Current Developments in Northeast Asian Environmental Law

Cho, Byung Sun*

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Ⅰ. Brief Introduction to Legal Transplant in Asia

Many countries in the Asian region have begun to realize that environmentallaw can be part of the answer to their regional and national environmental problems. The categories of Asian countries are: Northeast Asia (China, Taiwan, Japan, Korea); Southeast Asia (the ASEAN countries and Indochina), South Asia (India, Nepal, Pakistan, Sri Lanka). Yet, in their legal systems, another pattern of influence and common norm emerges. First of all, there are the Confucian nations of East Asia China, Taiwan, Japan, Korea and Vietnam. Parallel to these nations are the largely Buddhist nations of Southeast Asia particularly Thailand and Myanmar, but also Cambodia and Laos. Finally, there are the Asian nations under Islamic influence Pakistan, Malaysia and Indonesia.

Overarching all these groupings, of course, are the Western influences emanating from

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** Professor of Law, Chongju University College of Law

former colonial overlords that still affect certain Asian nations. For example, the British colonial legacy has entrenched elements of the common law throughout the Indian subcontinent in India, Pakistan, Sri Lanka and even Myanmar. In Southeast Asia, both Malaysia and Singapore remain substantially common law countries. Similarly, Indonesia retains elements of the Dutch civil law dating back to the colonial era. Only Thailand and the countries of East Asia escaped colonial domination of their legal orders, but these countries ultimately copied the legal traditions of the West in their attempt to legal modernization during the late 19th and early 20th century. The socialist legal system is a more recent transplant: In China, North Korea, and Vietnam, socialist legality is still the norm, though much modified from its Soviet origin. In sum, the models of legal modernization used by the Asian countries derive from one of three sources the civil law, the common law, or socialist law. However, after a certain period of time in almost every Asian nation, the transplanted law becomes localized and bears less resemblance to its foreign progenitors. Because the transplanted laws have undergone a process of indi-genization in some Asian societies, the similarities between the codes of Asian countries and their European cousins may often give rise to unfortunate misunderstandings.

Therefore all Asian legal systems are not alike. Despite their superficial similarities, most modern environmental laws in Asia have developed quite independently and diverged from other neighboring systems, both in from and in practice. Current developments in Asian environmental law are briefly canvassed here from the comparative point of view.

Ⅱ. Developments in Judicial Decisions in Northeast Asian Countries

1. A Brief Introduction

The following gives a small series of snapshots of developments in judicial decisions in selected countries in Asia, with examples of cases that illustrate the innovative actions in the courts in several of those countries.

The Korean people have suffered from a number of severe environmental arms, such as

the dumping of phenol into the Nakdong River.[1] Therefore, in the wake f the country's industrial growth in the late 1980s and 1990s, environmental protection became an "increasingly public issue."Article 35 of the Constitution of Korea provides that "all citizens shall have the right to a healthy and pleasant environment."[2] As depicted in the Appendix, this right is at the top of the hierarchy of the environmental law system. Since the early 1990s, the general public has tried in vain to pursue its environmental goals through litigation based upon this provision. However, the Supreme Court of Korea has construed the provision as not self-executing.[3]

Japan and Korea have now relatively effective environmental legislation and implement of various environmental laws. However, the success of evolutionary environmental law and legal theories could come at the costs of the past bitter experiences. In Japan, for example, the so-called "big four" cases radically altered the attitudes of people and courts toward environmental pollution. The Ashio Copper Poison case[4] is an early example in

1) See Six Doosan Plant Officials Arrested for Dumping 325 Tons of Waste Phenol into Nakdong River, Korea Herald, Mar. 22, 1991, at 3; Prosecution Pushes Probe into Doosan, Gov't Officials, Korea Herald, Mar. 23, 1991, at 1; Roh Orders Thorough Probe of Water Pollution - Urges Steps to Prevent Recurrence of Contamination, Korea Times, Mar. 22, 1991, at 1; Son Key-Young, Environmentalists Contend Polluters of Rivers Should be Given Harsher Punishment, Korea Times, Mar. 23, 1991, at 1.

