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CONTENTS

EDITOR-IN-CHIEF'S NOTE

The establishment of the National Legal Institute of Mongolia has turned a new page on Mongolia's modern history, taking place on September 26. We are here presenting the proceedings of the international academic conference on "Law and Development in a time of Crisis," which was held on the occasion of the 20th anniversary of our institute as the 91st special edition of the "Mongolian journal of law."

The approach to the development issues through judicial and other reforms has occurred in Mongolia and developing and transitional countries. The basis of this pragmatic action is a straightforward concept established at the international level about the interdependence of two social phenomena, named "Law and development." Whereas the recognition of the importance of relying on the theories and accumulated knowledge put forward by scientists in the field of "Law and development" concerning the discussion of the legal reform process that has taken place in our country for the last 30 years. Therefore, we have organized the international academic conference on the central theme of "Law and Development in a time of Crisis."

We are pleased to inform you that this edition, which contains the proceedings of the international academic conference on "Law and Development in a time of Crisis," will give you a comprehensive understanding of the challenges, lessons, new approaches, and needs that have discussed throughout the region, including Mongolia.

We would like to thank all of you, including beloved readers, scholars, researchers, and editorial board members who have been a part of the 20 years of history of the National Legal Institute of Mongolia. We wish you great success in your work.

Sincerely,

Dr. ERDEM-UNDRAKH KHURELBAATAR
Director at the National Legal Institute of Mongolia

"LAW AND DEVELOPMENT IN A TIME OF CRISIS"
INTERNATIONAL CONFERENCE

CONFERENCE PROGRAM
(Monday, September 26, 2022)

08:30-09:00	**Registration**
09:00-09:05	**Welcome speech** ***Dr. Erdem-Undrakh Kh,*** *Director, National Legal Institute of Mongolia*
09:05-09:10	**Opening remark** ***Zandanshatar G****, Chairman of the State Great Hural of Mongolia*
09:10-09:15	**Opening remark** ***Mr. Nyambaatar Kh****., Minister of Justice and Home Affairs of Mongolia*
09:15-09:20	**Opening remark** ***Mr. Felix Glenk,*** *Resident Representative of the Hanns-Seidel Foundation, Germany*
09:20-09:25	**Opening remark** ***Prof. Dr. Amarsanaa B****, Director of School of Law, National University of Mongolia*
09:25-09:30	**Photo session**

SECTION I

Moderator Dr. Sukhbaatar S., Scientific Secretary of the National Legal Institute	
09:30-09:50	**THE EVOLUTION OF THE SPIRIT OF LAWS: CHINGIS KHAN AND MONTESQUIEU** ***Narangerel S****, Member of the Academy of Sciences, Professor emeritus of National University of Mongolia, Advisor to the Minister of Justice and Home Affairs of Mongolia*
09:50-10:05	**CURRENT ISSUES OF PRIVATE LAW IN MONGOLIA: REFORM POLICY** ***Sainzorig P,*** *Secretary of State, Ministry of Justice and Home Affairs of Mongolia*
10:05-10:20	**LAW AND DEVELOPMENT: A NEW MOMENT?** ***Prof. Dr. Andrew James Harding,*** *Faculty of Law, National University of Singapore*
10:20-10:35	**THE RELATIONSHIP BETWEEN LOCAL GOVERNMENT LAW AND OTHER LAWS** ***Ganzorig D****, Former Member of the Constitutional Court of Mongolia Senior Lecturer, School of Law, National University of Mongolia*
10:35-10:55	**Questions and Answers**
10:55-11:15	**Coffee break**

SECTION II

11:15-11:30	**CRIMINAL JUSTICE: TRADITIONS AND REFORMS** ***Prof. Dr. Byambaa J,*** *School of Law, National University of Mongolia*
11:30-11:45	**HOW CAN LAND LAW ADDRESS "UNDERUSE" ISSUES? THE CASE OF JAPAN** ***Prof. Dr. Narufumi Kadomatsu,*** *Graduate School of Law, Kobe University, Japan*
11:45-12:05	**Questions and Answers**
12:05-13:35	**Lunch break**

SECTION III

13:35-13:50	**NO NEED FOR ASIA TO BE WOKE: CONTEXTUALIZING ANGLO-AMERICA'S "DISCOVERY" OF CORPORATE PURPOSE** ***Prof. Dr. Dan W. Puchniak****, Yong Pung How, School of Law, Singapore Management University, Research Member of European Corporate Governance Institute*
13:50-14:05	**CIVIL LAW TRADITIONS AND CONTEMPORARY CHALLENGES** ***Dr. Buyankhishig.B****, Senior Lecturer, Private Law Department, School of Law, National University of Mongolia*
14:05-14:20	**DEFINING THE ROLE OF THE LABOUR CODE IN A COUNTRY'S DEVELOPMENT** ***Prof. Dr.Uranstetseg B****, Department of Law, National Academy of Governance*
14:20-14:35	**KOREA'S LEGISLATIVE DEVELOPMENT TO OVERCOME SOCIAL DISASTERS** ***Dr. Junseo Lee****, Korea Legislation Research Institute, Senior Principal Researcher, South Korea* ***Dr. Jiyeon Choi****, Korea Legislation Research Institute, Senior Researcher, South Korea*
14:35-14:55	**Questions and Answers**
14:55-15:25	**General Discussion**
15:25-15:35	**Closing Remarks**

WELCOME SPEECH FOR THE INTERNATIONAL CONFERENCE "LAW AND DEVELOPMENT IN A TIME OF CRISIS"

Dr. Erdem-Undrakh Khurelbaatar
Director, National Legal Institute of Mongolia

Distinguished officials, scholars, and researchers,

Ladies and gentlemen!

First of all, on behalf of scholars and researchers of the National Legal Institute, I would like to express my sincere gratitude to all attendees and participants of the international academic conference on "Law and development in a time of crisis." Moreover, I sincerely congratulate you on the 20th of the National Legal Institute of Mongolia, affiliated with the Ministry of Justice and Home Affairs of Mongolia.

The historical event of the establishment of the National Legal Institute of Mongolia, a new page of the modern history of Mongolia, is taking place today.

Twenty years ago, our institution was established by the Minister of Justice and Home Affairs of Mongolia. Still, the National Legal Institute is becoming an important center for legal information, training, promotion, research, and analysis, strengthening its position in law.

I would like to thank all of you, including the current and past administration, employees, scholars, researchers, and officials who have dedicated themselves to the development of the Institute for 20 years.

On behalf of the National Legal Institute and Academic Council, I would take this opportunity to express our sincere gratitude to prominent Mongolian scholars as well as the distinguished speakers, doctors, and professors from prestigious foreign universities who warmly accepted our invitation to discuss the report during the conference on "Law and development in a time of crisis," dear guests and representatives who participated online and in person at our invitation, and all person who supported the conference activities.

I want to give you a summary of the purpose, importance, and cause of the central theme of this conference.

The legal system plays an essential role in developing countries even though a nation's prosperity depends on various internal and external factors.

As stated in the Constitution of Mongolia, we proclaimed that we, the people of Mongolia, aspire toward the supreme objective of building a humane, civil, and democratic society in the country".

Moreover, it states that "... the rule of law is one of the fundamental principles of state activities,"; and it can be interpreted that it expresses the concept that laws promote prosperity and state government shall be following laws.

It shows that national development depends on the Constitution, laws, and implementation.

On the other hand, numerous projects and programs have been implemented with financial support within the framework of our country's bilateral and multilateral foreign relations and development cooperation.

Thanks to the significant efforts of some developed countries and international organizations, the approach to the development issues through judicial and other reforms has occurred in Mongolia and developing and transitional countries.

The basis of this pragmatic action is a straightforward concept established at the international level about the interdependence of two social phenomena, named "Law and development."

"Law and development" is not just pragmatic action but has also become an important subject that has attracted legal scholars and researchers from many countries.

Whereas the recognition of the importance of relying on the theories and accumulated knowledge put forward by scientists in the field of "Law and development" concerning the discussion of the legal reform process that has taken place in our country for the last 30 years. Therefore, we have organized the international academic conference on the central theme of "Law and development in a time of crisis."

The Academic Council of the Institute unanimously supported our proposal to organize this conference under the "Law and Development" theme. It recommended the topic of "Law and development in a time of crisis."

The reason behind this is that the impact on the economic and social development of the country caused by crises such as the global pandemic and regional political instability is creating new relationships that must be regulated by law. Even after the crisis, developing laws ensure preparedness for future crises.

National development is the essential criterion of the legislative process. In other words, whether the law will promote or hinder the country's social and economic development shall be assessed.

In Mongolia, the legislative procedure took a big step forward due to the mandatory process for choosing among variables and assessing the needs and requirements of laws in advance based on pre-calculation of the effects on human rights, economy, society, and environment.

Similarly, it is advisable that scholars and researchers also study the history of the legislation and make conclusions on the impact on national development.

During this conference, lessons and future issues will be discussed in addition to historical views.

This conference consists of three main parts and general and fundamental issues are going to be discussed during the first part.

Issues related to public and private law are discussed in the second and third parts separately, and the period of question and answer is included in each part.

Therefore, conference attendees are encouraged to actively ask questions and express their viewpoints.

This academic conference is an example that we are committed to the development of our country b mobilizing our academics and trying to increase our contribution in this historical time when the role of science in the implementation of policies that define new development trends such as Sustainable Development and "Vision 2050" is increasing. The government and citizens put their trust in science.

So, I would like to announce the opening of the International Academic Conference on "Law and Development in a time of crisis," organized on the 20th anniversary of establishing the National Legal Institute of Justice. I wish you great success at the conference! Thank you all.

WELCOME SPEECH FOR THE INTERNATIONAL CONFERENCE "LAW AND DEVELOPMENT IN A TIME OF CRISIS"

Zandanshatar Gombojav
Chairman of the State Great Hural of Mongolia

Distinguished Ladies and Gentlemen,

I would like to sincerely greet all the legal scholars, researchers, and lawyers. Today is a historical event for the National Legal Institute, affiliated with the Ministry of Justice and Home Affairs of Mongolia.

First of all, I like to congratulate the current and past administration, employees, and all scholars, researchers, and officials who have dedicated themselves to the development of the Institute for 20 years.

The National Legal Institute of Mongolia is one of the subsidiary organizations in the legal sector which makes an outstanding contribution to the development of national legislation by supporting legislative drafting with legal research, scientific recommendation, methods, suggestions, data, and references, as well as by providing an assessment of the consequences of law enforcement. Moreover, promoting and informing the laws approved by the State of Great Khural and improving citizens' legal education are essential.

The current international conference is a prominent example of the active participation of the Institute in receiving and embodying scholarly opinion for legislative improvement and constantly organizing scientific conferences and seminars.

The development of the study of law is only possible with the innovation and development of other science fields. In this term, jurisprudence is an interdisciplinary study of law. A.M Dershowitz once said: "Law without interdisciplinary input is like a beautiful wine decanter without the wine".

I would like to take a few examples of the universal usage of an interdisciplinary approach to law development. It is said that law and economics played a crucial role in the 20th century. For example, we can find an honest answer to whether crime would decrease if the criminal sentencing policy is strengthened using microeconomics theories, game theories, and statistical modeling.

In the 21st century, the decision-making and risk-evaluating process is studied thoroughly on the strength of the establishment of behavioral science fields like social psychology and mental health. It is widely used in formulating policies in administrative law, consumer contract law, Etc.

Furthermore, the interdisciplinary study of neuroscience, neurology, and law, the new field of "neurolaw," is being developed. The impact of the brain on human behavior, decision-making, thinking, memory, and emotional regulation is also being studied. As a result, there is a possibility to provide objective evidence for emotional distress using brain mapping technology.

Law and development is also a subject of interdisciplinary study, after which the international conference is titled. The primary purpose of the law is to contribute to the country's development. Thus, it is essential to study the influence of law on economic and social growth. It is the right moment to discuss topics related to the law's role in times of crisis, such as a pandemic, geopolitical tensions, and armed conflicts.

I appreciate the domestic and foreign scholars for discussing critical legal issues related to "Law and development in the time of crisis." The fact that the foreign speakers pointed out Asia's characteristics piqued my curiosity.

Because Asia has its features, East Asian families have similarities in morals, traditions, customs, and social values. Mongolia is one of them. Some scholars consider East Asian law tradition as another independent system. Therefore, I recommend that our scholars conduct further research on the unique legal systems of developed countries with their development models, such as Japan, Korea, and Singapore.

Once again, I express my deep gratitude to the speakers and participants of the conference for sharing your opinions and giving speeches on topics related to "Law and development in the time of crisis" when the matter of maintaining stability and development of countries with the help of the rule of law is in the focus of attention. I wish you all the best!

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WELCOME SPEECH FOR THE INTERNATIONAL CONFERENCE "LAW AND DEVELOPMENT IN A TIME OF CRISIS"

Nyambaatar Khishgee
Minister of Justice and Home Affairs of Mongolia

Distinguished scholars and delegates!

Ladies and gentlemen!

We believe that the international academic conference on "Law and development in a time of crises" is of great importance, which is being held as part of the 20th Anniversary of the National Legal Institute of Mongolia, which is affiliated with the Ministry of Justice and Home Affairs of Mongolia.

First, I would like to thank all of you, including distinguished speakers and conference coordinators, and everyone who came to attend and share their opinion on the discussion topics. I wish you great success in your academic work.

The NLI has had a great deal of success in the last 20 years in the areas of legal training, information, and promotion while keeping its operations stable; additionally, it has strengthened its position into a large organization known in Mongolia as well as abroad which has produced many volumes of research works on various fields.

Also noteworthy is that the NLI has become a grand palace of academic matters where academic discussions are held by and between scholars, including the former researchers of the NLI and other researchers affiliated with similar research organizations, law schools, courts, prosecutions, and advocate firms.

I would like to extend my sincere gratitude for the discussions to the great scholars of Mongolia and the honorable doctors and professors from Japan, Korea, and Singapore.

We are interested in the "law and development" subject, which is novel. We have addressed the fundamental question of "what laws lead nations to development." Continuous research will lead us to the answer even though we have yet to identify it fully.

From the study on the subject of "law and development" at the international level, it is observed that there is a strong desire to find common patterns, principles, answers, and solutions. However, each country shall find its unique development recipe since every country has its characteristics, history, culture, customs, geographical location, and natural resources. In other words, the subject of "law and development" should be discussed in detail for each country.

In other words, the subject of "law and development" should be addressed in detail for each country. From this point of view, today's international academic conference will be the beginning of significant work to study the interdependence between the legal reform of Mongolia and the development based on the results of comparative studies, which will last for years. Therefore, I would want to draw the attention of both domestic and international academics who conduct a comparative study from the aspect of "law and development" and who study and are interested in Mongolia.

Lastly, I am confident that the conference will be an effective and rewarding discussion, addressing numerous exciting ideas and topics.

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REDE 20. JAHRE NATIONALES RECHTSINSTITUT INTERNATIONALE KONFERENZ "DIE ENTWICKLUNG DES RECHTS IN ZEITEN DER KRISEN"

Felix Glenk

Der Repräsentant vom Büro der Hanns-Seidel-Stiftung in der Mongolei (HSS)

Sehr geehrte Damen und Herren,

Es ist mir eine Freude und eine Ehre heute anlässlich des 20. Jubiläums des Nationalen Rechtsinstituts zu Ihnen sprechen zu können. Ich freue mich besonders deswegen, da die Hanns-Seidel-Stiftung mit dem Nationalen Rechtsinstitut von Anfang an so intensiv zusammengearbeitet hat.

Auch die Hanns-Seidel-Stiftung steht vor einem Jubiläum – nächstes Jahr feiern wir unser 30. Jubiläum unserer Arbeit in der Mongolei. Auch deswegen ist es mir eine Freude so viele langjährige Partner heute zu treffen, insbesondere Minister Nyambaatar vom Ministerium für Justiz und Inneres, sowie Professor Amarsanaa und Professor Narangerel von der National Universität der Mongolei.

Von Seiten der Hanns-Seidel-Stiftung ist es mir eine Ehre Frau Debora Tydecks-Zhou, Referatsleiterin für Nordost- und Zentralasien diese Woche aus München zu Gast haben zu können. Ein großer Dank geht auch an Frau Dr. Erdem-Undrach, die Direktorin des Nationalen Rechtsinstituts, für die Einladung an uns.

Die Hanns-Seidel-Stiftung arbeitet insgesamt in 60 Ländern weltweit mit dem Motto und dem Auftrag „für Demokratie, Frieden und Entwicklung". In Nordost- und Zentralasien sind wir in beiden Teilen Koreas aktiv, wir haben mehrere Projektbüros in China und arbeiten in Zentralasien in Kirgisistan, Tadschikistan, Usbekistan und Kasachstan.

Krisen, wie wir Sie in diesen Jahren so intensiv begegnen sind dabei keine Seltenheit. Die Welt ist in stetem Wandel und was uns wichtig ist, ist, dass wir die Fahnen für Demokratie, Frieden und Entwicklung trotz dieser Krisen jederzeit hochhalten und für unsere Werte einstehen.

Mit der Mongolei haben wir dabei einen unglaublich wertvollen Partner in der Region. Den demoraktischen Wandel haben wir seit 1993 unterstützt bei allen Herausforderungen und Fragestellungen, die unsere Partner im Land angefragt hatten. Daraus ist nicht nur eine wertvolle Zusammenarbeit entstanden, sondern auch eine Freundschaft zwischen Deutschland und der Mongolei, und Bayern und der Mongolei.

Als bayerische Stiftung sind hier vor allem unsere gemeisamen Werte und unser Traditionsgefühl eine wichtige Basis um auf Augenhöhe und gemeinsam den Krisen in dieser Welt, in unseren Heimatregionen und in unseren Heimatländern entgegenzutreten.

Oft sehen wir dabei Paralelen – sei es in der Flüchtlingskrise in Deutschland, ausgelöst durch den Krieg in Syrien, die Covid-Pandemie und auch jetzt beim Krieg in der Ukraine. Es sind gemeinsame Krisen, gemeinsame Herausforderungen und diesen sollten wir gemeinsam entgegentreten.

Die Hanns-Seidel-Stiftung wird daher auch die Zusammenarbeit mit der Mongolei nachhaltig fortsetzen. Sei es bei der Ausbildung von Richtern, Rechtsmentoren und der Verbesserung des Rechtsbewusstseins der Bevölkerung, aber auch bei anderen Krisen und Herausforderungen unserer Zeit, z.B. im Umweltbereich, wo wir seit diesem Jahr mit unseren Partnern die Anwendung und den Vollzug von Umweltrecht und die Steigerung des Umweltrechtsbewusstseins unterstützen.

Wir sehen, dass es viele Herausforderungen zu leisten gibt. Ich freue mich mit Ihnen einen verlässlichen Partner zu haben. Die Hanns-Seidel-Stiftung steht bereit alle Anstrengungen zu unterstützen und Krisen gemeinsam zu bewältigen. Wie in den letzten 20 Jahren mit dem Nationalen Rechtsinstitut, so auch in den nächsten Jahrzehnten. Gratulation zum heutigen Jubiläum, und ich freue mich sehr auf die weitere Zusammenarbeit. Dankeschön.

WELCOME SPEECH FOR THE INTERNATIONAL CONFERENCE "LAW AND DEVELOPMENT IN A TIME OF CRISIS"

Prof. Dr. Amarsanaa Batbold
Dean of the School of Law
National University of Mongolia

Ladies and Gentlemen!

Despite facing tremendous challenges for the past 20 years, the National Legal Institute has grown into a significant organization that has reinforced its position in law.

First of all, I would like to emphasize the fact that a significant number of undergraduates, postgraduates, and doctors from law schools have engaged in the research operation of the National Legal Institute; in addition, the Academic Council of the NLI consists of doctors and professors from School of Law of the National University of Mongolia. Teachers at the National University of Mongolia's School of Law have held positions as directors, scientific secretaries, unit heads, researchers, and administrative personnel. I am pleased to announce that we, the National Legal Institute and School of Law of the National University of Mongolia, are forging alliances.

This international academic conference on "Law and Development in a Time of Crisis" stands out among the many academic conferences held in Mongolia because of its clearly-defined, captivating, and well-timed topic. This conference will not only allow updating one's knowledge but also will have an effective tool for drawing attention to the issue of national development.

Lastly, I would like to congratulate all colleagues, including former ones, of NLI, and wish you success at the conference.

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THE EVOLUTION OF THE SPIRIT OF LAWS: CHINGIS KHAN AND MONTESQUIEU

Narangerel Sodovsuren
Member of the Academy of Sciences,
Professor Emeritus of the National University of Mongolia,
Advisor to the Minister of Justice and Home Affairs of Mongolia

SPIRIT OF THE LAW OR CHINGGIS KHAN AND THE MONGOLS

It is a factual truth that Chinggis Khan's late Mongols brought peace into the world in the 13th century, which lasted for 140 years. The main reason it is called "the world" is that the world in the 13th century was made up of only two countries of Europe and Asia. For the first time, the Portuguese started studying the African continent and its western banks from the 15th century onwards. The American continent was discovered in the 16th century. Scholars maintain that Europe compared to the East, which had progressed and flourished as never before during the era of the Mongols, linking the East with the West, and under the administration of the Mongols, was as good as unimportant. However, the Europeans had to race to read Marco Polo's[1] travel notes first. The Travels of Marco Polo[2] was a call to new places, names, goods, riches, adventures, and discoveries. The famous Spanish sailor and traveler Christopher Columbus, who used Marco Polo›s travel notes as a guide, accidentally discovered the opposite continent of America. At the same time, he searched for the Great Mongol Empire. The Australian continent has been explored since the 17th century. It is the reason that the world was governed by the Mongol laws established by Chinggis Khan, and humanity enjoyed a peaceful life during the 13th century.

It is time to ascertain what the concepts of Chinggis Khan's law, which was adhered to by the entire world for more than 120 years, indeed were. Chingis Khan, in his letter to his teacher Chanchung where the secret of his ideals for the spirit of laws might be referred, had written that "The Khan himself is living in the great northern plains, fervently putting in place fair justice, and I have banned and stopped destruction and ravaging, sharing my other clothes, food and drink with the horse herders and cattle breeders, treating my people as if they were my elder and younger brothers and sisters, trying hard to preserve unity and amity, and spreading the seeds of compassion."

1 Venetian Marco Polo served under Kubilai Khan for 20 years.

2 Ronald Latham, Marco Polo, the Travel, Penguin, 1974, translated by Burenjargal.O.

Some 2500 years ago, Aristotle stated that "…Legislators ought to stimulate men to virtue."[3] What is virtue? This is morality. Aristotle about morals had written that "…moral value belongs to all… but are not the same" [4]. In other words, it is the idea that morality is not derived from humans, but it varies due to many factors. Human morality is a call for peace and happiness in life. People attract to its unalterable and stable values, such as justice, courage, decency, benevolence, non-greed, shame, duty and responsibility, courage, honor, faith, loyalty, patience, unity, and generosity.

According to the theory of relativity, developed by Albert Einstein, people are born with moral energy in their brains and send signals to others like a wave. Sometimes, they respond faster than the speed of light, and those energies attract each other.

According to Juvaini, Chinggis Khan, in the 13th century, "… sallied forth, a single man, with few troops and no accouterment, and reduced and subjugated the lords of the horizons from the East unto the West[5] despite the Mongols having a population of less than a million with fewer than 100,000 young men, who were enlisted in the army, and the only available weapons were bows, arrows, and spears.

Alluding to Chinggis Khan's morals, Marco Polo wrote that "people from other countries, who had seen the Chinggis Khan's rule as being fair and a blessing for the Mongol population, voluntarily came to be united under him. His followers and supporters multiplied to cover the entire world in a short time.[6] Chinggis Khan said that he «made the dynasty fair and managed to bring it under the governance.» [7] In this way, the Mongols steadfastly adhered to the laws of Chinggis Khan, who made morality his spirit and brought peace to the world for an era.

The Mongols developed the great commercial zones of Eurasia, established cultural ties that passed right through the Mongol Empire from the Mediterranean Sea to Venice and Genoa, and the territories along the highway to China were made safe and secure, thanks to which the West was bridged with the East. Their fruits were enjoyed equally by the Europeans, the Muslims of the Middle East, the Jews, the Chinese as well other people of Asia. At this time, all humankind has fully realized that different nations can live happily and easily with the good energy of their morals.

THE EVOLUTION OF THE SPIRIT OF LAWS: CHINGIS KHAN AND MONTESQUIEU

In the 18th century, Charles de Montesquieu set the tone in his work, holding Chinggis Khan's views on the spirit of the law in haughty contempt. His famous ideas are reflected in his work named "The spirit of the laws" [De l'esprit des Lois I],[8] which was published in 1748. In his works, Baron de Montesquieu made the Mongols and Chinggis Khan one of the objects of his study and labeled them as the most singular people on earth, and created a modern theory of the spirit of laws.

The Mongols acknowledged the custom of honoring their emperor at the behest of the Tenggeri since ancient times. The emperor considered himself to be the father of a family with many children, fulfilling the mission of Tenggeri and trying to make his people happy during his short reign. This is confirmed by Chinggis Khan, when he became the ruler of the Mongols,

3 Aristotle,Nicomachean Ethics,Translated by W.D. Ross, Batoche Book, Kitchener, 1999, p.179.

4 Aristotle, Politics, p. 21.

5 The history of the World Conqueror translation by John Andrew Boyle, 1958, Translated from Russian by M.Badamnyam., Ulaanbaatar., 2006, p.18.

6 Ronald Latham, Marco Polo. The Travel, Penguin, 1974.

7 The Secret History of the Mongolia, Translation by Igor de Rachewiltz, The Australian National University, p. 224.

8 Baron de Montesquieu, ibid.

had said, "I did not become a Khan because of my valor and bravery. It was because the Khan Tenggeri" [9] as well as it is written that he would «share his clothes, food and drink with the horse herders and cattle breeders and treat his people as if they were his children.» [10]

However, Montesquieu defined that the state established by Chinggis Khan was despotic[11] and noted, "From the nature of despotic power it follows that the single person, invested with this power, commits execution of it also to a single person. A man whose sense continually informs that he is everything and that his subjects are nothing is naturally lazy, voluptuous, and ignorant.[12] Based on this, Montesquieu put forward his idea that the power of the government should not be concentrated in one person. He defined the Mongols as barbarous nations who were «herdsmen and shepherds.»[13]

Montesquieu put forward the idea that Chinggis Khan's rule had been defined as despotic due to its climate, writing that it «has larger plains; it is cut out into much more extensive divisions by mountains and seas; and as it lies more to the south, its spring is more easily dried up; the mountains are less covered with snow; and the rivers, being not so large, from more contracted barriers» [14]. Baron de Montesquieu created the basis for misunderstanding the Mongols and distorted their history in the 13th century, writing about the Mongols that they "may live in bodies for some time because their herds and flocks may for a time be reassembled. All the clans may then be reunited, and this is effected when one chief has subdued many others; after which they do two things – either separate, or set out with a design to make a great conquest in some southern empire".[15] During the reigns of Chinggis Khan›s successors, it was becoming more and more apparent that the invasion of the Mongols into the Golden Country, Tangut Country, Khwarazm, and Russia was not an act of invasion and destruction, but a holy act of justice and peace.

He continued, "It is a capital maxim that the manners and customs of a despotic empire ought never to be changed; for nothing would more speedily produce a revolution. The reason is that in these states, there are no laws, that is, none that can be properly called so; there are only manners and customs; and if you overturn these, you overturn all" [16]. The words of "customs" and "manners", that used by Baron De Montesquieu, are deemed the morals of Mongols. He has noted that in all countries and governments, morality is requisite and has written that morality is a common creation of man.

Montesquieu considers laws to be particular and precise institutions of legislators. In other words, the spirit of laws is directly related to the legislators, and laws should be separate from morality. He advanced his well-known notion that the government's legislative, executive, and judicial powers should be separate. Most nations' constitutions are based on this principle, including the United States Constitution of 1787. The Constitution of Mongolia of 1992 also follows this theory.[17] During the Mongol Empire, morality was considered the spirit of the law. However, it has changed into a norm approved by the legislator, according to the theory proposed by Baron de Montesquieu.

It is necessary to analyze the positive and negative effects of the idea of the distribution of state power, known as one of the values of humanity, in the 30 years of its implementation in Mongolia. The desire to legalize all social relations became widespread, and legal norms

9 Luu Altan Tobchi – Series on Mongolian Historical Chronicle, Ulaanbaatar, 2006, p.98.

10 Tru man Chanchung's journey to the west, by Daoist patriarch Qiu Chuji or Changchun, translation and commentary by Ya.Ganbaatar and Ts.Ganbaatar, Ulaanbaatar, 2010, p.18.

11 Baron de Montesquieu, ibid p.11.

12 Baron de Montesquieu, ibid p.13.

13 Baron de Montesquieu, ibid p.253.

14 Baron de Montesquieu, ibid p.257.

15 Baron de Montesquieu, ibid p.257.

16 Baron de Montesquieu, ibid p.272.

17 B. Chimid Today's politics through the eyes of a lawyer. Ulaanbaatar, 2006, p.44.

strangled social life in Mongolia. In Mongolian society, the idea that the law is all-powerful, the law conquers all, and the law should be respected above all else has taken hold. It has been relying on hopes that are too unrealistic. Instead of laws that are well-regulated and consistent with social relations, copies of laws incompatible with Mongolia's distinctive soil have been common.

There are two types of law in Mongolia: written and unwritten. Very few people obey the former. These laws are adopted for the pleasure of the majority but not for the circumstance. The latter is life's unwritten rule. The more senior the position, the more strictly they adhere to the unwritten law. In reality, it is highly prejudiced and dangerous to believe that people shall live to adhere to laws rather than adopt them for the welfare of the populace. Some courts, which encourage injustice with "dry" clauses of laws in the name of "independent authority" and "rule by law," are becoming more and more distant from the people.

Laws, which were separated from morality, have changed hospitality into brutality, justice into injustice, bravery into timidity and cowardice, generosity into greed, extravagant luxury, shame into negligence, irresponsibility, humanity into cruelty to benevolence into deceit, dishonor, unity into partiality, hatred, enmity, generosity into envy, bitterness, resentment, revenge, and malice. Because of that, wars, armed conflicts, deaths, orphans, terrorism, genocide, bribery, fraud, divisions, misunderstandings, violence, hatred, enmity, discrimination, and arbitrary behavior have reached an insurmountable level in this world.

The great Chinggis Khan, who considered morality as the spirit of the law, may have had a great power to influence not only Mongolians but also the world. Some of the research shows that unraveling this may be a timeless contribution of Mongolians to the development of human jurisprudence.[18]

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18 Regarding the hereditary lineage of Chinggis Khan see S.Narangerel's Chinggis Khan's moral-legal treatises, Ulaanbaatar, 2020.

CURRENT ISSUES IN PRIVATE LAW OF MONGOLIA: REFORM POLICY

Sainzorig Purevjav

Secretary of State, Ministry of Justice and Home Affairs of Mongolia

Distinguished delegates, spokespersons, ladies, and gentlemen,

First of all, I would like to express my sincere gratitude to you all for taking part in the international academic conference on "Law and Development in Times of Crisis" which is held as part of the 20th Anniversary of the National Legal Institute of Mongolia.

Today, I am here to discuss the Ministry of Justice and home affairs' policy and position on the development trends, current issues and reform progress for private law, which had not been deeply discussed for last 20 years since 2002.

I. Current issues in private law of Mongolia

II. Confronting challenges

III. Conclusion

Section 1. Current issues in the private law of Mongolia

The Parliament of Mongolia enacted the *"Legal reform program" in 1998* to adopt the directions for the perfection of the legislation of Mongolia as part of the reform of the laws and regulations in accordance with the principles and the concepts that declared by the Constitution of Mongolia after its adoption in 1992.

For the last years, Civil Code, Company law, Partnership law, Fair Competition law, Consumer Protection law, Investment law, Copyright Act, Patent law, Trademarks, Trade Names Law, Law on State registration of Property rights, The Immovable Property Taxation law, Law on private ownership of land by Mongolian citizens, Land law, Securities Market Law, Tourism Law, Advertisement law were (re)adopted within the framework of the Legal reform program's one objective of "the perfection of the legal basis of economic relations", but Foreign Trade law, Law on Undergrounds and Law on business without establishing legal entity have not been revised or approved.

The guarantees of Mongolia's independence and sovereignty was directly linked to the economy. Reform of economic regulations has been implemented on a wide scale for the last

years. However, policies for legal reform, especially policies for regulation reform, shall be amended and developed uncontinuously in accordance with the current trends, technological advancement, and social needs so that it can create opportunities for businessmen to carry out their business successfully, and thus it leads to economic growth. For that reason, the Ministry of Justice and Home Affairs is concentrating on the development trends, current issues and reform progress for private law, which had not been deeply discussed for last 20 years since 2002, and it is embodied in the Action Plan of the Government of Mongolia between 2020-2024" and "the Direction for the perfection of the legislation of Mongolia until 2024". This includes:

According to the Legal Reform Program that states Civil Code will be "revised", The Civil Code of 1994 was replaced by the Civil Code of 2002 which contains 552 articles. In recent days, scholars and researchers have stated that Civil Code is not appropriate for commercial activities, despite the purpose of Civil code is "to regulate relationship with respect to materialand non-material wealth arising between legal persons". In other words, the comprehensive regulations for the commercial relations such as B2B and B2, which is arisen by and between the business providers, are needed to be clarified and enriched. Moreover, as stated earlier, Foreign Trade law, Law on Undergrounds and Law on business without establishing legal entity have not been revised or approved whereas the regulations such as Family law, Land law, Fair Competition law and Consumer Protection law are non-compliant with the basic principles and the concepts in the Civil Code. To clarify, it is necessary to concentrate and conduct research on the following highlighted issues.

- To ensure the types of land rights stated in the Land Law in compliance with Civil Code,
- To set out the specific requirements for the protection and recovery of consumer rights in a short period of time in terms of service,
- To improve the regulation for family property rights in family law such as partial and joint ownership,
- To clarify the legal consequences of gender affirmation surgery in marriage and of surrogate and artificial insemination in family and inheritance law,
- To expand the tort law obligations arising from material and non-material damage, for example, the liability arising out from professional malpractice or negligence, and its limit and methods, as well as the connection between contract limits on negligence liability and the legislation on tort liability,
- To ensure the loss recovery related to unfair competition and business confidentiality.

Furthermore, the Law on state and local property of 1996 has not been revised despite the adoption of the regulations that state ownership relation types and scope such as Copyright Act, Law on State registration of Property rights and law on pledges over the Immovable Property.

