insolvenzforderungen”) or preferential liabilities (“Masseverbindlichkeiten”). Finally, Point V. discusses the insolvency administrator’s options for action and, in particular, his options under insolvency law for limiting liability.

## II. The conflict between environmental and insolvency law

### 1. Regulatory obligations as duties under objective law

The seemingly abstract controversy over a possible prerogative of regulatory or insolvency law has a very concrete background: the dispute over money. Ultimately, it is a question of deciding how to distribute the scarce financial resources, especially in an economic crisis. It has to be decided whether there is priority access to the debtor's financial resources under regulatory or environmental law or whether the assets must be distributed evenly among all creditors in accordance with insolvency law yardsticks. Does a preferential right of satisfaction therefore exist or does the principle of equal treatment of creditors also apply in this respect?

According to an exorbitantly far-reaching view founded by *Karsten Schmidt* and developed by him in several contributions, an obligation under environmental law is an obligation under objective law (“objektivrechtliche Pflicht”) which cannot be

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<sup>5</sup> BVerwG NZI 2005, 51, 52.



classified in the categories of insolvency law.<sup>6</sup> This obligation should exist as a continuous obligation not interrupted by the opening of insolvency proceedings and arising from the responsibility of the company for causing the pollution by its acts or omissions (“Handlungsstörer”) or merely as the site owner liable for its condition (“Zustandsstörer”).<sup>7</sup> The insolvency administrator must satisfy this obligation without restriction and thus with super priority from the assets of the estate.<sup>8</sup> Even an effective abandonment of the property, which will be dealt with later under V. 1., could not end this obligation.<sup>9</sup>

This concept is based on several premises. Fundamental to this position is the understanding of the insolvency administrator as an obligatory external liquidator. This interpretation places the insolvency administrator in the position of a corporate body, which must continue to fulfil the company's regulatory obligations.<sup>10</sup> Such an understanding of the insolvency administrator as a corporate body only interprets his position in a one-sided corporate orientation.

This view can no longer give a logical answer if the debtor is not a company but a natural person. In addition, it is important to emphasise the many and varied requirements that the insolvency administrator must meet, also vis-à-vis the creditors and the insolvency court, which cannot be explained by the concept of corporate bodies. Instead, it is to be assumed in accordance with the prevailing view that the insolvency administrator acts as an official trustee.<sup>11</sup> In this respect, the regulatory obligations do not apply to him personally per se, but only in the case of a particularly realised case of liability.

The aim of the opinion developed by *Karsten Schmidt* is to separate the regulatory obligations from the costs, such as those of substitute performance. This view, however, is thereby also detached from the determinants of insolvency law. The conflict with regulatory or environmental law would thus be clarified in principle, but completely unilaterally at the expense of insolvency law. Again, the opinion of *Karsten Schmidt*, which has remained isolated, cannot convince with this result.

## 2. No structural priority

Although an understanding of regulatory obligations as obligations of the company which are based on objective law and continue to exist in the event of insolvency must be ruled out, a general priority of an area of law is thus not excluded from the outset. Specifically, it is a question of whether the objective structure and in particular the legal stipulations of one area of law dominate over the other and thus set

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<sup>6</sup> *K. Schmidt*, ZIP 2000, 1913, 1919; *id*, NJW 2012, 3344, 3347.

<sup>7</sup> *K. Schmidt*, NJW 2010, 1489, 1493.

<sup>8</sup> *K. Schmidt*, NJW 2010, 1489, 1493.

<sup>9</sup> *K. Schmidt*, ZIP 2000, 1913, 1919; *id*, NJW 2010, 1489, 1493.

<sup>10</sup> *K. Schmidt*, NJW 2010, 1489, 1493; *id*, NJW 2012, 3344, 3345.

<sup>11</sup> Kübler/Prütting/Pape/Schaltke, InsO, 42. EL., § 55 Rn. 127.

requirements to which the other area of law is bound. In terms of content, it does not yet answer the question of whether the public law categories have priority, which in any case requires an increased need for legitimation from the point of view of insolvency law.

Due to the regulatory requirements, the hazards posed by contaminated sites and thus the damages to public security must be eliminated. It is administrative rationality to impose regulatory responsibility on the party causing the damages as the one responsible for it. As far as the consequences of the (former) business activity are concerned, it appears to be a logical regulatory consequence to assert the costs of the remediation of contaminated sites against the debtor or the insolvency administrator. This, however, does not yet imply an answer as to whether the responsibility under regulatory law is accompanied by a priority position under insolvency law.

Conversely, one of the inalienable conditions of an insolvency is that the debtor is no longer in a position to settle the existing liabilities from his assets. As a result, creditors are typically not fully satisfied. The aim of insolvency proceedings is to satisfy all creditors equally in accordance with their entitlement. This is referred to as *par conditio creditorum*. Any breach of this principle of equal satisfaction is suspect under insolvency law from the outset. This pure statement, however, does not include any substantive determination as to who is responsible for what and whether, in individual cases, a priority for satisfaction may be justified.

If the claims resulting from the remediation were to be given priority, the claims of other insolvency creditors could often not be satisfied or only to a small extent. If, on the other hand, the public sector is denied a priority, the public purse would have to bear the costs of the clean-up, while the advantages remained with the estate.

Even these brief characterisations reveal the material elements, but also the limits of environmental and insolvency law in terms of content. A systematic or other logical precedence of one of the areas of law is not discernible because of its respective objective limitation. Neither environmental law takes precedence over insolvency law in principle, nor, conversely, insolvency law in general over environmental law.<sup>12</sup> When deciding on the conflict between environmental and insolvency law, no area of law can from the outset claim a power of definition or restriction in relation to the other area.

### 3. Balancing of interests

A seemingly simple approach to dissolve the existing conflict could be seen in a balancing of interests. Yet the mere qualification of a liability as a claim of the public sector does not, in itself, justify considering it to have priority over liabilities under

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<sup>12</sup> Cf. BVerwG NZI 2005, 51, 52.

private law and therefore deviating from the equal treatment of creditors under insolvency law. Such a hierarchy of claims finds no basis in the Insolvency Code and would contradict the patterns of order applicable in Germany.

However, other values may have to be taken into account. On the one hand, there would be the fundamental importance of eliminating dangers to public health. In addition, the equally important water and food supply, but also the protection of public funds, could be included. In insolvency proceedings, nonetheless, other interests of high and highest rank may also be affected. One might think, for example, of employees' pay claims, an employer's social security contributions, a child's maintenance claims or claims for damages by an injured party against the debtor.

At the same time it would appear to be a short-sighted approach to weigh the public interest in a clean-up of contaminated sites against equal treatment of creditors and an even distribution of assets. The equally complex and heteronomous interests stand in the way of a balancing of interests. Above all, there is a lack of a normative basis that justifies the balancing of interests. In any case, insolvency law knows no general and thus unspecified balancing of interests.

As a result, the conflict between the two areas of law which collide in the clean-up of contaminated sites during insolvency proceedings cannot be decided in favour of one side or the other either on the basis of different considerations of principle or on the basis of a balancing of interests.

#### 4. Strictly systematic resolution of the conflict

As has been shown at the various levels of analysis, the competitive relationship between environmental and insolvency law cannot be unilaterally resolved in favour of one or the other area of law. In their treatment of regulatory obligations and the resulting cost consequences in the insolvency of the obligated party, both areas of law must be distinguished from each other according to systematic criteria resp. brought to concordance. To this extent, the 7th Senate of the BVerwG states consequently that insolvency law does not restrict regulatory law any more than regulatory law does insolvency law.<sup>13</sup>

In the legal - and, as a result, also financial - handling of regulatory obligations in insolvency proceedings, the two legal systems intertwine. Nevertheless, the questions to be assessed under regulatory law and insolvency law must be strictly differentiated. The conflict must therefore be decided primarily along the material dividing line according to the objectives of the respective legal area.