2) S. Korea Const. art. 35.

3) See, e.g., Dae-bup-won [DBW] [Supreme Court] 94 ma 2218 (May 23, 1995) (S. Korea); DBW 95 da 23378 (Sept. 15, 1995) (S. Korea); DBW 96 da 56153 (July 22, 1997) (S. Korea). In these decisions, the Supreme Court of Korea held that the right to a healthy and pleasant environment is not self-executing. In order for this right to be acknowledged as a right to be exercised as a matter of private law, the right's owners, counterparties, content, and means of exercise must be explicitly identified by statutory provisions and supported by "jori" - the application of natural reason, an innate sense of justice, and dictates of conscience. DBW 94 ma 2218.

4) See F.G. Notehelfer, Japan's First Pollution Incident, 1 J. Japanese Stud. 351, 352 (1975); Julian Gresser et al., Environmental Law in Japan 413 n.3 (1981). During a period of national prosperity and strength in the 1880s, water and soil pollution were damaging Yanaka Village, located in the Tochigi Prefecture. This community, nestled on the banks of the Watarase River, was downstream from Furukawa Mining Company, which maintained an ongoing copper mining facility. Furukawa Mining Company was one of the biggest mining companies in Japan at that time. The destruction of crops and the killing of fish caused by the water and soil pollution created by the mining company spurred the villagers to action. The villagers drafted a formal

the history of environmental protection in Japan where extensive local environmental pollution and suffering became a social problem. Remarkably, the Ashio Copper Poison case came to a final resolution.[5] The Meiji Constitution and the Mining Act of 1890 were thought to recognize the principle that the exercise of a property right should not infringe on the legal interests of others. However, the interests of pollution victims were routinely subordinated to those of the property right holders, particularly those of industrial companies.

In the pre-World War Ⅱ era, one of the major civil cases was the Osaka Alkali Company case.[6] The Osaka Alkali Company operated a copper refining plant that discharged sulfurous fumes into the air. The local farmers, suffering from heavy crop damage, sued the company for negligence based on the Civil Code of 1896.[7] On December 22, 1916, the Great Court of Judicature (then the Supreme Court in Japan) established a general rule on negligence. This rule maintained that if a company had adopted reasonably available pollution control technology pursuant to the nature of the business of the company, it would not be held liable for negligence even if damage or injury to another occurred by chance.[8] However, on remand the Osaka Court of Appeals held that the company had not used reasonably available pollution control technology and therefore should be liable for the damage.[9] This case shows that the judicial remedy for

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petition to the Minister of Agriculture and Commerce calling for the temporary closure of the mine in order to clean up the pollution.

5) Astonishingly enough, the final mediation settlement with the Furukawa Company was reached in 1974, almost a full century after the dispute began. Gresser et al., at 8.

6) Harada, at 31; Gresser et al., at 12.

7) Article 709 of the Japanese Civil Code provided that: "A person who violates intentionally or negligently the legal interests of another is liable to make compensation for damages arising therefrom." Minpo (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1988, art. 709.

8) Judgment of Dec. 22, 1916, Daishinoin [Great Court of Judicature], 22 Daihan Minroku 2474 (Japan). For an interesting comparison with American courts' attempts to adopt the law of nuisance to the demands of economic development, see Morton J. Horwitz, The Transformation Of American Law, 1780-1860, 74-78 (1992). See also W. Page Keeton et al., Prosser and Keeton on the Law of Torts 88, at 629 (5th ed. 1984) ("An industrial enterpriser who properly locates a cement plant or a coal-burning electric generator, who exercises utmost care in the utilization of known scientific techniques for minimizing the harm from the emission of noxious smoke, dust, and gas and who is serving society well by engaging in the activity may yet be required to pay for the inevitable harm caused to neighbors.").

negligence depended greatly on a court's willingness to broadly construe such a general rule. The dependence upon judicial magnanimityfor success proved to be a great weakness to environmental pollution plaintiffs. With the increasing rise of nationalism and militarism, the buildup of Japan's military arsenal and the industrialism behind it were given the highest priority among those national policies undertaken prior to World War Ⅱ. In this period the general rule of "reasonably available pollution control technology" served as a hazard to damage suits brought by victims against industrial enterprise.