In the first place, the draft of package law related to non-material property have been prepared by the Ministry of Justice and Home affairs and have been adopted by the Parliament of Mongolia. The Ministry of Justice and Home Affairs is now working on the regulation of state-owned legal entity in order to improve it.

For example, law on state and local property companies has been drafted, and it states that state-owned or locally-owned enterprises shall be established only in a strategic sector for the purpose of implementing large-scale projects that are important for the development of the economy, as well as it is obliged to carry out operation under the same conditions as the private sector in order to avoid unfair competition. The draft law also offers an optimal model for management and organization of state-owned legal entities.

Moreover, it is necessary, on the one hand, to make judicial system more accessible, affordable for citizens and business entities, on the other hand, to ensure the principle of civil legal services in a short period of time without any obstacle, and reduction in court workload in order to reduce the number of steps in civil procedure for the disputes between citizens and

service providers, and to make amendments to the Civil Procedure Law such as establishing the special procedure for low value claims.

In addition, many countries set the amount of low-value claims differently, and for our country, if we consider a low value claim to be up to 10 million, the proportions of in low value claims, from 2017 to 2019, is noticeable large in courts at every level in 9 districts and 21 provinces of Mongolia. For example, 1 out of every 3 cases or 33% of disputes in the court of first instance, about 1 out of 4 cases or 24.7% of the disputes in the appellate court, and 23.8% of all cases in the supreme court were within this scale.

Furthermore, it is also required to improve the regulation related to civil proceeding period (the average period of court procedure for loan disputes is 6.2 years and the maximum period of court procedures at every level and its execution is 16.6 years) and its stamp duty, to eliminate overlap between the jurisdictions ofcivil and administrative court, to regulate the digital contract as valid evidence before court in accordance with international trends, and to provide with legal opportunity for file a claim on behalf of numerous consumer (class action) in respect to the standart terms of condition.

In order to improve the execution of civil court decisions, the opportunities related for transferring the functions of civil and administrative court decision execution to judicial authorities, for implementing execution procedures based on the partnership between private and state entity, and for restoring the incentive system for court order execution will be studied. For example, according to the data on civil court decision execution for the last 5 years submitted by the General Executive Agency of Court Decision Mongolia, the decisions that amounts to approximately one trillion MNT are not executed every year.

As of September 2022, 16,511 executive notes amount to 522.8 billion MNT have been fulfilled, and 23,156 executive notes amount to 2.2 trillion MNT has been remained.The national average percentage of the actual implementation of the executive notes of court decision enforcement was 41.6, and its monetary amount percentage was 19.4.

Besides, a non-judicial debt settlement arrangement has been offered by the draft law on non-judicial debt settlement arrangement in order to set its standard and to establish legal framework for the mutually benefecial execution of the unpaid debts in a short period of time.

Among the abovementioned regulations, I am here discussing deeply about commercial law that plays an important role in economic and business relations.

Section 2. Confronting challenges

Legal Framework for commerce and business

In the context of ease of doing business in Mongolia, the index was increased from 59.9 points to 67.8 points for 10 years from 2010 to 2020 based on the World Bank report on Doing Business, but the enforcing contract indicator, which is one of the important indicators, have steadily decreased to 71.8 points from 2004 to 2013, 70.2 points from 2014 to 2015, 58.5 points from 2016 to 2018, and 61.4 points from 2019 to 2020.

We are facing challenges to concentrate and take measures to increase the enforcing contract indicator because ensuring the enforcing contract supports and leads to significant positive effects on the economy. For that index, the existence of special procedure for commercial disputes are mainly evaluated. Along with, it is necessary to pay attention to whether the regulation governing commercial legal relations exists.

Based on the assessment given to Mongolia, it is clear that the court procedure for commercial disputes, which is different from civil procedure for civil disputes, need to be established. The Civil Code primarily governs relations between individual and service providers, such as B2C, C2B, and C2C relationships between individuals.

However, there is no certain comprehensive regulation that governs B2B business relations between business entities and protects profit-making goal of the parties, freedom of contract, speed, availability and cost-effectiveness of transaction, flexibility in transaction form, utmost good faith and accountability.

Due to the fact that sole proprietorship is not required to register (unlike company and partnership) for business activities, there are numerous unresolved issues related to contract security, address of other party to the contract, property ownership condition, operational stability, affordability in loans to support small and medium-sized business, the procedure for receiving income and expenditure reports, and taxation.[1]

This problem was highlighted in the Legal Reform Program of 1998, and it states that the law on business without the establishment of a civil legal entity should be adopted, apart from the Civil Code. In that regard, this regulation shall be adopted. But the challenge is whether to amend the Civil Code or to adopt an independent Commercial Law.

It will be needed to amend procedural norms in order to make civil court procedure easier for disputes between business providers, and to reduce the number of steps, following the adoption of substantive norms that regulate the commercial relation. Improving the substantive and procedural norm in that way supports the profit-making goal of business providers while it ensures trust for contract, the speed of court procedure services, business ethics and accountability, and application of business practices and customs.

The following methods of regulation can be applied, such as to set up the special procedure for commercial disputes by establishing special commercial court or by establishing the chamber of commercial dispute in civil court, to resolve some complicated commercial disputes by first instance court in compliance with the appellate procedure, to specialize judges, and to employ experts at court, etc.

'Commercial customs and business practices' are the main concerns of the next section of this speech.

The Article 4 of the Civil Code of Mongolia regulates the concern related to similar application of the Civil code. It states that the particular relations shall be regulated in compliance with the civil legal content, principles and commonly accepted norms in the absence of norms regulating similar relations.

However, due to the fact that customs and business practices between the parties are not deemed sources of law, it becomes impossible to resolve the disputes between the parties based on that. It states several cases where business practices between the parties may be applied such as conclusion, interpretation and requirements for contract.

In some countries, customary laws are deemed as a source of law and regulate the relations in absence of substantice laws. For example, in Japan, customs, that are not contrary to the public order or ethical norms, are applied when it is permitted by law or in absence of the regulation for the relation; In the Republic of China, it is permitted to use the customs in absence of the regulation for certain private relations, and customs should not be contrary to the public order and ethical norms as well. While, in the legal system of Anglo Saxon, court recognizes the nature of disputes as customs and establishes the precedents through its decision, In Germany, court plays an important role in the issue on whether it is recognized.

According to "Research on commercial customs and practices"[2], which was conducted at request of The Ministry of Justice and Home affairs of Mongolia and Hanns Seidel Foundation of the Federal Republic of Germany, commercial customs and practices are applied to a certain extent in Mongolia, but there are some business customs and practices that may be contrary to commonly accepted norms, and the number of cases where commercial customs and practices

[1] Bericht der studie zur feststellung des bedarfs eines handelsgesetzbuchs, Hanns Seidel Stiftung, Akademie Rechtsbildung, 2019.

[2] Die Forschung der Handelsbrauche und der etablierten praxis, Hanns Seidel Stiftung, Akademie für Anwaltsforschung, 2020.

are applied by courts and arbitrators are infrequent, and the application of these practices has not introduced broadly. (applied for only 7 cases from 2011 to 2021).[3]

Based on analyses of 223,826 civil court decisions from 2013 to 2020, it was discovered that "customary norms" and "commercial practices between the parties" were considered and mentioned in 15 court decisions in total.[4] On the most of these decisions, the parties requested to apply business practices and customs between them in addition to substantive norms, but the court had not applied these practices, or had not interpreted why it were deemed "practices between the parties", "customs established in business circles".

Business is a dynamic relation, constantly in motion, that evolves as time goes by. Therefore, establishing private law system, where the related commercial customs can be used as source of law if there is no substantive norm applicable to new forms of business relations, and the related norms should be established instead of the customs that are contrary to commonly accepted norms, supports to carry out business in a short period of time. However, it is advisable to use the established practices between business providers to interpret the contract and to set criterion for evaluating the facts.

Due to the COVID-19 pandemic, some countries have adopted the legal regulations that are necessary or in temporary effect[5]. For instance, the extension period of moratorium or of filing for bankruptcy, the restriction on the contract termination without prior notice and on the terms that protect only one party's interest. Moreover, some countries such as Germany, Ireland, Hungary have recently established the legal framework for structural change in order to prevent from insolvency. For Mongolia, new rules related to structural changes, which is to restore business activity and to prevent from insolvency, as well as the special procedure for insolvency is stated in detail on the Draft law on Insolvency.

Finally, It is noted that judges, advocates, lawyers, and researchers play important role in the development of private law by interpreting and applying the principles and objectives of the law to the arisen problems, not only by making amendments to the laws and regulations.

Technology and Challenge

Klaus Schwab, the World Economic Forum's Founder and Executive Chairman, writes in the Global Technology Governance Report that "COVID-19 has accelerated our transition into the age of the 4IR. We have to make sure that the new technologies in the digital, biological and physical world remain human-centred and serve society as a whole, providing everyone with fair access." Five visions of a future influenced by emerging technologies that were discussed at the summit.[6] For instance, based on the diccussions, synthetic biology could change the world by allowing to not just edit genomes but also, and importantly, to change the world by to writing new code for life, and over 10 year its going to be about moving beyond the devices such as tablet, phone, computer. Moreover, real investment in human capital could be transformative. While artificial intelligence could be seen as a threat, it will create more jobs than it replaces. It is noted that the mentioned changes are same as the life changing scientific discoveries that were stated on the book named "Physics of the Future"[7] by American theoretical physicist Michio Kaku. Michio Kaku predicts capitalism has evolved from and will be perfected with innovation and technology for the next 10 years. But are we ready for this? Here are some examples.

One of the most diccussed topics is the issue of cryptocurrency or virtual assets based on blockchain technology. In the Mongolian market, many people have raised fund through an initial

[3] Statistics provided by the General Council of the Judiciary, 2021.

[4] Die Forschung der Handelsbrauche und der etablierten praxis, Hanns Seidel Stiftung, Akademie für Anwaltsforschung, 2020, p.33.

[5] EY Global Legal Commercial Terms Handbook 2020. file:///Users/user31/Downloads/ey-global-legal-commercial-terms-handbook-v1%20(1).pdf

[6] Global Technology Governance Summit 2021, World Economic Forum, https://www.weforum.org/agenda/2021/04/global-technology-governance-summit-gtgs-future/

[7] Physics of the Future, Michio Kaku, 2011.

coin offering (ICO), and the crypto trading is active at recent days.

However, the legal framework for this activity and protection of the rights of investors is unclear. The first attempt to regulate this relation was the draft Law on Virtual Asset Providers. This law aims to regulate the registration process of virtual asset service providers, supervising their business operations, defining their legal rights and obligations and other related aspects, imposing restrictions on operations of virtual asset service provides' and deregistration.

In the future, it is necessary to establish a technological research institute and its legal framework, which conducts research on and provides with reasonable response to question whether virtual asset is deemed official means of payment, whether it can be used for payment, and others arising from new financial services that will be created due to the development of technology.

In October 2021, Facebook has changed its company name to "Metaverse", and announced its intention to create an immersive virtual world called Metaverse, an imaginary virtual world, that people can enter and work in. The issue of protecting human rights in the vitual environment will also arisen. The importand question is what kind of legal framework should regulate the relationships that arisen from employment, cooperation, trade and property ownerships in the virtual environment. Should the new legal framework be created? Concentrating more on ethical issues. What position will take?

According to the news dated January 2020 on New York Times, African-American man was wrongfully arrested for 30 hours based on a false hit produced by facial recognition technology. Taking into account the lack of legal framework on how to deal with the legal consequences arisen from social communication using technologies such as facial recognition, blockchain, the Internet of Things (IoT), drones and other technologies, the challenges of digital economy and new phenomena should be addressed simultaneously rather than later, and to have vision for "welcome". We (lawyers) need to prepare for this from now.

Some scholars have already mentioned the terms of "legal futurism and legal futurology". This is a topic that is not discussed at all level from law school to public policy in our country. Futurism is more likely to be mentioned in sociology, economics, and business schools than lawyers. However, in addition to economists, lawyers play important role in futurism.

Actually, jurisprudence includes not only cognitive, methodological, and applied functions, but also predictive function. The objective of legal futurology is to regulate after the prediction of possible future trends and phenomena; however, the most of our lawyers prefer to meticulously scrutinise the law in order to establish what is legally valid, and not ready for challenges such as what types of relation will arise in the future and how to prepare to it. It should be emphasized that it is time to concentrate on the jurisprudence in this way, and to participate actively to international cooperarion. For example, the Hague Institute for the Internationalisation of Law set up the Law of the Future interdisciplinary program, and conducted analysis of the problems such as population growth, lack of food and natural resources, security threats, economic globalization, global energy distribution, and the increase in access to information.

Online dispute resolution is used in some countries. For example, the internet courts, were established in Beijing, Guangzhou, Hangzhou of China, r esolves the disputes related to intellectual property, domain names, e-commerce, and violations of property rights and interests in the Internet environment. In Canada, the parties are entitled to file a claim to online courts in cases of B2B, B2C and C2C relationship while Estonia has introduced a "robot judge" that could adjudicate small claims disputes of less than 7,000 euros.

However, in our country, a claim, which is arisen from electronic contract, has not filed[8], and claim, complaint and related forms can not be submitted electronically to the court.

[8] According to the Statistical report №01/1040 provided by the General Council of the Judiciary (2021), there is no statistical data on court adjudication of disputes related to electronic contracts.

Within the framework of E-mongolia project, the Mongolian government has succeeded in providing online public services. At the next stage, we need to study the possibility of providing online court services and AI-based decisions.

Unbureaucratic, transparent, prompt and cost-effective resolution of disputes is an important indicator of the business environment. Resolving the disputes in transparent and afforfable way without bureaucracy is the important indicator of business environment.

In a nutshell, borderless advancement of technology will raise a lot of questions for lawyers, and will lead to international cooperation on how to manage and solve the challenges. A state can not solve the issues, such as such as the jurisdiction and the applicable law of cross-border crimes that committed in online, and the recognition and enforcement of AI-based decisions. Thus, it requires mutual assistance and cooperation of countries.

Human resource and Challenge

According to academic studies, books, journals, compilations, and reports that have been published over the past five years by the Mongolian Supreme Court, the Judicial General Council, the National Legal Institute, the School of Law at the National University of Mongolia, the Mongolian Bar Association, and the Association of Mongolian Attorneys, 15 to 35 percent of all publications are related to private law. As of 2017, 8.9%[9] of Mongolian scholars' and lawyers' dissertation themes were privare law issues. The number of lawyers in Mongolia who work solely in the area of private law and conduct research is either insufficient or very low.

It is now obvious that development of private law leads to development of public law. We cannot resolve issues without an awareness of sophisticated business issues and contemporary tools. Recent years have seen an increase in internet crime, in particular, as a result of technological advancements.

Due to the electronic revolution, frauds and financial crimes include generating fraudulent documents to avoid paying taxes, making risky investments based on misleading information, gambling online, multi-level pyramid schemes, and other financial crimes have increased.The General Police Department has reported that, over the past ten years, around 37 and 53% of all crimes that registered and committed in Mongolia were crimes against against property rights, and about 0.6 and 1% of all crimes were against economy. For the last ten years, 24-32 percent of criminal cases resolved by criminal courts at first instance were crimes against economy and property rights, according to statistics provided by the the Judicial General Council and the Judicial Training, Research and Information Institute.

In order to gradually increase human resources within the framework of private law reform, the Law on the Legal Status of Lawyers will be revised and it requires that undergraduate law students must study private law courses, which should be at least 30% of a total of credit hours, when they graduate. Additionally, the Mongolian government, academic institutions, and private organizations are encouraged to increase the funding programs for lawyers and scholars who work in the area of private law.

Furthermore, the development of private law sector is required to look at the level of whole institute. Nowadays, ecomonic and business relationships are changing very quickly as time passes. It is possible to gain corporate advantages and boost economic growth by quickly establishing legal frameworks for every change. For that reason, it is essential to prepare an adequate workforce and build research infrastructure.

Lawyers with the intellectual creativity, innovative and leadership skills that cannot be performed by robots will be required once AI-based technology will be capable of handling legal services related to documents.

[9] Amarsanaa.J, Overview of the development of Mongolian jurisprudence, The First National Conference of Legal Scholars, 2017.

Section 3. Conclusion

The Civil Code is the fundamental law of our market economy, undoubtedly. Despite the minor changes, that have been made to the Civil Code since 2002, we have not reviewed completely the Civil Code and have put aside the provisions that are not implemented in accordance with principle or need to be changed or added.

It is essential to distinguish between commercial relations and relations between individuals, to conduct research on non-implementation of some provisions of the Civil Code, and to adjust the special norms that regulates technology-based relations. The traditional doctrine of property is progressively evolving. We must quickly regulate commercial legal relation while focusing on the present and the future, as well as bringing it more in line with international trends. These challenges must be seen as opportunities and move forward at a fast pace.

Since we will undoubtedly live in a "technological" age, I want to emphasize the importance of training IT lawyers and creating a legal environment for native citizens of that era.

It is time to acknowledge that the most critical factors for a successful business are, on the one hand, consistent evaluation of the implementation of laws and regulations, the formation of a special institution with the responsibility of conducting research and studies based on economic and social needs, and strengthening of their activities, on the other hand, sustainable implementation of state policies that support business.

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LAW AND DEVELOPMENT: A NEW MOMENT

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Law and development's 60-year trajectory

- 'Inaugural moment': 1960-1974
  - Guiding idea: American idealism
  - Ended by: Vietnam War
- Critical moment: 1974-1990
  - Guiding idea: Legal imperialism
  - Ended by: Fall of Soviet Union
- Revivalist moment: 1990-2000
  - Guiding idea: Neo-liberal economics
  - Ended by: Economic crisis, 1997-8
- 'Post'-moment: 2000-2022
  - Guiding idea: Pluralism? Millennium Development Goals 2000
  - Ended by: Sustainable Development Goals 2015, and the pandemic

What have we learned?

- Each 'moment' has been brought to an end by world events
- But the next moment has been defined by critique of the last moment
- Economic circumstances determine the direction (e.g. crises of 1998 and 2008)
- On this basis, what can we see about our current situation? What are the lessons of the pandemic/ Ukraine war period)?
  - Pandemic and war are devastating for development
  - Global cooperation is essential
  - We are mutually dependent both health-wise and economically
  - This means globalisation is even more, not less compelling
  - Social and international cohesion becomes fundamental
  - Climate change threatens

Where do we go from here?

- The plural post-moment's assumptions are basically right
- LAD is pluralistic: it is delivered by multiple actors, public, private, international; voluntary not compulsory
- LAD is delivered by more than the usual 'donors'
- LAD emphasises 'ESG': Environmental, social and governance concerns
- SDGs emphasise role of law in development (see Goal 16)

Goal 16 unpacked …

- 16.3 promote the rule of law at the national and international levels and ensure equal access to justice for all
- 16.5 reduction in instances of corruption
- 16.6 effective, accountable and transparent institutions at all levels
- 16.7 ensure responsive, inclusive, participatory and representative decision-making at all levels
- 16.10 ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements
- 16.a-b strengthen relevant national institutions for building capacity at all levels; refers specifically to independent national human-rights institutions in compliance with the Paris Principles; promote and enforce non-discriminatory laws and policies

What law and development talk about now ...

- 'rule of law'
- 'good governance' (often meaning anti-corruption measures)
- 'accountability mechanisms'
- 'independent agencies'
- 'judicial reform'
- 'human rights'
- 'access to justice'
- 'decentralisation'

How about Asia?

- Why is there no 'Asian moment'?
- Asia: the Asia developmental state of 1960s-80s (Japan, HK, China, Korea, Taiwan, Singapore, etc) involved rule BY law …
- 1990s-date new Asian constitutionalism (Taiwan, S Korea, Indonesia, Malaysia, Myanmar)
- Asian states have moved from rowing to steering (regulatory mechanisms)
- Asia now delivers LAD, not just receiving it

Conclusion

- The new ‘moment’ will emphasise ESG over economic gains
- Asia will be increasingly at the sharp end of LAD
- We need to work on law FOR development and development FOR law
- Global partnership for development is essential

THANKS FOR LISTENING!

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THE RELATIONSHIP BETWEEN LOCAL GOVERNMENT LAW AND OTHER LAWS

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The relationship between the law on administrative and territorial units and their governance of Mongolia and other laws

2022.09.26

Reasons for giving a speech

The Law on Administrative and territorial units and their governance of Mongolia (hereinafter referred to as “Local government law”) was approved in December 2020 and has been implemented since January 2022, but the subsequent measures are not being carried out properly according to its concept. Specifically, in connection with the adoption of this law, some amendments, which have been made to the relevant laws, are deemed unsuitable and incompatible with the concept of this law.

It is related to a lack of understanding, misunderstanding, and in some cases unwillingness to understand the concept of this basic law.

The systematization of the laws is required to be made correctly. In other words, it is necessary to develop the system where its parts are compatible with each other and regulate the related relation entirely.

I. The concept of the law

- Combination of both principles of self-governance and central government, which is stated and required by the Constitution of Mongolia.
  - Mongolia is a unitary state
  - Ensuring individual's right to participate in political and public affairs
- Decentralization
  - Demarcation of authority
    - Set boundaries between state and local affairs: the state is required to be more policy-oriented, and shall be responsible for those affairs which exceed the authority of the local government.
    - Local self-governing bodies – besides making independent decisions on matters of socio-economic life of the respective units
    - These shall be regulated by other subsidiary laws.

I. The concept of the law

The Fundamental provisions of the law

- Article 3.3.2 stated that "Principles and general regulations set forth in the Local government law shall be followed in defining functions and powers of administrative and territorial unit governance by other laws".
- Article 4.1.6 stated "Local functions" means economic and social issues specifically assigned to local self-government in accordance with the law and resolved by local self-governing bodies;
  - According to Article 20.1, Local functions shall include the following issues:
    - 20.1.18. use, maintenance, and servicing of buildings and movable properties of state and locally owned education, health, social and cultural organizations;
- Article 12.1 stated that during implementation of administrative and territorial unit governance, the core principles of state activities set forth in paragraph 2 of Article 1 of the Constitution of Mongolia shall be observed along with the following principles:
  - 12.1.1.to ensure unitary nature of state structure;
  - 12.1.2.to align state and local interests;
  - 12.1.3.to separate functions between state and local self-governing bodies in implementing the principle of alignment of local self-government with state administration;

I. The concept of the law

Article 19. Principles of determining local functions

19.1.The following principles shall be observed in determining local functions:

- 19.1.1.to properly allocate the functions to units closest to citizens and at an appropriate level;
- 19.1.2.to resolve the issue of funding when assigning functions;
- 19.1.3.not to duplicate functions;
- 19.1.4.to allocate powers to unit management differently in accordance with functions of each unit established by the Local government law;
- 19.1.5.to adapt to the features of the economic and social life of the respective territory.

Two. Methodology of systematization (harmonization) of legislation

1. To list the related sources. About 300 laws are considered the sources of public law.
2. To analyze the first clauses which describe the scope of relations regulated by these laws.

   - To identify state participation and local participation
3. To consider the capacity of “aimag”, “sum” and “bag” when identifying local participation

-The functions of these units, which stated in the Articles 6-11 of the Local government law, are required to be reviewed:

4. To define the related roles of the Khural (Local self-governing body) and the governor respectively
5. To conceptualize

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CRIMINAL JUSTICE: TRADITIONS AND REFORMS

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The Mongolian scholar M. Sanjdorj used to teach: "History is not to be written, but to be documented."

The president made a provocative observation at the conference commemorating the 790th anniversary of the foundation of the Great Mongol Empire and the 75th anniversary of the People's Revolution of Mongolia, concluding that "Mongolia did not lose its independence completely and was not conquered by Manchuria, it remained relatively independent from 1691 to 1911, and Mongolia was a country with a dominion status under the Manchurian rule". Shortly after this eccentric point was expressed, in early 1998, some Mongolian historians supported the idea in the "People's Rights" newspaper and argued that "It is true that socialist scholars distorted the history of Mongolia". Conversely, one of the Mongolian honorable scholars Mr. M. Sanjdorj strongly rejected and said despicably that "Were it to be true, my ancestors who opposed Manchu-colonialism such as Galdan Boshigt, the founder of the Dzungar Khanate, Amarsanaa, Chingunjav of Halkh, and Luvsandanzang of Khokh Lake, would have been traitors, rioters as pigs and dogs as mentioned in some formal or informal historical records of China."

Ts. Gombosuren, one of the leading contemporary philosophers, expressed the view that he would not allow to change history by the eloquent expression or due to the political climate.

Eventually, proof in criminal procedure is an act of recording of facts in the past. One of the main objectives of any legal system is to more precisely define the substantive or procedural rules relating to proof and evidence.

As an illustration, in England, which is known as the model country of accusation, Evidence Act, which is applied with the Criminal Procedure Code, was adopted in 1982, followed by two amendments, and it was revised in 1989.

Criminal procedure is required to be in harmony with legal system such as Anglo-Saxon, Romano-Germanic, Mixed, and Islamic families. Others contend that it is worthwhile to research socialist and post-communist legal systems.

Professor D. Bayarsaikhan divided the existing criminal procedure into three categories such as 1. Accusatorial system 2. Inquisitorial system 3. Mixed system. The accusatorial system is a more open and flexible system where adversary process is applied while the inquisitorial system is a non-adversary system without plea bargaining procedure. In addition, he noted that the fate of a criminal case largely depends on results of investigation, and a hearing is conducted within a case file provided by the prosecutor.

In 2015, A.P. Lupinskaya, a scholar of the Russian Federation, in his work named "Criminal Procedural Law" stated that "Internationalization is the process of establishing "consensual system" where national law is connected to international level and expands its scope." However, he cautioned that a perfunctory approach that does not rely on tradition and research would have negative consequences.

Generally speaking, the following elements should be taken into account while determining the type of criminal system:

1. Whether it is governed by general law or special ones, whether criminal procedure is regulated by both norms or only one, and how these norms are connected to each other;
2. To what extent do the rights and duties of parties affect the proof within different stages of criminal procedure and their scopes.
3. Whether the function of the prosecutor is focused on only one objective during different stages of criminal procedure or whether it is changeable depends on circumstances;
4. Whether it is possible to adjudicate through simplified procedure or usual procedure depending on criminalization and classification of crimes which are reflected in the substantive law.

Mongolia is rich in the history of resolving disputes by judges or higher-ranking officials. Despite the lack of researches on the relation between this tradition and the current legal system, there are numerous facts and pieces of evidence that support the notion that Mongolia was a nation governed by "the Khan and the laws." For example, the Secret history of the Mongols, Khalkha Rules, Yassa, Ulan Khatsart, and Hugarkhai Nuurt.

It is possible to fully understand the legal theories and the history of the Mongolian criminal procedure as well as its basis from some works such as M. Sanjdorj, (History of the Mongolian state, 1971), I. Dashnyam, (History of the state and law of Mongolia sub-volume, 2011), J. Urantuya, B. Bayarsaikhan, (Laws and regulations to be followed (1913-1918), 2004), B. Bayarsaikhan, (Historical tradition of criminal procedure laws of Mongolia (1911-2009), 2011), G. Sovd and B. Sodovsuren's works on the sources of criminal laws, doctors B. Bat-Erdene, D. Bayarsaikhan and J. Erkheskhulan's textbooks, dozens of speeches in 1995-2021.

G. Sovd and B. Sodovsuren had written that "the criminal procedure rules of Mongolia were quite systematic for the period from 1929 to 1933. Dr. Amarsaikhan.Ts has published several articles on the subject of "Court Law" in State and Law Journal of 1999. Also noteworthy is that the above-mentioned scholars have highlighted that court proceedings in our country were conducted with civil procedure in compliance with both the Russian Federation's legislation and Mongolia's customary laws.

However, the laws which had characteristics of the Roman-German system started to be applied in Mongolia through the Soviet Union since 1960s. According to some scholars, it should be noted that the impact of politics and ideology was considerable. The Criminal Procedure Law of 1963 was differentiated from other laws by its systematization, methodology, consistency among provisions and the application of general and special parts in accordance with the purpose and principles. It is important to note that in terms of legal techniques, it was just as methodical as its later adjustments and the subsequent criminal procedure laws of 2002 and 2017.

Academician S. Narangerel pointed out in an interview that with regard to the process of legal reform that began with great vigor in the late 1990s, significant changes and reforms have been made to the Criminal substantive law, which is second only to the Constitution in terms of its importance. A group of scholars and researchers who wrote the last criminal law repeatedly stated that "Mongolian traditions have been preserved and appropriate additional clarifications have been made there." However, no one would dispute that the combination and changes of traditions and reforms, which belong to the Roman-Germanic legal system, have remained in the field of criminal procedure. Moreover, there are several clauses reflecting the concepts of the so-called Anglo-Saxon legal system. For example, in the 2002 law, the **adversary proceeding applied in**

parallel with the principle of objective truth. This is a fact that the Mongols approached with "the curious mind of nomads" as stated in the friendly reminder given by the well-known German scholar H. Schöller.

Also noteworthy is that Dr. B. Shoneman of the University of Bavaria has warned several times since 2003 that these principles of the two legal systems shall not be applied simultaneously. However, it is acceptable that the Criminal Procedure Law of 2017 transformed the adversary proceeding into one of the fundamental methods of the criminal procedure. In other words, the accusatorial approach appears at the stage of trial while the inquisitorial principle is applied during the investigation process. It is apparent that rights of judges and representatives to ask questions and to receive explanations from the parties at any time during the court proceedings is definitely the feature of the Roman-Germanic legal system. Generally, the main requirement of the adversary proceeding is that the parties should collect the objects to be resolved separately and take them to an independent court for review. It means that the court will accept it; in other words, it only exercises the function of concluding.

It is the reason why it is important to make evidence collection process more objective, intelligent, and scientifically at the stage of investigation and pre-investigation. In order to do this, it is time to properly define the investigative function. The inquisitorial process appears at the pre-trial stage of Mongolia even tough the judicial power is considered the comprehensive operation of a rational state according to F.Hegel. Therefore, it is necessary that, along with the investigation and prosecution, mitigation and acquittal be used simultaneously from the very beginning. However, implementing such functions only by the defendant party is impossible in both of Roman-German and the Mixed legal system.

At the stages of pre-trial and tria, the parties' rights and duties are not clear; it exercised only by requests and complaints. Therefore, it is necessary to focus on developing legal regulations by which intelligent and compassionate system works not only to convict and investigate but also to mitigate and acquit simultaneously from the date of inquiry case.

It is possible that prosecutor is responsible for such functions due to the fact that prosecutor strictly adheres to the rule of law and respects human rights at all pre-trial stages. In contrast, court shall be only responsible for accusation and aggravation.

One of the significant improvements in our criminal procedure is that the current procedural law regulates the processes related search and undercover (also known as spying and wiretapping). But the process of search for sources of information (emphasis added) should be kept under control of intelligent state and/or prosecutor and/or court.

Despite the fact that the State Prosecutor's Office had special and constant control over the case of "S. Zorig murder", it failed to stop the "torture"; some illegal activities during the undercover operation were disclosed by the executive authority, not by the judicial power. It is surprising that they used it as a seemingly political act instead of stopping it immediately. (Theoretical and practical conference review, 2018, pages 17-18)

Some important provisions of the Roman-German legal system are still needed for the judicial proceeding legislation. For example, in Mongolia, the type of "appealization" seems more appropriate than the type of "cassation" for the appeal process. In event of the latter one, the current updates for the review process will be more consistent, because the provisions of "the decision is valid/ legally valid as soon as it is read and heard (shall come into force once such decision is read aloud)" are not in line with the current practice. Moreover, it is doubtful whether the court decision issued on behalf of the State should be measured by the formula "valid"; it weakens power of the decision.

It is, therefore, appropriate to review the "valid" decision through the "appealization" process and make it final on behalf of the State or of the people. In the abovementioned case, the nature and the purpose of the processes of "review" and "resolve cases upon discovery of new circumstances" will be explicit.

HOW CAN LAND LAW ADDRESS "UNDERUSE" ISSUES? THE CASE OF JAPAN

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ABSTRACT:

Japan's Land Use Law and City Planning Law have traditionally focused on addressing the issue of an "urbanizing society" and the "overuse" brought on by population growth and economic growth. However, in an "urbanized society" where urban expansion has subsided, legal responses to new issues such as landscape problems and area management will be necessary. In addition, the problem of unoccupied houses and unclaimed land brought about by an age of population decline indicates that legal measures to address "underuse" are becoming increasingly important. This chapter examines recent Japanese legal responses to challenges in an era of "underuse" from the perspective of the "tragedy of the commons" presented by G. Hardin and the "tragedy of the anticommons" presented by M. Heller.

KEYWORDS:

Underuse, The tragedy of commons, The tragedy of anticommons, Landscape, Area management, Unclaimed land, Owner-unknown land.

INTRODUCTION

Japan's Land Use Law and City Planning Law have traditionally focused on addressing the "urbanizing society" and "overuse" brought on by population growth and economic growth. However, in an "urbanized society" where urban expansion has subsided, legal responses to new issues such as landscape problem and area management will be necessary. In addition, the problem of unoccupied houses and unclaimed land brought about by the age of population decline indicates that legal measures to address "underuse" are becoming increasingly important.

This chapter examines recent Japanese legal responses to challenges in an era of "underuse" from the perspective of the "tragedy of the commons" presented by G. Hardin and the "tragedy of the anticommons" presented by M. Heller.

Section 1 discusses Hardin's "tragedy of the commons" argument as a justification for property rights, pointing out the distinction between "literal commons" and "figurative commons" and the distinction between the three solutions ("solution through property rights", "rule-based

solution", and "solution through collective management") (1.1). From this point of view, we will examine "landscape as commons" (1.2) and the legal measures toward "area management" (1.3), both of which have become important legal issues in Japan since the 2000s.

Section 2 analyzes the Japanese Supreme Court's "Forest Law Judgment" in 1987 (2.2) in terms of Heller's "tragedy of the anticommons" argument (2.1). From this perspective, I will examine the recent legislative measures toward the "unclaimed land" problem (2.3), which symbolizes the era of underuse. Particular emphasis will be placed on the theoretical implications of the "undertakings for the promotion of welfare of the community", stipulated in the Unclaimed Land Act of 2018 (2.4).

1.The tragedy of the commons

1.1. The "tragedy of the commons" as a justification for the property rights system

In general, there are two ways in which the property rights system is justified. The first emphasizes the protection of personal freedoms as the function of property rights; in other words, the focus is on securing the stable existence of the holder of the property rights and achieving the physical requirements for personal freedom. The second line of reasoning involves distributing resources by dividing up the property rights among various stakeholders; this logic pursues greater efficiency in the use of the resources and seeks to enhance the welfare of society as a whole.