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<sup>13</sup> BVerwG NZI 2005, 51, 52.

In the view of the BVerwG<sup>14</sup> and some voices in the literature following it<sup>15</sup>, regulatory law stipulates under which conditions a disturbance of public security (hazard) (“Gefahr für die öffentliche Sicherheit”) exists, how this damage is to be addressed and who can be held liable for it. This applies, for example, to the question whether taking possession of an asset already triggers a regulatory obligation or whether the obligation can only result from past conduct of the insolvency administrator.<sup>16</sup> Insolvency law would then be linked to this regulatory finding. Since no insolvency privilege exists, the opening of insolvency proceedings has no influence on the public law obligations, which therefore also continue in the insolvency.<sup>17</sup>

According to this opinion of the administrative judicature, insolvency law then determines how regulatory obligations are to be assessed in insolvency proceedings. This applies in particular to the question whether the costs resulting from an administrative obligation give rise to a preferential liability or whether they merely lead to an insolvency claim. With this contouring, a demarcation is named which seems willing to take account of both regulatory fields with their respective peculiarities and therefore also with the respective necessary distinctions in principle.<sup>18</sup>

## 5. Systematic-functional resolution

With this strictly systematic concept of the BVerwG, a logical solution to the question of conflict seems to have been found. However, it should not be underestimated that this demarcation is only straightforward from a public law perspective. With the far-reaching definition of the remit of public law, the terrain of regulatory law is extended far into the area of insolvency law. From the point of view of insolvency law, this impairs, if not destroys, essential functional conditions of insolvency proceedings.

It is precisely the statement that regulatory law determines who can be held liable for the fulfilment of a regulatory obligation which, on closer examination, reveals serious problems under insolvency law and perhaps also problems extending beyond this. One of the fundamental consequences of insolvency proceedings is the decision as to whom is liable for a liability in the debtor's insolvency. In this respect, there is no legitimation for the opinion of the BVerwG as to why this decision may be taken under regulatory law.

This issue becomes obvious when considering whether taking possession of the assets by the insolvency administrator already constitutes a regulatory obligation on

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<sup>14</sup> BVerwG NZI 2005, 51, 52.

<sup>15</sup> MüKoInsO/*Hefermehl*, 3. Aufl., § 55 Rn. 88; HambK/*Jarchon*, 6. Aufl., § 55 Rn. 72 f.; KK/*Röpke*, § 55 Rn. 53; cf. *Depré/Kotbe*, in: Beck/*Depré*, Praxis der Insolvenz, 3. Aufl., § 36 Rn. 61.

<sup>16</sup> BVerwG NZI 2005, 51, 52; Jaeger/*Henckel*, InsO, § 38 Rn. 26.

<sup>17</sup> K. Schmidt/*Sternal*, InsO, 19. Aufl., § 80 Rn. 69.

<sup>18</sup> BVerwG NZI 2005, 51, 52; Jaeger/*Henckel*, InsO, § 38 Rn. 26.

the part of the insolvency administrator for the hazards emanating from the assets.<sup>19</sup> Some substantive provisions of environmental law link the regulatory obligation to the economic control of the asset without differentiating according to further conduct of the insolvency administrator. According to § 148 InsO, one of the mandatory duties of the insolvency administrator is to immediately take possession of and administer all assets belonging to the insolvency estate.

If the obligations are solely based on the regulatory provisions, the consequence would be an automatic assumption of responsibility which cannot be influenced by the insolvency administrator. In any case, the regulatory obligation connected with economic control (“Sachherrschaft”) would apply to the administrator who has to take possession. As a consequence, the insolvency administrator would inevitably have to meet the costs resulting from these regulatory obligations as preferential liabilities. Thus, such liabilities would have an exegetically based priority via the assignment of the regulatory obligation which is not provided for according to the systematics of the Insolvency Code.<sup>20</sup>

This understanding, which is shaped by administrative law, is by no means inevitable.<sup>21</sup> The BVerwG concept treats the insolvency administrator like a new legal entity which becomes responsible for the hazards as a new party with economic control (“Zustandsstörer”) when the assets are taken possession of. In contrast, it should be emphasised that the insolvency administrator does not act as a new legal entity to which responsibility could be attributed. Rather, the insolvency administrator acts only as the trustee of the debtor who is liable for the hazards. Consequently, the claims established prior to the opening of the insolvency proceedings would continue to exist with the same quality as those against the debtor.<sup>22</sup> More extensive liability, on the other hand, would have to be based on an additional responsibility arising from the actions of the insolvency administrator.

The latter interpretation, which is both systematic and functional, is to be supported. In principle, the assessment of the prerequisites of a hazard to public security under regulatory law and the qualification of the resulting claims under insolvency law, as advocated by the BVerwG, remain the same. Yet, in contrast to the case law of the BVerwG, the position of the insolvency administrator must also be interpreted in accordance with insolvency law standards since his position is distinctly shaped by insolvency law. In this respect, the administrative court judicature is to be rejected and the insolvency law view represented by the BGH<sup>23</sup> is to be followed.

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<sup>19</sup> BVerwG NZI 2005, 51, 52.

<sup>20</sup> Kübler/Prütting/Pape/Schaltke, InsO, 42. EL., § 55 Rn. 129; Uhlenbruck/Sinz, InsO, 14. Aufl., § 55 Rn. 31.

<sup>21</sup> Cf. Jaeger/Windel, InsO, § 80 Rn. 121.

<sup>22</sup> Mohrbutter/Ringstmeier/Voigt-Salus, Handbuch Insolvenzverwaltung, 9. Aufl., Kap. 32 Rn. 95; critical from a different perspective Jaeger/Windel, InsO, § 80 Rn. 121.

<sup>23</sup> BGHZ 148, 252, 259 f.

From a material point of view, this position leads to a differentiation in the consideration of who can be held liable for a hazard. The responsibility is to be determined in accordance with substantive law. The further consideration of which claim results from this, on the other hand, is subject to the categories of insolvency law. This, however, goes beyond the allocation of territory by the BVerwG to insolvency law solely for the purpose of assessing regulatory obligations.

### III. Environmental liability for contaminated sites

#### 1. Disturber (“Störer”)

According to the case law of the BVerwG, the relevant regulatory law determines when a regulatory obligation is established for public security disturbances caused by the insolvency estate. For this purpose, the court follows the constitutive elements of the respective regulatory law. For example, § 4 III 1 BBodSchG, § 7 II 1 in conjunction with § 3 IX KrWG<sup>24</sup> refer to the economic control of an asset. According to these provisions, the insolvency administrator becomes subject to regulatory obligations as soon as he takes possession of the assets.

This comprehensive responsibility of the insolvency administrator for the condition of the assets, which results merely from his economic control (“Zustandsverantwortlichkeit”), leads to the central area of conflict between administrative and insolvency law described above. According to the position developed here, the question of who is to be classified as a disturber is to be determined depending on the continuing obligations under regulatory law. Of course, this does not yet imply any statement about the resulting quality of the costs incurred, in particular for substitute performance. This follows the rationality of insolvency law.