The drive toward industrial reconstruction during the early post-World War Ⅱ period caused serious pollution problems in the mid-1950s. The most important of the pollution cases in the 1960s were the so-called "big four"cases. These were the Kumamoto Minamata Disease case,[10] the Niigata Minamata Disease case,[11] the Toyama Itai-Itai Disease case,[12] and the Yokkaichi Asthma case.[13] All these cases finally resulted in a

9) Judgment of Dec. 27, 1919, Osaka [Court of Appeals], 1659 Shinbun 11 (Japan). In Japan, the Court of Appeals also performs the role of fact finder.

10) Judgment of Mar. 20, 1973, Kumamoto [District Court], 696 Hanji 15 (Japan). See Gresser et al., supra note 5, at 65. See also infra notes 48-63.

11) Judgment of Sept. 29, 1971, Niigata [District Court], 22 Kaminshu, Nos. 9 & 10., Extra No., at 1 (Japan). The Niigata Minamata Disease case was a damages action brought against the Showa Electrical Chemical Corporation.

12) Judgment of June 30, 1971, Toyama [District Court], 22 Kaminshu, Nos. 5 & 6., Extra No., at 1 (Japan). See Gresser et al., supra note 5, at 55. The Toyama Itai-Itai Disease case was an action for damages filed by victims who suffered from such intolerable pain that they would often cry out "itai-itai" ("it hurts, it hurts"). The disease was caused by the accumulation in bone tissues of cadmium that came from factory waste discharged by Mitsui Mining and Smelting Company.

13) Judgment of July 24, 1972, Tsu [District Court, Yokkaichi Branch], 672 Hanji 30 (Japan). See Gresser et al., supra note 5, at 105. The Yokkaichi Asthma case was an action for damages brought by air pollution victims who suffered from asthma caused by sulfur dioxides discharged from six companies, including several Mitsubishi system companies. For the details of these cases, see Gresser et al., supra note 5, at 37-124; Shigeto Tsuru, History of Pollution Control Policy, in Environmental Policy in Japan 15 (Shigeto Tsuru & Helmut Weidner eds., 1989) [hereinafter Enivronmental Policy]; Margaret A. McKean, Environmental Protest and Citizen Politics in Japan (1981); Julian Gresser, The Development of Pollution Control in Japan: An Historical Note, 1 Harv. Envtl. L. Rev. 541 (1976); Tomohei Taniguchi, A Commentary on the Legal Theory of the Four Major Pollution Cases, 9 Law in Japan 35 (1976); Frank K. Upham, Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits, 10 Law & Soc'y Rev. 579 (1976).

difficult and agonizing victory for the first plaintiff/victims who brought suit.[14] Of particular interest is the Kumamoto Minamata Disease case because it is one of the biggest cases with respect to the number of victims and the amount of pollution. Unfortunately, at present there are a large number of victims from this case who have not obtained remedy due to delays in the litigation. It is also notable because the history of this case was accentuated by the persecution of the victims and its reflection of the typical mindset of industrial companies, governments, and the public concerning industrial development at that time.[15] The legacy of the "big four"cases lies in the tremendous influences they have had on judicial, administrative, social, and political changes in attitude toward environmental protection. Because of the media's comprehensive coverage of the "big four" trials, the plaintiffs' concerns were quickly and effectively transmitted to the entire nation. Thus the public's awakening in the early 1970s reinforced changes in judicial thinking. In the "big four" trials, the judiciary had an important role as a last resort for the victims. The "big four"judgments accelerated the establishment not only of basic legal principles governing damage claims, but of a national compensation system for personal injury caused by environmental pollution. The legislature was stimulated to reform existing statutes and reenact a basic anti-pollution act.