We will temporarily put aside the first line of reasoning and first focus on the postulation of the "tragedy of the commons" by Garett Hardin. He paints a picture which can be summarized as below.

There is a pasture open to all. Various herdsman let their cattle to graze on this pasture and determine the number of cattle based upon their own costs and benefits. If a given herdsman puts more livestock on the pasture, the benefit will be exclusively attributed to the owner but the costs (deterioration of the pasture by overgrazing) are shared by all the herdsmen. Therefore, the only sensible course for each herdsman is to add more cattle on the pasture. As a result, too much cattle are turned loose, and no herdsman is able to maintain his own cattle, and no one ends up with their de- sired result. In order to avoid this tragedy, the common pasture will be divided into parcels and exclusive right of usage attributed to each herdsman.[1]

However, there are a few key points to consider here. Firstly, take the "pasture open to all" that Hardin presupposes - what is the actual nature of this pasture as a good? In the sense that it would be difficult to block external parties from using the pasture and other herdsmen from overusing it, it has a low level of exclusivity and is in a state of "open access." By contrast, it has competitive- ness, in the sense that the more users of the pasture there are, the more the resources are consumed[2]. In other words, this is a "common pool" resource, to use the term coined by Elinor Ostrom.[3] If we look at the actual use of land in Japan for the purpose of attaining resources derived from the land, there are few plots that feature this element of a "common pool" resource. There is generally no "unowned" land, with all land largely having property rights associated with some public or private body. Therefore, in Japan, land for free productive use by anyone is nearly non-existent. Hardin's example presupposes a world in which property rights do not exist. Today, it belongs to the domain of the "fable."

That being said, there are more than a few cases of phenomena resembling the tragedy of the commons, such as management of fishery resources, global warming through energy consumption, traffic congestion, and other domains beyond physical land itself, where establishing

* This chapter is based on the author's presentation at the international workshop "A Cooperative Establishment in a Downscaling Society" (Mar.14, 2018, Chonbuk National University, Korea). The Japanese version is published as "Kasho Riyo Jidai ni okeru Komonzu no Higeki to Antikomonzu no Higeki" (The tragedy of commons and the tragedy of anticommons in an era of underuse), in M. Noro et al (eds), Gendai Gyosei to Nettowaaku Riron (Horitsubunkasha, 2019), p.143-170. This work was supported by JSPS KAKENHI Grant Numbers JP26285009, JP15H03290, JP18H00796, JP18KK0033. The author would like to thank Gengo Inc. for the provisional translation and Dr. Steve Pickering (Brunel University London) for great editing.

[1] Hardin (1968).

[2] There are other types of property rights, such as intellectual property, which lack this aspect of competitiveness.

[3] Ostrom (1990).

property rights would prove difficult or impossible.[4] Returning to the subject of land proper, there are also similar examples to be found in illegal dumping in the context of vacant land that has an owner, but is substantively unmanaged, and in children's parks that are not maintained by anyone. Hardin also touches on environmental pollution and, as its cause, population growth, saying: "Here it is not a question of taking something out of the commons, but of putting something in"[5]. Herein, I will treat the state of open access associated with the use of land as a resource, as in the case of the pasture above, as the **"literal commons,"** and the state of open access for non-land phenomena or for purposes other than the use of re- sources as the **"figurative commons."**

Hardin goes on to suggest methods beyond the creation of property rights as a means of solving the tragedy of the commons. He states that in order to prevent the destruction of a national park due to increased visitors, we could 1) "sell them off as private property" or 2) "keep them as public property, but allocate the right to enter them." Allocating the right to enter the parks could involve various possibilities, among them i) auction of the allocation rights ii) allocation through merit-based standards iii) lottery or iv) first-come, first- served schemes, or other methods.[6]

For the sake of argument, I will refer to 1) as a **"solution through property rights"** and 2) as a **"rule-based solution."** In the case of 2), we would presume that a) the government functions as the body enacting and executing these rules. However, (and Hardin may not have accounted for this) it would also be logically possible for b) an autonomous group consisting of the herdsmen to manage the pasture. Among commons researchers, many emphasize the notion that it would be possible for a local society to collectively or autonomously manage shared spaces in a sustainable fashion, or at least it was possible at a certain time. These researchers have come to be referred to as "comedy of the commons theorists."[7]

In the above example, what led to the impoverishment of the common pasture was that, from the point of view of individual herdsman as operators, it was "reasonable" to allow for "just one more" head of cattle. If the individual herdsmen were not treated as managers, but rather a company collectively founded by them were the managing body, the entirety of the pasture would be looked at from the long-term view of maximizing its benefits, allowing for thinking about how to manage it sustainably. At least as a logical possibility, this would represent another way of solving the tragedy of the commons. I will refer to this as **3) solution through collective management.**

1.2.Landscape as commons

Around the 2000s in Japan, there was a sudden and marked interest in jurisprudence in the context of "landscapes." In 2004, the Landscape Act[8] was established. The impetus for this was the "*Kunitachi* condominium conflict" in *Kunitachi* City, Tokyo[9]. This incident involved a plan to construct an apartment complex approximately 40 meters tall alongside *Daigaku-dōri,* a street emblematic of community development and city planning in *Kunitachi*. The City Planning Act[10] and Building Standards Act[11] of the time allowed for apartment buildings of this height, but local residents felt that the height of the mansion would not coalesce with the rows of gingko and cherry trees along *Daigaku-dōri*, which had a height of 20 meters, so this would disrupt the landscape. The city government rapidly moved to create a district plan restricting the height of buildings to 20 meters, as well as ratify a set of building ordinances that would give legal force to said plan. However, the Tokyo metropolitan government, which has jurisdiction over the Building Standards Act, held that the apartments in question were already "under construction" (Article 3,

[4] Hardin himself cites the example of free parking in the Christmas shopping season, fishery resources and use of national parks. Hardin (1968), p.1245.

[5] Hardin (1968), p.1245.

[6] Hardin (1968), p.1245.

[7] E.g. Rose (1986). Cf. Takamura (2012), p.7, Suga (2008).

[8] Keikan Hō (Act No.110 of 2004).

[9] Regarding this conflict in general, see Kadomatsu (2017).

[10] Toshi Keikaku Hō (Act No.100 of 1968).

[11] Kenchiku Kijun Hō (Act No.201 of 1950).

Clause 2 of the Building Standards Act) on the date the *Kunitachi* regulations went into effect, so the district plan and ordinances did not apply to this complex (grand- father clause). Since Tokyo government took the stance of allowing a building of 40 meters in height, the neighboring residents lodged a suit. There are many cases of litigation, but two suits are worth mentioning here. Namely, 1) a civil litigation was lodged seeking an injunction against the construction of parts exceeding 40 meters in height (or for the removal of parts already constructed) and 2) administrative litigation was sought, asking that the aforementioned district plan and building ordinances be applied to the apartment, seeking Tokyo to issue an order barring construction of parts exceeding 40 meters (or an order for removal of parts already constructed).

In this case, both the judgment of first instance in the administrative litigation[12] and the judgment of first instance in the civil litigation[13] which recognized the residents' claims, made the following opinions, which treat the landscape as commons[14]. Both the appeals judgment in both suits and the Supreme Court judgment in the civil litigation[15] dismissed the claims of the residents, however.

[Judgment of first instance in administrative litigation (Judgment of the Tokyo District Court, December 4, 2001)] (hereafter" the Judgment A")

For passersby, landscapes represent merely a one-way form of enjoyment; however, where buildings are one of the major constituent parts of a specific landscape, the persons residing within that space and those persons possessing buildings within said space, namely, users of the space, must maintain the aspects of the landscape in order to enjoy its benefits as intended. Furthermore, in cases such as these, if a particular user of one aspect forming the landscape does not follow the rules for its maintenance, there is a high likelihood of the landscape being immediately destroyed; unless all users of the landscape reciprocally maintain and respect it, the benefits conferred by said landscape cannot be enjoyed in a continuous manner. In other words, the maintenance of a landscape is only possible when all constituent and actual users of the landscape respect it; landscapes are highly dependent on a shared consciousness among their users.

[Judgment of first instance in civil suit: Judgment of the Tokyo District Court, December 18, 2002] (hereafter "the Judgment B")

There are cases in which the property right holders establish certain standards on height, color or design for the buildings within the area and thus a certain landscape of the area evolves. When not only the residents but also the society at large considers it to be a good landscape, it gives added value to the lot. Such added value of urban landscape is by its nature different from enjoyment of the natural landscape of mountains or coast, or from enjoyment of historical buildings which are preserved at a cost to their owners. It is the property-right holders who enjoy the added value of the landscape themselves that have brought forth the value by their continuous effort. It required their mutual understanding, solidarity and self-sacrifice. In order to maintain such added value, the above standards must be observed by all the property-right holders. Only one property-right holder can immediately destroy the uniformity of the landscape by a building that violates the standard and deprives other property-right holders of the above added value.

With respect to the landscape as commons, we could interpret the above as follows. Seeking to avoid Hardin's tragedy of the commons, the law has created property rights through a two-layer division of space which involves 1) individually dividing up land that would otherwise be contiguous and 2) stipulating that property rights to land extend both above and below the surface of the land (Japanese Civil Code, article 207). However, by their nature, landscapes cannot be physically subdivided. Furthermore, they are a good in which, provided all recipients of the benefits conferred by a landscape use it while observing its rules with due care and maintain it as necessary, the landscape can confer major benefits on each person in a continuous fashion,

[12] Judgment of the Tokyo District Court, December 4, 2001, Hanrei Jihō 1791:3.

[13] Judgment of the Tokyo District Court, December 18, 2002, Hanrei Jihō 1829:36

[14] See also Kadomatsu (2017).

[15] The Supreme Court did not render a substantive decision on the administrative litigation.

but if a small subset of users pursue self-interest in a short-sighted manner, the landscape may be easily destroyed.[16] As people's interest in and the economic importance of a landscape grows, the tragedy of the commons effect once again is produced.

The unique aspect of these two judgments is that they found local residents (the plaintiffs) to bear a certain role in enforcing rules to preserve the landscape. Specifically, the Judgment A stated as follows, finding the plaintiffs having the standing to sue in order to enforce administrative and legal rules stipulated in district plans and building ordinances.

"Owners of land in the district subject to height restrictions are...subject to the building ordinances and district plan which respectively impose a limit of 10 meters and 20 meters on buildings constructed in said district; landowners in the height-restricted district are users of the space encompassing *Daigaku-dōri* and exist in a **reciprocal interest relationship** whereby, by following the height restriction and by being subject to it, enjoy specific benefits conferred by the landscape of the aforementioned *Daigaku-dōri...*taking these factors into account, the building ordinance and Article 68, Clause 2 of the Building Standards Act achieve the public aim of maintaining the specific landscape of *Daigaku-dōri.* In addition, the building ordinances subject the landowners subject to building height restrictions in the district to other specific restrictions, which can be interpreted to impel each individual member to maintain and uphold those restrictions for the individual benefit of enjoying the landscape of *Daigaku- dōri*".

The Judgment B also found that where a) there is the ongoing application of self-imposed restrictions on the use of land by the landowners of a specific region, b) a specific manmade landscape is maintained for a suitable length of time and that landscape is deemed good as per social norms, and c) this landscape creates added value to the land owned by the landowners,

"While the landowners of land in the region bear the obligation to exercise self-restraint on the free exercise of their own property rights, they must also seek the same obligation of other equivalent landowners."

In other words, the Judgment B finds that, irrespective of administrative regulations, there is an unwritten law of self-restraint (customary law, as it were) governing landowners in their use of the commons; for this reason, the courts found that there is a "interest in landscape" under legal protection of civil tort law. Based on this "interest in landscape," it acknowledged the local residents' right to seek an injunction against the construction of a building violating the above rules.

What this example of the "landscape as commons" has to teach us is, firstly, even where the "literal commons" is nonexistent and the land divided up, there may be cases where a "figurative common" emerges as the point at issue due to economic/social conditions and changes in people's consciousness. Secondly, avoiding the tragedy of the commons would require redividing the "figurative commons" (a solution by use of property rights) or treating it as commons and setting rules for the management thereof (a solution through rules). The latter brings up the third consequence, which is that a sort of interest-based collective is produced among the stakeholders in the commons (i.e., the "reciprocal relationship" referred to in the judgment of first instance in the administrative litigation proceedings). Thus, there are cases where the constituent members of that collective body are recognized to have certain privileges - both in terms of individual "rights" and a certain "competence" in managing the collective - to enforce the aforementioned rules.

1.3. Area management as management of the commons

In recent years, a form of "area management" towards maintaining and improving a positive environment and local value through autonomous initiatives by residents, business operators, and landowners has drawn more attention. These initiatives include the holding of events to vitalize the region, engaging in cleanup activities, and the creation of autonomous community building rules. These area management initiatives can also be interpreted as cases where a given region or space, or the individual facilities or activities within it, are treated as commons, with a body comprising local stakeholders being in charge of its management - corresponding to 3) above (see

[16] Takamura (2012), p.3.

1.1), namely, a "solution through collective management".

Some issues that occur when trying to justify the legal basis for area management activities in the management of the commons are a) in which cases to formally (publicly) authorize area management and how to define the main agent (the area management body) for said activities, the spatial scope, and the scope of stakeholders therein (**authorization of area and agent**); b) how to allocate the burden of costs for these activities, and whether to levy their collection (prevention of free riders) **(costs allocation**); and c) whether it is possible to enforce the payment of dues and observance of autonomous community building rules in stakeholders who have not consented to said activities (**necessity of consent**)[17].

In 2014, Osaka City enacted a new local ordinance (Ōsaka Shi Eria *Manejiment Katsudō Sokushin Jōrei* [Osaka City Area Management Promotion Ordinance], hereafter "Osaka Ordinance"). The ordinance is the first attempt in Japan to introduce a comprehensive legal scheme of Business Improvement Districts (BIDs), which is widely utilized in North America and Europe.

Under the Osaka BID scheme, the city mayor may designate area management bodies as "Urban Reconstruction promotion corporations" stipulated in Art. 118 of the Act on Special Measures concerning Urban Reconstruction[18] (*Toshi Saisei Tokubetsu Sochi Hō*, hereafter the "Urban Reconstruction Act") and may certify the "district management plan" proposed by the area management body (Art. 2, Osaka Ordinance) (**(a) authorization of area and agent**).

The Osaka ordinance also makes it possible for area management organizations to collect contributions from the beneficiaries of the activities and use the collected funds as the subsidies for area management activities. For that purpose, the ordinance utilizes a levy scheme (*Buntankin*) in the Art. 224 of the Local Autonomy Act. However, the purpose of the subsidy is limited to the maintenance and management of certain public facilities designated under the Urban Reconstruction Act (Art. 46, para 16. "Urban Convenience Promotion Facilities" (*Toshi Riben Zōshin Shisetsu*) (**(b) costs allocation**).

However, the premise of the application of the BID scheme is the conclusion of the Urban Convenience Promotion Agreement (*Toshi Riben Zōshin Kyōtei*) in Art. 74 of the Urban Reconstruction Act. Such agreements shall be voluntarily concluded between the area management organization and the landowners or leaseholders. Namely, the collection of compulsory contributions is possible only from those beneficiaries that have voluntarily agreed in advance to pay the contributions. Thus the only merit of using the scheme is that the collection of the money will be conducted by local governments, which nevertheless has significance[19] (**(c) necessity of consent**).

In June 2018, two important revisions of the laws were enacted concerning area management. These are an amendment to the Local Revitalization Act (*Chiiki Saisei Ho*[20]), which falls under the jurisdiction of the Cabinet Office, and an amendment to the Urban Reconstruction Act, which falls under the jurisdiction of the Ministry of Land, Infrastructure, Transport, and Tourism.

The amendment to the Local Revitalization Act involves, like the Osaka ordinance, the introduction of a BIDs system. It defines area management activities carried out in "a given region, as based on natural, economic, or social factors" where the expectation of increased tourists to the region will lead to more employment opportunities and the expansion of the economic base as "activities for the increased convenience of local visitors". Area management bodies, which carry out activities to improve the convenience of visitors to the local region, can file with the local mayor for approval of a plan (Local Tourists Convenience Promotion Action Plan *(Chiiki Raihōshatō Riben Zōshin Katsudō Keikaku)* that describes these activities (**(a) authorization of area and agent**). One requirement to file for approval is a 2/3 majority of beneficiary businesses

[17] See Kadomatsu (2018).

[18] Act No. 22 of 2002.

[19] Kadomatsu (2018), p.9.

[20] Act No. 24 of 2005.

of the activities and a similar 2/3 majority for the allocation of expenses. Where the action plan is approved, the local mayor can levy expenses from the beneficiary businesses of the activities and use this as a subsidy for the area management body **((b)costs allocation)**. Unique aspects of this amendment are the way it 1) treats the scope of stakeholders as business operators (rather than landowners or residents) and 2) differs from the Osaka city ordinance in that it allows for levying expenses from business operators who do not agree to the motion provided there is a 2/3 majority of business operators **((c)non-necessity of consent)**.

The amendment to the Urban Reconstruction Act is designed around the spaces defined as "residential promotion areas" and "urban function promotion areas" **((a) authorization of area and agent)** in the Location Normalization Plan (*Ricchi Tekiseika Keikaku,* a system implemented in 2014 in the Urban Reconstruction Act[21]). This seeks to achieve the "compact city," and aims for the creation therein of such facilities as community recreation squares or streetlights to prevent crime, treating these as "facilities to be induced in the district" (*Ricchi Yudō Sokushin Shisetsu*). In this case, landowners and other right holders in the region in question can, through unanimous agreement **((c)necessity of consent)** and the approval of the local mayor, enter into an agreement concerning "facilities to be induced in the district" and stipulate rules on the burden of payment **((b) costs allocation)**. The local mayor can intermediate to require the participation of those persons not agreeing to participate in the agreement to do so. Unlike from the amendment to the Local Revitalization Act, the amendment to the Urban Reconstruction Act calls for the agreement of all right holders. The key points here are that it stipulates the possibility of intermediation by the local mayor and that approved agreements still hold validity (*Shōkeikō*, succession of obligations) over persons who are not parties to the initial agreement, such as through purchase of land after the agreement is entered into. Documents by the Ministry of Land, Infrastructure, Transport, and Tourism refer to facilities for the promotion of local visits as "commons."[22]

As indicated above, area management initiatives could be interpreted as one form of avoiding the tragedy of the commons -- namely, **3) a solution through collective management**. Not only would this serve to vitalize economic activity and increase the asset value of land in the place under area management, but it would also lead to increased social capital there. Furthermore, one could expect spillover effects beyond the place under area management. At the same time, a more detailed inquiry would need to be made to identify the grounds for the "publicness" of the space as a justification for impelling those not in agreement with these activities to nevertheless cooperate.[23] Notably, due consideration must be given to whether, where area management initiatives are handled by constituent members who have equivalent interests, this results in the expulsion or exclusion of stakeholders with differing interests (in particular, the risk of gentrification, when carried out in residential districts).[24]

2. The tragedy of the anticommons

2.1. Argument by Heller

Michael Heller's 1998 paper is written as a direct response to Hardin's theory of the "tragedy of the commons" and is entitled, "The Tragedy of the Anticommons." The "anticommons" is defined as "a property regime in which multiple owners hold effective rights of exclusion in a scarce resource." It is then subdivided into "legal" and "spatial" forms of anticommons.[25] Heller treats property rights as a "bundle of rights"[26], following Anglo-American legal tradition. The

[21] See Kadomatsu (2017a), p.503 (There the author used the translation "Location Improvement Plan").

[22] http://www.mlit.go.jp/common/001220829.pdf.%20.%20Accessed%20Mar%2028,2020.

[23] Kadomatsu (2018), p.11. " If area management activities were to be found solely in the efforts of landowners for the purpose of promoting their asset values, it would constitute only a pursuit of private interests. (…….) The case can be made that the public nature of area management activities can be found in increasing the attractiveness of public space that is open to "many and unspecified persons", which is nothing but the classic feature of "publicness". The promotion of asset values in the area or even in the neighborhood itself cannot be recognized to be "public", unless the significance of the area is legally acknowledged, such as by its positioning in city planning. The pursuit of private interests may coexist, but these interests alone cannot be something that legitimizes public support."

[24] Kadomatsu (2018), p.12-13.

[25] Heller (1998), p.668.

[26] Heller (1998), p.623 n.4.

situation of legal anticommons means that "the rights of ownership, leasing, use, and so on were initially given to different owners"[27], to an asset, for example for a single piece of real estate. By contrast, the spatial anticommons refers to a context in which "each anticommons owner receives a core bundle of rights, but in too little space for the most efficient use in the given time and place."[28] This condition of anticommons invites the underuse of resources (that is, the tragedy of the anticommons). Attempting to bundle the rights after the fact reaches an impasse due to the high transactional cost and strategic behavior among parties.[29]

2.2.Supreme Court judgment on the Forest Act

Heller's theory is predicated on the Anglo-American legal concept of property rights as a "bundle of rights." In Japanese law, the underlying concept differs, revolving around "standalone ownership" or "one asset, one owner." In other words, there is a single rights holder to a given asset, and the property right therein is free and exclusive.[30] From this point of view, ownership based around co-ownership (Article 249 of the Civil Code) would take on a negative connotation.

One such case was the June 22, 1987 Supreme Court judgment[31] on the Forest Act[32]. In this case, brothers who had been given a forest plot of land from their father while he was still alive shared it equally with two stakes. They had entered a feud, and the younger brother demanded that the shared part of the forest be split up. The Civil Code states (Article 256, Paragraph 1) that any co-owner can request the split of a shared asset at any time; however, Article 186 of the Forest Act at the time did not grant such requests for the splitting of shared forests where the co-owner held a stake of less than 50 percent. The first appeal dismissed the younger brother's claim on the grounds of the above law, but the Supreme Court held that Article 186 of the Forest Act was a restriction on property rights that did not conform to standards of public welfare and violated Article 29, Paragraph 2 of the constitution, so it reversed the original judgment.

There are various theoretical dimensions to this ruling (an oft-cited issue is that at the time the forest became the shared property of the brothers, it had already been subject to the restrictions of Article 186 of the Forest Act, bringing into question why the brother would emphasize that his property rights were being "restricted" by the law)[33], but for our purposes, we will focus on the opinion of the court with respect to the sharing system and the demand to split up the shared asset.

Article 186 of the Forest Act denies the right to seek partitioning provided for in Article 256, Paragraph 1 of the Civil Code[34] to a co-owner or owners with less than one half of the total value of the holding (including several co-owners with less than one half of the total value of their combined holdings). First, the Court will examine the legislative intent and purposes of Article 256 of the Civil Code. Co-ownership is for more than one person to jointly own an object. and each co-owner has a certain share of the right to own. Co-owners are not connected to each other for any special purpose except for their mutual relationship of owning something jointly. Because owners of shares in co-ownership mutually control each other, sometimes adequate consideration is not given to the use or improvement of their common property, compared to a case of single ownership. Also, disagreements and conflicts are likely to emerge between co-owners concerning the management of or changes in the property. Once a disagreement or conflict emerges, the management or changes regarding the jointly owned property may be impaired and the economic value thereof may not be fully realized. In order to avoid such impairment, and to protect a co-owner's right to control the property freely and fully realize its economic utility, the said article enables each co-owner to seek a partitioning of the jointly owned property. Furthermore, the said article sets a limit on the duration within which co-owners may conclude a contract not to partition their property, and guarantees each co-owner the right to have the jointly owned property

[27] Heller (1998), p.671.

[28] Heller (1998), p.671. "In a legal anticommons, the horizontal lines demarcate core rights of exclusion held by different owners. …… In a spatial anticommons, by contrast, the horizontal lines demarcate the physical subdivisions of an object." (op.cit).

[29] Heller (1998), p.659.

[30] Ishikawa(2011), p.303

[31] Supreme Court Judgment (Grand Bench) Apr.22, 1987 Minshu 41(3):408

[32] Shinrin Hō (Act No. 249 of 1951).

[33] Annen (1995).

[34] Mimpō (Act No.89 of 1896).

partitioned by not recognizing the effect of the contract of prohibiting partitioning beyond the above period of time. Thus, the right to seek a partition of the jointly owned property has been developed to serve the above public objectives by enabling each co-owner to shift to single ownership which is the basic form of ownership in modern society and has been recognized in the Civil Code as an attribute of co-ownership along with the freedom to dispose of a share in co-ownership.

The ruling thus resulted in the interpretation that 1) given that the co-ownership produces a relationship in which the respective stakes restrict each other by their nature, therefore preventing the economic value of the asset from being realized, and 2) if treating sole ownership as the inherent form of ownership in modern society, a state of co-ownership is a transitional state that must eventually revert to sole ownership through the exercise of a right to split the asset.

1) bears similarity to Heller's concept of the legal anticommons insofar as the way in which multiple rights holders can restrict the use, revenue generation, and disposal of an asset by other rights holders, leading to underuse. However, in the legal anticommons, multiple rights holders retain rights over fragmented parts of an asset, while in a state of co-ownership, multiple parties hold a "stake" in a single right.

The reason Article 186 of the Forest Act denies requests for a split is to maintain stable operation of the forest and prevent its fragmentation. The Supreme Court stated the following, indicating that there was no rational relationship between the legislative intent of the scheme and the restrictions in that article.

The Forest Act excludes application of the provision of the Civil Code regarding the co-ownership to the extent that a co-owner (or co-owners) with less than half the total value of shares is not allowed to seek a partitioning of the jointly owned forest: but in all other instances the above provision on co-ownership clearly applies. However, when co-owners, particularly two co-owners with an equal share of the total value, disagree or have a conflict concerning the management or a change in the jointly owned property, each co-owner may engage only in preservation of the jointly owned forest under Article 252, proviso of the Law, and may not manage or change the jointly owned property. This may cause the devastation of the said forest. As stated above, Article 256, paragraph 1 of the Law was set up to solve this type of situation. A consequence of excluding by Article 186 of the Forest Act an application of the above provision of the Civil Code to a co-owner (or owners) of the forest with less than half the total value of the shares would merely invite a perpetuation of the above conditions, and would not help in stabilizing the management of the forest. This would clearly involve the absence of a rational relationship between the legislative objectives in Article 186 of the Forest Law and the denial in the same article to a co-owner of a forest with less than half the total value of the shares the right to have the forest divided.

Does this mean that resolving the legal anticommons produced through co-ownership requires splitting up the rights into individual ownership? Would that suffice? That is not likely the case. Let us take stock of the issues once again in light of this point.

2.3.Owner-unknown land and the legal anticommons

In Japan today, a growing social issue is that of large plots of land that are "owner unknown."[35] Some estimates suggest that 20% of Japan's landmass is owner unknown. One major factor responsible for this is the situation of legal anticommons after the inheritance.

According to the Japanese Civil Code, upon the death of a decedent, the estate is shared by all the heirs. This state of co-ownership will continue until the partition procedure is completed. If the heirs do not dare to take the procedure, this situation may continue for generations and the number of the heirs will multiply.

A case that is often cited is the 2013 incident of a municipality attempting to obtain a mere 192 square meter plot of land to construct a road; the rights to the land had not been re-registered since its inheritance in 1948, and the co-owners to the plot had proliferated to some 150 people,

[35] Cf. Harding (2018), Yoshihara (2015), Yohihara (2016).

each of which had to be individually contacted.[36]

The legal anticommons caused by inheritance produces vast transaction costs that impede the use of public land and its reconstruction after disasters. We could safely describe this as "underuse." "Owner unknown" land also represents problems in terms of proper management of agricultural land and forests. However, this does not imply that only allowing a split of the land, the solution implied by the above Forest Act Judgment of the Supreme Court, would perforce lead to a resolution of the legal anticommons discussed above.

Firstly, heirs, who are shared holders to a plot of land, can legally request a split of the inheritance at any time. If this does not occur, it is because of the transactional costs required for the split (such as registration license tax, consulting with a judicial scrivener, conferring on the split, etc.). As the asset value of land in Japan has dropped, the costs of obtaining a split-up of land exceed the potential benefits that would accrue from the land, so these processes are left unpursued and the land is not split up. In other words, underuse in this case is not only the logical **conclusion** of the legal anticommons, but also its **cause**. 1). The transactional costs and underuse associated with land -- more accurately, we may not talk about "underuse" at this stage, because the term implies that the resources are not being used economically effectively[37], but here economic demand for land itself has gone down -- produce the legal anticommons, and 2) the legal anticommonsincreases the transactional costs, 3) inviting a **negative feedback loop of underuse** in which the land cannot be used even where there is economic demand. Where the split itself carries transaction costs, unless the division of those costs among parties is discussed, the legal anticommons cannot be resolved.

Secondly, even supposing a split resolves the legal anticommons, there may be cases where a spatial anticommons exists. This leads to the property rights becoming too fragmented and being unable to be used effectively. The issue of "owner unknown" land on so-called "shared private roads" is indicative of this problem.[38] In Japan, buildings must abut the road; in order to meet this requirement, there are cases where adjacent owners provide their private land as a common road and have it designated by a government agency as such. When the owners of a "shared private road" of this nature become unknown for some reason, repairs to the pavement and updates to infrastructures like water mains and sewer pipes are impeded, leading to the tragedy of the anticommons. Where these roads are shared by adjacent owners, in addition to being classed as "joint private roads," they may be referred to in some cases as "reciprocal cross-driveways." This is where the plot of the private roads consists of multiple sections, with the owners of the adjacent residential plots each owning the respective sections, and mutually allowing each other to use them. For reciprocal cross-driveways, the ownership rights are intentionally fragmented at the time of the creation of the road, creating conditions where the respective owners cannot obstruct each other's use. In this case, there is no legal anticommons, but inability to contact the individual owners of the fragmented road may produce a spatial anticommons.

2.4. Solutions to the tragedy of the anticommons

2.4.1 Tasks facing solution through property rights

What measures might we take to address the tragedy of the anticommons in cases where owners are unknown?

Firstly, when this issue is attempted to be resolved by property law and the split-up is resolved ("solution through property rights" (supra1.2)), there is then a further need to discuss who is to bear the transaction costs associated. When it further creates spatial anticommons, we should

[36] Cf. The Tokyo Foundation (2014), pp.20-21.

[37] As a matter of fact, the "underuse" by Heller is conceptually inseparable from the cost-benefit analysis. "Searching for an optimum between overuse and underuse sets us on the contested path of modern regulation of risk, an inquiry that starts with economic analysis but quickly implicates our core beliefs… I note this difficult topic to show that finding the optimum requires the idea of underuse and that this new word in turn transforms the meaning of overuse. Overuse no longer just means using a resource more than an ordinary amount. The possibility of underuse reorients policy making from relatively simple either-or choices to the more contentious trade-offs that make up modern regulation of risk." (Heller (2013), pp.15-16. Cf. Heller (2008), pp.35-36.

[38] See the Ministry of Justice (2018).

discuss how to bring them together and aggregate the fragmented ownership rights.[39][40]

Secondly, the countermeasures to take must be distinguished based on what sort of issue the "owner unknown" land has produced and in what sense it represents a tragedy of the anti-commons. *Gakuto Takamura* classifies underuse into two types: **a) underuse from a holistic perspective** (not disturbing neighbors, but where the use of the real estate is inefficient for the plot in question) and **b) underuse infringing on neighbors** (insufficient management creates large externalities that infringe on neighbors).[41]

Measures against negative externalities (neighborhood perspective)

2.4.1.1 Let the owner bear the costs

Examples of case b) would be a vacant home where the owner is unknown, inviting decay of a shared forest or farmland and causing a negative externality to the neighboring residents. There is therefore significance to clearly delineating a rule here that states that the owner is responsible for the cost of these negative externalities. This would create an incentive where the owner would take appropriate measures, such as disposing of the land, before it reaches a state of "owner unknown." However, this strategy would not be effective in cases where, at the time of inheritance, there is no demand for the plot. Furthermore, if the plot has already slipped into a state of "owner unknown," and there is a duty to make payment, the owner may hesitate to voluntarily provide that information, which would in turn further inhibit a resolution of the problem.

2.4.1.2 Compulsory Measures

(1) Unoccupied House Act- specified vacant homes

One means of handling b) negative externalities would involve imposing compulsory measures. The Act on Special Measures for the Promotion of Measures for Unoccupied Houses hereafter, "Unoccupied House Act")[42] defines "specified vacant homes" producing pronounced negative externalities to neighboring residents and employs measures where, following warnings/administrative guidance to the owner, the property can ultimately be removed by "subrogation". Where it is unable to ascertain the land owner without negligence on the part of the municipality, it is possible to employ a legal scheme of "summary subrogation" by public notice.

(2) Forest Act- forests requiring thinning or otherwise

Further, the Forest Act allows, for "forests requiring thinning" (that is, those left unattended and requiring immediate thinning or preservation), the local mayor to notify and recommend the owner of the forest to take measures. Where the owner does not accede to the recommendation, they can then be advised to engage in consultation for the transfer or establishment of the rights of the owner or third parties. Where the parties fail to reach agreement, the prefectural governor may issue a "ruling" (*Saitei*) in order to establish the minimum required ownership and/or usage rights for periodic thinning, etc. A 2011 amendment to the Forest Act states that, where the owners are unknown, a public notice can be used for the above ruling over the compulsory establishment of ownership/usage rights.

2.4.2 Measures against ineffective use (holistic perspective)

What would happen when there is no negative externality but there is some form of demand for the plot of land, which is being impeded by its current condition? This case, where an underuse from a holistic perspective (the above (a)) occurs, could be subdivided into those where i) the intended purpose of use is inherent to the characteristics of the plot of land or ii) the intended purpose of use is completely external to the plot of land.

[39] E.g. proposal of Land Assembly Districts (Heller & Hills (2008)).

[40] Additionally, there is also a question of how to produce the information on the owners and whether one may use/distribute the information.

[41] Takamura (2015), p.67.

[42] Akiya Tō Taisaku no Suishin ni Kansuru Tokubetsu Sochihō (Act. No.127 of 2014). See Chap.1 of this book.