In contrast, §§ 5, 22 BImSchG, for example, refer to the position as operator of the facility, for which taking possession is not considered being sufficient.<sup>25</sup> In this respect, the insolvency administrator must at least have co-induced the emissions so that he can be held liable for the disturbances because of his own conduct (“Verhaltensstörer”). This could be done by positive action or by omission of an act required to prevent hazards.<sup>26</sup> In the case of regulatory responsibilities of the insolvency administrator for his own actions or omissions, there are no substantial points of conflict between regulatory law and insolvency law. The regulatory obligations fit into the insolvency law system.

<sup>24</sup> According to the prior legal situation §§ 11 I i.V.m. § 3 VI KrW/AbfG, BVerwG NZI 2005, 55, 56.

<sup>25</sup> BVerwG NZI 1999, 37, 39.

<sup>26</sup> MüKoInsO/Hefermebl, 3. Aufl., § 55 Rn. 90a.

## 2. Addressee of the remediation order

A remediation order issued before the commencement of insolvency proceedings is directed against the debtor quite straightforward. Insofar as the debtor has not complied with the regulatory obligations and the regulatory authority has carried out a substitute performance, the costs incurred must be corrected in accordance with the general criteria of insolvency law. Insofar, these are insolvency claims which are subject to the principle of equal treatment of creditors.

The situation is more difficult with a remediation order issued after the opening of insolvency proceedings. Such a remediation order is not prevented by the prohibition of enforcement under § 89 InsO.<sup>27</sup> With such an order, a public law regulatory obligation and no financial claim is asserted. Only the compulsory enforcement of costs arising from a substitute performance could therefore be prevented by the prohibition of enforcement.

A disposal order issued after the opening of the insolvency proceedings is to be addressed to the insolvency administrator.<sup>28</sup> This also applies if the situation in breach of regulations has already existed prior to the opening of the insolvency proceedings. In this case, the debtor cannot be the correct addressee of a remediation order, since the right to manage and dispose of the assets of the insolvency estate is withdrawn from him pursuant to § 80 InsO. Therefore, he could no longer comply with a regulatory obligation.<sup>29</sup> There is no doubt that the insolvency administrator is the correct addressee if the situation is based on an act of the insolvency administrator.

If a substitute performance is carried out, the claim for payment of the costs thereby incurred is to be treated independently of the qualification of the regulatory obligation.<sup>30</sup> Rather, these costs are to be satisfied in accordance with the standards of insolvency law.

## IV. Effects under insolvency law

### 1. In advance: The order of settlement under insolvency law

In the previous remarks, reference has repeatedly been made to the significance of the order of settlement under insolvency law. In a nutshell, the priority principle under enforcement law from § 804 III ZPO is relinquished in insolvencies. If it is

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<sup>27</sup> Jaeger/Henckel, InsO, § 38 Rn. 26; Depré/Kothe, in: Beck/Depré, Praxis der Insolvenz, 3. Aufl., § 36 Rn. 55; different view: Kölner Schrift/Lüke, 3. Aufl., Kap. 22 Rn. 54 f.; also see Jaeger/Windel, InsO, § 87 Rn. 7.

<sup>28</sup> HK-InsO/Kayser, 9. Aufl., § 80 Rn. 58; FK-InsO/Wimmer-Amend, 9. Aufl., § 80 Rn. 41; Nerlich/Römermann/Andres, InsO, 29. EL., § 55 Rn. 66.

<sup>29</sup> MüKoInsO/Hefermebl, 3. Aufl., § 55 Rn. 94.

<sup>30</sup> Jaeger/Henckel, InsO, § 38 Rn. 26.

no longer possible to satisfy all claims from the debtor's assets, it would be inappropriate to let the time of seizure decide on the prospects of satisfaction. Priority is replaced by equal treatment in accordance with the entitlement. However, the principle of equal treatment does not imply complete equality of all creditors either.

Apart from creditors entitled to segregation ("Aussonderungsberechtigte") respectively separate satisfaction ("Absonderungsberechtigte"), who are not pertinent in this context, the preferential creditors should first be mentioned here as a privileged group of creditors. Preferential liabilities are instigated by the insolvency proceedings. In general, they are only established after the opening of proceedings, but see, for example, § 55 IV InsO. Among the preferential liabilities are in particular the costs of the insolvency proceedings, § 54 InsO, the liabilities arising through the acts of the insolvency administrator or in any other way through the administration, realisation and distribution of the insolvency estate, § 55 I No. 1 InsO, as well as liabilities arising out of reciprocal contracts insofar as performance is demanded on behalf of the insolvency estate or if such a contract has to be performed after commencement of the insolvency proceedings, § 55 I No. 2 InsO.

As these obligations are necessarily connected with the handling of the insolvency proceedings,<sup>31</sup> the creditors of these claims are satisfied in advance. By virtue of the principle of advance satisfaction laid down in § 53 InsO, the preferential liabilities are to be adjusted in particular before those of insolvency creditors in order to enable the insolvency proceedings to be conducted properly.<sup>32</sup> Under the dictate of limited financial resources, this means an essential but justified advantage for the preferential creditors. Nevertheless, the assets may not be sufficient to satisfy the preferential liabilities, §§ 207 ff. InsO.

Insolvency creditor is anyone who has a justified financial claim against the debtor at the time of commencement of the insolvency proceedings. The decisive factor here is whether the legal basis for the claim was already established when the proceedings were opened.<sup>33</sup> The claims of these creditors are satisfied on a pro rata basis from the estate and thus usually only to a small extent.

## 2. Preferential liability or insolvency claim

The recoverability of a cost reimbursement claim for substitute performance to remedy a disturbance of public security is thus decisively influenced by the qualification of the claim as a preferential liability. The insolvency administrator is responsible for disturbances caused by the continuation of the business after commencement of the insolvency proceedings as the party who conducted the relevant acts. This also applies if the insolvency administrator has not sufficiently secured a property against third parties depositing waste on it after commencement of insolvency proceedings.

<sup>31</sup> HK-InsO/Lohmann, 9. Aufl., § 53 Rn. 2.

<sup>32</sup> K. Schmidt/Thole, 19. Aufl., § 53 Rn. 7.

<sup>33</sup> Ahrens/Gehrlein/Ringsteiner/Abrens, InsO, 3. Aufl., § 38 Rn. 29.



In such cases, it is undisputed that preferential liabilities pursuant to § 55 I No. 1 InsO are created.<sup>34</sup> The insolvency administrator is personally liable if he negligently violates the duties incumbent upon him, § 60 I 1 InsO.

Conversely, if the disturbance has already occurred before the opening of the insolvency proceedings and the substitute performance has taken place on the basis of an administrative order issued against the debtor, the costs resulting therefrom shall, as already mentioned, only be asserted as an insolvency claim.<sup>35</sup> This is also not called into question.