In 1970, a special session of the Japanese Diet ("Diet") initiated a new era of environmental protection in Japan. During this session, the Diet passed or amended fourteen laws[16] that were designed to reduce and prevent pollution,[17] giving Japan the

14) See Judgment of June 30, 1971, Toyama [District Court], 22 Kaminshu, Nos. 5 & 6., Extra No., at 1 (Japan) (The Toyama Itai-Itai Disease case); Judgment of July 24, 1972, Tsu [District Court, Yokkaichi Branch], 672 Hanji 30 (Japan) (The Yokkaichi Asthma case); Judgment of Sept. 29, 1971, Niigata [District Court], 22 Kaminshu, Nos. 9 & 10., Extra No., at 1 (Japan) (The Niigata Minamata Disease case); Judgment of Mar. 20, 1973, Kumamoto [District Court], 696 Hanji 15 (Japan) (The Kumamoto Minamata Disease case).

15) See, e.g., Ishimure Michiko, Paradise in the Sea of Sorrow: Our minamata disease 372-73 (Livia Monnet trans., 1990) ("Like the Ashio Copper Mine Pollution Incident, the Minamata Disease Incident clearly shows that the so-called prosperity advocated by Japanese capitalism can only be bought at the price of countless human lives. Minamata is without doubt a contemporary version of the tragedy of Yanaka Village."). See also Sadao Togashi, Zoku Minamata Byo Jiken [The Minamata Disease Case, Continued] (22), Shukan Dokusho Jin, Sept. 13, 1993.

16) The amended laws included the Basic Law for Environmental Pollution Control, the Air Pollution Control Law, the Noise Regulation Law, the Road Traffic Law, the Sewage Law, the

strictest anti-pollution laws in the world.[18] Among these was the first law to criminalize acts of pollution that endanger of human health.[19] Prior to the passage of these laws, the principal law imposing criminal sanctions for acts of pollution in Japan was contained in the Criminal Code, which criminalizes negligent acts that cause death or injury[20] and the intentional pollution of drinking water. The new laws substantially broadened the scope of criminal liability for acts of pollution.[21]

Natural Parks Law, the Poisonous and Hazardous Substances Control Law, and the Agricultural Chemicals Regulation Law. Chao-chan Cheng, A Comparative Study of the Formation and Development of Air & Water Pollution Control Laws in Taiwan and Japan, 3 Pac. Rim L. & Pol'y J. S-43, S-69 (1993). The new laws included the Law Concerning Entrepreneurs' Bearing of the Cost of Public Pollution Control Works, the Law for Punishment of Environmental Pollution Crimes Relating to Human Health, the Water Pollution Control Law, the Marine Pollution Prevention Law, the Waste Disposal and Public Cleansing Law, and the Law Relating to Soil Pollution Control in Arable Lands. Id.

17) Margaret A. McKean, Environmental Protest and Citizen Politics in Japan 20-21 (1981).

18) Jeffery Broadbent, Environmental Politics in Japan: Networks of Power and Protest 20 (1998). Broadbent refers to this event as the "pollution miracle." Id.

19) The particular statute was the Law for Punishment of Crimes Relating to Environmental Pollution Pertaining to Human Health. Hito no Kenko ni Kakaru Kogai Hanzai no Shobatsu ni Kansuru Horitsu [Law for Punishment of Crimes Relating to Environmental Pollution Pertaining to Human Health] (adopted Dec. 25, 1970) Law No. 142 [hereinafter Environmental Pollution Crime Law]. This law has also been referred to as the "Law on Punishment of Pollution Offenses Affecting Human Health," the "Law for the Punishment of Crises Relating to Environmental Pollution," and the "Law for Punishment of Environmental Pollution Crimes Relating to Human Health." Hiroshi Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy in Japan 183, 183 (Shigeto Tsuru & Helmut Weidner eds., 1989); George F. Curran Ⅲ, Pacific Rim Environmental Regulation: A Western Perspective of Several Countries' Environmental Liability Laws, 3 J. Int'l L. & Prac. 47, 51 (1994); Environment Agency, Quality of The Environment In Japan 136 (1975) [hereinafter Environment Agency (1975)].