2.4.2.1 Establishing Purposes inherent to the characteristics of the plot of the land

(1) Forest Act-right to use another's land for the purpose of forest management

According to the Forest Act (Art. 50 para 1), those who remove timber from the forest or build forest roads or other equipment necessary for forest management can ask for the approval of the prefectural governor to ask for consultation to use another's land if there is no alternative. Where the parties fail to reach agreement, the governor may issue a ruling to establish the right to use the land. The 2011 amendment made it possible to proceed the process even when the owner is unknown, using public hearing, public notice and deposition. In this case, the existence of negative externality is not the prerequisite, and the compulsory setting of the right to use may be analogous to expropriation. On the other hand, indispensability of the use of another's land is mainly due to topographic constraint and the necessity of forest management is inherent to the nature of forest.

(2) Cropland Act[43]-right to use unused cropland for the promotion of use

Another example of the measures against the above i) (the intended purpose of use is inherent to the characteristics of the plot of land) is the system for obtaining right to use for unused cropland. The Cropland Act employs a set of "ruling" measures that resemble those employed in the Forest Act; these measures are used by the Institutes for the Intermediary Management of Agricultural Lands (Agricultural Land Bank) to obtain usage rights for fallow land. Unlike the Forest Act, in the case of fallow agricultural land, even if it does not necessarily produce negative externalities on neighbors, the law allows for the obtaining of usage rights "where it is deemed necessary and appropriate for the promotion of use of the land for agricultural purposes." The above chooses to focus on the efficient use of resources. This system can be used even in cases where the owners are unknown. If the agricultural commission is unable to ascertain the land owner without negligence on its part, the commission may publicly notice the fallow land. After 6 months from the public notice, the Agricultural Land Bank may apply for the ruling of the governor to obtain usage rights. This system does not presuppose the existence of negative externalities—to be sure, there may be abstract risk of such in unused cropland. Compared to forests, there is less topographic constraint. However, at least in the case of cropland (and also for forest land), the intended purpose of use for the plot is legally fixed and the specific nature of what it would mean to make "efficient use of the resources" of the plot of land is to a certain extent clear. The Cropland Act stipulates that "persons who have ownership of or the right of lease of agricultural land, or any other right to use and derive profit from cropland must ensure that cropland is used in an agriculturally-appropriate and efficient manner) (Art.2-2).

(3) Special clauses for "co-owner unknown land"-measures against legal anticommons

Recent legislations stipulate special measures to establish the right to use in the cases where the co-owners are unknown. The 2016 amendment of the Forest Act provides for the right of a co-owner of the forest to apply to the local mayor to take the necessary to take steps to find the other co-owners whose name/whereabouts are unknown. If no one appears after the public notice, the co-owner who made the application may ask for a ruling by the governor to let her obtain the right to use timbers and lands of the other co-owners' until the next cutting age.

Under the newly enacted Forest Management Act[44] in 2018, the municipalities may lay down a Forest Management Right Aggregation Plan, obtain the right to use from the owners and conduct municipal management or let a specific private enterprise manage the forest. Under the Act, the requirement for the Forest Management Right Aggregation Plan is made easier for the case when the co-owners are not known. A similar scheme was introduced for agricultural land in the 2018 amendment of Agricultural Management Framework Reinforcement Act[45].

[43] Nōchi Hō (Act No.229 of 1952).

[44] Shinrin Keiei Kanri Hō (Act No.35 of 2018)

[45] Nogyō Keiei Kiban Kyōka Sokushin Hō (Act No. 65 of 1980).

2.4.2.2 Purposes external to the characteristics of the plot of the land

What occurs, then, when the intended use for the plot of land is ii) purely external to the characteristics of the plot of the land?

(1) "unknown adjudication" system in the Expropriation of Land Act

The typical case of the external purpose is, of course, the Expropriation of Land Act[46], which allows for compulsory obtaining of ownership rights against the will of the owner. It should be obvious that the same compulsory process applies to cases where the owner is unknown. For these cases, the Expropriation of Land Act employs a system of "unknown adjudication."

(2) 2018 Unclaimed Land Act

The Special Measures Act on Facilitation of Use of Land where the Owner is Unknown[47] (hereafter the "Unclaimed Land Act"), enacted in June 2018, defines "unclaimed land" as "the plot of land where all or part of the owners are unknown, even after the reasonable effort has been made by the method stipulated by the Cabinet Order" (Art. 2 para.1). The law stipulates (a) the special procedure for the land expropriation in case of unclaimed land and (b) the scheme to establish right to use for the "undertakings for the promotion of welfare of the community".

(a) Special procedure for the land expropriation.

In the case of the "specified unclaimed land", where there is no building and it is not being used for business or for other special purposes (Art.2, Paragraph 2), the Unclaimed Land Act makes it possible to expropriate land by the "ruling" of the prefectural governor, different from the normal procedure of "expropriation adjudication" by the prefectural Expropriation Commission. Since the Expropriation Commission is a council system organization that includes outside experts, the meeting schedule is limited, which acts as a bottle neck for the expropriation procedure. This special procedure is legitimated, so the government says, because it is easy to calculate compensation in the case of specified unclaimed land and one can ascertain that there is no right-holders' objection to the compensation using public notice procedure.

(b) Right of use for the undertakings for the promotion of welfare of the community.

"Undertakings for the promotion of welfare of the community" *(Chiiki Fukuri Zōshin Jigyō)* is defined as the undertakings for the "promotion of common welfare or convenience of community residents etc." and the Unclaimed Land Act enumerates roads, parking lots, public parks etc. (Art. 2, para 3). An entrepreneur may apply for the ruling of the governor to establish the right of use for unclaimed land for the purpose of such undertakings. The longest term for the right of use is 10 years. Even when the project does not belong to the undertakings enumerated under the Expropriation of Land Act (Art.3), establishing the right of use is possible, albeit the ownership transaction is impossible.

The Unclaimed Land Act thus makes it possible to compulsorily establish the right of use for unclaimed land for the purpose of undertakings that "may not have enough public welfare nature that would legitimize compulsory ownership transfer by land expropriation but do have a certain degree of public nature such as promotion of welfare or convenience of community residents". How can we evaluate such a scheme?

As stated in 1.1. there are two frames of reasoning as a basis for justifying the property rights system: (1) protection of personal freedoms and (2) greater efficiency in the use of the resources that enhances the welfare of society as a whole. It goes without saying that the need to protect land ownership rights from the point of view of (1) would already have been quite diluted in cases of unclaimed land. In addition, there is a need for some state interventions to cope with the situation of legal or spatial anticommons from the perspective of (2).

Which type or degree of state interventions is desirable and how can they be legitimized, then? First, one may focus on the decrease of objective/subjective value of the asset itself. Katsu-

[46] Act No. 219 of 1951.

[47] Shoyūsha Fumei Tochi no Riyō no Enkatsuka Tō ni Kansuru Tokubetsu Sochi Hō (Act No. 49 of 2018).

mi Yoshida names property whose value is low and which does not meet the cost of maintenance as a "negative asset". For such a negative asset, there is an imbalance between the cost of detailed cautious procedures for defending the rights and interests of landowners under the Expropriation of Land Act and the actual smallness of the interest of defended landowners. Such imbalances may legitimate the special procedure of land expropriation, skipping the procedures of the Expropriation Commission[48].

Second, one may legitimize the intervention on the basis of the presumed will of the unknown owner. Since the unclaimed land does not attract the owner's attention any more, one can presume that the owner does not object to the use by other person, if the contact were possible.

Third, how should we evaluate the scheme to establish the right of use of land in comparison to compulsory land ownership transfer? The separation of the right to use and the ownership has a potential to lead to the solution through collective management (1.2). Some evaluate the scheme of the Agricultural Land Bank as a step that leads to a management system as "a modern form of *Gesamteigentum*" (a concept in German law), making possible collective management of the cropland as commons. The "undertakings for the promotion of welfare of the community" scheme in the Unclaimed Land Act does not seek joint management. However, the scheme of "certification of civic green space", introduced by the 2017 amendment of the Urban Green Space Conservation Act[49], allows for the short-term use of vacant city lots by citizens or local groups through the coordination of the municipality. The latter would be an example of solution through collective management. A similar system of "the plan to promote establishment of rights for use of unutilized or low utilized land" *(Tei Mi Riyōchi Tochi Kenri Settei Tō Sokushin Keikaku)* was introduced in the Urban Reconstruction Act by the 2018 amendment.

There is criticism against the system of establishing the right to use in the Unclaimed Land Act. While the law obligates restoration to the original state after the land use term has expired, such criticism argues that this obligation would limit the range of economically feasible projects for the legal scheme and thus acquiring ownership is necessary. Some also argue that the law should abandon the requirement of "publicness" and allow municipalities to rent or sell unclaimed land on behalf of the owner to anyone who has interest in using the land, even for purely "private" purposes. To be sure, if we do not expect anything from the direction toward future collective management of commons by establishing the right to use, it may be more natural to forget about the "publicness" of the purpose. So, the prospect to the "third solution" to the tragedy of commons is the turning point.

The legal scheme of establishing the right of use has the possibility to lead to future collective management on the one hand, but may lead to a complex legal relationship as a conduit for legal anticommons on the other hand. In my view, the choice between three solutions to the tragedy of commons -- property law, rule-setting and collective management -- should be a flexible and strategical judgment on case-by-case and trial-and-error basis. A doctrinal approach with a lexical priority rule may not be most productive.

[48] Yoshida (2018).

[49] Toshi Ryokuchi Hō (Act No.72 of 1973). 51 Takamura (2018), p. 47.

REFERENCES

1. Annen, J. *Kempō ga Zaisanken wo Hogosuru Koto no Imi* (The mean- ing of constitutional protection of property rights). In Hasebe Y.(ed.), *Reedinguzu Gendai no Kempō,* Tokyo: Nihonhyoronsha, 1995, pp.137-153.
2. Hardin, G. *The Tragedy of the Commons*. Science, 162 (1968), pp.1243-1248.
3. Heller, M. *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, Harvard Law Review 111 (1998), pp. 621-688.
4. Harding, R. *Japan's lost lands: why a fifth of the nation's territory is worthless.* Financial Times 18 January 2018. https://www.ft.com/con-tent/3aaa626e-f61f-11e7-8715-e94187b3017e.
5. Heller, M. *The Gridlock Economy: How Too Much Ownership Wrecks Markets Stops Innovation and Costs Lives*, New York: Basic Books, 2008.
6. Heller, M. *The Tragedy of the Anticommons: A Concise Introduction and Lexicon, Modern Law* Review 76(1) (2013), pp.6-25.
7. Heller, M & Hills, R. *Land Assembly Districts, Harvard Law Review* 121(6) (2008), pp.1465-1527
8. Ishikawa, K. *Hōseido no Honshitsu to Hireigensoku no Tekiyō (The essence of legal institution and application of proportionality principle)*. In, "Purosesu Enshū Kempō (4th. edn.), Tokyo: Shinzansha, 2011, pp.291-320.
9. Kadomatsu, N. *A Misinterpretation or a Productive Diversion? ―The Rise and Fall of the "Relationship of Reciprocal Interchangeability" Concept and the Possibility of Reception of a Legal Interpretation.* In: Weaver, R.L., Hofmann H.C.H, Huang, C. & Friedland, S.I. (eds.), Comparative Perspectives on Administrative Procedure, Durham: Carolina Academic Press, 2017, pp.105-127.
10. Kadomatsu, N. *Legal Management of Urban Space in Japan and the Role of the Judiciary*, in: Rose-Ackerman S. et al.(Eds.), Comparative Administrative Law (2nd edn.), Cheltenham: Edward Elgar, 2017, pp.497-512.
11. Kadomatsu, N. *Inclusion and Seclusion in Area Management Activities. Zeitschrift für Japanisches Recht*, Journal of Japanese Law 45(5) (2018), p.15.
12. Ministry of Justice, *Shoyūsha Fumei Shidō e no Taiō Gaidorain* (A guideline for measures toward owner-unknown shared private roads), 2018. http://www.moj.go.jp/content/001266072.pdf.
13. Ostrom, E. *Governing the Commons: The Evolution of Institutions for Collective Action.* Cambridge: Cambridge University Press, 1990.
14. Rose, C. M. *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*. University of Chicago Law Review 53(3)(1986):711-781.
15. Suga, Y. Komonzu no Kigeki (Comedy of the Commons). In Inoue, M. (Ed.), Komonzu Ron no Chōsen, Tokyo: Shinyōsha, 2008, pp.2-19.
16. Takamura, G. *Komonzu kara no Toshi Saisei* (Urban regeneration beginning from commons). Kyoto: Mineruba Shobō, 2012.
17. Takamura, G. *Kashō Riyō Jidai ni okeru Shoyūken Ron Saiko* (Rethinking property law theory in an era of underuse). Hoshakaigaku 81 (2015), pp. 64-75.
18. Takamura, G. *Gendai Toshihō Ron to Toshi Komonzu Kenkyū―Renketsu no tameno Shiron* (A Thought on Combining the Theory of Contemporary, 2018.
19. Kurumizawa Y. et al. *Urban Law and Urban Commons Studies*. Gendai Toshihō no Kadai to Tembō, Tokyo: Nihonhyōronsha, pp.29-52.

20. Tokyo Foundation, *Kokudo no Fumeika, Shizōka no Kiki* (The crisis of national land becoming owner-unknown and dead storage), 2014. https://www.tkfd.or.jp/files/product/2013-06.pdf.
21. Yoshida, K. *Shoyūsha Fumei Tochi Mondai to Tochi Shoyūken Ron* (Unclaimed Land Problem and the Theory of Property Rights). Hōritsu Jihō 90(9) (2018), pp.68-77.
22. Yoshihara, S. Property Laws Hindering Disaster Recovery, 2015. https://www.tkfd.or.jp/en/research/detail.php?id=594.
23. Yoshihara, S. *Japan's "Missing Landowners": Legal Framework for Land Ownership Inadequate to Cope with Aging, Depopulation*, 2016. https://www.tkfd.or.jp/en/research/detail.php?id=17.

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NO NEED FOR ASIA TO BE WAKE CONTEXTUALIZING ANGLO-AMERICA"S "DISCOVERY" OF CORPORATE PURPOSE

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ABSTRACT:

Viewed through an Anglo-American lens, corporate governance around the world is living a woke moment. Anglo-America"s recent "discovery" that corporations have stakeholders (other than shareholders) and purposes (other than maximizing shareholder value) is hailed as a corporate governance solution that can deliver global prosperity. However, this article demonstrates that long before Anglo-America"s "discovery" of corporate purpose, Asia was already awake to it. It describes how Asia"s most important and dynamic economies – which are the world"s engine for economic growth – have been built on systems of corporate governance where corporate purpose and stakeholderism reign supreme.

This positive claim has important normative implications. The Anglo-Americanmovement to push corporations around the world to be more purposeful is likelyto have deleterious effects in Asia where corporations already tend to have too many purposes. Under the guise of embracing the Anglo-American corporate purpose movement, entrenched stakeholders may resist reforms to reduce rent seeking, wealth tunnelling, and protect (minority) shareholder interests.

A proper understanding of the history of corporate purpose in Asia demonstratesthat different jurisdictions have different understandings of the purpose that corporations should serve and that there is no one model that fits all. At any given time, each jurisdiction will be at a different point along the shareholder- primacy/stakeholderism continuum. How this is achieved will vary from jurisdiction to jurisdiction and within each jurisdiction over time. Ultimately, prosperity requires diversity.

I. Introduction

In 2018, Colin Mayer, a stalwart of the British Academy, published "Prosperity".[1] The Book is thenew "bible" of corporate governance that "is destined to change the world", says Martin

[1] Colin Mayer, Prosperity: Better business makes the greater good. Oxford: Oxford University Press, 2018.

Lipton, aprolific prophet for America"s white-shoe lawyers.[2] The Book"s revelation is that corporations should no longer be governed for the sole purpose of maximizing shareholder value. In 2019, theBusiness Roundtable, a club of America"s elite CEOs, reportedly "made headlines around the world" by releasing its new statement on corporate purpose.[3] The statement"s epochal epiphany echoed Mayer"s clarion call for corporations to have a purpose other than maximizing shareholdervalue: corporations no longer exist principally to serve shareholders but "for the benefit of all stakeholders—customers, employees, suppliers, communities and shareholders".[4] In 2020, Larry Fink, founder and chief executive of the American-cum-global investment goliath BlackRock, issued a letter to CEOs around the world imploring them to govern corporations to embrace "purpose and [serve] all stakeholders" – ostensibly spelling an end to the shareholder primacy obsession.[5] The same year, the World Economic Forum, an international organization comprisingmajor global corporations and thought leaders, "issued a manifesto urging companies to abandon the traditional model of "shareholder capitalism"" and its executive chairman likened "the session focusing on the subject to "the funeral of shareholder capitalism"".[6]

Viewed through an Anglo-American lens, corporate governance around the world is living a wokemoment.[7] The "discovery" that corporations have stakeholders (other than shareholders) and purposes (other than maximizing shareholder value) promises to deliver global corporate governance from Tartarus to Elysium – or as Mayer describes it, perhaps drawing on Hinduism for global effect, corporate "nirvana".[8] Mayer tells us that this woke moment has the potential to emancipate the global community from the "Friedman Doctrine", which posits that the corporation"s sole purpose is maximizing shareholder value. In Mayer"s words, the Friedman Doctrine "has been a powerful concept that has defined business practice and government policiesaround the world for half a century".[9] Not so fast.

That the Friedman Doctrine has played a central role in shaping *Anglo-American* corporate governance is beyond reproach. Despite their myriad differences, until recently, modern corporatelaw and governance in the United Kingdom and United States has, in theory and practice, been defined by shareholder primacy. Recognition of the interests of other corporate stakeholders (asidefrom shareholders) has largely been on the margins of corporate law and governance in both systems – with "shareholder primacy" at the core.[10] At the dawn of the new millennium, two of America"s preeminent law professors, Henry Hansmann and Reinier Kraakman, in their pugnaciously titled article "The End of History for Corporate Law", boldly claimed that "[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is nowassured".[11] In the echo of such Anglo-American shareholder primacy triumphalism, perhaps the iniquities of those who now suggest that the Friedman Doctrine is a powerful concept that

[2] Colin Mayer, Prosperity: Better business makes the greater good. Oxford: Oxford University Press, 2018.

[3] Jill E Fisch, Purpose Proposals (April 4, 2022). U of Penn, Inst for Law & Econ Research paper No.20-21, University of Chicago Business Law Review, Forthcoming, European Corporate Governance Institute - Law Working Paper 638/2022, https://ecgi.global/working-paper/purpose-proposals.

[4] Business Roundtable Redefines the Purpose of a Corporation to Promote An Economy That Serves All Americans, Business Roundtable, 19 August 2019, https://www.businessroundtable.org/business-roundtable- redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[5] Larry Fink, A Fundamental Reshaping of Finance, Harvard Law School Forum on Corporate Governance, 16 January 2020, https://corpgov.law.harvard.edu/2020/01/16/a-fundamental-reshaping-of-finance/.

[6] Lucian A. Bebchuk and Roberto Tallarita, The Illusory Promise of Stakeholder Governance, 106 Cornell Law Review 91 (2020), p.107.

[7] For an excellent nuanced comparative analysis that unpacks the complexities of the purpose debate see, Amir N. Licht, Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral, Elizabeth Pollman & Robert Thompson (eds.), Research Handbook on Corporate Purpose and Personhood (Edward Elgar 2021).

[8] Colin Mayer, Prosperity (OUP, 2018), pp.35-37.

[9] Colin Mayer, Prosperity (OUP, 2018), p.2. It should be noted that Mayer"s claim about the Friedman Doctrine may even be incorrect in the context of the United States as a leading corporate law professor has convincingly explained how it is erroneous to blame (or credit) Milton Friedman for the rise of shareholder primacy in corporate America. Brian R. Cheffins, Stop Blaming Milton Friedman! (ECGI Law Working Paper 523/2020, June 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552950.

[10] For an excellent overview of this topic in the Anglo-American context see, Lucian A. Bebchuk and Roberto Tallarita, The Illusory Promise of Stakeholder Governance 106 Cornell Law Review 91 (2020), pp.103-108.

[11] Henry Hansmann and Reinier Kraakman, The End of History for Corporate Law, 89 Georgetown Law Journal 439 (2001), p.468.

has defined business practice and government policies in Asia (and everywhere else) over the last fifty-years can be forgiven.

What seems to have been forgotten is that the Friedman Doctrine is as autochthonous to Asia as the fortune cookie.[12] Asian economic miracles have propelled the world"s economic growth for half a century.[13] However, they have not been built on the Friedman Doctrine. Instead, for better or worse, the corporate governance systems in Asia"s most important economies have been drivenby a variety of purposes – with neither the Friedman Doctrine nor its corporate law incarnation in the form of "shareholder primacy" reigning supreme.

This is a positive observation with normative implications. As illuminated below, the failure to accurately understand the purposes corporations have served – and do serve – in Asia has real-world consequences. It risks the well-intentioned Anglo-American-cum-global corporate purpose movement providing cover for rent-seekers in Asia – who are (or should be) disciplined by shareholder wealth maximization – in systems long steeped in corporate purpose. It may hinder efforts to address climate change as repurposing corporations for this task requires understanding what their core purpose is to begin with. It cancels convincing evidence that corporate governancewithout shareholder primacy can produce economic success; and, in some cases, spawn economic miracles that lift hundreds of millions of people out of poverty, produce world leading innovations, and build stable and safe societies. It masks the dark sides of Asia"s economic miracles, in which corporations with core purposes other than shareholder wealth maximization can produce – and have produced – societal ills, which other countries would do well to avoid.

II. A Brief History of Corporate Purposes in Asia Usurping Shareholder Primacy

Asia is diverse. With over four billion people, two thousand languages, and around fifty countries,one should almost never make claims about Asia as a whole. However, when it comes to economicpower and financial markets a handful of countries in Asia dominate.[14] For this short article, it makes sense to consider Asia"s three largest economies respectively – China, Japan, and India – which comprise three of the four largest economies in the world.[15] It is also instructive to considerSingapore as it is one of the world"s wealthiest economies – which as a Commonwealth, English speaking, international financial centre would be the jurisdiction that one may predict should haveembraced shareholder primacy more so than anywhere else in Asia.

A. Understanding Stakeholderism With Chinese (Communist Party) Characteristics

Two decades ago, the United Sates had almost twenty times as many Fortune Global 500 Companies as China. Today, the number of Fortune Global 500 Companies in China (124) has surpassed the United States (121). China"s listed companies are leaders in many of the world"s most important industries, a fact that was unthinkable at the dawn of the new millennium. China now has the world"s largest market for initial public offerings and the world"s second largest stock market, which has grown five-fold in the past decade.[16]

These facts help explain how China has enjoyed decades of economic success which have

[12] What is commonly known as the "fortune cookie" is ubiquitous in Chinese restaurants in the United States and now in Chinese restaurants in several other Western countries. It was most likely created by Japanese immigrants in California in the late 19th or early 20th century. The fortune cookie appears to have nothing to do with traditional Chinese culture – as is often erroneously assumed. These cookies may have drawn some inspiration from different cookies historically produced in Japan – but which are different from the American fortune cookie. "Fortune cookie" (Wikipedia), https://en.wikipedia.org/wiki/Fortune_cookie.

[13] Dan W Puchniak, Multiple Faces of Shareholder Power in Asia: Complexity Revealed, in Jennifer G Hill and Randall S Thomas (eds), Research Handbook on Shareholder Power (Edward Elgar Publishing, 2015) pp. 511- 512.

[14] Dan W Puchniak et al., Introduction in Dan W Puchniak et al. (eds), Independent Directors in Asia: A Historical, Contextual and Comparative Approach (CUP 2017), pp.7-8; Dan W. Puchniak at al., The Complexity of Derivative Actions in Asia: An Inconvenient Truth in Dan W. Puchniak et al. (eds.), The Derivative Action in Asia: A Comparative and Functional Approach (CUP 2012), p.98.

[15] Measured on a Purchasing Power Parity basis (PPP) the largest economies in the world based on 2020 data are: China (1); United States (2); India (3); and, Japan (4) ("The World Bank Data, GDP, PPP" (The World Bank Data) <https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD?most_recent_value_desc=true> accessed 14 May 2022. Measured in US Dollars the largest economies in the world based on 2020 data are: United States (1); China (2); Japan (3); Germany (4); United Kingdom; (5) and, India (6) ("The World Bank Data, GDP, (current US$)" (The World Bank Data) <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true > accessed 14 May 2022.

[16] For the original text with the sources supporting this paragraph see, Lin Lin and Dan W. Puchniak, Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State, 35 Columbia Journal of Asian Law 74 (2022), p.77.

lifted hundreds of millions of people out of poverty, placing it on a trajectory to be the world"s most powerful economy. To Western observers, claims that China has achieved its economic success at the expense of Western democracy, individual liberties, and human rights are well-known. That the Chinese economy is on the precipice of imploding has been repeated ad nauseam for decades –but has not (yet) transpired. Given China"s global economic superpower status and Anglo-America"s corporate purpose obsession, including China in the corporate purpose debate would seem unavoidable. This is especially so considering claims of the Friedman Doctrine"s global ubiquity and the declaration that world domination of Anglo-American shareholder-primacy marked "the end of history for corporate law". Yet, the leading Anglo-American-cum-global corporate purpose literature barely considers China at all.

Based on a conventional understanding of stakeholderism, Chinese corporate law and governanceticks all the boxes. From the inception of China"s modern PRC Company Law in 1994, employees have been recognized as important corporate stakeholders. Employee board representation has always been enshrined in the company law and the requirement that employees must play a meaningful role in corporate decision making has always been made explicit.[17] More broadly, from its inception the PRC Company Law has included provisions that have been all about purpose – exhorting companies to act ethically, strengthen China"s socialist society, and to be accountable to the wider community.[18] In 2006, the PRC Company Law was amended to explicitly require companies to "undertake social responsibility".[19] The newly issued draft of the revised PRC Company Law is as purposeful as ever; Article 19 states that "companies should fully consider the interests of the company"s employees, consumers and other stakeholders, as well as ecological andenvironmental protection and other social public interests, to assume social responsibility. The State encourages companies to participate in social welfare activities and publish social responsibility reports."[20]

In 2002, China joined one of the most significant international corporate governance trends in modern times: adopting a UK-style corporate governance code. One may have thought that this would be a catalyst for China to join "the end of history for corporate law" by implementing a shareholder primacy corporate governance model. Instead, the inaugural 2002 Chinese Corporate Governance Code (CCGC) reads like it was woke in 2022. It encouraged listed companies to "be concerned with the welfare, environmental protection, and public interests of the community" andto "pay attention to the company"s social responsibilities".[21] The 2018 CCGC goes even further byencouraging listed companies to "actively implement the concept of green development, integrateecological and environmental protection requirements into the development strategy and corporategovernance process, actively participate in the construction of ecological civilization, and play an exemplary role in pollution prevention, resource conservation, and ecological protection".[22] As if that were not purposeful enough, it encourages listed companies to assist "poverty-stricken counties or villages, and actively connect with and earnestly support poverty-stricken areas to develop local industries, train talents, and promote employment". [23]

China was clearly awake to corporate purpose long before Mayer penned "Prosperity" or Fink proclaimed the end of shareholder-primacy; at least on paper, Chinese corporate law and governance is as purposeful as can be.[24] What is less clear, is whether Chinese companies can fulfil

[17] Li-Wen Lin, Corporate Social Responsibility in China: Window Dressing or Structural Change?, 28 Berkeley Journal of International Law 64 (2010), p.68. Li-Wen Lin, Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China, 68 American Journal of Comparative Law 576 (2020), p.582.

[18] Li-Wen Lin, Corporate Social Responsibility in China: Window Dressing or Structural Change?, 28 Berkeley Journal of International Law 64 (2010), p. 69. Li-Wen Lin, Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China, 68 American Journal of Comparative Law 576 (2020), p.582

[19] PRC Company Law, 2006, art. 5. For an excellent analysis of this development see, Li-Wen Lin, Corporate Social Responsibility in China: Window Dressing or Structural Change?, 28 Berkeley Journal of International Law 64 (2010), pp. 71-72.

[20] Revised Draft of PRC Company Law, issued on 24 Dec 2021, art. 19 < https://npcobserver.com/wp- content/uploads/2021/12/Company-Law-Draft-Revision.pdf > accessed 14 May 2022.

[21] Code of Corporate Governance for Listed Companies 2018, art 86.

[22] Code of Corporate Governance for Listed Companies 2002, art 86.

23 Code of Corporate Governance for Listed Companies 2018, art 87.

[24] See, Dan W Puchniak and Lin Lin, Institutional Investors in China: An Autochthonous Mechanism Unrelated to UK-cum-Global Stewardship, Global Shareholder Stewardship (Dionysia Katelouzou and Dan W. Puchniak eds, CUP 2022), p.416.

these lofty purposes. Another question that looms large is: Can Chinese companies stay on their world changing trajectory in an economy where the Chinese Communist Party (CCP) appears to be ratcheting-up its control over which purposes companies may serve?

If President Xi"s "common prosperity" campaign is to be taken at face value, companies" purposesare being defined by the government for the public good – whether it involves effectively banningtrading on cryptocurrency and for-profit tutoring, restricting gaming for children, or cajoling prominent companies to make large charitable donations.[25] If one is more cynical, the CCP"s roleas China"s *de facto* largest controlling shareholder, its informal control over private corporations and institutional investors, and its campaign to formalize its control over corporate management byhaving it formally inserted into corporate charters, suggest that the real purpose of corporate governance in China is to reinforce the CCP"s ultimate control.[26] From either perspective, considering the CCP"s more assertive role in restricting and controlling corporate purpose, it appears that fewer purposes and a narrower focus on maximizing shareholder value may be exactlywhat is required in China at this moment – the opposite of what Anglo-America"s awakening prescribes.

B. "Company Community" Defines Corporate Purpose in Post-war Japan

After more than three decades of tepid economic growth, it is easy to forget that in the late 1980s Japan was, by many measures, the richest country in the world. It had the world"s highest per capitaGross National Product, largest net holdings of foreign assets, and by far the largest stock market capitalization and highest property values. Japan"s rise to the zenith of the world economy was even more extraordinary considering that merely a few decades earlier its devastating defeat in World War II had reduced it to the level of a poor developing country.[27] Japan"s post-war economicmiracle produced growth rates unseen in human history. It was the first time an economy had ever doubled in size in under a decade – which set the stage for other Asian economic miracles that transformed Asia into the world"s engine of economic growth.[28]

It is well-known that Japan"s post-war economic miracle transpired in a corporate governance environment defined by stakeholderism.[29] Prior to the burst of the economic bubble in the early 1990s, the world marvelled at Japan"s unique system of corporate governance – in which shareholder voice was scant. As if taken from the pages of "Prosperity", Japan"s corporate gov-

[25] For a critical Western perspective discussing President Xi"s "common prosperity" campaign see, China"s new reality is rife with danger, The Economist, 2 October 2021, https://www.economist.com/leaders/2021/10/02/chinas-new-reality-is-rife-with-danger; Xi Jinping"s talk of "common prosperity" spooks the prosperous, The Economist, 28 August 2021, https://www.economist.com/finance-and-economics/xi-jinpings-talk-of-common-prosperity-spooks-the prosperous/2180389.

[26] For an excellent analysis of the CCP"s role as China"s de facto largest controlling shareholder see, Li-Wen Lin and Curtis J Milhaupt, We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China, 65 Stanford Law Review 697 (2013). For insight into the CCP"s control over private corporations see, Curtis J Milhaupt and Wentong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, 103 Georgetown Law Journal 665 (2015). For a detailed analysis of the CCP"s formal and informal control over institutional investors in China see, Lin Lin and Dan W. Puchniak, Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State, 35 Columbia Journal of Asian Law 74 (2022). For an empirical analysis of the CCP"s campaign to formalize its control over corporate management in corporate charters see, Lauren Yu-Hsin Lin and Curtis J Milhaupt, Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance 50(1) Journal of Legal Studies 187 (2021). For a fascinating analysis of the possible risks and benefits of the CCP using China"s corporate social credit system (CSCS) to shape the purpose that Chinese companies fulfil see, Lauren Yu-Hsin Lin and Curtis Milhaupt, China"s Corporate Social Credit System and the Dawn of Surveillance State Capitalism, ECGI Law Working Paper 610/2021, October 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933134.

[27] For original text with the sources supporting this paragraph see, Dan W Puchniak and Masafumi Nakahigashi, The Enigma of Hostile Takeovers in Japan: Bidder Beware 15 Berkeley Business Law Journal 4 (2018), p.10.

[28] Michael Spence, The Next Convergence: The Future of Economic Growth in a Multispeed World (Farrar, Straus and Giroux., 2011), p.14. See generally, Dan W Puchniak, Multiple Faces of Shareholder Power in Asia: Complexity Revealed, Jennifer G Hill and Randall S Thomas (eds), Research Handbook on Shareholder Power (Edward Elgar Publishing., 2015), p.511.

[29] Gen Goto, The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code, in Global Shareholder Stewardship (Dionysia Katelouzou and Dan W. Puchniak eds, CUP 2022) 223; Gen Goto et al., Diversity of Shareholder Stewardship in Asia: Faux Convergence 53 Vanderbilt Journal of Transnational Law(2020) pp. 829 and 834; Dan W Puchniak, Multiple Faces of Shareholder Power in Asia: Complexity Revealed, in Jennifer G Hill and Randall S Thomas (eds), Research Handbook on Shareholder Power (Edward Elgar Publishing, 2015) pp.511, 521; Dan W Puchniak, The Japanization of American Corporate Governance? Evidence of the Never Ending History for Corporate Law, 9 Asian-Pacific Law & Policy Journal 7 (2007), pp.51-69. For an interesting comparative analysis of other forces that may have driven these corporate governance changes see, Mariana Pargendler, The Grip of Nationalism on Corporate Law, 95 Indiana Law Journal (2020), pp.533, 559.

ernance model was referred to as the "company community" – in which boards were overwhelmingly staffed by lifetime employees.[30] Japan"s comparatively small wage gap between senior executives and average workers appeared to be the embodiment of woke egalitarianism.[31] Rather than hostile takeovers, Japan"s success was credited to "the efficiency of friendliness" in which friendly mergers rather than hostile takeovers produced corporate governance efficiency.[32] Informal corporate groups, called *Keiretsu*, produced innovative and high-quality products, without the need for detailed contracts, which used "just-in time" production to dominate global product markets.[33] Shares were held between *Keiretsu* members and their "main bank" (a feature coined "cross-shareholding") as informal symbols of commitment to the *Keiretsu* members and to act asa defence against hostile takeovers – but not to reap profits by maximizing their value.[34] When things went wrong in companies, the main bank (not shareholders) would efficiently sort things out.[35] Researchers and pundits wondered whether the world would converge on Japan"s woke model of corporate governance.[36] But, then, in the early 1990s, Japan"s economic bubble burst.