On the other hand, cases in which the threat existed before the opening of the insolvency proceedings but the remediation order was issued against the administrator only after the opening of the insolvency proceedings are controversially dealt with. The BVerwG and the literature following it focus on whether the insolvency administrator is responsible under regulatory law. As explained above, the responsibility of the insolvency administrator is dependent on the factual prerequisites of the respective regulatory law and, in the opinion of the administrative courts, can be based on the possession of the assets without any further preconditions.<sup>36</sup> As a consequence, the cost reimbursement claims are to be regarded as preferential liabilities.<sup>37</sup>

Even if the insolvency administrator may be regarded as a responsible disturber of public security under regulatory law, the legal consequence derived from this is not convincing under insolvency law. According to the case law of the BGH, the taking possession of the assets involved in the insolvency proceedings merely serves as a means of safeguarding them. This alone does not constitute a preferential liability.<sup>38</sup> Preferential liabilities are only created if the insolvency administrator uses or exploits the object for the benefit of the insolvency estate, which in itself does not necessarily lead to a regulatory responsibility based on his conduct.<sup>39</sup>

This convincing view leads to an appropriate result and follows from the mandatory provisions on preferential liabilities, which are not at the disposal of the administrative courts.<sup>40</sup> By virtue of § 55 I No. 1 Alt. 1 preferential liabilities arise through the conduct of the insolvency administrator or through the administration of the insolvency estate. The term conduct encompasses positive acts as well as

<sup>34</sup> BGHZ 148, 252, 257 f.; 150, 305, 316 f.; FK-InsO/*Bornemann*, 9. Aufl., § 55 Rn. 28; HK-InsO/*Kayser*, 9. Aufl., § 80 Rn. 59; K. Schmidt/*Sternal*, 19. Aufl., § 80 Rn. 70; Kübler/*Prütting/Pape/Schaltke*, InsO, 42. EL., § 55 Rn. 116; KK/*Röpke*, § 55 Rn. 45; *Depré/Kothe*, in: Beck/*Depré*, Praxis der Insolvenz, 3. Aufl., § 36 Rn. 48; *Häsemeyer*, Insolvenzrecht, 4. Aufl., Rn. 13.13.

<sup>35</sup> Jaeger/*Windel*, InsO, § 80 Rn. 123; FK-InsO/*Wimmer-Amend*, 9. Aufl., § 80 Rn. 42; Ahrens/*Gehrlein/Ringsmeier/Piekenbrock*, InsO, 3. Aufl., § 80 Rn. 34; HK-InsO/*Kayser*, 9. Aufl., § 80 Rn. 59; K. Schmidt/*Sternal*, 19. Aufl., § 80 Rn. 70; Kübler/*Prütting/Pape/Schaltke*, InsO, 42. EL., § 55 Rn. 116; *Depré/Kothe*, in: Beck/*Depré*, Praxis der Insolvenz, 3. Aufl., § 36 Rn. 52.

<sup>36</sup> BVerwG NZI 2005, 51, 52.

<sup>37</sup> BVerwG NZI 2005, 51, 52; MüKoInsO/*Hefermehl*, 3. Aufl., § 55 Rn. 90a.

<sup>38</sup> BGHZ 150, 305, 311; Uhlenbruck/*Mock*, InsO, 14. Aufl., § 80 Rn. 255; K. Schmidt/*Sternal*, 19. Aufl., § 80 Rn. 70; Nerlich/*Römermann/Wüttkowski/Kruth*, InsO, 27. EL., § 80 Rn. 131.

<sup>39</sup> BGHZ 150, 305, 311; cf. K. Schmidt/*Thole*, 19. Aufl., § 55 Rn. 29.

<sup>40</sup> K. Schmidt/*Thole*, 19. Aufl., § 53 Rn. 1.

omissions in breach of a duty. The mere taking possession of the insolvency estate pursuant to § 148 InsO cannot be equated with this. Otherwise an unrestricted establishment of preferential liabilities would occur and the further criteria from § 55 I No. 1 and 2 InsO would be redundant.

A position deviating from this, fed by regulatory law, would be irreconcilable with insolvency law and could in no way be properly implemented under insolvency law. Nor could it do justice to its own premise, according to which insolvency law determines how regulatory obligations are to be assessed in insolvency proceedings.

There is thus a substantial conflict between administrative and private law judicature. This controversy has not yet been finally resolved, due to various factors. One reason for this is undoubtedly the predominance in the respective fields of law of the respective supreme courts in practice. In addition, there is a further explanatory approach, because the lack of conflict resolution may also be due to the fact that the insolvency administrator has an option through which he can relieve the assets of the liabilities.

## V. Abandonment (“Freigabe”)

### 1. Admissibility

In principle, the insolvency administrator is entitled to abandon assets from the insolvency estate.<sup>41</sup> This abandonment is not codified in the Insolvency Code as a general legal institution, but is presumed in § 32 III 1 InsO. In a so-called genuine release, an object is released from the insolvency proceedings by the administrator's declaration. At the same time, the debtor regains his right to manage and dispose of the object.<sup>42</sup> Abandonment must be considered in particular in the case of worthless assets in the insolvency estate or if these cause costs which may exceed the expected proceeds of a sale.<sup>43</sup>

By abandoning encumbered objects, i.e. in particular properties, the insolvency administrator can also relieve himself of his obligations under public law. This is also recognised in principle by the case law of the BVerwG with regard to regulatory obligations.<sup>44</sup> The abandonment is permitted in the case of a responsibility of the insolvency administrator merely based on the economic control of the asset and is rejected in the case of an insolvency administrator subject to regulatory obligations

<sup>41</sup> BGHZ 163, 32, 34; Ahrens/Gehrlein/Ringstmeier/*Abrens*, InsO, 3. Aufl., § 35 Rn. 28.

<sup>42</sup> BGHZ 163, 32, 35; 166, 74, 82 f.; Ahrens/Gehrlein/Ringstmeier/*Abrens*, InsO, 3. Aufl., § 35 Rn. 28.

<sup>43</sup> MüKoInsO/*Peters*, 3. Aufl., § 35 Rn. 85.

<sup>44</sup> BVerwG NZI 2005, 51, 53.

because of his conduct.<sup>45</sup> In individual cases, however, this may be contradicted by special environmental regulations, such as national waste laws.<sup>46</sup>

## 2. Special aspects

By virtue of a negative declaration (“Negativerklärung”) pursuant to § 35 II 1 InsO, which is systematically close to an abandonment, the insolvency administrator can also exclude the assets from a self-employed activity from the insolvency estate. It is entirely unresolved whether this negative declaration also covers property in breach of regulations. According to a widely held opinion, all objects belonging to the assets dedicated to the self-employed activity should be removed from the insolvency proceedings.<sup>47</sup> In this respect, contaminated business property would also have been excluded from the insolvency proceedings. If it is feared that this could result in disadvantages for the assets,<sup>48</sup> this does not apply in any case if hazardous objects are removed by a negative declaration.

If the debtor is a natural person and liable for costs arising from a substitute performance, he may be released from the claims arising prior to commencement of insolvency proceedings in the event of a granted discharge of residual debt pursuant to § 301 InsO. This shall not apply in cases of intentionally committed torts, for which the debtor continues to be liable even in the event of a discharge of residual debt pursuant to the conditions of § 302 No. 1 Alt. 1 InsO. For businesses organised under company law, the discharge of residual debt does not apply, but they are dissolved upon closure of the insolvency proceedings, which is why a liability subject is subsequently missing. This, however, also excludes subsequent liability for an intentionally committed tort after closure of the insolvency proceedings.

Insofar as a breach of regulations is remedied by the public authorities, but the costs can only be asserted as an insolvency claim, the insolvency estate experiences a considerable increase in value. This increase in value is to be compensated in particular under the conditions of § 25 BBodSchG<sup>49</sup> or as unjust enrichment of the insolvency estate pursuant to § 55 I No. 3 InsO.<sup>50</sup>

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<sup>45</sup> Ahrens/Gehrlein/Ringstmeier/*Piekenbrock*, InsO, 3. Aufl., § 80 Rn. 35; Uhlenbruck/*Sinz*, InsO, 14. Aufl., § 55 Rn. 31 f.; K. Schmidt/*Thole*, 19. Aufl., § 55 Rn. 32; Kübler/Prütting/*Pape/Schaltke*, InsO, 42. EL., § 55 Rn. 124; HambK/*Jarchow*, 6. Aufl., § 55 Rn. 75.