20) Keiho [Criminal Code] (adopted Apr. 24, 1907, multiple amendments) Law No. 45. See Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy in Japan (Shigeto Tsuru & Helmut Weidner eds., 1989), at 183 (discussing Articles 204 and 205).

21) The Criminal Code was first adopted in 1907. Id. The Criminal Code was seldom used in pollution cases for a variety of reasons. Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy in Japan (Shigeto Tsuru & Helmut Weidner eds., 1989), at 187. First, there was great difficulty in proving the causal relationship between an act of pollution and death or injury. Id. It was also difficult to prove negligence under the statute. Id.

The Law for Punishment of Crimes Relating to Environmental Pollution Pertaining to Human Health ("Environmental Pollution Crime Law") was perhaps the most revolutionary environmental law passed by the Diet in 1970.[22] This law was Japan's first attempt to levy economic sanctions or penalties on polluters whose pollution activities jeopardized public health. The Environmental Pollution Crime Law punishes intentional, as well as negligent, acts of pollution. Unlike the Criminal Code, which punishes negligent acts only when they cause actual harm to human health, the Environmental Pollution Crime Law punishes negligent acts that pose a risk to human health, even if there is no showing of actual harm.[23] While the Environmental Pollution Crime Law was conceptually innovative when it was passed, its scope is limited in a number of ways,[24] and it has rarely been used.[25]

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22) Julian Gresser et al., Environmental Law in Japan 261 (1981).

23) Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy in Japan (Shigeto Tsuru & Helmut Weidner eds., 1989), at 185-86. Under Articles 204 and 205 of the Criminal Code, it is only a crime to cause actual injury or death through negligence. Id. at 183, 186. Article 3 of the Environmental Pollution Crime Law addresses pollution crimes involving negligence.

24) Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy in Japan (Shigeto Tsuru & Helmut Weidner eds., 1989), at 185. First, the Environmental Pollution Crime Law only governs industrial pollution emitted in the course of entrepreneurial activities and does not extend to pollution by citizens. Id. Second, the law only targets water and air pollution and does not deal with other types of pollution. Id. Finally, the law does not address pollution incidents involving multiple discharges that jointly cause damage. Id. The overall purpose of the law is to prevent pollution affecting human health by punishing acts of pollution that are undertaken in the course of business. Id. Article 1 emphasizes that the law works in coordination with other measures, implying that criminal sanctions are neither the only nor the primary means to prevent pollution. Id.

25) See Gresser et al., at 261 & n.209. In 1976, only four cases were referred to the prosecutor's office under the Environmental Pollution Crime Law. Id. By 1989, there were only four court judgments involving the law. Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy in Japan (Shigeto Tsuru & Helmut Weidner eds., 1989),at 188. In 1993, only one person was reported for violating the law. Environment Agency, Quality of the Environment in Japan 711 (1995) [hereinafter Environment Agency (1995)]. An Environment Agency report is also called a "White Paper on the Environment." Preface to Environment Agency, Quality of the Environment in Japan (1980) [hereinafter Environment Agency (1980)]. It is an annual report on the environment that is submitted to the Diet pursuant to Article 7 of the Basic Law for Environmental Pollution Control. Id.

The Japanese "big four" judgments accelerated the establishment not only basic legal thinking and principles governing damage claims and criminal evidence, but also of a national compensation system for personal injury caused by environmental pollution in Japan as well as in the Asian region. Korea has also similar experience regarding the development of environmental program. Currently, Korea has no comprehensive theory except for a constitutional right to a healthy and clean environment. Moreover, the Korean Supreme Court has consistently stated that the constitutional right to a healthy and clean environment is notself-executing. As a result, unless an environmental suit is based upon a specific statute, it must be pursued under tort or nuisance law. Unfortunately, there is a paucity of such precedents in Korea. For example, during the time when the enactment of a bill called the Wetlands Preservation Act was pending, one could not compel the government to consider the ecological value of wetlands before reclaiming them unless he or she was the owner of adjacent property. Except for property claims, one could not find any legal grounds upon which to establish a claim. As democracy has developed in Korea, the Korean people's awareness of environmental protection has dramatically increased, affecting governmental and business practices both in the form of public protest and by means of litigation. China was just beginning to develop environmental law in the late 1980s. Since then China has enacted a number of new environmental laws. Despite this increased environmental lawmaking and increasing awareness of environmental problems, in the case of China's provinces, environmental law demonstrates not only the negative side effects of economic autonomy, but also the difficulty of enforcing national law when region do not see such enforcement as in their own interests.