In the post-bubble period, an era of American hegemony transpired in which legions of academicsand pundits predicted that Anglo-American-style shareholder-primacy would emerge as the dominant corporate governance model in Japan.[37] These predictions were not without reason. Japan"s post-war corporate law had (and still has) strong legal protections for minority shareholdersthat lay moribund for decades before the bubble burst.[38] At least empirically, the shareholding in Japan"s large public companies was (and still is) as widely dispersed as in the United Kingdom and United States – a fact that is often overlooked because historically a majority of the "dispersed- shares" were held in informal cross-shareholding arrangements.[39] In the decades following the bubble"s burst, economic stagnation forced banks and *keiretsu* members to "unwind" their cross- shareholdings and the main bank system of monitoring management withered. Foreign ownership of Japanese listed companies spiked, and activist shareholder campaigns emerged.[40] A bevy of legalreforms that appeared as if they would usher in American-style shareholder primacy

[30] Zenichi Shishido, Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions 25 Delaware Journal of Corporate Law (2000), pp. 189 and 201-214.

[31] For an analysis that sees Japan"s low wage gap as a positive feature of its system of corporate governance see, Alberto R Salazar and John Raggiunti, Why Does Executive Greed Prevail in the United States and Canada but Not in Japan? The Pattern of Low CEO Pay and High Worker Welfare in Japanese Corporations, 64 American Journal of Comparative Law (2016) p.721. For another perspective see, Japanese executive pay: Spartan salarymen, The Economist, 30 June 2010, https://www.economist.com/newsbook/2010/06/30/spartan-salarymen.

[32] Dan W Puchniak, The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers, 5 Berkeley Business Law Journal (2008), p.195.

[33] For an overview of how the Keiretsu were seen to improve corporate governance, contracting and productive efficiency see, Ronald J Gilson and Mark J Roe, Understanding the Japanese Kieretsu: Overlaps Between Corporate Governance and Industrial Organization, 102 Yale Law Journal (1993), p.871.

[34] Dan W Puchniak and Masafumi Nakahigashi, The Enigma of Hostile Takeovers in Japan: Bidder Beware, 15 Berkeley Business Law Journal 4 (2018), p.17.

[35] For an explanation of the classic Japanese main bank model see, Masahiko Aoki, The Japanese Main Bank System: An Introductory Overview, The Japanese Main Bank System: Its Relevance for Developing and Transforming Economies (Masahiko Aoki and Hugh Patrick eds., OUP 1994), pp.1-50.

[36] Dan W Puchniak, Multiple Faces of Shareholder Power in Asia: Complexity Revealed, Jennifer G Hill and Randall S Thomas (eds), Research Handbook on Shareholder Power (Edward Elgar Publishing, 2015) pp.511, 521; Dan W Puchniak, The Japanization of American Corporate Governance? Evidence of the Never Ending History for Corporate Law, 9 Asian-Pacific Law & Policy Journal 7, pp.17-18.

[37] Dan W Puchniak, Multiple Faces of Shareholder Power in Asia: Complexity Revealed, Jennifer G Hill and Randall S Thomas (eds), Research Handbook on Shareholder Power (Edward Elgar Publishing 2015) pp.511, 521- 522.

[38] Gen Goto, "Legally "Strong" Shareholders of Japan" 3 Michigan Journal of Private Equity & Venture Capital Law (2014), p.125. For an analysis of how the derivative action lay moribund before Japan"s economic bubble and exploded after the burst see, Dan W Puchniak and Masafumi Nakahigashi, "Japan"s Love for Derivative Actions: Irrational Behavior and Non-economic Motives as Rational Explanations for Shareholder Litigation", 45 Vanderbilt Journal of Transnational Law (2012) pp.1, 2.

[39] Dan W Puchniak and Masafumi Nakahigashi, "The Enigma of Hostile Takeovers in Japan: Bidder Beware", 15 Berkeley Business Law Journal 4, (2018) pp. 15-16; Dan W Puchniak, "Multiple Faces of Shareholder Power in Asia: Complexity Revealed", Jennifer G Hill and Randall S Thomas (eds), Research Handbook on Shareholder Power (Edward Elgar Publishing, 2015) pp.511, 521.

[40] Gen Goto, "Legally "Strong" Shareholders of Japan", 3 Michigan Journal of Private Equity & Venture Capital Law (2014), p.125; Dan W Puchniak and Masafumi Nakahigashi, "The Enigma of Hostile Takeovers in Japan: Bidder Beware" , 15 Berkeley Business Law Journal 4 (2018).

were enacted, including making derivative actions less costly,[41] providing companies with the option to adopt American-style boards with independent directors,[42] and ostensibly developing a Delaware-style regulatory framework for hostile takeovers.[43]

However, over three decades have passed, economic stagnation has continued to stimulate repeatedreforms, but American-style shareholder primacy has not yet emerged. Until the 2010s, independent directors were absent on the boards of most Japanese listed companies and even though the number of independent directors has increased in recent years, lifetime employees still dominate corporate boardrooms.[44] Despite a wave of shareholder activism in the 2000s, Japan remained an oddity among large-developed-economies as the only one without a successful hostile takeover – until its first occurred last year.[45] Although some cross-shareholding has unwound and foreign shareholders have increased, the regulatory regime for hostile takeovers has turned out to look nothing like Delaware.[46]

It is noteworthy that in the 2010s, as part of former Prime Minister Abe Shinzo"s hallmark economic policy to revitalize the Japanese economy after two "lost decades", Japan adopted UK-style Stewardship and Corporate Governance Codes, but with Japanese characteristics.[47] The goal of these codes was to shift Japan"s traditional stakeholder-oriented corporate governance system toa more shareholder-oriented system – but this never fully materialized. Now Abe"s successor, Prime Minster Kishida Fumio, under the slogan of "new capitalism", "talks about the importance of other stakeholders in businesses, such as workers and customers, evoking the Edo-era merchantphilosophy of *sanpō-yoshi*, or "three-way good" for buyers, sellers and society".[48] Many experts believe that Japan should still work to move away from its stakeholder-centred approach towards having a more shareholder primacy focus – the opposite of what Anglo-America"s awakening prescribes.

C. A Long History of Stakeholderism in India – But Still a Work in Progress

With the rapid rise of China, India"s economic importance is sometimes erroneously overlooked. As the world"s fourth largest economy, with 1.4 billion people, and growth projected to be the highest among all major economies in 2022, what happens in India clearly has global

[41] Dan W Puchniak and Masafumi Nakahigashi, "Japan"s Love for Derivative Actions: Irrational Behavior and Non-economic Motives as Rational Explanations for Shareholder Litigation", 45 Vanderbilt Journal of Transnational Law 1 (2012), pp.34-36, 64-65 (explaining the legal changes that lowered the cost of derivative actions after Japan"s economic bubble burst and how irrational behaviour and non-economic forces must also be understood to accurately understand derivative actions in Japan).

[42] Gen Goto et al., "Japan"s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis" in Dan W Puchniak et al. (eds), Independent Directors in Asia: A Historical, Contextual and Comparative Approach (CUP, 2017) pp. 135, 138; Dan W. Puchniak, "The 2002 Reform of the Management of Large Japanese Corporations: A Race to Somewhere?", 5 The Australian Journal of Asian Law (2003) p.42.

[43] Dan W Puchniak and Masafumi Nakahigashi, "The Enigma of Hostile Takeovers in Japan: Bidder Beware", 15 Berkeley Business Law Journal 4 (2018).

[44] Gen Goto et al., "Japan"s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis" in Dan W Puchniak et al. (eds), Independent Directors in Asia: A Historical, Contextual and Comparative Approach (CUP 2017) pp.135, 146 (showing the percentage of independent directors in Japanese listed companies); Dan W Puchniak and Masafumi Nakahigashi, "The Enigma of Hostile Takeovers in Japan: Bidder Beware", 15 Berkeley Business Law Journal 4 (2018), pp.38-41 (explaining the resilience and importance of lifetime employees in Japanese corporate governance).

[45] Dan W Puchniak and Masafumi Nakahigashi, "The Enigma of Hostile Takeovers in Japan: Bidder Beware", 15 Berkeley Business Law Journal 4 (2018) (explaining why Japan was an outlier with no hostile takeovers); Stephen Givens, "Murakami vindicated by Japan"s first successful hostile takeover", Nikkei Asia, August 11, 2021.

[46] Dan W Puchniak and Masafumi Nakahigashi, "The Enigma of Hostile Takeovers in Japan: Bidder Beware", 15 Berkeley Business Law Journal 4 (2018). However, it should be noted that recently there has been an increase shift towards more shareholder activism and a unique environment triggering more hostile takeover activity in Japan. See, Leo Lewis and Kana Inagaki, "Japan"s icy climate for hostile takeovers starts to thaw", The Financial Times, 22 December 2020, https://www.ft.com/content/fc4ea0f4-d54e-4b59-ae4b-da2e32fce286; Stephen Givens, "Murakami vindicated by Japan"s first successful hostile takeover", Nikkei Asia, August 11, 2021, https://asia.nikkei.com/Opinion/Murakami-vindicated-by-Japan-s-first-successful-hostiletakeover#:~:text= At%20the%20end%20of%20July,first%20successful%20hostile%20corporate%20takeover.

[47] Gen Goto et al., "Japan"s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis", Dan W Puchniak et al. (eds), Independent Directors in Asia: A Historical, Contextual and Comparative Approach (CUP 2017) pp.135-172 (discussing independent directors and Japan"s corporate governance code); Gen Goto, The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code, in Global Shareholder Stewardship (Dionysia Katelouzou and Dan W. Puchniak eds, CUP 2022), pp.222-238 (discussing Japan"s stewardship code).

[48] "Kishida Fumio"s "new capitalism" is many things, but it is not new", The Economist, 12 February 2022.

consequences.[49] With approximately 5 million people working in tech, about 100 unicorns (unlisted start-ups worth over US $1 billion), the world"s fourth largest stock market (behind only the United States, China and Japan), India"s future appears bright.[50] Distinct from China and Japan, India is a common law country and is part of the Commonwealth. As the most cited empirical scholarship in comparative corporate law posits that common law countries provide stronger protection for minority shareholders than civil law countries, one may anticipate that India has been a bastion for shareholder primacy.[51]

To the contrary, stakeholderism has a long history in India that has accelerated in recent times.[52] Several age-old business groups have long inculcated broader corporate responsibility as part of their business motto over more than a century.[53] However, in recent decades, the push towards a stakeholder orientation in corporate governance has been driven largely by the government. In the years following India"s independence in 1947, and consistent with the socialist economic policies of the time, company law underwent amendments that incorporated the requirements for companies to act not only in the interest of their shareholders, but also in the "public interest".[54] In the 1980s, the Supreme Court of India enunciated that "a company is now looked upon as a socio-economic institution wielding economic power and influence on the life of the people".[55] No longer was the company a private contractual construct between the entity and its shareholders, but one that took on wider form given its larger societal impact.

If there was even any doubt regarding the purpose focus for Indian companies, that has been set to rest with the enactment of the revamped Companies Act in 2013. Section 166(2) imposes duties on directors of a company to act "in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment". As evident, shareholders are only one among several constituencies that deserve the attention of directors. This embodies the pluralist approach which places the interests of all stakeholders (whether shareholders or others) on par without creating any hierarchy among them.[56]

The judiciary too has rendered an expansive reading of the duty. For instance, the Supreme Court"s interpretation of the expression "environment" in section 166(2) is adequately capable of accommodating the risks corporations face due to climate change.[57] Hence, a consideration of matters such as climate risk and sustainability is not merely an option for directors on Indian companies that they may account for on a voluntary basis, but it is an obligation, which they can afford to ignore only at risk of liabilities for breach. Overall, the jurisprudence surrounding corporate law in India suggests that directors ought to consider the long-term interests of the company. Conduct that involves sacrificing the long-term interests of the company in favour of

[49] Measured on a Purchasing Power Parity basis (PPP) the largest economies in the world based on 2020 data are: China (1), United States (2), India (3) and Japan (4) ("The World Bank Data, GDP, PPP" (The World Bank Data) <https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD?most_recent_value_desc=true> accessed 14 May 2022.

[50] "India is likely to be the world"s fastest-growing big economy this year", The Economist, 14 May 2022).

[51] For the most cited literature claiming that common law countries provide stronger protection for minority shareholders than civil law countries, which has a significant impact on economic development and stock markets see, Rafael La Porta et al., "Law and Finance", 106 Journal of Political Economy (1998), p. 1113; Simeon Djankov et al., The Law and Economics of Self-Dealing, 88 Journal of Financial Economics (2008), p.430. For critiques of this scholarship see, Holger Spamann, "The "Antidirector Rights Index" Revisited", 23 Review of Financial Studies (2010) , p.467; Dan W Puchniak and Umakanth Varottil, "Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm", 17 Berkeley Business Law Journal 1 (2020).

[52] The following five paragraphs have been reproduced with permission from the author: Umakanth Varottil, "Responsible Capitalism and Corporate Purpose: The India Way", ECGI Blog, 26 April 2022, https://ecgi.global/blog/responsible-capitalism-and-corporate-purpose-india-way.

[53] Colin Mayer, Firm Commitment (Oxford: Oxford University Press, 2013), pp.195-197.

[54] Umakanth Varottil, "The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony", 31 American University International Law Review (2016), pp. 253, 278-280.

[55] National Textile Workers v. P.R. Ramakrishnan, (1983) 1 S.C.R. 9 (India).

[56] Umakanth Varottil, "The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony" 31 American University International Law Review (2016), pp. 253, 315-316.

[57] M.K. Ranjitsinh v. Union of India, (2021) SCC Online SC 326, as discussed in Shyam Divan, Sugandha Yadav & Ria Singh Sawhney, "Legal Opinion: Directors" obligations to consider climate change-related risk in India", 7 September 2021.

short-term profitability would militate against the statute.[58]

It is clear, therefore, that the legislative duties and responsibilities of directors clearly define the corporate purpose for Indian companies that is altogether stakeholder oriented. At the same time, it is worth noting that the corporate purpose debate in the Indian context tends to be enmeshed withthe statutorily mandated corporate social responsibility (CSR) requirements under corporate law. This requires companies to spend at least two percent of their average net profits made during threeimmediately preceding financial years towards earmarked social purposes.[59] However, this generates some amount of conceptual murkiness in the context of the corporate purpose debate asthe CSR provisions in India veer towards corporate philanthropy through mandatory spending rather than the all-inclusive view that company managements must adopt on how their business operations impact society.[60] In that sense, while the CSR regime supplements the corporate purpose stance in India, it ought not to drive the discourse.

The government has trained its focus largely on ensuring compliance with the CSR requirements in terms of corporate spending rather than addressing the broader questions of corporate purpose. Despite the perceived lucidity in aspirations of the Indian corporate legal system towards stakeholder capitalism, there could be several hurdles in operationalizing the idea. First, there is a lack of clarity regarding the enforcement of directors" duties to consider stakeholder interests.[61] Second, the government has trained its focus largely on ensuring compliance with the CSR requirements in terms of corporate spending rather than addressing the broader questions of corporate purpose.[62]

In sum, India appears like a textbook case of having a long history of a corporate governance philosophy with stakeholderism at its core. This philosophy has also been operationalized by clearly articulating stakeholderism in the legislative design of Indian corporate law. Obviously, India does not need to be woke by Mayer"s prophesy that purpose can be the path to "nirvana". However, implementing stakeholderism to work in practice has been a challenge for India and it ispossible that even more rhetoric about stakeholderism – with less focus on protecting minority shareholders in India"s concentrated shareholder environment, may exacerbate India"s corporate governance challenges.[63] Yet again, given India"s context, Anglo-America"s prescription for a more purposeful approach to corporate law and governance appears to be bad medicine.

D. Profit Making State Owned Enterprises and Family Firms as Models for Purpose – TheSingapore Story

In 1965, Singapore was a poor developing country with no significant natural resources. Today, itsGDP per person is double Japan"s and significantly higher than every G7 country. Singapore has a strong common law legal system and has historically led the Commonwealth in its protection of minority shareholder rights. Its company law jurisprudence and legislation have been heavily influenced by the United Kingdom, as well as Australia, Canada and New Zealand.[64]

[58] Umakanth Varottil, "Directors" Liability and Climate Risk: White Paper on India", Commonwealth Climate and Law Initiative, 4 October 2021, < https://ccli.ubc.ca/wp-content/uploads/2021/10/Directors-Liability-and- Climate-Risk-White-Paper-on-India.pdf.

[59] Companies Act, 2013, s. 135(5).

[60] See Afra Afsharipour, "Redefining Corporate Purpose: An International Perspective", 40 Seattle University Law Review (2017) pp.465, 469-470.

[61] Mihir Naniwadekar and Umakanth Varottil, "The Stakeholder Approach towards Directors" Duties under Indian Company Law: A Comparative Analysis" in Mahendra Pal Singh (ed), The Indian Yearbook of Comparative Law 2016 (OUP 2016).

[62] Akshaya Kamlnath, "A Post Pandemic Analysis of CSR in India", ANU College of Law Legal Studies Research Paper Series < https://ssrn.com/abstract=3826832> accessed 16 May 2022.

[63] For an excellent in-depth analysis of this risk see, Afra Afsharipour, "Lessons from India"s Struggles with Corporate Purpose" in Elizabeth Pollman & Robert Thompson (eds.), Research Handbook on Corporate Purpose and Personhood (Edward Elgar 2021).

[64] Meng Seng Wee and Dan W Puchniak, "Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth" in Dan W Puchniak et al. (eds), The Derivative Action in Asia: A Comparative and Functional Approach (CUP 2012) pp.326-330, 359.

Its corporategovernance code,[65] stewardship code for institutional investors[66] and takeovers law[67] were modelled on the United Kingdom"s equivalent legislation.[68] Singapore"s listed companies have long had boards with a majority of independent directors and directors have a duty to act in the interests of the company, which in solvent companies generally means maximizing the long-term shareholder value of the company.[69]

These facts suggest Singapore should be a bastion for shareholder primacy in Asia. However, if one drills-down deeper, in many respects, Singapore is the antithesis of the Friedman Doctrine. InSingapore, the state is the largest shareholder of public listed companies.[70] This relatively new formof capitalism combines the state as the controlling shareholder, with private investors as minority shareholders, in what has come to be known as "mixed-ownership" companies. Singapore"s mixed-ownership companies have consistently delivered strong corporate performance and good corporate governance for decades – resulting in them trading at a premium, with exceptional ratesof return on capital. As a result, other countries, particularly China, have looked to Singapore as apotential corporate governance model.[71]

Ironically, the secret to the success of mixed-ownership companies in Singapore is the unique institutional architecture it has developed to ensure that profit maximization – and not politics – drives how its mixed-ownership listed companies are governed.[72] However, as the government benefits from the success of these companies and Singapore citizens in turn benefit from the government"s social programs, Singapore"s mixed-ownership model may ultimately be the most purposeful of all. That its success lies in the unique institutional architecture that ensures state-controlled companies have a focus on profit maximization runs counter to Mayer"s call to "Prosperity" and Fink"s proclamation.[73]

The other significant type of company in Singapore"s highly concentrated shareholder environmentare family-controlled listed companies. In Singapore, listed companies with family-controllers have consistently outperformed non-family companies and are the most common type of companylisted on the stock exchange.[74] The purpose of these family companies is the family"s prosperity –which some have posited is reinforced by Singapore"s culture.[75] Singapore is unique in that it is theonly country in the world that has a stewardship code for family companies. The code does not seek to displace family ownership. Rather it aims to ensure that family-controlled

[65] Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation", 65 The American Journal of Comparative Law (2017), pp. 265, 267.

[66] Dan W Puchniak and Samantha Tang, "Singapore"s Puzzling Embrace of Shareholder Stewardship: A Successful Secret", 53 Vanderbilt Journal of Transnational Law (2020), pp. 989, 992.

[67] Wai Yee Wan and Umakanth Varottil, Mergers and Acquisitions in Singapore: Law and Practice (Singapore: LexisNexis, 2013), p.90.

[68] Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation", 65 The American Journal of Comparative Law (2017), 265, 267

[69] Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation", 65 The American Journal of Comparative Law (2017), p. 265 (provides an in-depth analysis of independent directors in Singapore). Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (High Court, Singapore., 2010), paras. 163-164 (articulating that acting in the interests of the company normally equates to acting in the long-term interests of its shareholders). See generally, Pearlie MC Koh, Company Law (3rd ed, LexisNexis 2017) p.107. It should also be noted that the first sentence of the Singapore Code of Corporate Governance (2018) states that: "Corporate governance refers to having the appropriate people, processes and structures to direct and manage the business and affairs of the company to enhance long-term shareholder value, whilst taking into account the interests of other stakeholders." See "Code of Corporate Governance 2018", Monetary Authority of Singapore, 6 August 2018. See also, Walter Woon, Walter Woon on Company Law (Tan Cheng Han ed, 3rd rev edn, Sweet & Maxwell 2009) para 8.22 & 8.25.

[70] Tan Cheng Han et al., "State-Owned Enterprises in Singapore Model: Historical Insights into a Potential Model for Reform", 28 Columbia Journal of Asian Law (2015), p.61, 67.

[71] Tan Cheng Han et al., "State-Owned Enterprises in Singapore Model: Historical Insights into a Potential Model for Reform", 28 Columbia Journal of Asian Law (2015), p.61, 67-69.

[72] Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation", 65 The American Journal of Comparative Law (2017), p.265, 305-17.

[73] See, Curtis Milhaupt & Mariana Pargendler "Governance challenges of listed state-owned enterprises around the world: National experiences and a framework for reform", 50 Cornell International Law Journal (2017), pp. 473, 518-524, 535-536.

[74] Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation", 65 The American Journal of Comparative Law (2017), pp.265, 296-298.

[75] Dan W Puchniak & Luh Luh Lan, "Independent Directors in Singapore: Puzzling Compliance Requiring Explanation", 65 The American Journal of Comparative Law (2017), pp. 265, 302-303.

companies are governed in a way that ensures their longevity and that the family"s longevity benefits all corporatestakeholders and the entire community.[76] Once again, Singapore"s family companies do not need to be woke.

III. Risks of Failing to Recognize Asia"s Purposes and the Prosperity of Diversity

Long before Anglo-America"s "discovery" of corporate purpose, Asia was already awake to it. This positive claim has important normative implications as Anglo-America"s call to become morepurposeful sweeps the globe. In Asia, it risks providing cover for the CCP in China to use purposeto stray further from shareholder maximization for its own self-interested purposes. It has the potential to provide a justification for Japan"s old guard to roll back hard-fought moves towards delivering more value for shareholders, in a corporate governance system built for an earlier age. It has the potential to allow India to bask in its purposeful legislation, without tackling the problemsof implementation nor focusing on its core corporate governance problem of controlling controllingshareholders.[77] It may disrupt Singapore"s successful mixed-ownership model by allowing politicsto enter corporate boardrooms under the guise of purpose.[78]

The failure to understand how Asia has been built on systems where corporations have had purposes other than maximizing shareholder value also cancels convincing evidence that corporate governance without shareholder primacy can produce economic success. It is undeniable that China"s system of corporate governance, which is the antithesis of the Friedman Doctrine, has helped lift hundreds of millions of people out of poverty. Japan has built a remarkably successful, safe, innovative, peaceful, and free post-war society, with a system of corporate governance where lifetime employees, not shareholders, have been at the core. Singapore is one of the wealthiest, healthiest, safest, cleanest, and most educated countries in the world, with a state-ownership model that would make Friedman roll in his grave. Cancelling this history to feign an Anglo-American discovery is simply sad.

However, Asia"s purposeful systems of corporate governance have been far from perfect. China"ssystem has emboldened the CCP which risks turning its rule even more towards party tyranny thancommon prosperity.[79] Japan"s lifetime employment system has counterintuitively created one of the harshest work environments in the world where lifetime employees die from overwork and women have been largely excluded.[80] India has had enviable purposeful ambitions for generations,but its enormous human potential has too often been squandered, while too few reap enormous rewards among toiling masses.[81] The limits of Singapore"s mixed-ownership model will be tested as it is not yet known whether the next generation of political leadership will be as disciplined as the past in keeping politics out of corporate boardrooms – a reality that Covid may have made moredifficult as government support for critical industries was required. Asia"s purposeful approaches demonstrate that the absence of the Friedman Doctrine is not a panacea – in and of itself.

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[76] Dan W. Puchniak and Samantha S. Tang, "Singapore"s Embrace of Shareholder Stewardship: A Puzzling Success", Global Shareholder Stewardship (Dionysia Katelouzou and Dan W. Puchniak eds, CUP 2022), pp.310-313.

[77] See, Afra Afsharipour, "Redefining Corporate Purpose: An International Perspective", 40 Seattle University Law Review (2017), pp.465, 491-495.

[78] Interestingly, it appears that Temasek Holdings Private Limited (Temasek) – the privately incorporated company that is wholly owned by the Singapore government and controls the voting rights in most of Singapore"s largest listed companies – is acutely aware of this risk. Although Temasek has embraced a purposeful approach as an investor, it also realizes the need to keep politics out of the boardroom. Stephen Forshaw "Letter to the Editor: Responsible companies must deliver sustainable value over the long term" (ECGI Blog, 22 March 2022), https://ecgi.global/blog/letter-editor-responsible-companies-must-deliver-sustainable-value-over-long-term

[79] "Xi Jinping"s talk of "common prosperity" spooks the prosperous", The Economist, 28 August 2021, https://www.economist.com/finance-and-economics/xi-jinpings-talk-of-common-prosperity-spooks-the prosperous/21803895.

[80] "Death by work: Japan"s habits of overwork are hard to change", The Economist, 2 August 2018, https://www.economist.com/asia/2018/08/02/japans-habits-of-overwork-are-hard-to-change.

[81] "Compounding inequality: India"s super-rich are getting much richer" The Economist, 3 December 2020, <https://www.economist.com/asia/2020/12/03/indias-super-rich-are-getting-much-richer. For an excellent analysis of the risks of corporate purpose in India see, Afra Afsharipour, "Lessons from India"s Struggles with Corporate Purpose", Elizabeth Pollman & Robert Thompson (eds.), Research Handbook on Corporate Purpose and Personhood (Edward Elgar 2021).

The point is not that a move away from shareholder primacy towards purpose is good or bad. Thepoint is that context matters. Asia demonstrates that different jurisdictions have different understandings of the purpose that corporations should serve and that there is no one model that fits all. Also, at any given time each jurisdiction will be at a different point along the shareholder-primacy/stakeholderism continuum.[82]

However, this much is certain: corporations must be governed, within the context of *their* environment, in a way that benefits the public good. How this is achieved will vary from jurisdiction to jurisdiction and within each jurisdiction over time.[83] Responsible capitalism and good corporate governance mean ensuring that the purpose that corporations (should) serve is aligned with maximizing the public good in each jurisdiction at any given time.

What is also certain is that the existential threat of climate change can only be successfully addressed through intervention on a global scale. Global action will require accepting diversity in approaches, allowing each system to achieve climate change goals in their own way. As such, *outcomes* should be the focus of good corporate governance and the purpose corporations serve, not prescribed methods of achieving those outcomes. Ultimately, prosperity requires diversity.

REFERENCES

1. Colin Mayer. *Prosperity: Better business makes the greater good*. Oxford: Oxford University Press, 2018.
2. Jill E Fisch. Purpose Proposals (April 4, 2022). U of Penn, Inst for Law & Econ Research paper No.20-21, University of Chicago Business Law Review, Forthcoming, European Corporate Governance Institute - Law Working Paper 638/2022, https://ecgi.global/working-paper/purpose-proposals.
3. Larry Fink. *A Fundamental Reshaping of Finance*. Harvard Law School Forum on Corporate Governance, 2020.
4. Lucian A. Bebchuk and Roberto Tallarita. "The Illusory Promise of Stakeholder Governance". 106 Cornell Law Review (2020) p.91.
5. Amir N. Licht. "Varieties of Shareholderism: Three Views of the Corporate Purpose Cathedral". In *Research Handbook on Corporate Purpose and Personhood*, edited by Elizabeth Pollman & Robert. Edward Elgar Publishing, 2021.
6. Brian R. Cheffins. "Stop Blaming Milton Friedman!". ECGI Law Working Paper 523/2020, June 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552950.
7. Henry Hansmann and Reinier Kraakman. "The End of History for Corporate Law". 89 Georgetown Law Journal (2001), p. 439-468.
8. Dan W Puchniak. "Multiple Faces of Shareholder Power in Asia: Complexity Revealed". In *Research Handbook on Shareholder Power*, edited by Jennifer G.Hill and Randall S Thomas, p.511. Edward Elgar Publishing, 2015.
9. Dan W Puchniak et al. *"Introduction"*. In *Independent Directors in Asia: A Historical, Contextual and Comparative Approach*, edited by Dan W Puchniak et al, p.7. Cambridge University Publishing, 2017.
10. Dan W. Puchniak at al. "*The Complexity of Derivative Actions in Asia: An Inconvenient Truth*". In *The Derivative Action in Asia: A Comparative and Functional Approach* edit-

[82] For an interesting analysis that generally supports this observation see, Ronald J. Gilson and Curtis J. Milhaupt, "Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling" (ECGI Law Working Paper 546/2020, January 2021), pp. 76-77, https://ecgi.global/working-paper/shifting-influences-corporate- governance-capital-market-completeness-and-policy.

[83] For an analysis about how good corporate governance is about adaptation, and not any particular model see, Dan W Puchniak, "The Japanization of American Corporate Governance? Evidence of the Never Ending History for Corporate Law", 9 Asian-Pacific Law & Policy Journal 7 (2007), pp.15-16, 69-70.

ed by Dan W.Puchniak, p.98. Cambridge University Publishing, 2012.

11. Lin Lin and Dan W. Puchniak. "*Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State*". 35 Columbia Journal of Asian Law (2022).
12. Li-Wen Lin. *"Corporate Social Responsibility in China: Window Dressing or Structural Change?".* 28 Berkeley Journal of International Law (2010).
13. Li-Wen Lin. "*Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*", 68 American Journal of Comparative Law (2020).
14. Revised Draft of PRC Company Law, 24 December 2021.
15. Code of Corporate Governance for Listed Companies, 2018.
16. Dan W Puchniak and Lin Lin. "*Institutional Investors in China: An Autochthonous Mechanism Unrelated to UK-cum-Global Stewardship*". In Global Shareholder Stewardship edited by Dionysia Katelouzou and Dan W. Puchniak, p.416. CUP, 2022.
17. Li-Wen Lin and Curtis J Milhaupt. *"We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China"*. 65 Stanford Law Review (2013).
18. Curtis J Milhaupt and Wentong Zheng. *"Beyond Ownership: State Capitalism and the Chinese Firm"*. 103 Georgetown Law Journal (2015).
19. Lauren Yu-Hsin Lin and Curtis J Milhaupt. "*Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance"*. 50(1) Journal of Legal Studies (2021).
20. Lauren Yu-Hsin Lin and Curtis Milhaupt. *"China"s Corporate Social Credit System and the Dawn of Surveillance State Capitalism"*. ECGI Law Working Paper 610/2021, October 2021.
21. Dan W Puchniak and Masafumi Nakahigashi. *"The Enigma of Hostile Takeovers in Japan: Bidder Beware"*. 15 Berkeley Business Law Journal 4 (2018).
22. Michael Spence. *The Next Convergence: The Future of Economic Growth in a Multi-speed World*. Farrar, Straus and Giroux, 2011.
23. Gen Goto. *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code.* In *Global Shareholder Stewardship* edited by Dionysia Katelouzou and Dan W. Puchniak. CUP 2022.
24. Gen Goto et al. *"Diversity of Shareholder Stewardship in Asia: Faux Convergence"*. 53 Vanderbilt Journal of Transnational Law (2020).
25. Dan W Puchniak. *"The Japanization of American Corporate Governance? Evidence of the Never Ending History for Corporate Law*". 9 Asian-Pacific Law & Policy Journal 7 (2007).
26. Mariana Pargendler. *"The Grip of Nationalism on Corporate Law"*. 95 Indiana Law Journal (2020).
27. Zenichi Shishido. *"Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions"*. 25 Delaware Journal of Corporate Law (2000).
28. Alberto R Salazar and John Raggiunti. *"Why Does Executive Greed Prevail in the United States and Canada but Not in Japan? The Pattern of Low CEO Pay and High Worker Welfare in Japanese Corporations"*. 64 American Journal of Comparative Law (2016).
29. Dan W Puchniak. *"The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers"*. 5 Berkeley Business Law Journal (2008).
30. Ronald J Gilson and Mark J Roe. *"Understanding the Japanese Kieretsu: Overlaps Between Corporate Governance and Industrial Organization".* 102 Yale Law Journal (1993).

31. Masahiko Aoki. "*The Japanese Main Bank System: An Introductory Overview"*. In The Japanese Main Bank System: Its Relevance for Developing and Transforming Economies edited by Masahiko Aoki and Hugh Patrick, p.1. OUP, 1994.
32. Gen Goto. *"Legally "Strong" Shareholders of Japan".* 3 Michigan Journal of Private Equity & Venture Capital Law (2014).
33. Dan W Puchniak and Masafumi Nakahigashi. *"Japan"s Love for Derivative Actions: Irrational Behavior and Non-economic Motives as Rational Explanations for Shareholder Litigation*". 45 Vanderbilt Journal of Transnational Law (2012).
34. Gen Goto et al. "Japan"s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis". In Independent Directors in Asia: A Historical, Contextual and Comparative Approach by Dan W Puchniak, p.165, CUP, 2017.
35. Dan W. Puchniak. *"The 2002 Reform of the Management of Large Japanese Corporations: A Race to Somewhere?"*. 5 The Australian Journal of Asian Law (2003).
36. Leo Lewis and Kana Inagaki. *"Japan"s icy climate for hostile takeovers starts to thaw",* The Financial Times, 22 December 2020. https://www.ft.com/content/fc4ea0f4-d54e-4b59-ae4b-da2e32fce286.
37. Gen Goto. *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code*. In Global Shareholder Stewardship edited by Dionysia Katelouzou and Dan W. Puchniak, p.222, CUP, 2022.
38. Rafael La Porta et al. *"Law and Finance".* 106 Journal of Political Economy (1998).
39. Simeon Djankov et al. "*The Law and Economics of Self-Dealing"*. 88 Journal of Financial Economics 430 (2008).
40. Holger Spamann. *"The "Antidirector Rights Index" Revisited"* (2010) 23 Review of Financial Studies 467; Dan W Puchniak and Umakanth Varottil, "Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm" (2020) 17 Berkeley Business Law Journal 1.
41. Umakanth Varottil. "Responsible Capitalism and Corporate Purpose: The India Way". ECGI Blog, 26 April 2022, https://ecgi.global/blog/responsible-capitalism-and-corporate-purpose-india-way.
42. Colin Mayer, Firm Commitment, Oxford: Oxford University Press, 2013.
43. Umakanth Varottil. *"The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony"*. 31 American University International Law Review (2016) 253.
44. National Textile Workers v. P.R. Ramakrishnan, (1983) 1 S.C.R. 9 (India).
45. M.K. Ranjitsinh v. Union of India, (2021) SCC Online SC 326. In *Legal Opinion: Directors* edited by Shyam Divan, Sugandha Yadav & Ria Singh Sawhney.
46. Umakanth Varottil. "*Directors" Liability and Climate Risk: White Paper on India"*. Commonwealth Climate and Law Initiative, 4 October 2021.
47. Companies Act, 2013.
48. Afra Afsharipour. "*Redefining Corporate Purpose: An International Perspective*". 40 Seattle University Law Review (2017), pp. 465, 469-470.
49. Mihir Naniwadekar and Umakanth Varottil. "*The Stakeholder Approach towards Directors" Duties under Indian Company Law: A Comparative Analysis*". In The Indian Yearbook of Comparative Law edited by Mahendra Pal Singh. OUP, 2016.
50. Akshaya Kamlnath. "*A Post Pandemic Analysis of CSR in India*". ANU College of Law Legal Studies Research Paper Series, https://ssrn.com/abstract=3826832.

