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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)



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Contact

Prof. Dr. Gunnar Duttge
E-Mail: lduttge@gwdg.de

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Contents

Preface	7
<i>Gunnar Duttge, Ji-Yun Jun</i>	
Bartolus on the Beach: Rivers as Legal Persons, Now ... and Then	9
<i>Nikolaus Linder</i>	
Environmental Protection by Means of Public-Law Contract	29
<i>Sina Fontana</i>	
On the Overdue Reform of Criminal Sanction Law for Adult Offenders	37
<i>Gunnar Duttge</i>	
The Status of Cybercrime in Korea and the Criminal Code Reform Plan	49
<i>Ji-Yun Jun</i>	
Citizen Participation in Criminal Trials in South Korea from the Perspective of Legal Paradigm Shift	65
<i>Sang Hoon Han</i>	
Contaminated Soils in Insolvency Proceedings	85
<i>Martin Abrens</i>	
Environmental Liabilities in Insolvency Procedure: A Korean Perspective	99
<i>Yeonkab Lee</i>	
Authors	111

Environmental Protection by Means of Public-Law Contract

Sina Fontana
University of Göttingen

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.¹ At the same time, it is legally binding for both parties² – an advantage over other instruments characterised by cooperation.³

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.⁴ The consent of the other party is always required to conclude the contract.⁵ Furthermore, a public authority cannot lawfully rescind its contract without the contractor's consent.⁶ 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.⁷

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).

¹ *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).

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

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

⁴ *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).

⁵ *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.).

⁶ Compared to §§ 48, 49 Administrative Procedure Act concerning the administrative act.

⁷ *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,⁸ e.g. soil, water, air, animals, plants and their relation to one another.⁹ The selection of instruments depends on their suitability for that purpose. In many cases, protection measures cannot be enforced.¹⁰ In those cases, the aim is to motivate the addressees to be ecologically aware and to contribute to protecting the environment by personal choice.¹¹ 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.¹² 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.¹³

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.¹⁴ 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.

⁸ 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.

⁹ *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.

¹⁰ *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

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

¹² *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.

¹³ *Kloepfer*, Umweltschutzrecht, 2008, § 4 para 3.

¹⁴ *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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰

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

¹⁶ *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.

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

¹⁸ *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).

¹⁹ *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.).

²⁰ 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.²¹ For the selection of instruments, it follows a preference of cooperative measures including the public-law contract.²² 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.²³ 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.²⁴ 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.²⁵

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

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

²¹ *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.

²² *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.

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

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

²⁵ 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.²⁶ In cases where forecasts proved wrong, an adjustment is required.²⁷ 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.²⁸ 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.

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

²⁷ *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.

²⁸ 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.²⁹ One difficulty is that in many cases the responsible persons are not identified. In case of uncertainty about the responsibility,³⁰ a contractual agreement can help to justify the payment obligation.³¹ 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.

²⁹ *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.

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

³¹ Cf. *Schlette*, *Die Verwaltung als Vertragspartner*, 2000, p. 302.