<sup>46</sup> HK-InsO/*Kayser*, 9. Aufl., § 80 Rn. 62; K. Schmidt/*Sternal*, 19. Aufl., § 80 Rn. 71; Kölner Schrift/*Lüke*, 3. Aufl., Kap. 22 Rn. 82.

<sup>47</sup> BT-Drs. 16/3227 S. 17; BGHZ 192, 322 Rn. 19; BGH NZI 2014, 614 Rn. 22; BSG 10. NZI 2015, 620 = VIA 2015, 63 with comment *Kluth*; Ahrens/Gehrlein/Ringstmeier/*Abrens*, InsO, 3. Aufl., § 35 Rn. 165; MüKoInsO/*Peters*, Rn. 47e; Karsten Schmidt/*Büteröwe*, Rn. 54; BeckOK InsO/*Jilek*, Rn. 67; *Peters*, WM 2012, 1067 (1069); *Heinze*, 2016, 1563 (1565); different view: BFH ZInsO 2011, 2339; *Kühne*, Insolvenz des selbstständig tätigen Schuldners, S. 117; *Gehrlein*, ZInsO 2016, 825 (826 f.); *id.*, ZInsO 2016, 1238 (1239); v. *Gleichenstein*, ZVI 2013, 409 (410f.).

<sup>48</sup> *Gehrlein*, ZInsO 2016, 825 (826 f.); *id.*, ZInsO 2016, 1238 (1239).

<sup>49</sup> Jaeger/*Henckel*, InsO, § 38 Rn. 28; Kübler/Prütting/*Pape/Schaltke*, InsO, 42. EL., § 55 Rn. 131; MüKoInsO/*Ott/Vuia*, 3. Aufl., § 80 Rn. 144; cf. Kölner Schrift/*Lüke*, 3. Aufl., Kap. 22 Rn. 65.

<sup>50</sup> *Häsemeyer*, Insolvenzrecht, 4. Aufl., Rn. 13.13.

## **VI. Instead of a conclusion**

Administrative and insolvency case law have not found a common denominator so far. In particular, administrative court rulings lead to inconsistencies. This state of conflict is practically resolved by the hardly limited right of the insolvency administrator to abandon a contaminated object. In the interest of a procedure that is preserving the insolvency estate, he will regularly be obliged to do so. In many cases, the interests of the public sector are impaired to a greater extent by this consequence than by a solution that is also convincing in terms of insolvency law

# Environmental Liabilities in Insolvency Procedure: A Korean Perspective

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## I. Introduction

There is an inherent conflict between the objectives of insolvency law and those of environmental law. The main objective of insolvency law is giving the debtor an opportunity for a fresh start, free of all existing liabilities. To provide the debtor with this opportunity, the insolvency law sets mechanisms to resolve outstanding debts, gather assets to distribute among the creditor, and to discharge all remaining debts. If we allow environmental liabilities to survive these procedures, an otherwise comprehensive reorganization or rehabilitation plan may hinder or even destroy the debtor's ability to get back on track.

On the other hand, the objective of environmental law is to preserve and decontaminate the damaged environment by imposing environmental liabilities on responsible parties. If polluters could evade these liabilities, somebody else would have to pay the cleanup costs, and it would delay or prevent the cleanup process, and oftentimes burden the government budget. Thus, governments have introduced mechanisms to ensure that the polluter ultimately pays.

These concerns surrounding environmental matters in the context of insolvency cases have been given little thought before environmental protection problems attracted serious attention in the 1970s. Since then, many countries have enacted laws

designed to identify and clean up existing environmental problems and to prevent future ones. For many businesses, the cost of complying with environmental laws has increased and sometimes has become the main reason to seek insolvency protection. Insolvency courts and legislators were given the daunting task of solving the obvious dilemma. If the polluter-pays principle prevails in insolvency procedures, a debtor cannot get a fresh start if the environmental liabilities take a large portion of the debt. If a debtor can get a complete discharge from the environment liabilities in the insolvency procedures, the cleanup cost ultimately has to be paid for with taxpayer's money. Maybe there is no clear-cut answer to this problem. However, we could try to get insights into this dilemma with some knowledge of bankruptcy law and its interface with environmental law. In this essay, the author will explain the basic structures and main concepts of the Korean insolvency system, and try to give the readers some suggestions about the interpretation of Korean insolvency law regarding this problem.

## II. Overview of Korean insolvency law

### 1. Brief history

The history of the bankruptcy system of South Korea begins in 1922. Since Korea was a colony of Japan at that time, Japanese laws were enforced in Korea as well.<sup>1</sup> As soon as Japan enacted the Bankruptcy Act and the Composition Act in 1922, these insolvency acts took effect in Korea. Even after the liberation in 1945, Japanese laws remained in effect until the new laws were enacted in 1962.<sup>2</sup> At that time, South Korea was still an agricultural country, more than 70% of population over 13 years old were working in the agricultural and fishing industries and only 2.4% in manufacturing.<sup>3</sup> GDP was only 2.7 billion USD and GNI per capita was 87 USD. The South Korean government prepared comprehensive economic plans to industrialize the economy. Three new insolvency acts, e.g. the "Company Reorganization Act", "Bankruptcy Act" and "Composition Act" were enacted in 1962, as a part of the economic development plan. Since then, South Korea's economy has grown rapidly.<sup>4</sup> In 1997, GDP was 557 billion USD and GNI per capita was 11,176 USD. In that year, only 11.8% of the economically active population were employed in the agricultural and fishing industries, while 22% were in manufacturing, 64.5% were in

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<sup>1</sup> There were a few exceptions such as family law, which was heavily influenced by local custom and traditions.

<sup>2</sup> This longer-than-expected delay was mainly due to the Korean War (1950-1953) and subsequent economic damages and political disturbances.

<sup>3</sup> Bank of Korea, Economic Statistics Yearbook, 1962.

<sup>4</sup> See Robert Hassink, South Korea's economic miracle and crisis: Explanations and regional consequences, European Planning Studies, Vol. 7 Iss. 2, 128f.

services.<sup>5</sup> In less than five decades, South Korea transformed into one of the most advanced capitalist economies in the world. Although there have been companies and individuals that resorted to insolvency procedure during this period, these cases were very rare. Reported cases, books, or manuscripts on insolvency were scarce. The Asian Financial Crisis in 1997 changed the landscape forever.<sup>6</sup> South Korea had to borrow 21 billion USD from the IMF in December 1997 due to the shortfalls in liquidity.<sup>7</sup> Failed banks and companies, big and small, had to shut down and go out of business.<sup>8</sup> Now the insolvency laws, almost dormant since the inception, were called upon to clean up the mess. However, the foreign investors viewed the Korean insolvency system as inadequate for efficient debt restructuring. So when the South Korean government submitted a turnaround plan to IMF, which was asked as a condition of the loan, a bankruptcy reform was suggested. Following this plan, the “Debtor Rehabilitation and Bankruptcy Act”(hereinafter “Insolvency Act”) was enacted in 2005, and went into effect on April 1, 2006. The three insolvency acts were repealed at the same time.<sup>9</sup>

## 2. Structure of the procedures

The Insolvency Act regulates three kinds of insolvency procedures: reorganization, bankruptcy and individual rehabilitation. Reorganization and bankruptcy are available not only to juristic persons (mostly companies) but also to natural persons. Individual rehabilitation is available only to natural persons. This procedure, modeled after Chapter 13 of US Bankruptcy Code, was originally introduced by a separate act in 2004, and became part of the Insolvency Act in 2005. Debtors who earn a regular income, and with less than 0.5 billion KRW (approximately 432,500 USD) of unsecured debt, or less than 1 billion KRW (approximately 865,000 USD) of secured debt may apply for this procedure. In summary, we have bankruptcy for both juristic and natural persons, reorganization for both entities, and individual rehabilitation only for natural persons with a certain amount of debt.