51. Afra Afsharipour. "*Lessons from India's Struggles with Corporate Purpose*". In Elizabeth Pollman & Robert Thompson (eds.), Research Handbook on Corporate Purpose and Personhood. Edward Elgar, 2021.
52. Meng Seng Wee and Dan W Puchniak. "*Derivative Actions in Singapore: Mundanely Non-Asian, Intriguingly Non-American and at the Forefront of the Commonwealth*". In *The Derivative Action in Asia: A Comparative and Functional Approach* edited by Dan W Puchniak et al. CUP, 2012.
53. Dan W Puchniak and Samantha Tang. *"Singapore"s Puzzling Embrace of Shareholder Stewardship: A Successful Secret"*. 53 Vanderbilt Journal of Transnational Law (2020) p. 989, 992.
54. Wai Yee Wan and Umakanth Varottil. *Mergers and Acquisitions in Singapore: Law and Practice*. Singapore: LexisNexis, 2013.
55. Walter Woon, *Walter Woon on Company Law*. Edited by Tan Cheng Han, 3rd ed, Sweet & Maxwell, 2009.
56. Tan Cheng Han et al. *"State-Owned Enterprises in Singapore Model: Historical Insights into a Potential Model for Reform"*. 28 Columbia Journal of Asian Law (2015) p.61.
57. Curtis Milhaupt & Mariana Pargendler. "*Governance challenges of listed state-owned enterprises around the world: National experiences and a framework for reform".* 50 Cornell International Law Journal(2017) p.473.
58. See, Afra Afsharipour. "Redefining Corporate Purpose: An International Perspective". 40 Seattle University Law Review (2017) p.465.
59. Ronald J. Gilson and Curtis J. Milhaupt. "*Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling"*. ECGI Law Working Paper 546/2020, January 2021).

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THE CIVIL LAW OF MONGOLIA TRADITIONS AND CONTEMPORARY REQUIREMENTS

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ABSTRACT:

It is worth emphasizing the need to improve the legal technique of civil law regulation in Mongolia, and every reform of the current private law will greatly affect civil law. Therefore, it is appropriate to consider the tradition of civil law in combination with the results of research aimed at selecting current requirements.

I. Civil Law of Mongolia, its functions and effects

The Civil Code of 2002 is similar in content to the civil laws of the continental legal codification tradition but retains its own characteristics. A comparative study reveals a significant difference in terms of regulatory relations or systems of fundamental values from the major codifications that superseded and assimilated Roman law.[1] The items regulated by the Civil code of Mongolia are 1/. basic principles and regulation of private law; 2/. participant of private law; 3/. the object of private law; 3/. contractual and non-contractual obligations; 4/. basic legal regulation of inheritance; 5/. private international law is called conflict law.

In our country, which has a monistic private legal system, Civil law has been considered the basic law of economic relations, but modern researchers emphasize the inaccessibility of the monistic system and attach great importance to the difference in the concept of civil law. In order to keep pace with the rapid development of business relations, many say it is important to legislate additional laws and create a dualistic system highlighting the difference between civil and business. In this context, the National Legal Institute`s specialized research conducted in the field of private law is important and representative of the development of private law.

Research conducted in the civil law and economic sectors is generally classified globally as follows: 1/. retrospective study / aimed at assessing the consequences of law enforcement and eliminating violations/; 2/. comparative law analyses; 3/. judicial decision research / whether it is empirical research in some cases is questionable/; and including 4/. legal sociology

[1] B. Buyankhishig, Codification and comparison of private law of Mongolia, 2021, p.145.

research /Rechtstatsachenforschung/. Legal sociology research has been done the least since the research criteria are not clear, it is difficult to make a representative sample, and the evaluation is questionable. However, legal sociology research should become the center for changing major codifications such as the Civil code, changing the monistic system, and creating a completely new legal environment. For example, this study considers the limitations of theoretical knowledge to estimate the effect of regulation, and rationally solve the problem of legitimation, and in doing so, it is a selected method that allows the correct use of legal facts to make conclusions, rather than replacing conclusions. As a result, it will be possible to evaluate the cases in society using empirical and theoretical methods. Domestic legal and empirical research is mainly commissioned by the National Legal Institute and Open Society NGO.

To mention the research of the National Legal Institute in the civil law and economic sector are "Advertising and Harms (Volume I)", "Remediation of Harms [2]Caused by State Organizations and Officials (Volume I)", "Doctors and Hospitals" Compensation for damages caused by employees to others (Volume II)", "Regarding the Bill on Pledge of Movable Property (Volume II)", "European Legal System (Volume III)", "Experience of Foreign Countries in Acquisition and Reorganization of Companies (Volume III)", "Evaluation of the consequences of the implementation of the Law on the Courts of Mongolia, the Law on Civil Procedure, the Law on Notaries (IV)", and in 2021: "Research on Civil Law and International Civil Proceedings".

These are mostly retrospective studies with comparative legal and to some extent empirical tests, and pure legal sociological studies are rare. *Social jurisprudence*, or the study of law as a social phenomenon, will begin the social-centered law application and law-making process and is more indicative of the implementation of legal policy. The legal policy should comprehensively express what goals in society will be achieved using legal means and methods. In other words, setting a very good goal and achieving it using the best-selected method or achieving it by means of administration and oppression are the 2 ways that determine the legal policy. The sociology of law is called "the science of things and goals" and the change in society is reflected in the law because of the research of legal sociology /M. Rehbinder/.[3] Therefore, in Western countries, research on judicial law, etc., without trying to make immediate results, conducting long-term basic research, and charting it is a suitable research method to understand our society and make appropriate changes.

II. Tradition/origin: the dualism of socialist and liberal models

The Civil Code of Mongolia has an external structure that preserves the civil law traditions of the Soviet Union and the CIS countries, quantification of the dominance of liberal EU regulation is only indicative of their reception history. Some researchers consider domestic private law to be included in the Roman-Germanic legal system, but foreign researchers attribute it to the post-socialist legal system.[4] Basically, the Civil code of Mongolia has a mixed structure that combines the post-socialist model of the previous Civil code and the liberal model. For example, the non-property relationship between individuals is reflected in Family Law and the regulated articles about the general class of material and non-material property law. Also, the restriction of conflict norms to private international law alone reflects the legal technique used by the Civil code, However, until now, the basic legal principles of the contract are not clear, for example, whether the principles of wealth enrichment and mutual benefit should prevail, or whether to implement social-oriented legal policies using the vague terminology of the Civil code.

III. Requirements for further reforms

Since the principle of the universal applicability of laws originating from the Constitution requires the creation of common laws covering past events and future events, maintaining a high level of abstraction of the Civil code will include new relationships, thus making the codification long-term, and in doing so, flexible to new situations. When determining whether there is a need

[2] References to the relevant volumes of the National Legal Institute's Research Bulletin.

[3] M.Rehbinder: Rechtssoziologie, 2010, S. 35.

[4] Zweigert/Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3.Aufl., 1996, S.67.

for some reforms, the legal, and sociological research mentioned above will be carried out, and as a result, it will be determined that there has been a real change in the regulatory relationship. It will continue to conduct legal research to determine whether it falls within the scope of the Constitution and other valid laws, and then evaluate whether a new law is necessary.

1. Actual changes in regulatory relations

During the pandemic, or in the last 2-3 years, there was a real need to digitize all legal relations. In order to keep pace with this, the legislator has exempted several form requirements in §42. 1 1 of the Civil code, allowing for electronic contracts. In this regard, the introduction of electronic representatives is discussed, but there are 2 ways to make appropriate changes to the regulation of representation or to allow the court to conduct research according to its own resources and adapt its decision to the technological features within the law.

In addition, it is appropriate to expand the regulation of civil law objects in addition to economic, administrative, and criminal regulation in disputes related to the rapid development of the virtual capital market and the issuance of tokens backed by shares. However, in the context of placing the artist's work on the Internet using NFT, it is advisable to slightly change the copyright regulation and, consequently, to change the judicial practice related to the commercial sale-purchase agreement. The Bank of Mongolia is of the opinion that cryptocurrency cannot be accepted as a means of payment, but on the other hand, the principle of free choice of payment by the parties applies to the legal part of the Civil code so the case can be resolved by applying commercial agreements and other contractual arrangements. In the use of nanotechnology, the use of artificial intelligence, and gene technology, regulations that protect public interests should be demanded first, and then the regulation that serves civil legal relations should be applied accordingly. Due to the digitization of social relations, it is necessary to adapt copyright protection in the electronic environment to the characteristics of electronic devices and to balance the freedom of press information with the method of the constitution.

It is sufficient to understand these new relations through the study of the needs of the law, and no study of the sociology of law is necessary. On the other hand, in the already regulated sector, especially the reform of the judiciary, the research directed to society has the main role. According to the legal research conducted in Germany, there is a tendency to believe that it is possible to solve the problems arising in the new legal relationship by using the traditional regulations of the Civil code and other laws in the new relationship.[5] In our country, we are paying more attention to creating an organizational structure to regulate and implement new relations with the new law. But the most pressing issue is the lack of consumer protection for both new and regulated relationships.

2. Socio-economic requirements

The question arises as to what contribution IH has to social problems, such as poverty reduction. Researchers emphasize the protective function of the Constitution, for example, §§56-60 of the Constitution, etc. For example, the ban on transactions "not contrary to public morals" mentioned in §56.1.1 of the Supreme Court should be a mechanism to stabilize the interest rate and balance the average interest rate of commercial banks and the interest rate charged by non-banking institutions. However, in practice, although the credit balancing mechanism between citizens is carefully used, the above regulations are hardly used in the interest of banks and non-banking organizations. Also, there will be difficulties in determining the damages due to the insufficient regulation of §218 of the Supreme Court in the matter of determining the amount of interest prescribed by law and the damages due to the overdue payment period[6].

While the rapid development and expansion of the economic conditions are the requirements for the special approval of the Commercial Code by the Civil code, there is a study of established commercial customs, and on the other hand, the goal is to clarify the system of responsibility in the internal and external relations of companies, legal entities, and private legal entities. In the framework of these goals, National Legal Institute will undoubtedly prepare and deliver our

[5] M.Rehbinder: Rechtssoziologie, 2010, S. 213.

[6] B. Buyankhishig, General part on the law of obligations, 2nd edition, 2017.

many types of research in the future based on its rich past experience.

Since law aims to regulate the general framework of social life, it was mentioned above that researching the existing society or doing sociological research of law at an empirical level is an important step in correctly defining one's own values. In this sense, the research institute of the Supreme court and the National Legal Institute has the main task of conducting regular research on the social and economic reality of the country. For example, amendments to the Law on Courts / §25.7.5a /b of the Civil Code, amendments to procedural legislation / 172.2.1, 172.2.2, 172.2.3 of the Civil Procedure Code, 123.2.1, 123.2.3 of the Administrative procedure code 40.1, 1.1, 1.3/ of the Criminal procedure code should be conditioned by sociological research, and then become the subject of a retrospective study of the National Legal Institute. An important step in the application of any research is to use already prepared comparative studies and international regulatory trends to make a case study of norms that apply to regulated relations in domestic law.

IV. Conclusion

The primary purpose of the civil code of Mongolia is to perform the basic codification function of the economy, which can equally cover current and future civil legal relations. While the principle of universal application of the law prohibits the regulation of one contractual relationship in a different way, there may be additional regulations applicable to civil, consumer, and commercial contracts around the main regulations.

There is a need to give priority to empirical or sociological issues in legal policy research, and based on this type of research, it will be possible to compare with recent comparative jurisprudence and the facts behind foreign regulations. It can be seen from the judicial practice of foreign countries that it is quite possible to make a decision using the abstract norms of the Civil code in many areas of social and economic change. Therefore, in order to solve the innovative problems of private law, it is important to make a case explanation explaining the common norms of the Supreme Court in accordance with the economic and social development from the Civil Code and the Civil Code to create an opportunity to keep pace with the global economic development.

Therefore, in order to solve the innovative problems of private law, it is important to create an interpretation of the basic norms of the Civil code in accordance with the economic and social development of the National Legal Institute to create an opportunity to keep pace with global economic development.

REFERENCES

1. B. Buyankhishig. *Codification and comparison of private law of Mongolia*, 2021.
2. References to the relevant volumes of the National Legal Institute's Research Bulletin.
3. M.Rehbinder: Rechtssoziologie, 2010.
4. Zweigert/Kötz. *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3.Aufl., 1996.
5. M.Rehbinder: Rechtssoziologie, 2010.
6. B. Buyankhishig. *General part on the law of obligations*, 2nd edition, 2017.

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DEFINING THE ROLE OF THE LABOUR CODE IN A COUNTRY'S DEVELOPMENT

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ABSTRACT:

The State Parliament revised the Labor Law in July 2021, and it came into force on January 1, 2022. This article is to give a brief summary of how the changes of this law will affect the country's development.

Before the adoption of the Labor Law, I studied numerous research works and reports conducted by some governmental and non-governmental organizations in the field of labor relations as a member of the working group for drafting the law and numerous information and statistics from there have been used here. The Law on Labor covers many newly created phenomena in the labor market and provides specific legal tools to help regulate and solve some of the problems faced by the market. The law also includes regulations that will promote the harmonization of the content of national laws and ILO labor standards and promote respect and protection of human rights in the field of work. This law contains many advanced and effective regulations such as the law providing the opportunity for enterprises, organizations, and certain socio-economic sectors to adjust their labor relations to their own characteristics.

The main impact of the new law on the country's development is focused on the labor market. In addition, it can be considered that appropriate progress has been made in the development of the study of law. In addition, the role and importance of the new law in the field of improving the national legislation regulating labor relations in accordance with international standards and ensuring respect for human rights in the field of labor is not slight.

The new Labor Law (hereinafter referred to as the "Labor Law") will have a positive impact on the country's development in several areas.

KEYWORDS:

Labor relations, ILO basic convention, Labor laws, Labor market, Labor disputes, Internal labor norms

I. The impact of the Labor Law on the labor market

The labor market is the process of economic relations related to the hiring and supply of labor, in other words, its purchase and sale[1]. In the labor market, first of all, there is an initial negotiation of the interests of business owners-employers and hired employees[2]. It is the agreement which creates a legal relationship between them, and requires state regulation. The agreement of the parties on the labor market has been updated in terms of content and form in the past years, and it requires new regulations from a legal point of view. Therefore, along with the bilateral labor contract, which is the traditional main form of labor relations, new types and forms of contracts involving three parties were included in the Labor Law. This includes the regulation of employment under labor supply contracts (Article 76 of the Labor Law) and the regulation of apprenticeship contracts (in the form of apprenticeship contracts in general and specialized professions) (Articles 62 and 63 of the Labor Law). These agreements are important to help solve some of the difficult problems in the labor market. However, they are different in terms of their intended use and consequences.

What both labor supply contract and apprenticeship contract have in common is that they create an employment relationship. However, the purpose of the labor supply contract is to give the employer the opportunity to save some types of labor costs in order to temporarily increase the workload of the employer, in the event of a short-term increase in the need for additional labor, or in order for employer to focus on its core activities and adjust its staff and structure. The regulation of labor supply contracts is different from "recruitment" in the Employment Promotion Act (2011). The special feature of this contract is to hire or train people to work in a certain field of work (cleaning, service, security, plumbing, etc.), that it is hired through an employer-enterprise or organization that needs to be an employer. Such an agreement will be an important legal tool that can be used to maintain the appropriate level of demand and supply of labor in the labor market by preparing and training human resources that are more needed in the labor market in the future, and to reduce the shortage of labor force.

One of the factors that negatively affects the employment of young people, who make up more than 50% of the total population of our country, is a lack of work experience. When employers determine their requirements for a job in its structure, it is common to require to have work experience. However, young people who have just finished vocational training, universities, and professional courses are unable to meet the requirement. According to the "Research Report on Youth Unemployment and Economic Inactivity" conducted by the Research Institute of Labor and Social Security under the Ministry of Labor and Social Security in 2017, which conducted with a total of 2,856 people aged 15-34, lack of work experience is the main cause of difficulty for young people who have acquired a profession (26.2%) while lack of knowledge and ability to do the work is the third most common factor (19.5%)[3]. In the Labor Law, an innovative type of contract called "apprenticeship contract" is included which is to provide employees with the opportunity to acquire skills and practice at the workplace. In this way, it can be noted that a unique legal instrument has been created in order to support the employment of young people who are an active part of population in the labor market. Apprentice labor contract has two different types: regular and special (Articles 62 and 63 of the Labor Law). There are three parties involved in these contracts: an employee, an employer and an accompanying employee appointed by the employer. The main feature of the contract is that employer agrees to hire an individual who does not meet the work practices, experience, and skills set forth in the job description, but also agrees to fulfill the aforementioned requirements itself. In 2017, in the "Barometric Research Report" found that the most common problem encountered in the process of participating in labor relations was insufficient work experience of job applicants[4]. For example, 31.5 percent of employers said that job seekers lacked work experience, and 23.5 percent said that education and/

[1] Rofe, A.I. Textbook, 2018, p.13.

[2] Ibid.

[3] Ministry of Labour and Social Protection of Mongolia, LSP Research Institute, A study of youth unemployment and economic inactivity, 2017, p.48.

[4] NHRC, Some issues of labor rights in small and medium-sized enterprises: trade, services, wool-cashmere sector, research, 2017, p.83.

or professional level did not meet job requirements[5].

In order to solve such difficulties, the above-mentioned apprenticeship labor contract can help to an extent. By signing this agreement, it is possible to improve the employment of economically active population on the labor market by providing employment opportunities with young professionals who have just graduated from vocational training and universities. At the same time, it is worth noted that the regulations, which aims to improve skills and abilities of employees working in certain workplaces, have been recently included in the law. Article 42 of the Labor Law defines the basic rights and duties of employees, including the duty to improve employee's qualifications and skills. In addition to technical skills, employers prefer job seekers' work experience, personal responsibility and positive attitude. A job seeker with the right personality traits is considered employable.[6] Article 73 of the Labor Law regulates the relations related to training, professional development and qualification of employees at the employer's own expense.

In our country, where agriculture sector, specifically livestock sector plays an important role in the economy, the issue of the employment of assistant herdsmen, who create their livelihood by helping herdsmen with thousands of animals, has been regulated in the Labor Law for the first time. International norms, including the International Labor Standards, do not include "employment in the agricultural sector" as informal sector work. However, for Mongolia, agricultural sector and animal husbandry are one of the main components of the country's economy, and employment of herdsmen and assistant herdsmen is not registered, and is left outside the protection of laws and regulations, thus being free from forced labor and labor exploitation.

It is considered "informal employment" due to its characteristics such as not being able to enjoy the rights stated in the law, and not being governed by the basic principles of labor relations. Therefore, the Labor Law will now regulate the work of assistant herders as formal employment. Another example of informal employment is domestic work[7]. The other party that performs domestic work services by individuals is also considered as "informal employer" according to the recommendations of the International Labor Statistics Committee [8]. The majority of wage-earning domestic service workers are women, and for them, labor activities are outside the scope of legal regulation; thus, labor rights, interests, and other individual rights are often violated. As a result, the ILO urges member states to adopt the principle of transferring employment in the informal sector to the formal sector as much as possible and bring it into the scope of labor laws. According to our Labor Law, domestic wage workers, which are one illustration of informal employment, are now considered employees with a labor contract and the relations related to assistant herdsmen is also governed by the Labor law due to its special characteristics. Article 71 of the Labor Law requires to conclude labor contracts with assistant herdsmen, domestic service workers, and equivalent workers; thus, the relationship arising from them is now regulated. In this way, supporting the employment of young people and regulating the employment relations of assistant herdsmen, which were outside the regulation of laws, become important indicators for determining the role of the Labor Law in economic development. Also, the Government of Mongolia approved the "Mongolian Shepherd" national program in 2020 by Resolution No. 34. The first action for the programs' goal "to create a legal framework regulating the labor relations of assistant herdsmen" has thus been implemented through the Labor Law.

In recent years, there has been a widespread discussion about the shortage of labor force which is one of the factors that slows down the development of our country. One of the reasons for labor shortages is the low evaluation of labor except the quality of vocational training and education systems and lack of understanding about career choices. According to the "Wage Structure Survey" conducted by the Labor and Social Protection Research Institute under the Ministry of Labor and Social Protection in 2021, conducted with a total of 2,474 enterprises and 148,999 employees of these enterprises, employers use different indicators to calculate the

[5] Ibid.

[6] Ministry of Labor and Social Protection of Mongolia, LSP Research Institute. Labor market barometric survey, 2017, p.59.

[7] International Labor Organization, Informal economy and decent work, 2013, p. 31.

[8] Ibid.

wages of their employees. Due to the lack of common indicators, different indicators, which is not always methodical, affect the flow of employees leaving their jobs to one with higher wages. According to the survey, 21.1 percent of employers calculate the basic salary based on years of service, 5.3 percent on skill level, 25.5 percent on job performance, and 48.1 percent on job duties and positions[9]. With regard to calculation of the basic salary, where the duties and workload of the workplace are the main indicators, the criterion does not depend on employee. On the other hand, where salary depends on skills and works performance results, the indicator is directly relied upon employee; it is, therefore, more appropriate for calculating bonus, not the basic salary.

In order to create the common standard for determining wages, the law includes several provisions related to the calculation of salary such as the principle of equal wages for employees performing the same duties, and the principle of that wages should be based on employee's performance and productivity.

The basic principles of ILO are included in the law in a wide scope and detail, and it is beneficial in the exportation of Mongolia, not only from the human rights point of view. In order to support developing and landlocked countries, the European Union establishes the system based on the General Agreement on Tariffs and Trade (GATT) where it is possible to provide preferential conditions for foreign trade tariffs and to exempt some imported goods from customs duties. Mongolia has been eligible for this discount since 1991. Moreover, in 2006, our government signed the agreement with the European Union and agreed on the accompanying GSP+ conditions which made it possible to export 7,200 products to Europe without customs duties and without limit in quantity. It is important to increase our exports and to provide employers with opportunities to introduce their products abroad. However, the additional GSP+ condition of the agreement states that enterprises and organizations must meet the requirement "to be produced without harm to the environment without violating the labor rights of employees." More than 20 treaties and covenants declared by the United Nations, ILO, and Human Rights Organizations are annexed to the agreement. It includes all the basic conventions of the International Labor Organization. Consequently, every employer who produces products to be exported to the European Union faces with the requirement to strictly follow domestic laws which is accordance with the basic principles of labor rights that are annexed in the agreement as well as in the additional conditions of GSP+. In the Labor Law, certain regulations aimed at the implementation of the basic principles of the right to work have been enacted. Moreover, for the first time, the issue of Labor control, which is an important mechanism for ensuring the implementation of labor laws, is also included in this law.

II. The Labor Law plays an important role in improving national legislation in accordance with international labor standards.

Conventions ratified by ILO member states are mandatory. Among the conventions adopted by that organization, the "fundamental" one establishes the minimum standard in order to support peace and social justice in the labor market and protects the fundamental rights of employees. In 1998, the ILO announced 8 basic conventions that established basic rights and principles that applicable in the field of labor. Since Mongolia has already ratified these conventions, the related measures shall be taken to improve the national legislation in accordance with the conventions it has joined.in accordance with Article 10, 1 of the Constitution of Mongolia, in order to fairly fulfill its obligations under international agreements,

The principles of the eight fundamental conventions of the International Labor Organization were adapted into the Law on Labor in accordance with the practice of our country and stated. The basic principles and regulations defining the fundamental rights of the ILO shall be applied to labor relations from collective labor relations to all types of labor contracts in accordance with the relevant conventions of the organization. It shows that Mongolia fulfills its obligations to respect and protect human rights in the labor market.

According to Article 43.1.6 of the Labor Code, an employer is entitled to adopt its internal labor rules that apply within its scope. As a result, the internal rules shall be deemed one of

[9] Ministry of Labor and Social Protection of Mongolia, LSP Research Institute, Wage Structure Survey, 2021, p.89.

the sources of law which regulate labor relations only provided that it meets the requirements stated by law. (clauses 2.3.7 of Article 2 and 12.2 of Article 2). If it is necessary, an employer shall approve and shall implement the internal labor rules in order to regulate the labor and social affairs of its employees in accordance with the characteristics of operations and economic potential. However, the Labor Law specifies several types of internal norms that must be approved by enterprises. These include several internal norms aimed at creating the primary legal basis for the implementation of the regulations of the basic conventions of the International Labor Organization. For example, Article 7.4 of the Labor Law states that "the procedure for preventing and suppressing harassment, violence, sexual harassment in employment and labor relations, and resolving complaints" and Article 43.2.8 states that "the procedure for usage of monitoring equipment in the workplace" as well as Article 45.1 states that "the procedure for processing, protecting and using employee information". These internal labor rules play important roles in ensuring and protecting basic human rights within the employment.

III. The impact of the Labor Law on Jurisprudence

It is undeniable that science plays an essential role in the development of countries. Social relations are regulated by law. Labor law is a branch of the study of law. The Labor Law of 2021 made significant changes in the field of labor law (which is a branch of the private law sector) which consists of legal norms that regulate labor relations.

With regard to the autonomous system of law, the new law has made a change to the understanding of the composition of labor legislation. It was the first time to state that labor legislation is also comprised of labor-related agreements such as collective agreements, negotiations, and labor contracts as well as internal labor rules approved by the employer in accordance with the law. In other autonomous systems of law, internal rules that are approved by enterprises or organizations shall not be deemed one type of composition of the system's legislation. Due to the special features of labor relations, where a large number of employees perform diverse types of activities in varied workplaces and conditions, the aforementioned rules should be regarded as one of the sources of labor legislation. The specific forms of employment agreement which constitutes labor relation, are now covered by the Labor Law. Labor contracts between citizens, for instance, and three-party labor contracts are now regulated. As a result, the concept of "contract" and its special form of "labor contract" as well as the related notions will be expanded.

The notion of "labor dispute" is related to the special relation, which is one of the objects of study, should be regulated by law. According to the Labor Law, the legal term of labor dispute has been changed and re-defined. It had brought our national legislation into line with international norms.

In the previous law, the dispute resolution mechanism was classified into individual and collective labor disputes depending on the number of parties involved in the labor dispute. Now, labor disputes are classified into labor interest disputes and labor rights disputes, taking into account their purpose and consequences. It is the regulation that is consistent with the general formulation of labor disputes in the ILO's standards. Also, the lawmaker believed that the general principle should govern any type of labor dispute resolution; thus, the principle of "disputing parties should understand each other and settle the dispute as much as possible" and the special system for "preliminary settlement" are regulated.

However, it should be noted that these favorable effects of legal services directly depend on the legal knowledge, culture, and awareness of those who implement it and the participants in the relations governed by it.

IV. Conclusion

The following conclusions can be drawn:

1. The implementation of the new labor law will have a positive effect on the economy if it can be applied to labor relations efficiently by governing new phenomena in the labor

market, making the tools that reduce the labor shortage legalized, and/or determining the methodology that optimizes the value of labor.

2. Science plays an important role in the development of the country. Social relation is regulated by legal norms; thus, it is one factor of the functions of jurisprudence in society. Within the framework of Labor Law and Private Law, which are components of the study of law, labor legislation creates several new legal relations. For example, the labor legislation includes labor agreements between the parties and internal norms set by employer in addition to legal and administrative acts. It is not only to enrich the sources of law, but also to re-define the concept. Additionally, the traditional concepts related to labor contract and labor dispute have been updated. Consequently, the science of labor law is not limited by the field of labor legislation, but the Labor Law has created quite several changes and reforms that are determined by the scope of jurisprudence.
3. This law has been a significant advancement in the development of national labor law in accordance with the requirements of the International Labor Standards.
4. The Labor Law of 2021 contains provisions related to basic principles and fundamental rights aimed at ensuring and protecting the rights of employees, which are the major factors to be considered when exporting manufactured goods, obtaining customs incentives, and being exempted from customs taxes. In this way, the new law will play a significant role in expanding the opportunities for Mongolian enterprises and organizations to enter foreign markets.

REFERENCES

1. The Constitution of Mongolia, 1992.
2. The Labor Law of Mongolia, 2021.
3. Guide to self-assessment of compliance with GSP+ conditions imposed on exports of goods under the General Agreement on Tariffs and Trade of the European Union, 2018.
4. Rofe. A.I, *Labour market*. Textbook, 2018.
5. Urantsetseg.B. *The need to update the Labor Law and the main changes*, Mongolian Journal of Law 1 (2021).
6. Ministry of Labour and Social Protection of Mongolia, LSP Research Institute. *A study of youth unemployment and economic inactivity*, 2017.
7. NHRComittee, *Some labor rights issues in small and medium-sized enterprises: trade services, wool cashmere sector*, 2017.
8. ILO. *Informal economy and decent work*, 2013.
9. Ministry of Labour and Social Protection of Mongolia, LSP Research Institute, *Salary structure study*, 2021.
10. Ministry of Labour and Social Protection of Mongolia, LSP Research Institute, *Graduate employment survey*, 2017.
11. Ministry of Labour and Social Protection of Mongolia, LSP Research Institute. *Barometric survey of labor market demand*, 2017.
12. Ministry of Labour and Social Protection of Mongolia, LSP Research Institute. *A survey of the employer's requirements for the employee,* 2017.

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KOREA'S LEGISLATIVE DEVELOPMENT TO OVERCOME SOCIAL DISASTERS

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ABSTRACT:

Coping with crisis, such as social disasters, is one of the essential functions of the State. This article observes the case of Korea, which has taken rather progressive legislative actions to overcome those frequent disasters. When dealing with crises like no other and to defeat them, Korea typically utilizes legislative actions. Such legal measures usually lead ways to enacting a 'Special Act' or a 'Special Measures Act' to supplement current laws and their deficiencies, yet those legislative actions may also result in designing comprehensive response-management-system for disasters that are variable.

As such, legislation coping with crisis in Korea developed in two directions: enactment of a 'Special Act' or 'Special Measures Act' to supplement current laws and their limits, and designing comprehensive response-management-system for diversified disasters. Of course, a catch-all response-management-system cannot be perfect, thus strengthening the foundational system for disaster management must be carried out while separate legislation accompanies.

For disasters that are so varied in their nature and character, amendment of their related laws have been pursued to provide (a) investigation of the cause of disaster and damage relief, (b) regulation of the causes of disaster such as substances and products, (c) administrative orders to response and to manage disasters, and (d) compensation for losses caused by disaster response and management measures. The so-called "COVID-3-Laws," a comprehensive reorganization of related laws, that goes beyond the scope of separate laws and the agreement of the legislature for prompt and effective legislative action, is one of the exemplary cases showing successful and quality legislation both in its content and process.

I. Introduction

Like any other, quite a few societal disasters have occurred in Korea, and the need for legislative actions to overcome such crises were called upon. Surely concerns and conflicts arose while inducing legislative responses to disasters that no members of the society has ever

encountered before; however, preventative measures start to be discussed and designed into the law to preemptively avoid similar tragedies occur again along the way, while ex-post solutions to resolve and heal damages from the crisis are built into the system as well. Legislative actions like these are typically molded into the shape of the "Special Act" or "Special Measures Act" to supplement the limits of the current laws and systems, providing compensation for damages under the "Civil Act" or compensation for loss under Administrative Laws.

Although point-specific amendment and enactment of a law to respond each disaster could also be effective, the need for a comprehensive response management system for a diversified crisis has made its way to the enactment of the "Framework Act on the Management of Disasters and Safety (hereinafter referred to as "Disaster Safety Act")." This law provides an overall management system from the definition of disaster, safety management organizations such as the Central Safety Management Committee and their functions, safety management plans, to the overall management system including prevention, preparation, response, and recovery of disasters. This Disaster Safety Act stands out from other disaster response laws because it categorized disasters into three kinds: (a) natural disasters, (b) disasters from man-made accidents that result in certain threshold of casualty, and (c) damage from the malfunctioning governmental system and spread of infectious disease.[1] Disaster Safety Act also reinforced overall coordination function for safety management tasks scattered over different administrative agencies.

"Disaster Safety Act" established comprehensive disaster management & response system, yet disaster beyond the scope of this law increased, so did the frequency of their occurrences. The National Assembly and the government devised a prompt response plans through amendment of related laws while maintaining the fundamental disaster management system. Amendment of relevant laws is only effective in dealing with the already happened disaster in a retroactive way, but it still is a valid option to prevent similar disasters that may happen in the future. Amendment of the Disease related laws after the MERS outbreak in 2015 eventually ended another MERS outbreak in 2018 without major harm done, and this is the exemplary case of preventing similar disasters by making amendment of related laws. Under the premise that such legislative attempts to overcome disasters had a significant impact on the development of legislation for crisis response in Korean society, the following will look at major disasters that have occurred in Korean society over the past 10 years, and briefly review Korea's legislative development through disaster management.

II. Korea's Disaster Management System and Examples

1. Disaster Management System

Disaster management and safety management in response to disasters in Korea are stipulated in the Disaster Safety Act. It covers the comprehensive disaster response system and the organizations dealing with disaster. Such organizations are divided into a deliberation and consultation organization on policies and plans for disaster and safety management and a working group coordinating disaster management.

A. Deliberation and Consultation Organization on Policies and Plans for Disaster and Safety Management

The Prime Minister shall prepare guidelines for formulation of master plans for national disaster and safety management affairs (hereinafter referred to as "Master Plan for National Safety Management"), as prescribed by Presidential Decree, and notify the heads of related central administrative agencies thereof. Then the heads of relevant central administrative agencies shall prepare basic plans concerning their duties on disaster and safety management under their jurisdiction in accordance with guidelines for formulation prepared by the Prime Minister, and thereafter submit them to the Prime Minister. The Prime Minister shall prepare a Master Plan for National Safety Management by compiling the basic plans submitted by the heads of relevant central administrative agencies, finalize them following deliberation by the Central Committee, and notify the heads of relevant central administrative agencies thereof.[2]

[1] In the following text, the term 'disaster' is used as a term that includes various incidents, accidents, and damages resulting therefrom.

[2] Disaster Safety Act §22(1), (3), (4).

Central Safety Management Committee (hereinafter referred to as "Central Committee") is established under the Prime Minister' office to review key issues related to disaster and safety management, and the Prime Minister shall serve as the Chairperson of the Central Committee.[3] The Central Safety Management Committee also reviews important policy issues related to disaster and safety management, including Disaster and National Safety Management Basic Plan.[4] The 4th National Safety Management Basic Plan that the Central Safety Management Committee submitted in 2019 proposed (a) strengthening governmental responsibility, (b) consolidated management of disaster related works in different departments, (c) ensuring effective financial investment to guarantee full execution of the plan, (d) warranting business effectiveness and improving financial operation efficiency through evaluation of the disaster and safety management business, and (e) reflecting the demands of the international community, such as climate change and improvement of resilience, in line with resolving issues and restrictions in the previous plan.[5]

B. Working Group Coordinating Disaster Management

The Central Disaster and Safety Countermeasure Headquarter (hereinafter referred to as the "Central Countermeasure Headquarter") shall be established under the jurisdiction of the Ministry of the Interior and Safety in order to exercise general control over, to coordinate matters concerning the response and recovery from large-scale disasters, and to take necessary measures.[6] The Minister of the Interior and Safety shall serve as the head of the Central Countermeasure Headquarter.[7][8] The August 6, 2013 Amendment specified that each type of disaster may have respective disaster response management agency in the enforcement decree and the Central Countermeasure Headquarter could take command of the Central Accident Management Headquarter; however, under the December 30, 2014 amendment passed after the controversy over the disaster response control tower triggered by the Sewol Ferry Disaster, the Prime Minister, not the Minister of the Interior and Safety, shall exercise the authority of the Central Countermeasure Headquarter if it is a large-scale disaster.[9]

In order to exercise general control over, and to coordinate, matters concerning the management, etc. of a disaster, and to take necessary measures within the relevant competent districts, a Mayor/Do Governor shall establish a City/Do disaster and safety countermeasure headquarters (hereinafter referred to as "City/Do countermeasure headquarters"), and the head of a Si/Gun/Gu shall establish a Si/Gun/Gu disaster and safety countermeasure headquarters (hereinafter referred to as "Si/Gun/Gu countermeasure headquarters"), respectively.[10] A Mayor/Do Governor or the head of a Si/Gun/Gu shall serve as the head of a City/Do countermeasure headquarters or the head of a Si/Gun/Gu countermeasure headquarters (hereinafter referred to as "head of a local countermeasure headquarters")[11]

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[3] Disaster Safety Act §9(1), (2).

[4] 1. Matters concerning the important policies on disaster and safety management;
2. Matters concerning the Master Plan for National Safety Management under Article 22;
2-2. Matters concerning any medium-term project plan related to disaster and safety management projects, opinions on investment priority, and the budget requests provided for in Article 10-2;
3. Matters concerning the coordination of disaster and safety management affairs, such as plans, inspections and examinations, education and training, and evaluation, that are formulated and implemented by the heads of central administrative agencies;
3-2. Matters concerning the management of safety standards;
4. Matters concerning the declaration of disaster emergency under Article 36;
5. Matters concerning the declaration of special disaster areas under Article 60;
6. Important matters concerning cooperation among related agencies for disaster management where disasters or various other accidents occur or are likely to occur;
6-2. Matters concerning the management and operation of mandatory disaster insurance;
7. Matters concerning the promotion of projects for preventing disasters and accidents prescribed by Presidential Decree, which are implemented by the heads of central administrative agencies;
8. Other matters the Chairman brings to a meeting for deliberation.

[5] 4th National Safety Basic Plan, Central Safety Management Committee, 2019, p.11.

[6] Disaster Safety Act §14(1).

[7] Disaster Safety Act §14(3).

[8] Also See, Enforcement Decree of the Disaster Safety Act §13.

[9] Disaster Safety Act §14(4).

[10] Disaster Safety Act §16(1).

[11] Disaster Safety Act §16(2).

2. Response Examples for Disasters

A. Respond by Enactment of Separate Acts

Issues regarding livestock burial, compensation for the buried livestock, vaccination, livestock purchase by government, business stability support, and environmental management of burial site occurred due to the foot-and-mouth disease in 2010. The 2011 humidifier disinfectant case[12] spotlighted the nonexistence of the safety standard of the 'chemical compounds' under the "Food Sanitation Act" and the industrial products under the "Quality Management and the Industrial Product Safety Management Act" that are not 'quasi-drugs' under the "Pharmaceutical Affairs Act"; specifically, the lack of prior safety evaluation and management plan, absence of obligation to submit inhalation toxicity data of disinfectant ingredients, allowing changed use without any restrictions once hazard review is passed, and lack of product-level approval system are pointed as problematic.

Through these two incidents, the problem of ambiguity in the scope of disasters corresponding to infectious diseases and infectious diseases and the limitations of the preventive management system for chemical products used in daily living spaces were revealed. There was a growing awareness that the safety management system should be further strengthened to ensure the safety of chemical products, including chemicals, for the protection of people's lives and health, as well as the government's financial input following the slaughter of livestock.

Before the shock of the humidifier sterilizer incident was over, large and small incidents involving chemicals or chemical products, such as Gumi hydrofluoric acid gas leak,[13] pesticide egg,[14] harmful substance found in cosmetics and sanitary napkins,[15] CMIT/MIT toothpaste,[16] air conditioner/air purifier OIT antibacterial filter,[17] methanol washer fluid for vehicles,[18] and the radon bed incident that is called as the second humidifier disinfectant case, have occurred. Because gaps and loopholes in the management system for chemical substances and products were exposed, similar types of problems were discovered or pointed out after the manufacture, import, and distribution of the product. A research has also been published that the so-called

[12] This is a case that without proper understanding of how substances such as PHMG and PGH contained in a product called a humidifier disinfectant are exposed to the human body and of the degree of harm and risk to the human body due to exposure, 33 companies including OSK, Sunkyung Wotech, SK Chemical manufactured, imported, and distributed PHMG without permission, causing many people to suffer from acute respiratory failure and other unknown lung damage, even to death. Although the humidifier disinfectant itself does not pose any fatal risk to the human body as it is in liquid form, it is actually exposed to the consumer in vapor that the safety evaluation to determine how it effects to the health of the consumer in vapor was not conducted, and that was the biggest mistake. In particular, the fact that exposure to the harmful component of the humidifier disinfectant occurs in the winter and at night that fresh air rarely gets in, and that the humidifier disinfectant is typically used in a household where young children resides are not fully considered during the development and distribution stage. As of July 2018, the total number of people recognized as victims of humidifier disinfectant increased to 607. See "85 additional victims of humidifier disinfectant were recognized… 607 in total," Ministry of Environmental, Press Release, July 12, 2018.

[13] On September 27, 2012, hydrofluoric acid gas was leaked due to the mistake of a worker at Hub Global Co., Ltd. at the 4th Industrial Complex in Gumi, Gyeongsangbuk-do. It was a man-made disaster as the company, municipal government, and the supervising authority failed to respond early in the accident, ended up causing 5 deaths of workers and 18 injured people, while causing great damage to nearby crops and livestock.

[14] In 2017, eggs and egg products contaminated with fipronil were distributed in 15 countries, including Switzerland and Hong Kong, starting with the Netherlands. In August of the same year, eggs contaminated with fipronil were also found in eggs produced in Korea.

[15] In 2017, as a result of a study on harmful substances in sanitary napkins commissioned by the Women's Environment Solidarity for Women's Environment Research team by Professor Kim Man-gu of Kangwon National University, there was a controversy that carcinogenic substances were found in sanitary napkins of some companies. On September 28 of the same year, the Ministry of Food and Drug Safety announced that the compounds in sanitary napkins and panty liners were not harmful to the human body as a result of a full investigation of 666 products from 61 companies. The final conclusion was that the level of (VOCs) is harmless to human body.

[16] On September 27, 2016, the Ministry of Food and Drug Safety took recall measures for all 11 products confirmed to contain 'CMIT/MIT', a raw material that is not allowed in toothpaste, which is a quasi-drug.

[17] In June 2016, some media reported that the antibacterial filter used in car air conditioners and air purifiers contained OIT (2-Octyl-3(2H)-isothiazolone), a toxic substance. As a result of evaluating the risk of air purifiers and antibacterial filters containing OIT in vehicle air conditioners, it was confirmed that OIT was released during the use of the product. Ministry of Environment disclosed names of the products and a recall was taken.

[18] In response to the controversy that various harmful substances such as methyl alcohol and ammonia contained in automobile washer fluid threaten the health of drivers, the Ministry of Trade, Industry and Energy revised the Electrical Appliances and Household Appliances Safety Management Act on Aug. 2. 2017 and allowed ethyl alcohol as the main component of the washer fluid and also supplemented the Safety standard to apply different standards depending on water repellency. Along with the revision of the Act on Registration and Evaluation of Chemical Substances, the Ministry of Environment also announced Designation of Hazardous Products and Safety and Labeling Standards on August 22, 2017 and started to regulate the use of methanol in automotive washer fluid.

'Chemophobia',[19] in which the public feels anxious about household chemical products, may appear as a substantive psychological phenomenon according to these consecutive chemical-related incidents and accidents.

Societal disasters in various fields continued to occur. On April 16, 2014, the Sewol ferry sank in the sea near Jodo-myeon, Jindo-gun, Jeollanam-do, and on November 15, 2017, a geothermal power plant injected water into the ground in Pohang, Gyeongsangbuk-do, triggering an earthquake. The problem of fine dust, which became serious to the point that in spring and autumn people were afraid of outdoor activities due to the high concentration level, also became a mid- to long-term task for the political circles.

To cope with those disasters, separate Acts were enacted on top of the "Disaster Safety Act." Those include "Special Act on Remedy for Damage Caused by Humidifier Disinfectants," "Special Act on Investigating the Truth of the April 16 Sewol Ferry Disaster and Building a Safe Society," "Special Act on Remedy for Damage Caused by the April 16 Sewol Ferry Disaster and Assistance Therefor," "Special Act on the Establishment and Operation of the Sewol Ferry Hull Investigation Committee," "Special Act on Investigating the Truth of Social Disasters and Building a Safe Society," "Special Act for Investigation of the Pohang Earthquake and Relief for Damages," "Special Act on the Reduction and Management of Fine Dust."

B. Respond by Amendment of Disaster Safety Act

Aside from the enactment of the Special Acts, response through amendment of the "Disaster Safety Act" was made as well. In March of 2011, the National Assembly changed the term "infectious disease" under the "Disaster Safety Act" to specify "infectious disease under the Prevention and Management of Infectious Diseases Act and livestock contagious diseases under the Livestock Infectious Diseases Prevention Act" so that the response in the macro-level by the "Disaster Safety Act" comes parallel to the micro-level response by the separate Acts. Another round of amendment was made on August 6, 2013 on the "Disaster Safety Act" to organize the types of disaster into Natural Disasters and Societal Disasters and to embrace infectious disease and livestock contagious disease into the realm of the societal disasters.

The amended Disaster Safety Act categorized disasters caused by a typhoon, flood, downpour, strong wind, wind and waves, tidal wave, heavy snowfall, lightning, cold wave, lightning, drought, heat wave, earthquake, sandy dust, hypertrophied of algae, ebb and flow, volcanic activity, crash or collision of a natural space object, such as an asteroid and meteoroid, and other natural phenomena equivalent thereto as natural disaster, and damage, beyond the scale prescribed by Presidential Decree, caused by a fire, collapse, explosion, traffic accidents (including aviation accidents and marine accidents), chemical, biological, and radioactive accidents, environmental pollution incidents, etc.; damage caused by the paralyzation of the national core infrastructure; and damage caused by the spread, etc. of infectious diseases under the Infectious Disease Control and Prevention Act, contagious animal diseases under the Act on the Prevention of Contagious Animal Diseases, or damage by fine dust, etc. under the Special Act on the Reduction and Management of Fine Dust as societal damage.[20]

The MERS outbreak in 2015 was an opportunity to discover that there were many problems in Korea's infectious disease management system. It was because in the previous amendments, the authority of the Minister of the Interior and Safety, who is the head of the Central Disaster and Safety Countermeasures Headquarters under the Framework Act on Disaster and Safety Management, was divided so that the Minister of Foreign Affairs can exercise it in the case of an overseas disaster and the Chairman of the Nuclear Safety Committee in the case of a radioactive disaster, yet no specialized administrative agency response system was in place when it comes to the infectious diseases.

C. Respond by Amendment of Relevant Laws

The MERS outbreak also left legal tasks for prompt response to periodic infectious diseases

[19] Junseo Lee, New Statutory Framework for Household Chemical Products in Safety of Household Chemical Products and Biocidal Products Act, Beophaknonchong, Vol. 35 No.3 (2018) , p.173.

[20] Disaster Safety Act §3(1)(a)-(b).

such as SARS, H1N1, and MERS, as well as establishment of central and local infectious disease management systems and interconnected responses. After the end of the MERS outbreak, the National Assembly revised the Infectious Disease Prevention Act to strengthen the authority of the Minister of Health and Welfare to deal with disasters caused not only by the spread of infectious diseases but also by the influx of new infectious diseases from overseas.

The Corona 19 (COVID-19) virus was first discovered in Korea in January 2020, and in order to respond to the strong transmission power and the high fatality rate at the time, the National Assembly adopted the so-called 'COVID-3- Act' ("Infectious Disease Prevention Act", "Quarantine Act", and "Medical Act", hereinafter these three laws are referred to as the "COVID-3-Act"). After the COVID-19 situation was alleviated, a provision was newly established in the 'Act on the Protection and Support of Small Businesses' to relieve small business owners who have suffered losses due to preventive measures against infectious diseases such as restrictions and bans on gatherings.

III. Legislative Measures for Disaster Response and Damage Compensation

1. Investigation of the Cause of the Disaster and Remedy for the Harm

A. Establishment of the Committee for Investigation of the Cause of the Disaster and Remedy for the Harm

The legislative intent of "Special Act on Investigating the Truth of the April 16 Sewol Ferry Disaster and Building a Safe Society" is to find facts on the cause, recovery process, follow up measures, and the party liable, to support victims, to establish preventative and responsive plans for disaster, so that to build a safe society. In this Act, a special investigation committee for the 4·16 Sewol Ferry Tragedy was established to identify the cause of the disaster, investigate the appropriateness of the government's response, and prepare measures to resolve the cause. "Special Act on Remedy for Damage caused by the April 16 Sewol Ferry Disaster and Assistance Therefor" was enacted separately to commemorate the victims of the Sewol Ferry sinking disaster, and promptly provide relief and support for those who suffered physical, mental, and economic damage with mental health care, so that affected area may recover as a community.

A special investigation committee was operated to find out the truth about the Sewol ferry disaster, but it was not easy to identify the cause or responsible person, and as the period of activity of the special investigation committee was temporarily set by law, the facts of the accident were not fully identified. Following such criticism, the National Assembly enacted "Special Act on Investigating the Truth of Social Disasters and Building a Safe Society" on December 12, 2017. Under the law, The Special Investigation Commission on Humidifier Disinfectants and April 16 Sewol Ferry Disasters (hereinafter referred to as the "Commission") was established,[21] the term of the Commission was extended to June 10, 202, and the Commission was obliged to report to the competent standing committee every 6 months.[22] The law strengthened the authority of the Commission by allowing the Commission to request the chief prosecutor of the competent district prosecutors' office to request a warrant to submit materials or articles necessary to ascertain the truth of the Sewol Ferry Disaster, if any individual or institution holding such material or articles refuses to submit such materials or articles without justifiable grounds despite the Commission's request for submission of such data.[23] Also the law stipulates that the statute of limitation for any criminal acts related to Sewol Ferry Disaster be stopped during the term of activities of the Commission, thereby eliminating any possibilities of evasion of prosecution.[24]

"The Special Act for Investigation of the Pohang Earthquake and Relief for Damages" aims to economic revitalization and community recovery through finding of the truth of accident and through damage relief for those affected by the earthquake. Like the 4/16 Sewol Ferry Disaster, the Pohang Earthquake Investigation Committee was established under the Prime Minister's Office to investigate the cause and liability for the Pohang Earthquake.

[21] Special Act on Investigating the Truth of Social Disasters and Building a Safe Society §3.

[22] Special Act on Investigating the Truth of Social Disasters and Building a Safe Society §7.

[23] Special Act on Investigating the Truth of Social Disasters and Building a Safe Society §27-2.

[24] Special Act on Investigating the Truth of Social Disasters and Building a Safe Society §30-2.

The Pohang Earthquake Investigation Committee identified the cause of the disaster and the liable party for the incident, while producing amendment of relevant laws and regulation and changes of related policies and procedures.[25] Members of the Committee was appointed by the Prime Minister from among those who has abundant expertise and experience for conducting the investigation of the Pohang earthquake.[26] Also, the Committee was to complete its activities within one year from the date of completion of its composition, so that the delay on investigation and the following relief may not be postponed further.[27]

Apart from the Investigation Committee, a Deliberation Committee for Remedy for Damages of Pohang Earthquake was established under the Prime Minister's office[28] for deliberation and resolution of the victim determination, the implementation and check-up of remedies for damage of, and subsidizing measures for, the victims, investigation of damages to remedy and subsidize the damage, the subsidies for damage remedy, and the determination of the persons subject to subsidization and the scope of subsidization.[29]

B. Estimating a Causal Relationship for Damages

Special Act on Remedy for Damage Caused by Humidifier Disinfectant also established the Committee on Remedying Damage Caused by Humidifier Disinfectant[30] so that the Committee may determine the level of harm and whether the compensation may be paid to a certain victim or their families.[31]

What stands out in this law is that it has the 'presumption of causation' clause that where the victim has been exposed to humidifier disinfectants, a disease has occurred (or the existing disease has worsened after exposure to humidifier disinfectants, and the epidemiological correlation between exposure to humidifier disinfectants and the disease was confirmed, if not the supplier proves that the damage was caused by other reasons, the damage to life or health shall be presumed to have been caused by a humidifier disinfectant.[32]

2. Regulating the Cause of the Disaster and the Support for Recovery

A. Pre-approval of Chemical Substance and Follow-up Management

The Consumer Chemical Products and Biocides Safety Control Act ("Chemical Products Safety Act") states in its purpose for enactment that due to the humidifier disinfectant accident, which caused many casualties, public anxiety such as chemical phobias about products containing chemical substances in general is aggravated and awareness is increasing. It also pointed out that the need for management of biocides such as disinfectants and insecticides with functions such as removing or detoxifying harmful organisms has increased.[33] In order to reorganize the system for risk assessment and management of products of concern under the previous "Act on Registration and Evaluation of Chemical Substances, etc.," a preventive management system for biocides (referring to biocidal substances, biocidal products and biocidal products) was established by introducing the approval system. Risk management, usage management, and confirmation of compliance with safety standards and labeling standards for chemical substances and products containing them for the prevention of damage for health and environment was an example. Entry regulation at the manufacturing and import stage of products through the approval system was set, and the manufacturers and importers are required to provide information on the substance and the product in the distribution stage. Customer rights to request for information on products are expanded.

[25] The Special Act for Investigation of the Pohang Earthquake and Relief for Damages §5.

[26] The Special Act for Investigation of the Pohang Earthquake and Relief for Damages §6(2).

[27] The Special Act for Investigation of the Pohang Earthquake and Relief for Damages §6(3).

[28] The Special Act for Investigation of the Pohang Earthquake and Relief for Damages §13(1).

[29] The Special Act for Investigation of the Pohang Earthquake and Relief for Damages §13(2).

[30] Special Act on Remedy for Damage Caused by Humidifier Disinfectant §7.

[31] Special Act on Remedy for Damage Caused by Humidifier Disinfectant §8.

[32] Special Act on Remedy for Damage Caused by Humidifier Disinfectant §5.

[33] Korean Law Information Center, http://law.go.kr/lsInfoP.do?lsiSeq=202779&lsId=&efYd=20190101&chrClsCd=010202&urlMode=lsEfInfoR&viewCls=lsRvsDocInfoR#0000 (last visited August 29, 2022).

It is impressive that architecting the system in law did not stop there – the efficacy of the preventative regulation was warranted by preparing measures to prevent any chaos due to the labeling/advertising regulation, by obligating reporting for new hazards, and also by allowing recall orders and fines, thus rules in every step of the distribution has been tightened.[34]

B. Support for Fine Dust Reduction

"Special Act on the Reduction and Management of Fine Dust" designated fine dust concentrated management area to regulate fine dust (PM10, PM 2.5) and its derivative substances such as nitrogen oxide and sulfur oxide, so that regular measurement of air pollution levels, frequent operation of sprinkler trucks and vacuum cleaner trucks, replacement of school buses with environment-friendly buses, installation of air purifying systems at schools, and planting trees and creation of parks be done.[35] The law specifically demand measures for the prevention of vulnerable population including children and elderly.[36] Also, the law allows where the predicted concentration of fine dust reaches the level prescribed by Ordinance of the Ministry of Environment during the period determined by the Minister of Environment, a Mayor/Do Governor may restrict operation of motor vehicles except for business use, change of business hours and adjustment to operating rates of the air pollutant-emitting facilities defined by the Clean Air Conservation Act.[37]

3. Measures for Disaster Response and Management

A. Administrative Orders for Prevention and Management of Infectious Disease

Even after the amendment of the Infectious Disease Prevention Act and the reorganization of the quarantine system after the MERS outbreak, needs for guaranteeing efficacy of regulations and the supply of quasi-drugs such as facial masks due to the explosive increase of the infected patients by the super-spreader of COVID-19, and because of the reluctance in examination and non-compliance of self-quarantine by the patients. Such urgent needs lead to the speedy amendment of the relevant laws.[38] During the very next month from the date when the first COVID-19 patient was confirmed, on Feb 26, 2020, the COVID-3-Laws are passed by unanimous vote in the National Congress.

Amended Quarantine Act allows the Minister of Health and Welfare to request the Minister of Justice to prohibit or suspend the entry and departure of a quarantinable infectious disease[39] patient and any suspected patient, people exposed to a risk factor of a quarantinable infectious disease, or someone coming from or via a quarantine inspection required area, if such person is likely to pose a substantial risk to public health.[40]

The law also mandates certain medical personnel to report to the head of the local public medical institution when a person suspected of infection refuses to get tested.[41] The Head of the Center for Disease Control and Prevention, when the chief of the public medical institution reports such refusal and also when the person is suspected[42] of infection for the class 1 infectious disease,[43] may require such person to get tested.[44]

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[34] Junseo Lee, New Statutory Framework for Household Chemical Products in Safety of Household Chemical Products and Biocidal Products Act, Beophaknonchong, Vol. 35 No.3 (2018) , p.195.

[35] Special Act on the Reduction and Management of Fine Dust §22.

[36] Special Act on the Reduction and Management of Fine Dust §23(1).

[37] Special Act on the Reduction and Management of Fine Dust §18.

[38] Junseo Lee, The Success and Challenges of Response to COVID-19 in South Korea, HanyangBeophak Vol 32 No.1 (2021) , p.80.

[39] "Quarantinable disease" was defined as "infectious diseases that the Minister of Health and Welfare recognizes that emergency quarantine measures are needed because there is a risk of spread to Korea from foreign countries or vice versa under the Quarantine Act Section 2(1). Besides SARS (2003) and MERS (2015), COVID-19, as the novel infection presenting acute respiratory symptoms, fits into the definition.

[40] Quarantine Act §24.

[41] Infectious Disease Prevention and Control Act §11(1)-4.

[42] The term "probable patient of an infectious disease" was added to the law to cover anyone who had contact or suspected to have had contacts with infectious disease patients, anyone coming from or via the main quarantine management area under the "Quarantine Act," or anyone who is suspected of infection for exposure to the infectious pathogen. Infectious Disease Prevention and Control Act §2(15).

[43] Infectious diseases are classified into four groups depending on the risks of the bioterrorism, high fatality, mass outbreak, need for negative pressure facilities, contagiousness, and the need for quarantine. SARS, MERS, and the novel infectious symptoms are in class 1. A first-class infection poses greater risk for bioterrorism, high fatality, and mass outbreak, thus required to report as soon as possible, and it also requires negative pressure facilities. Infectious Disease Prevention and Control Act §2(2).

[44] Infectious Disease Prevention and Control Act §13.

As a measure to prevent infectious diseases, the head of the Korea Centers for Disease Control and Prevention, the Mayor/Do Governor, or the head of a Si/Gun/Gu shall issue quarantine guidelines such as creating a list of visitors and wearing a mask for managers, operators, and users of places or facilities at risk of spreading infectious diseases. Users of means of transport that are concerned about the transmission of infectious diseases, such as buses, trains, ships, and airplanes, can be ordered to comply with quarantine guidelines, such as wearing masks.[45]

Where the spread of an infectious disease harmful to citizens' health triggers the issuance of a crisis alert of the caution level or higher prescribed in Article 38 (2) of the Framework Act on the Management of Disasters and Safety, the Commissioner of the Korea Disease Control and Prevention Agency, a Mayor/Do Governor, and the head of a Si/Gun/Gu shall promptly disclose information that citizens need to know to prevent the infectious disease, such as the movement paths, transportation means, medical treatment institutions, and contacts of patients of the infectious disease, the current status of the outbreak and testing of the disease infectious by region and by age group, using such means as posting the information on information and communications networks and distributing a press release.[46] [47] Also, if necessary to prevent infectious diseases and block the spread of infection, the Commissioner of the Korea Disease Control and Prevention Agency must provide information from the National Health Insurance Service, the Health Insurance Review and Assessment Service, and others to health and medical services institutions.[48]

When it comes to the level of actual occurrence of the first-class infectious disease, not a mere suspicion, even compulsory disposition is possible under the amendment. Where any Class 1 infectious disease breaks out, the Commissioner of the Korea Disease Control and Prevention Agency, a Mayor/Do Governor, or the head of a Si/Gun/Gu may have the relevant public official take measures such as quarantine at home, restriction on transportation, confirmation of symptoms by wireless communications, collection of location information, and infection inspection for persons suspected of contracting the infectious disease.[49] Anyone who fails to receive inpatient treatment or refuses hospitalization and/or quarantine is punishable by imprisonment with labor for not more than one year or by a fine not exceeding 10 million won.[50]

The newly amended "Medical Service Act" authorizes the Commissioner of the Korea Disease Control and Prevention Agency to establish and operate a medical care-related infection[51] surveillance system for the medical and scientific surveillance of outbreaks, causes, etc. of medical-care related infections.[52] The law reinforced the infection supervising system by having head of a medical institution, medical personnel, a person working for a medical institution, or even a patient, if comes to know the outbreak of a medical care-related infection, to report such fact to the Commissioner of the Korea Disease Control and Prevention Agency.[53]

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[45] Infectious Disease Prevention and Control Act §49(1)2-2, 2-3.

[46] Infectious Disease Prevention and Control Act §34-2(1).

[47] This provision was added after the MERS outbreak in 2015, because the Commissioner of the Disease Control Agency was criticized for exacerbating the in-hospital infections by not revealing the hospital where the infection broke. The method of disclosure was specified as using the information and communication network or the press release in this amendment. Previously, only when facts are different or different opinion may be raised in the released public record, someone could appeal to the Minister of Health and Welfare. Such restriction has been changed in a way to restriction exactly what kind of information must not be revealed – gender, age, and other information irrelevant to prevention of infectious disease. Still, conflicts arose between the Korea Disease Control and Prevention Agency and local municipalities regarding disclosure of footage info of confirmed patients.

[48] Infectious Disease Prevention and Control Act §76-2(4).

[49] Infectious Disease Prevention and Control Act §42(2).

[50] Infectious Disease Prevention and Control Act §79-3.

[51] "Infections that develop in patients, guardians of patients, medical personnel, persons working for medical institutions, etc. within medical institutions" is defined as "medical care-related infections" in Medical Service Act §4(1). Medical Services Act required person who establishes a medical institution to comply with matters set by the Ordinance of the Ministry of Health and Welfare to prevent medical care-related infections by medical institutions (§36, 13) and take necessary measures for preventing hospital infection (§47). Terms used differently under "Infectious Disease Prevention Act" and "Medical Services Act" got harmonized into "medical care-related infections," thereby the basis for operation standard for medical institution for prevention of medical care-related infections and the basis for the supervising system have been made. See Junseo Lee, A Study on Improvement of Infectious Disease Control and Prevention Act and System, pp 21-22, Korea Legislation Research Institute, 2020.

[52] Medical Services Act §47(4).

[53] Medical Services Act §47(8).

Under the new "Medical Service Act," where the founder of a medical institution reports the closure or suspension of the medical institution, the founder shall confirm the quantities and lists of the medical records to the head of the competent public health clinic.[54] The Minister of Health and Welfare may establish and operate a system to assist the heads of the competent public health clinics keeping the medical records of medical institutions closing or suspending business so that the founders of medical institutions safely and effectively preserve and manage the medical records.[55]

B. Management of Medical Products to Respond to the Public Health Crisis

National Assembly enacted the "Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis," to set up rules to speed up medical products development to overcome public health crisis and also to create supply base for emergency.

Under the law, the Minister of Food and Drug Safety designates medical products as preliminary emergency response medical products,[56] preliminary crisis response medical products take precedence over the examination of other medical products for manufacturing and selling product license, import product license, manufacturing license, import license, manufacturing certification or import certification (hereinafter "itemized license"),[57] and for a preliminary crisis response drug that has completed clinical trials, itemized license may be granted on condition that data from clinical trials to confirm the treatment of the drug be submitted within a separately stipulated period.[58] The Minister of Food and Drug Safety may support the preparation of clinical trial plans, recruitment of subjects, training of workers, implementation of international joint trials when a person who has a medical product designated as a preliminary emergency response medical product intends to conduct a clinical or non-clinical trial on the medical product.[59]

When the Minister of Food and Drug Safety deems it necessary to properly respond to a public health crisis, or when there is a request from the head of a related central administrative agency, emergency use approval may be granted,[60] or the Minister may even order the producer to produce or import designated crisis response medical products (emergency production/import order).[61]

4. Compensation for Loss due to Disaster Response and Management Measures

Compensation for losses according to the existing Infectious Disease Prevention Act is stipulated to compensate for losses incurred by medical institutions while treating patients with infectious diseases, designated and operated as an infectious disease management institution, or operating quarantine facilities for suspected infectious diseases,[62] thus there is no way for non-medical institutions to receive compensation for losses due to the prevention and management of infectious diseases.

The head of the Korea Disease Control and Prevention Agency, the Mayor/Do Governor, or the head of a Si/Gun/Gu has taken measures to restrict or prohibit performances, assemblies, ceremonies, or other gatherings of various people to prevent infectious diseases, and such restrictions in business evidently lead to the business losses of the SMEs and small business owners to the point the loss could be threatening their lives, Ex post legislation has been prepared to compensate SMEs and small business owners for their operating losses.

The Constitution of the Republic of Korea provides that Expropriation, use or restriction of private property from public necessity and compensation therefor shall be paid just compensation.[63]

[54] Medical Services Act §40-2(1).

[55] Medical Services Act §40-3(1).

[56] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §6(2).

[57] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §7(1).

[58] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §11(1).

[59] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §10(1).

[60] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §11(1).

[61] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §18(1).

[62] Infectious Disease Control and Prevention Act §70(1).

[63] Constitution of the Republic of Korea, Art. 23(3).

A legislative basis was needed to compensate the operating losses of SMEs and small business owners, and the adequacy of compensation for losses according to the law was reviewed. After reviewing whether the collective restriction or prohibition measures for the prevention and control of infectious diseases are violations of property rights due to administrative actions in response to public needs, legitimate violations rather than restrictions on the essential exercise of property rights, and also reviewing whether special sacrifices exist for SMEs or small business owners, the National Assembly added Section 12-2 to the "Act on the Protection of and Support for Micro Enterprises." Such provision formed the legal basis to compensate losses occurred due to the administrative measures under the "Infectious Disease Control and Prevention Act." This provision requires the Minister of SMEs and Starups to compensate small business owners for the business loss due to the restrictions on the use of business places and operation hours, measures taken pursuant to section 49(2) of the "Infectious Disease Control and Prevention Act."[64]

The government decided to pay customized loss compensation in proportion to the amount of loss to small businesses that suffered serious business losses due to the compliance to the government's gathering and restriction bans. Of course, if the applicant for the compensation violated measures under Section 49(1)2 of the "Infectious Disease Control and Prevention Act," such compensation may be reduced or denied,[65] and the compensation may be confiscated in part or whole if the applicant who received such compensation violate the measures under the same law.[66] Compensation for the loss for the third quarter of 2031 is set to be made to 800,000 small business owners with 2.4 trillion Korean won, and for the fourth quarter of 2021 and throughout 2022, 2.2 trillion Korean won is appropriated.

IV. Conclusion

Korea's legislation for crisis response has been divided into two forms: the 'Special Act' or 'Special Measures Act' to supplement the limitations of existing laws and systems, and the Basic Act to establish an integrated response and management system. Since an integrated and comprehensive disaster management response to a diversified crisis cannot be perfect, for disasters that cannot be managed by the Basic Act, the basic system for disaster management has to be strengthened and the relevant individual laws have to be revised in parallel.

Since it is not easy to categorize disasters, laws to solve integrated disaster response and management have been developed focusing on the disaster response and management system and organization. Since then, the concept and scope of disasters were categorized and revised from time to time in order to materialize the situation to which such a disaster response and management system can be applied. Accordingly, the "Disaster Safety Act" is composed of matters concerning the composition and functions of a deliberation and consultation body on the scope of disasters, policies and plans related to disaster and safety management, and a working group for generalizing and coordinating disaster management.