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<sup>5</sup> Bank of Korea, Economic Statistics Yearbook, 1997.

<sup>6</sup> See generally John W. Head, Lessons from the Asian Financial Crisis: The Role of the IMF and the United States, *Kansas Journal of Law & Public Policy*, Vol. 7 (1998), 73-74.

<sup>7</sup> International Monetary Fund, IMF Approves SDR 15.5 Billion Stand-by Credit for Korea (Dec. 4, 1997) <<http://www.imf.org/external/np/sec/pr/1997/pr9755.htm>> (last visited July 2, 2019)

<sup>8</sup> Even huge conglomerates, or so-called “chaebol”, including Hanbo, Jinro and Daewoo group went bankrupt. The author served as presiding judge of the Hanbo bankruptcy case from 1998 to 2000.

<sup>9</sup> South Korea’s GDP growth rate fell from 7.1% in 1996 to -6.8% in 1998. But it rebounded to 10.7% in 1999 and has been stabilized between 2 and 3% since 2012. Whether the reform recommended by IMF contributed to this recovery is a matter of debate. As of 2017, GDP of South Korea is 1,531 billion USD and GNI is 29,745 USD. Bank of Korea, Economic Statistics Yearbook, 2018. According to the World Bank, South Korea is the twelfth largest economy in the world. <https://data-bank.worldbank.org/data/download/GDP.pdf> (last visited July 2, 2019).

The bankruptcy procedure is a liquidation process, in which the assets of the debtor are sold and the price distributed among creditors. On the other hand, reorganization or rehabilitation procedures are plan processes, in which the plans for payment and regaining the ability to make profits are made, voted and approved.

These procedures are separate and independent, which means the debtor (in voluntary cases) or creditor (in involuntary cases) has to choose one of these procedures upon filing. If the process so chosen fails, another procedure needs to be filed *de novo*. For example, if a corporate debtor files for reorganization and could not get the plan accepted by his creditors, the reorganization procedure is terminated by the court. If any creditor wants to liquidate the debtor's assets, a bankruptcy procedure needs to be initiated. This feature is different from the German insolvency system.

Overall, about 150,000 insolvency cases are filed every year in South Korea. For example, in 2017, we had 878 cases of juristic person reorganization, 573 cases of natural person reorganization, 81,592 cases of individual rehabilitation, 699 cases of juristic person bankruptcy, and 44,246 cases of natural person bankruptcy.<sup>10</sup>

### 3. Overview of the procedures

Each procedure begins with the court's ruling based on the application of the debtor or creditor. When the court decides the commencement of the procedure, court-appointed officers (that is, receivers in reorganization and administrators in bankruptcy) take control of the debtor's property. Only they have the power to administer and dispose of the debtor's property with the court's approval.

In individual rehabilitation, there are no court-appointed officers. So, the debtors may retain control of their property during the whole process.

In corporate reorganization, existing CEOs are usually appointed as receivers. This is similar to DIP (Debtor-In-Possession) in the US, but different in that the existing CEO is acting in receiver's capacity, and represents the debtor company as before. Before 2005, we usually appointed third-party receivers recommended by

<sup>10</sup> The following table shows the number of insolvency cases filed from 2011 to 2017 (Source: Supreme Court Yearbook).

Type \ Year	Reorganization (juristic persons)	Reorganization (natural persons)	Individual Rehabilitation	Bankruptcy (juristic persons)	Bankruptcy (natural persons)
2017	878	573	81,592	699	44,246
2016	936	741	90,400	740	50,288
2015	925	855	100,096	587	53,865
2014	872	840	110,707	540	55,467
2013	835	829	105,885	461	56,983
2012	803	727	90,368	396	61,546
2011	712	678	65,171	312	69,754



the creditors. The Insolvency Act changed that policy. The purpose of the change was to encourage the debtors to file for the reorganization in the earliest stage possible, to ensure a more successful reorganization.

Creditors' claims are allowed and paid in proportion only in the procedure, by plan in reorganization/rehabilitation or by distribution in bankruptcy. Creditors are not allowed to collect or execute their claims outside the procedure. Claims need to be filed and determined before they are eligible to be part of the plan or paid in distribution.

In the reorganization procedure, a plan needs to be decided by creditor's vote and approved by the court. The plan provides for the reduction of the debt and various plans for the reorganization including M&A, business transfer, issue of bonds, etc. In individual rehabilitation, the payment plan needs to be presented before the creditor's meeting, but may be approved by the court without voting by the creditors. In bankruptcy, the administrator may sell the debtor's property and distribute the price to creditors.

In bankruptcy for natural persons, discharge is a separate procedure for the debtors who get the court's ruling on bankruptcy filing. In other procedures, the discharge is integrated into the insolvency procedures. We will return to this subject later.

### III. Claims in insolvency procedures

#### 1. Types of claims

In Korea, there are three kinds of claims in insolvency procedures. First, there is the "secured claim" which means the claim with security interest. These claims become insolvency claims only in reorganization procedure. In bankruptcy, secured creditors may exercise their own security rights outside the procedures as long as the value of the collateral is enough for their claims. In reorganization procedures, secured claims take relative priority over unsecured claims.<sup>11</sup> Second, there is the unsecured claim, which is not secured by security rights. Third, there is the subordinated claim. In bankruptcy, interests and damages accruing post-filing, penalty in money, administrative fines, etc. belong to this category. In reorganization, claims that arise post-commencement but do not belong to the common benefit claims are subordinated claims. Here, post-filing interests and damages are ordinary unsecured claims.

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<sup>11</sup> South Korea does not adopt the "absolute priority rule" of the US Bankruptcy Code. Article 217 of the Insolvency Act provides that a plan shall treat the claims in different categories in a fair and equitable way. The Supreme Court of Korea interpreted "fair and equitable" as meaning "inferior rights should not be treated better than the superior rights in distribution of the future profits or asset sale price." Supreme Court Decision of Dec. 10, 2004, Case Number 2002Gu121. Arguments for the absolute priority rule *de lege ferenda* are not nonexistent, but minority views in South Korea.

Unlike the insolvency claims, common benefit claims (in reorganization) or estate claims (in bankruptcy) are paid before the insolvency claims, whenever they are due. You can find a limited list of common benefit claims in Article 179 and estate claims in Article 473 in Insolvency Act. These include the following claims: claims for common benefits to creditors as a whole, e.g. expenses by receivers/administrators, claims for management of affairs without delegation, claims for unjust enrichment to the estate, etc.

For tax claims, or any other claims collectible as taxes, there are estate claims in bankruptcy, but usually ordinary insolvency claims in reorganization.

Therefore, it is crucial to which category in insolvency procedure a claim belongs. If you are a holder of a common benefit claim or estate claim, you can exercise your right as soon as it is due. If the receiver or administrator does not pay, you may execute any property of the insolvency estate. If you are a holder of an insolvency claim, you should be paid only by the insolvency plan or distribution, and may not sue the receiver or administrator, or execute the property of the insolvency estate.

## 2. Requirements for an insolvency claim

For an insolvency claim, the requirements of Article 118 (in reorganization) or Article 423 (in bankruptcy) must be satisfied. Each article provides the same idea: an insolvency claim is a property right that arose before the commencement of the procedure.<sup>12</sup> This means that for the insolvency claim, the elements for establishment (*Tatbestand*) of a property right need to be present before the court's decision initiating the process. Insolvency claims do not have to be in the form of money, but non-monetary claims can be insolvency claims if they can be converted to monetary claims by appraisal. Also, they have to be suitable for collection and execution.