For various disasters, in consideration of the nature and characteristics of the disaster, ① fact-finding investigation of the cause of the disaster and remedies for damage, ② regulation of the cause of disasters such as materials and products, ③ administrative orders for response and management of disasters, ④ disaster response and management measures Appropriate amendments to laws and regulations such as compensation for losses incurred in accordance with the Act have been promoted. The integrated reorganization of related laws that go beyond the scope of separate laws, such as the COVID-3-Act, and the agreement of the legislature for quick and effective legislative action can be seen as development examples in terms of the content and procedure of legislation.

The legislative and administrative actions to respond to disasters inevitably have room for limiting the basic rights of the people, and to implement the administrative actions that have

[64] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §12-2(1).

[65] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §12-2(4).

[66] Special Act on the Promotion of Development of and Emergency Supply of Medical Products Responding to Public Health Crisis §5.

room for limiting the basic rights, a clear legislative basis through public discussion and opinion gathering is needed; yet, at the time of a disaster, there is not enough time to reach a social consensus on the legislative basis for the action. In spite of the importance of prompt and clear legislation, legislators should carefully examine the legislative interest in the legislative purpose, the appropriateness of the method to achieve the objective, the minimum damage, and the balance between the public interest to be protected by the legislation and the fundamental rights infringed. This is because administrative actions to protect a large number of citizens should not be abused as a means to easily restrict the freedom of the body, privacy and freedom of private life, and freedom of residence and movement.[67]

REFERENCES

1. Constitution of the Republic of Korea.
2. Disaster Safety Act of the Republic of Korea.
3. Central Safety Management Committee. 4th National Safety Basic Plan, 2019.
4. Also See, Enforcement Decree of the Disaster Safety Act of the Republic of Korea.
5. Ministry of Environmental, Press Release, July 12, 2018.
6. Electrical Appliances and Household Appliances Safety Management Act of the Republic of Korea.
7. Act on Registration and Evaluation of Chemical Substances of the Republic of Korea.
8. Designation of Hazardous Products and Safety and Labeling Standards.
9. Junseo Lee, New Statutory Framework for Household Chemical Products in Safety of Household Chemical Products and Biocidal Products Act, Beophaknonchong, Vol. 35 No.3, 2018.
10. Special Act on Investigating the Truth of Social Disasters and Building a Safe Society of the Republic of Korea.
11. The Special Act for Investigation of the Pohang Earthquake and Relief for Damages of the Republic of Korea.
12. Special Act on Remedy for Damage Caused by Humidifier Disinfectant of the Republic of Korea.
13. Junseo Lee, The Success and Challenges of Response to COVID-19 in South Korea, HanyangBeophak Vol 32 No.1, 2021.
14. Quarantine Act of the Republic of Korea.
15. Infectious Disease Prevention and Control Act of the Republic of Korea.
16. Junseo Lee, A Study on Improvement of Infectious Disease Control and Prevention Act and System, Korea Legislation Research Institute, 2020.
17. Medical Services Act of the Republic of Korea.
18. Infectious Disease Control and Prevention Act of the Republic of Korea.

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[67] Junseo Lee, The Success and Challenges of Response to COVID-19 in South Korea, HanyangBeophak Vol 32 No.1 (2021) , p.96.

ACTIO PAULIANA IN EU COURT PRACTICE

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ABSTRACT:

An attempt was made to compare the decision of the EU Court in the case/dispute with Actio Pauliana, methods of property protection to ensure the asset of obligations of the European Union member states to the loan contract, and its legal environment.

KEYWORDS:

European law, Civil law, Actio Pauliana, fraudulent conveyance, fraudulent transfer

I. Introduction

The Court of Justice of the European Union (hereinafter referred to as the CJEU) interprets whether EU law applies equally to all EU countries and resolves the legal disputes between national governments and EU organizations.

Besides, in certain circumstances, individuals, companies, and organizations may apply to the CJEU if they believe that the EU has violated their rights in any way.

There were around ten court decisions related to Actio Pauliana claims in the database of the Court of Justice of the European Union. Most of the court decisions refused to accept the claim and decided that the claim does not fall under international jurisdiction.

In European law, there is no direct regulation on fraudulent transfers or Actio Pauliana related disputes, and is mainly used only to establish jurisdiction.

The European law does not directly codify the legal actions to be taken in the event of a false or fraudulent transfer of property to others by a debtor to cause damage to a creditor but it is settled by the court precedent given the laws of the member states. I think that the court decisions for this civil case or dispute, which protein protect the interest of the creditor, remain a controversial topic among European lawyers.

II. What is "Actio Pauliana"?

What is "Actio Pauliana"? Actio Pauliana is translated into the English language as "A fraudulent conveyance" or "fraudulent transfer". Otherwise, "A **fraudulent conveyance**, or **fraudulent transfer**, is an attempt to avoid debt by transferring money to another person or company. It is a civil cause of action. It arises in debtor/creditor relations, particularly concerning to insolvent debtors. The cause of action is typically brought by creditors or by bankruptcy trustees"[1].

"Actio Pauliana" is a Roman legal term. It was named by Roman layer Julius Paulus in the Year 250 AD. He was the lawyer who first developed the theory of claim in the Roman, which is made by an insolvent borrower against a third party who transferred its property s to cover up.

"Actio Pauliana" is a claim made by a third party in order for the property to be transferred to a creditor.

In other words, it is a claim which is made by the creditor to repeal the transfer of the loan guarantor's property s to other third parties. Another third party a mechanism to protect the property to be transferred to the creditor`s possession from loss.

In case, if the circumstances with the following common features were identified by the borrower or third party, the creditor may lodge a claim to the court by using the Actio Pauliana:

- Action of the borrower to cause damage was intentional /willing to cause damage to the creditor/;
- Caused damage to the creditor;
- Fraudulently transferred property to others /any method could have been used to transfer the property. For instance, forgery, pretending to have made a contract/;
- Third party, The thirdhand the property through transfer, had known that the borrower`s intention or fraudulent transfer of debts;
- The third party hired the property through transfer, and earned a profit (it may not be required);
- Deliberately conspired and disposed of the property s in order to favor a creditor;
- The third party in the property through transfer may be a maybe dual or a legal entity. In this case, the individual shall be a relative or employee and partner of the property owner. The legal entity may be another legal entity of the same level or a legal entity under its control or its affiliate[2].

III. Cases of Actio Pauliana in court

The Court of Justice of the European Union[3] (hereinafter referred to as the CJEU) interprets

[1] https://translation.babylon-software.com/english/actio+pauliana/.

[2] J.Otgongerel, "Does Mongolian Civil Law have the Regulation of the Actio Pauliana, is there a Regulation of the Actio Pauliana?", Mongolian Journal of law, №5(80), 2020, p.96-97.

[3] The Court of Justice is composed of 27 Judges and 11 Advocates General. The Judges and Advocates General are appointed by common accord of the governments of the Member States after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned. They are appointed for a term of office of six years, which is renewable. They are chosen from among individuals whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognized competence.
The Judges of the Court of Justice elect from amongst themselves a President and a Vice-President for a renewable term of three years. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber. The Vice-President assists the President in the exercise of his duties and takes his place when necessary.
The Advocates General assist the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.
The Registrar is the institution's secretary general and manages its departments under the authority of the President of the Court.
The Court may sit as a full court, in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.
The Court sits as a full court in the particular cases prescribed by the Statute of the Court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations) and where the Court considers that a case is of exceptional importance.
It sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.
Other cases are heard by Chambers of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year. /from the CJEU's website/

whether EU law applies equally to all EU countries and resolves the legal disputes between national governments and EU organizations.

Besides, in certain circumstances, individuals, companies, and organizations may apply to the CJEU if they believe that the EU has violated their rights in any way. Pauliana claim related disputes settled by the Court of Justice of the European Union[4] were compared below with examples:

Dispute 1: C - 115/88

The Reicherts, who live in Germany, are the owners of real estate in the commune of Antibes in the French city of Alto-Maritimes, and donated the real estate by naming their son Mario Reichert and others as the legal owners. The Dresdner Bank, a creditor of the Reicherts, has filed a claim against the donation.

The parents demised their property to their son and the dispute was settled by the Court of Justice of the European Union in 1990 when the 1968 Brussels Convention was not amended.

Jurisdiction was denied by Reicherts, however the court held that it had jurisdiction on the grounds that the objective of the case is an immovable property that is situated on the territory of Contracting states. Therefore, the court has exclusive jurisdiction, regardless of the nationality of the parties. Court held that article 16 should not be interpreted widely. Therefore, jurisdiction is best determined by the location of the property (Locus rei sitae). However, article 16(1) means the hat contracting state where the property is situated has the jurisdiction but only in measures that come the under Brussels convention and regarding actions that seek to determine the extent, content, ownership or possession of named property and the rights and obligations of the right holders. Consequently, such an action, brought by a creditor against a contract of sale of immovable property entered into, or a donation thereof made, by his debtor, does not come within the scope of Article 16(1). Creditors request regarding Actio Pauliana does not come under the scope of Article 16(1).

Dispute 2: C - 339/07

Frick.TSG, a German-registered company, transferred 50,000 euros to Deko.M, a Belgian-based company. Two and a half months later, a bankruptcy or insolvency case was opened in Germany at the request of Frick.TSG. Since the case of the avoidance of obligations was settled under the Insolvency Law of Germany, the bailiff filed a claim at the German court seeking a refund for the payment to Deko.M from Frick.TSG.

Only the bailiffs were authorized to take this action and it was the only action that could be taken. The German court ruled that the claim was stateless and dismissed the case. Eventually, the case was transferred to the European Court of Justice (ECJ) by the Federal Court of Justice of Germany (Bundesgerichtschof). The Federal Court of Justice of Germany transferred the case to the Court of Justice of the European Union to get settled the following issues:

1. Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

2. If the first question is to be answered in the negative: Does action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?

The Court of Justice of the European Union got the case settled by the Federal Court of Justice of Germany, which filed the bankruptcy case and postponed the transfer. In other words, the CJEU confirmed that Article 3(1) of the European Insolvency Regulation must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings

[4] The Court of Justice of the European Union's website/data base: https://curia.europa.eu/jcms/jcms/j_6/en/.

have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State. This means that a third party has to accept the fact that the courts of the center of the main interest of the debtor Member State are competent to hear and determine recovery actions[5].

Dispute 3: C - 337/17

Feniks, a Polish investor, had signed a construction contract with the Coliseum Company. However, due to the insolvency of the Coliseum, Feniks was obliged to pay the debt of the Coliseum to subcontractors under the applicable laws of Poland. As a result, the Coliseum was indebted to Feniks for the amount paid to subcontractors. During this process, the Coliseum sold its real estate in Spain to Azteca, a company in Spain. Actio Pauliana claim was filed at a Polish court against the Spanish company to repeal the sale of the real estate by opposing this transfer as it adversely affected Feniks's chance to take back the payment.

The court of Poland transferred the case to the Court of Justice of the European Union to clarify whether it falls under international jurisdiction.

The Court of Justice of the European Union reviewed the dispute and accepted Feniks's claim, stating that "The case applies to the Regulation 1215/2012 (EU) adopted on December 12, 2012, on the court decision on jurisdiction, civil, and commercial issues. Therefore, the international jurisdiction set forth in Article 7 (1) (a) of this regulation, jurisdiction and court decisions may be enforced and approved"[6].

The decision of the CJEU contradicts the opinion of the Advocates General[7] of the Court and divided[8] the lawyers. For example, researcher Tobias Lutsi[9] critized that the Court of Justice of the European Union settled the case of Feniks as "Forcing a square peg into a round hole". The decision was made against the proposal of the Advocate General. This decision was different from similar cases that have been settled before." has been criticized.

Researcher Michiel Poesen concluded the court decision "The notion of 'matters relating to a contract' within the meaning of Article 7 (1) of the Brussels I Regulation Recast underwent an evolution in the recent case law of the ECJ the decision in Feniks confirming and advancing its broadening. It is worth noting that the ramifications of this evolution are not isolated to the topic of jurisdiction under the Brussels I Regulation Recast. … As for now, it appears that there are good arguments to assume that third parties who are even remotely involved in the contractual dealings of others are at risk of being sued in the contract.[10]".

Dispute 4: C - 722/17

Mr. Casamassima and Mrs. Isabel C., citizens of Rome, lived together until the spring of 2014. In 2010, they bought a house in Villach, Austria. Although Mr. Casamassima paid for the house, Mrs. Isabel C. was registered as the sole owner at the registration office. With the help of Casamassima, Isabel C. signed a contract with Reitbauer and others (hereinafter referred to as " Reitbauer") and started renovating the house. Payment to the Reitbauers was suspended because the cost of the renovation far exceeded the budget. Since 2013, the Reitbauers have sued Isabel C.int the Austrian court. In 2014, the decision of the primary court settled the case in Reitbauer's

[5] Tuula Linna, Actio Pauliana – "Actio Europensis"? Some Cross-Border Insolvency Issues, Journal of Private International Law, p.78, 2014, https://doi.org/10.5235/17441048.10.1.69.

[6] I would like to emphasize that the Brussels Convention was not amended when the case of Case C - 115/88 and the case of the Richards which is similar to this case.

[7] The Advocates General assists the Court. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.

[8] See Tobias Lutsi, https://conflictoflaws.net/2018/forcing-a-square-peg-into-a-round-hole-the-actio-pauliana-and-the-brussels-ia-regulation/.

[9] Ibid.

[10] Michiel Poesen, "Once More unto the Breach: the Actio Pauliana is a Matter Relating to a Contract in EU Private International Law", 15 European Review of Contract Law 1 (2019), pp.58-65, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470216.

favor. But Isabel C. appealed against the decision.

Meanwhile, Casamassima sued Isabel C. on May 7, 201,4 at the court of Rome to enforce payment of the house which he bought in Villach. Isabel C. accepted the claim and agreed to apply for a mortgage on his house in Villach for ensuring the payment for the claim. Accordingly, the debt and collateral certificates were notarized and the settlement was confirmed on June 13, 2014, in Vienna. On June 18, a mortgage was signed for the house in Villach.

From that day on, the court decision for the Reitbauer could not be enforced. The Reitbauer pledged Isabel C.'s house under the law enforcement decision but now it was ranked behind Casamassima's mortgage agreement.

In February 2016, Mr. Casamassima filed a lawsuit in the district court of Villach, Austria, demanding that the house in Villach be put up for auction and getting an ordinance issued related to Isabel C. Then the house was sold at an auction in the autumn of 2016. According to the order in which the land was registered, the revenue from the sale of the collateral was decided to be transferred in full to Casamassima.

To prevent this, the Reitbauer filed a complaint against Mr. Casamassima and Mrs. Isabel C. in June 2016 at the court in Klagenfurt, Austria. However, Casamassima and Isabel C. were not residents of Austria, so the complaint was rejected. The Reitbauer believed that Isabel C. and Casamassima had forged the house documents and it was a form of Actio Pauliana. The Reitbauer is, therefore, requested the Court of Justice of the European Union to review whether the court decision is acceptable and followable in connection with the regulations No (EX) 24 (1) and (5) issued by the European Parliament and Council on December 12, 2012.

The Court of Justice of the European Union reviewed the dispute and ascribed that the actions of Mrs. Isabel C. and Mr. Casamassima were not related to the evasion of payment and that the claim was inadmissible and does not apply to the court of the member state where the real estate is located.

Dispute 5: C - **394/18**

The Costruzioni Ing. G. Iandolo, a construction company in Italy, was reorganized, and a new company, IGI, was incorporated from it and a part of the assets was transferred to it. However, some creditors objected, claiming that they were "losing a significant portion of their assets" and filed a claim to the district court of Avellino, Italy, to delay the transfer of assets of the two companies. The district court accepted the creditor's claim and made a decision to delay the division of the assets. The two reorganized companies objected and appealed to the Naples City Court of Appeals. They said that: "Under the Italian and EU laws, creditors could have exercised their right to get a court decision issued before reorganizing and registering the split company. They also protested that "separation" cannot be considered "invalid" after the official requirements have been met, and that "measures to delay the transfer of assets will not be accepted". The court of appeals upheld the decision and addressed it to the Court of Justice of the European Union.

The Court of Appeals of Naples stayed referred two questions to the Court of Justice for a preliminary ruling with regards to Articles 12 and 19 of Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies ('the Sixth Directive').

Court of Justice of the European Union revised the case and considered it possible for creditors to file an Actio Pauliana claim against the split company. In other words, it was settled that the Actio Pauliana claim can be lodged with the purpose of not letting the activities of the two companies that resulted from the reorganization of the company can not cause harm to creditors and taking coercive and protective measures related to the assets transferred to the newly

established company and Actio Pauliana would not affect the reorganization of the company but would eliminate the solvency to the creditors and that the creditors are able to claim to delay the transfer of assets even after the company is reorganized.

There were around ten court decisions related to Actio Pauliana claims such as C-115/88, C-339/07, C-337/17, C-722/17, C- 394/18, C- 213/10, C-157/13, C- 256/00, C- 274/16, and C-133/78 in the database of the Court of Justice of the European Union. Most of the court decisions refused to accept the claim and decided that the claim does not fall under international jurisdiction. Therefore, I have selected and compared five specific disputes with the court decisions that accepted the claims, establishing international jurisdiction, and refusing to accept the claim, as well as attracted the attention of lawyers and researchers.

Two of the disputes involved family members and people who had family relations, and the other three cases were related to the claims lodged by the people against the transfer of real estate and payments from one company to another (bankruptcy, reorganization, etc.). In other words, these are the disputes with Actio Pauliana claims against cross-border actions between citizens and legal entities of the EU member states (dispute C - 394/18 was only in Italy).

So, I do not consider court decisions to be right or wrong because I have made my study to seek answers to the questions: Is there Actio Pauliana regulation in the laws of Europe? What regulation was used by the Court of Justice of the European Union to settle the disputes related to Actio Pauliana and how were the cases settled?

When I study the disputes, the courts of member states addressed the Court of Justice of the European Union to clarify "whether the Actio Pauliana falls under the jurisdiction of an international regulation (hereinafter referred to as the EU law) in accordance with the Brussels Convention, whether a claim in regard to the fraudulent transfer could be settled by the court of a member state, the court decision of a member state can be enforced in another member state, and how to understand the provisions of the EU law". For example, the following articles and provisions of the EU law were explained whether those are related to Actio Pauliana and how to understand:

1. In the dispute C-115/88, Article 16 (1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, September 27, 1968;
2. In the dispute C-339/07, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Article (2)(b) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
3. In the dispute C–337/17, Article 7 (1)(a) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
4. In the dispute C–722/17, Article 24 (1) and (5) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
5. In the dispute C–394/18, Articles 12 and 19 of the Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 amending Council Directives based

Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies.

The court decisions acknowledged and interpreted the Actio Pauliana related insolvency claims in the legal regulation pertaining to the insolvency and reorganization of the companies. However, the Actio Pauliana claims between the family members were rejected and the cases were dismissed.

IV. Conclusion

In European law, there is no direct regulation on fraudulent transfers or Actio Pauliana related disputes and is mainly used only to establish jurisdiction. In other words, it is not legalized. Only in the case of C-394/18, 2020, it was explained whether Actio Pauliana could be used after the reorganization or division of the company for EU law and the laws of Italy.

Maybe there was no other way because the EU member states have different regulations for Actio Pauliana or fraudulent transfers in their civil laws. Besides, some researchers of the European Union intend to codify the EU's Civil Code but have not yet reached any result. This is due to the fact that researchers and lawyers of the member states have different views on this issue.

Moreover, I conclude that the Court of Justice of the European Union should make a flexible and balanced decision, taking into account the interests of the parties.

In the end, I would like to emphasize, that the European Court decisions on the disputes between legal entities in recent years show that the EU regulations have constantly been modified and amended, also some positive progresses have been done to interpret Actio Pauliana related disputes and to determine its jurisdiction.

It is expected that in the near future the European Court of Justice will not only resolve disputes between legal bodies but also accept cross-border disputes between citizens and establish appropriate measurement of the jurisdiction. Moreover, there is a possible way to settle the dispute without adopting a new European civil code or a special regulation.

The reason is the following:

1. Actio Pauliana's regulation has already been included in the existing national legislation of all EU member states.

2. It can be decided according to the law of the country where the property is located, in other words it is subject to the locus rei sitae. Furthermore, the European Court of Justice decides cases on the basis of court precedent.

Finally, any country's language, borders, and laws are the main pillars of national independence. Independence of a country means the sovereignty of any nation. The purpose of the European Union is to ensure economic balance, conduct foreign and security policies, and preserve and strengthen the common heritage of the countries. That is why the EU Court respects the sovereignty of its member states and believes that any dispute can be resolved by the law of the place where the assets are located.

REFERENCES

1. Andre Boraine, Towards Codifuing the Actio Pauliana, 8 S. Afr. Mercantile L.J. 213 (1996).
2. Tobias Lutsi, Forcing a Square Peg into a Round Hole – The Actio Pauliana and the Brussels Ia Regulation, Conflict of Laws Net, October 4 2018. https://conflictoflaws.net/2018/forcing-a-square-peg-into-a-round-hole-the-actio-pauliana-and-the-brussels-ia-regulation/.
3. Michiel Poesen. "*Once More unto the Breach: the Actio Pauliana is a Matter Relating to a Contract in EU Private International Law*", 15 European Review of Contract Law 1 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470216.
4. Tuula Linna, Actio Pauliana - "Actio Europensis"? Some Cross-Border Insolvency Issues, Journal of Private International Law, p.78, 2014, https://doi.org/10.5235/17441048.10.1.69.
5. The Common law and Civil, The Robbins collection. Educational use only, 2010, p 5. / https://www.law.berkeley.edu/wp-content/uploads/2017/11.
6. Principles of European Contract Law (PECL) https://www.trans-lex.org/400200/_/pecl/.
7. Treaty on European Union, Official Journal C191 of 29 July, 1992 / https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN.
8. https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_en.pdf
9. http://www.duhaime.org/LegalDictionary/P/PaulianAction.aspx.

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LATEST NEWS

"THE INTERNATIONAL ACADEMIC CONFERENCE ON "LAW AND DEVELOPMENT IN A TIME OF CRISIS" WAS BEING HELD"

The 20th anniversary of the National Legal Institute of Mongolia occurs on September 26, 2022. The International Academic Conference on "Law and development in a time of crisis" was being held as part of the 20th Anniversary of the National Legal Institute. Domestic and foreign scholars from Korea, Singapore, and Japan attended the conference.

Image 1. The opening of the International Academic Conference on "Law and development in a time of crisis"

The conference was inaugurated by Dr. Erdem-Undrakh.Kh, Director of the National Legal Institute. During the opening speech about the conference's purpose, importance, and features, she emphasized that the legal system plays an important role in developing countries despite the fact that a nation's prosperity depends on various internal and external factors.

Image 2. Dr. Erdem-Undrakh.Kh, Director of the National Legal Institute.

During the opening marks, Zandanshatar. G, Chairman of the Great Ikh Khural of Mongolia, highlighted that the National Legal Institute of Mongolia is one of the fundamental organizations in the legal sector which makes an outstanding contribution to the development of national legislation.

Image 3. Zandanshatar. G, Chairman of the Great Ikh Khural of Mongolia

Subsequently, Nyambaatar.Kh, Minister of Justice and Home Affairs of Mongolia, Felix Glenk, Resident Representative of the Hanns-Seidel Foundation, as well as Prof. Dr. Amarsanaa B, Director School of Law, National University of Mongolia, gave their speeches, expressing their sincere gratitude to the participating scholars and highlighting the role of NLI and further legislative development of Mongolia.

Image 4. Mr. Felix Glenk, Resident Representative of the Hanns-Seidel Foundation, Germany

Image 5. Prof. Dr. Amarsanaa B., Dean of School of Law, National University of Mongolia

The conference consisted of three main parts and general and fundamental issues were discussed during the first part, while issues related to public and private law were discussed in the second and third parts separately.

Narangerel.S, member of the Academy of Sciences and Professor Emeritus of NUM presented “The Evolution of the spirit of laws: Chinggis Khan and Montesquieu”.

Image 6. Narangerel S, member of the Academy of Sciences, Professor Emeritus of NUM

The first part of the conference was also comprised of presentations by Sainzorig P, Secretary of State of the Ministry of Justice and Home Affairs of Mongolia and Prof. Dr. Andrew James Harding, National University of Singapore, named “Current issues of private law in Mongolia: Reform Policy” and “Law and Development: A New Moment”.

Image 7. Sainzorig P, Secretary of State of Ministry of Justice and Home Affairs of Mongolia

In the second part of the conference, Ganzorig D, Senior Lecturer, School of Law, NUM and Prof. Dr. Byambaa.J, Prof. Dr. Narufumi Kadomatsu of Graduate School of Law, Kobe University participated with their presentations such as "The relationship between Local government law and other laws", "Criminal Justice: Traditions and Reforms" and "How can land law address 'underuse' issues: The case of Japan".

Image 8. Prof. Dr. Byambaa.J, School of Law, NUM

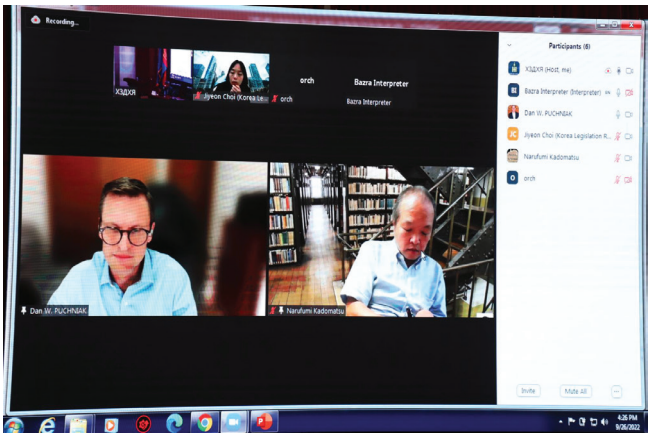


Image 9. Prof. Dr. Narufumi Kadomatsu of the Graduate School of Law, Kobe University

After the presentation "No need to be woke: Contextualizing Anglo-America's discovery of corporate purpose," which was presented by Prof. Dr. Dan W. Puchniak, Yong Pung How School of Law, Singapore Management University, conference participants, Dr. Buyankhishig B, Senior Lecturer, School of Law, NUM and Prof. Dr. Uranstetseg.B, National Academy of Governance, presented their articles named "Civil law traditions and contemporary challenges" and "Defining the role of the Labour code in national development" before the presentation on "Korea's legislative development to overcome natural disaster" by Dr. Junseo Lee, Korea Legislation Research Institute, Senior Principal Researcher and Dr. Jiyeon Choi, Korea Legislation Research Institute, Senior Researcher.

Image 10. Prof. Dr. Dan W. Puchniak, Yong Pung How School of Law, Singapore Management University

Image 11. Dr. Buyankhishig B, Senior Lecturer, School of Law, NUM

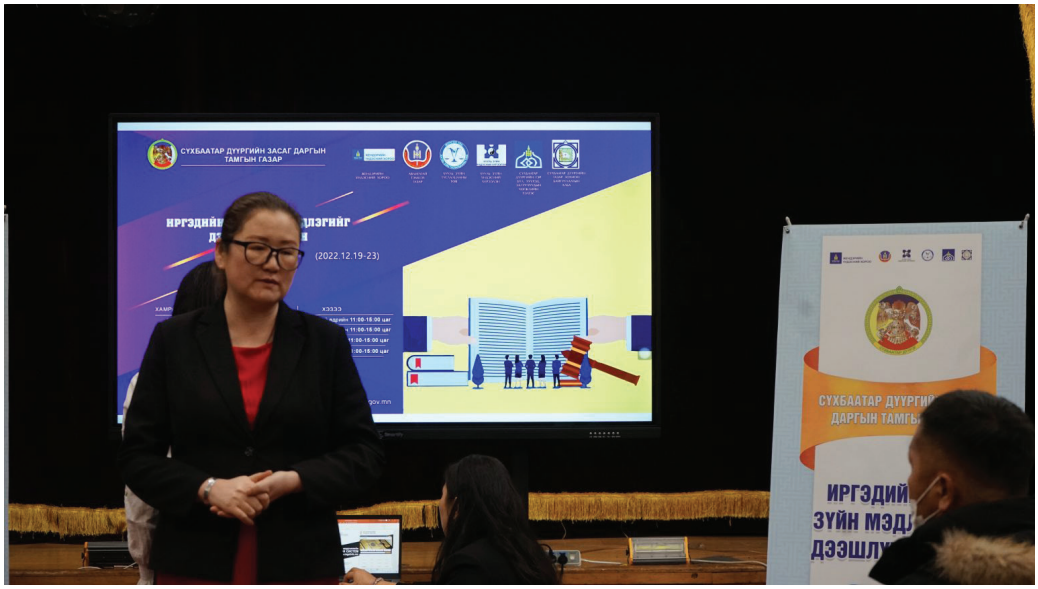
Image 12. Prof. Dr. Uranstetseg.B, National Academy of Governance

"TRAINING WAS BEING ORGANIZED WITHIN THE CAMPAIGN TO IMPROVE CITIZEN'S LEGAL EDUCATION"

Within the campaign to improve citizens' legal education, Legal training was co-organized by the National Legal Institute of Mongolia and the Office of the Governor of Sukhbaatar District on December 21, 2022 at the hall of 31st school of Ulaanbaatar.

Methodologist teacher Tsetsegdari.Kh introduced websites such as legalinfo.mn and e-khutuch.mn and gave information to the attendees. The training was attended by about 40 citizens who live in 1st, 2nd, 3rd and 4th khoroo of Sukhbaatar District.

This campaign aims to raise citizens' knowledge about legal and human rights, explain recently approved laws to the public in a simple and understandable manner, provide legal advice and organize discussion on the draft law on land.


СҮХБААТАР ДҮҮРГИЙН ЗАСАГ ДАРГЫН
ТАМГЫН ТАЗАР
(2022.12.19-23)

"XIV ACADEMIC COMPETITION NAMED AFTER STATE-HONORED LAWYER CHIMID. B WAS BEING ORGANIZED"

XIV Academic competition named after State honored lawyer Chimid.B, who played a significant role in adopting the new democratic Constitution of Mongolia and was organized successfully on January 12, 2023, under the main theme of "Basic structure and Fundamentals of Constitution of Mongolia" and the awards were given to the most outstanding researchers of the conference. It was said that about 40 articles were submitted.

Five winners were selected in each category: Graduate and Undergraduate. Oyundelger.R was prized as the first-place winner of the category of graduate with her work "Analyzing the authority to interpret the law of Supreme Court of Mongolia following basic structure and fundamentals of the Constitution of Mongolia" whereas Ariunzaya.B was granted the first-place winner of the category of undergraduate with her work "Reviewing constitutional amendments under constitutional fundamentals: a comparative study".


МОНГОЛ УЛСЫН ТӨР, НИЙГМИЙН НЭРТ ЗҮТГЭЛТЭН, АРДЧИЛСАН
ҮНДСЭН ХУУЛИЙН ЭХИЙГ БАРИГЧ, ХӨДӨЛМӨРИЙН БААТАР, АРДЫН БАГШ,
ГАВЬЯАТ ХУУЛЬЧ, ДОКТОР, ПРОФЕССОР Б.ЧИМИДИЙН НЭРЭМЖИТ
ЧИМИД САН


МОНГОЛ УЛСЫН ТӨР, НИЙГМИЙН НЭРТ ЗҮТГЭЛТЭН, АРДЧИЛСАН
ЧИМИД САН
ОРГ ӨМЖЛӨЛ

"THE MINISTRY OF LEGISLATION OF THE REPUBLIC OF KOREA AND THE NATIONAL LEGAL INSTITUTE OF MONGOLIA PROMOTE COOPERATION"

On January 10, 2023, the Ministry of Legislation of the Republic of Korea hosted Erdem-Undrakh.Kh (Dr.Jur), Director of the National Legal Institute of Mongolia and held an introductory meeting including Choe Young-chan, Director General for Planning and Coordination, Jieun Park, Director of Legislative Exchange and Cooperation Division, Woo Seung ki, Director of Legislative Information Division and Cho Ji won, Director of Legislative Education Division.

During the appointment with Lee Wan-kyu, the Minister of Government Legislation and representatives of the Ministry, Korean Law Information Center (law.go.kr) and Legal Education Programs which focus on elementary students were introduced.

As a result of the meeting, the National Legal Institute is going to cooperate with the Ministry of Legislation of Korea to improve public legal education and to take a step forward in the software development of the unified legal information system (Legalinfo) based on AI.

"THE NATIONAL LEGAL INSTITUTE OF MONGOLIA AND KOREA LEGISLATION RESEARCH INSTITUTE RENEW COOPERATION MEMORANDUM"

Erdem-Undrakh.Kh (Dr.Jur), Director of the National Legal Institute of Mongolia and Kim, Kye-Hong. The President of The Korea Legislation Research Institute signed a cooperation memorandum on January 9, 2023.

Within the cooperation memorandum, the parties agreed to

- Exchange legal information and news;
- Co-organize academic conferences and research;
- Exchange and train researchers.

Furthermore, representatives of the National Legal Institute learned about the operation of the Korea Legislation Research Institute and the parties agreed to promote cooperation.

“KOOKMIN UNIVERSITY AND THE NATIONAL LEGAL INSTITUTE OF MONGOLIA PROMOTE COOPERATION”

Erdem-Undrakh.Kh (Dr.Jur), Director of the National Legal Institute of Mongolia and Park Jung-won, dean of the School of Law at Kookmin University agreed to co-organize academic conferences and research works and constantly exchange researchers.

“SCIENCE WRITING COMPETITION NAMED AFTER SOVD.G WAS ORGANIZED SUCCESSFULLY”

Science writing competition named after Prof. Dr. Sovd Galdan, the first chairman of the Constitution Court of Mongolia was co-organized by the Research Center of the Constitution Court of Mongolia, Judicial General Council, Research and Training Center of General Prosecutor’s Office of Mongolia, Law school of NUM and the National Legal Institute of Mongolia.

Based on the overall result, the prize was awarded to work named “The problem of differentiating between the financial lease agreement and loan purchase agreement and reasons for updating the Law on Financial Leasing” written by Mandukhai.R.

The prize was introduced by Mukhiit Rom, Academic Director of the Research Center of the Constitution Court of Mongolia and Davaanyam.G, Scientific Secretary of the National Legal Institute of Mongolia.