## 3. Environmental claims as insolvency claims

There are two different kinds of environmental claims. One is a claim to pay money, e.g. for the substitute execution cost. The other one is a claim (order) to perform decontamination.

If the claim to pay money arises before the commencement, it could be an insolvency claim. But when does the claim arise? In the context of environmental liabilities, we can assume several stages leading to the decontamination as follows: (1) the polluter's action or inaction (2) contamination of the environment (3) detection of the contamination (4) government's cleanup order or payment order for the decontamination cost (5) execution of decontamination. Let us assume that, for the sake of argument, the insolvency procedure begins right after Stage 2. If we take the

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<sup>12</sup> Similar provisions are found in § 38 of Insolvenzordnung of Germany, and § 101(5)(B) of the US Bankruptcy Code.

view that the environmental liabilities arise only when all the elements for the existence are satisfied, then the decontamination cost claim could not be an insolvency claim, because the government's payment order was decreed after the commencement. However, if we take the view that the action or inaction leading to the pollution should be the main factor in deciding the existence of the environmental right, then the payment order could be the insolvency claim. According to the Supreme Court of Korea, "because the liability for damages caused by joint tort arise when the tortuous action took place, the main element for the existence of co-tortfeasor's right to reimbursement was present at the same time. Therefore, even the co-tortfeasor paid the damages after the commencement of the insolvency procedure, his right to reimbursement should be treated as the insolvency claim."<sup>13</sup> According to this decision, the primary factor would be whether main elements were present before the commencement. It is not necessary to satisfy all the elements of existence before the commencement. It is suggested that the same rule should be applied to the environmental claims, because the nature of the environmental right is similar to the right to damages. Therefore, if the contamination existed (Stage 2) before the initiation, the claim for decontamination cost could be the insolvency claim even though the state of contamination was discovered later. Furthermore, even if the contamination occurred after the commencement, it could be the insolvency claim if the debtor's action or inaction leading to the pollution (Stage 1) existed before the start of the procedure, because the main elements of establishment for the claim were present at that stage.<sup>14</sup>

In the case where the order to perform decontamination (Stage 4) was decreed before the commencement, it could usually be the insolvency claim, because the order could be converted to a monetary claim by appraisal (cleanup costs).<sup>15</sup>

Therefore, these environmental claims should be filed and determined in the procedure, and the holders of these claims (mainly the government) cannot collect or execute the debtor's property, and should be paid by the plan or distribution only.

However, if these claims are collectible according to tax collection procedure, and given priority over unsecured claims in the statutes that regulate these claims, they are treated as common benefit claims (Article 473, No. 2). For example, according to the Article 6, Para 1 & 2 of the Administrative Vicarious Execution Act, the cost of vicarious execution should be collected by the tax collection procedure, and it is given priority over general creditors. Therefore, if the government executes the

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<sup>13</sup> Supreme Court Decision of Nov. 25, 2016, Case Number 2014Da82439.

<sup>14</sup> Germany appears to have conflicting lines of precedents on this point. According to the Federal Administrative Court (BVerwG), decontamination cost for the contamination presented before the commencement should be treated as estate claims (Masseverbindlichkeit). BVerwG 23.9.04, NZI 2005, 51. On the other hand, the Federal Court of Justice (BGH) says that the cost is not the estate claim when the administrator (Insolvenzverwalter) did not actually use the property for the estate. BGH 18.4.02, ZIP 2002, 1043. Views of the scholars are diverse as well. See Schmidt, NJW 1993, 2833; Eckardt, AbfallR 2008, 197; Lüke, Kölner Schrift zur InsO, 696, 699; Nerlich/Römermann/Andres InsO § 55 Rn. 73.

<sup>15</sup> Case law of United States follows the same logic. *Ohio v. Kovacs*, 469 U.S. 274 (1985).

cleanup order by vicarious execution after the commencement of the procedure, its claim for reimbursement should be the common benefit claim.

Moreover, if the cleaning up after the commencement by the government or anybody else benefits the estate (Article 179 Para No. 6, Article 473 No. 5), they could be the common benefit or estate claims.

Apart from these claims mentioned above, there is no doubt that the receivers or administrators have a duty to comply with the ongoing environmental regulations. Receivers or administrators are required to comply with the laws during insolvency procedures. Therefore, if they are culpable for the violation of environmental law, their responsibilities could be common benefit or estate claims (Article 473 No. 4, Article 179 Para 1 No. 5). Even though they are not personally culpable for the contamination, they could be responsible when the employees are culpable, because the receivers or administrators are employers in the context of vicarious liabilities.

#### 4. Successor liability of receivers or administrators

Regarding the responsibilities of receivers or administrators, we need to discuss whether the receivers or administrators are general successors or not.

According to Article 10-4 No. 3 of the “Soil Environment Conservation Act”, the environmental remediation duty can be succeeded by a general successor. If the receivers or administrators are deemed to be general successors, they are required by law to perform the cleanup duty even though they are not culpable.

Are they general successors to the debtors? In cases of false representation (Article 103 of Korean Civil Code),<sup>16</sup> the Supreme Court of Korea decided on the relevant issue. According to that Article, the party to the contract invalid for false representation cannot assert the invalidity against a bona fide third party. The court said that the receivers or administrators are third parties to the contract, so that the other party could not assert the invalidity against the receivers or administrators if all the creditors were bona fide when they acquired their respective claims.

Some might argue that the receivers or administrators are not general successors to the debtors, based on these precedents. According to this view, they do not succeed into the environmental liabilities, in which case the debtor’s responsibilities remain without regard to the insolvency procedures. However, it is suggested that that rule does not apply to the succession of the environmental liabilities. The court’s rule presupposes the situation where the contract by the debtor is invalid. Here, the need to protect the third party’s (i.e. the creditor’s) reliance outweighs the debtor’s interest. In the environmental liabilities context, there is no void contract, and no reliance to protect. Therefore, we need to go back to the principle, according to which the receivers or administrators generally stand in the shoes of the debtor. In other words, the debtor’s environmental liabilities would pass to the receivers or administrators.

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<sup>16</sup> This is similar to the German “Scheingeschäft” (§ 117 BGB).

It goes without saying that this does not mean the receivers or administrators should pay for the liabilities with their own assets. It just means that those liabilities could be insolvency claims or, as the case may be, common benefit/estate claims when the requirements explained above are satisfied.

## IV. Discharge

### 1. Discharge in insolvency procedures

Article 251 of the Insolvency Act says that when the reorganization plan is approved, the debtor shall be discharged from all the claims except those recognized in the plan or the Insolvency Act. In bankruptcy, the court should grant the discharge unless there are specific reasons not to do so (Article 565). In individual rehabilitation, the debtor should be discharged from the rest of the debt when the payment plan is carried out (Article 624 Para 1). When the debt is discharged, the creditor cannot demand the payment, or execute against the debtor's property. This rule intends to ensure the debtor's rehabilitation.<sup>17</sup>

There are non-dischargeable claims, which include criminal or administrative sanctions in the form of a money penalty, minor fine, criminal procedure expense, additional collection charges and administrative fine (Articles 250, 140 Para 1, 566 No. 2), damages for intentional tort (Article 566 No. 3), damages to the life or body for tort by intention or gross negligence (Article 566 No. 4).

### 2. Environmental claims and discharge

The dischargeability of environmental claims depends on the nature of the debt. If they are insolvency claims, then they are dischargeable in principle. Having said that, it might be unimaginable that the debtor could be discharged from the environmental liabilities in the plan procedure, because the plan usually holds the relevant provisions regarding the public duties, which could be performed by the debtor even after the insolvency procedure is closed.

On the other hand, in bankruptcy procedures, it could be a tricky problem. In cases where the pollution was intentional, or a person's death or bodily injury was caused by the pollution, the claims would not be discharged. In addition, if the claims were criminal or administrative sanctions, they would not be discharged, either. Other than that, if the environmental liabilities are bankruptcy claims, they could be discharged, and if they are estate claims, they could not be discharged. Therefore, it essentially depends on whether the environmental claims are bankruptcy claims or

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<sup>17</sup> Similar provisions are found in §§ 254, 254b, 301 of the German Insolvenzordnung, and §§ 727, 1141 of the US Bankruptcy Code.

estate claims.<sup>18</sup> As to this problem, please refer to the explanation aforementioned.<sup>19</sup>

### 3. Dischargeability of late-filed claims

Insolvency claims should be filed within the period set by the court, upon the commencement of the procedure. The Insolvency Act provides that the filing period shall be set between 2 weeks and 2 months after the commencement in the reorganization procedure (Article 50 Para 1). If the creditor could not meet the deadline for the filing of claims due to reasons for which the creditor is not responsible, the deadline shall be extended to 1 month after the reason disappeared (Article 152 Para 1). After the creditor's meeting for the review of the plan, no filing of claims is allowed (Article 152 Para 3). However, the Supreme Court of Korea made an exception to this rule. It determined that, even after the creditors' meeting aforementioned is over, when there are reasonable excuses for not filing the future claims, then the creditor can file the claim within 1 month after the reason disappeared.<sup>20</sup> Therefore, even if the environmental claims were not filed within the period fixed by the court, the creditor could have chances to file them when excusable. This could happen when the contamination is discovered after the commencement of the reorganization procedure. But what if the contamination is detected after the reorganization process is complete? It is suggested that in that case, if there are reasonable excuses, the claim should not be discharged, and should be treated as the debt of the debtors, because the debt is treated as the insolvency claim only in the insolvency procedures. When the process is over, there could be no receivers, no other creditors to object to the claim, and no plans to amend reflecting the late-filed claim.

In bankruptcy, the filing of the claims should be within the deadline fixed by the court (Article 312 No. 1). Late filing is allowed when the filing creditor pays for the additional cost (Article 453, 455), but not after the exclusivity-period for the final distribution (Article 521). When the final distribution is complete, no filing of claims would be allowed, whether excusable or not. However, it is suggested that, when there are reasonable excuses, the claim for late-discovered contamination should not be treated as discharged, even if the debtor had obtained the discharge judgment.

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<sup>18</sup> Germany appears to have some discussions on whether the effect of discharge extends to the unfilled claims. See MüKoInsO/Ehricke § 38 Rn. 26; Uhlenbruck/Sinz InsO § 38 Rn. 42.

<sup>19</sup> See III.3 of this article.

<sup>20</sup> Supreme Court Decision of Nov. 11, 2016, Case Number 2014Da82439.

## V. Abandonment

### 1. Abandonment in insolvency procedure

According to the Insolvency Act, the receivers or administrators can abandon the property of the estate with court approval (Article 61 Para No. 7, Article 492 No. 12). The cost of management of the estate property could be so high that there would be no remaining value for the creditors. In that case, keeping the property in the state would be a poor choice economically. This is the reason why the Insolvency Act allows the abandonment of the estate property. If abandoned, the property is no longer a part of the insolvency estate, and goes back under the control of the debtor.<sup>21</sup>

### 2. Abandonment of the contaminated property

In the context of the environmental responsibilities, if the cleanup costs outbalance the possible gain from the contaminated property of the estate, the receivers or administrators should consider abandoning it from the estate. There are no precedents on this point, so it is not clear whether the court would allow it under the Insolvency Act in South Korea.

There could be different views on this matter. Some would argue against the abandonment, the reason being if the debtor, after the abandonment could not afford the cost of decontamination, it would be paid out of taxpayer's money. Others would argue that the abandonment should be allowed, because the purpose of the abandonment is to maximize the creditor's satisfaction, and this would be arguably the primary objective of the insolvency procedure.<sup>22</sup>

My opinion on this matter is as follows: First, if the cleanup is an insolvency claim, the receiver or administrator should not pay for the cleanup because it would go against the principle that insolvency claims should be paid only by plan or distribution. Those arguing against the abandonment of the contaminated property presuppose that the cost of cleanup should be treated as a common benefit or estate claim. This premise cannot hold when you consider the requirements of insolvency claims. Therefore, if the environmental liabilities are insolvency claims, abandonment should be allowed. Second, even if the cleanup costs would be common benefit or estate claims, when the contaminated property would be of no value at all for

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<sup>21</sup> In Germany, there are no specific provisions on the abandonment. However, § 32(3) of the Insolvenzordnung presupposes the power to abandon the property from the estate. The US Bankruptcy Code has provision on abandonment in §554(a)(b).

<sup>22</sup> In Germany, the Federal Administrative Court (BGH) concluded that the abandonment should not be allowed when the administrator would be responsible for its actions. BVerwG 23.9.04, NZI 2005, 51. But this case was criticized by some scholars. MüKoInsO/Peters InsO § 35 Rn. 99. When the administrator is responsible for the status, not for its actions, it appears the cases are ambiguous. Compare OVG Lüneburg 3.12.09, NZI 2010, 235 and OVG Greifswald WM 1998, 1548, 1553.

the creditors after the cleanup, it is suggested that the abandonment should be allowed. Some would argue against this suggestion on the ground of public policy. However, when the interests of the creditors and those of the rest are in conflict, on what ground is it justified for the creditors to yield to the rest? Without specific rule in the law, the private interests of the creditors should not be overridden by the interests of the other citizens. It would be against the principles of the liberal democracy.<sup>23</sup>

With that being said, there could be exceptions to this principle. In a famous case dealing with bankruptcy trustee's power to abandon contaminated sites, the US Supreme Court declared, "a trustee in bankruptcy may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."<sup>24</sup> In note 9 of the decision, however, the court adds this frequently quoted comment:

*This exception to the abandonment power vested in the trustee by 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.*

This comment could be called upon when you draw a line on the abandonment issue in South Korea law. That is, when the abandonment creates a present and imminent danger to the public health and safety, then the abandonment could be against the public order and become invalid. Although this rule lacks some clarity, future cases will hopefully eliminate the ambiguity and lead to rules that are more detailed.

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<sup>23</sup> German Federal Administrative Court has declared the same reasoning in BVerwG NZI 2005, 51.

<sup>24</sup> *Midlantic National Bank v. New Jersey Department of Environment Protection*, 474 U.S. 494 (1986).



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In times of rapidly changing social worlds and an ever more fragile controllability of the law, international legal comparison obtains increasing relevance. Frequently, similar or even identical questions and problems must be answered and solved in different legal communities, but there is rarely a single answer or solution. For a decade, the Faculty of Law of the University of Göttingen and the Yonsei Law School in Seoul (Republic of Korea) have engaged in continuous dialogue about both current and fundamental questions of legal reform. In October 2018, the fifth German–Korean Symposium took place. The lectures and presentations covered highly relevant aspects of public environmental law, insolvency proceeding, law of criminal sanctions and law of the constitution of the criminal courts as well as computer crime, including historic and philosophical foundations of the law. This volume combines the elementary contributions and makes them accessible for the interested professional public.

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