China's environmental problems are manifest and extreme.[26] Water shortages and pollution are commonplace. More than half of China's towns have water supplies contaminated by industrial and municipal wastes.[27] Pesticides, fertilizers, reclamation, and erosion have all contributed to the deterioration of ecosystems. Furthermore, the air in many Chinese cities is dangerous to breathe. The use of coal for fuel has contributed through so-called "yellow sand" heavily to the problems of acid rain and soil

26) See Paul J. Smith, Free Trade and the Environment: Will Free Trade Save China's Environment?, 1 Buff. J. Int'l L. 28 (1994).

27) See John Copeland Nagle, The Missing Chinese Environmental LawStatutory Interpretation Cases, 5 N.Y.U. Envtl. L.J. 517, 519 (1996).

contamination in both China and neighboring Korea and Japan. These problems are compounded as the PRC's economy grows and the number of automobiles increases. The lack of alternative fuels and other concerns, such as solid waste disposal, also continue to plague the environment of mainland China.[28] China's large hydroelectric projects have generated a great deal of environmental controversy, especially recently. Critics claim that the economic benefits expected from the energy these projects generate do not outweigh the environmental costs.[29] Perhaps the most prominent of these projects is the Three Gorges Dam Project on the Yangtze River.

Characteristic features of Chinese environmental law exacerbate the problems produced by the structural factors. The general, aspirational terms in which the PRC's major environmental statutes are drafted and their disjunction from current Chinese conditions (as in the EPL's presumption of a largely planned economy) leave disproportionate interpretive discretion to sub-national officials. This discretion, which far exceeds that provided by counterpart statutes in other important East Asian jurisdictions, is not adequately bounded by administrative regulations or judicial decisions. China has a substantial and growing body of regulation concerning environmental matters, but these rules are not yet implemented and enforced systematically enough to create predictable, compelling consequences for economic actors or to furnish yardsticks by which the citizenry might assess the performance of environmental officials. This is particularly so in the case of sub-national rules. On the basis of formulating and improving various environmental laws and regulations, with the revising of the Criminal Law (1997) as the turning point. China established an environmental system of Criminal Law. This marked a new stage in the development of China's environmental legal system and will play an important role in protecting the ecological environment and the development of a market economy. Environmental crimes are those acts which violate environmental protection laws and regulations or pollute or destroy the ecological environment, thereby causing injury or death, serious property loss and seriously damaging the environment. Such criminals should be punished according to environmental criminal law.

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28) See John Copeland Nagle, The Missing Chinese Environmental Law Statutory Interpretation Cases, 5 N.Y.U. Envtl. L.J. 517 (1996), at 520.

29) H. F. Ludwig et. al., Environmental Impact Assessment for Xiaolangdi Yellow River Mult-Purpose Economic-Cum-Environmental Improvement Project, 1995 Environmentalist 45.

2. Comparative Analysis: Judicial Role in Environmental Protection in Northeast Asia

In Northeast Asian countries, the Confucian preference for internalized social norms of conduct and reliance on conciliation over recourse to formal law pervaded the entire fabric of traditional Asian society. Although remnants of such ideals still abound, modern Asian society has gradually grown more litigious, as the influence of the West on recent generations of Asians has helped to shape the Asian environmental law theories.

1) The Historical and Cultural Background

A proper examination of the nature and history of the Northeast Asian legal system would take us back to the three thousand years ago. A predominant principle of the traditional Asian conception of law has been the belief in a cosmic order of the universe, involving an interactive relationship between heaven, earth and men. The universe is seen as the basic of law. Asia's three thousand year-old history produced numerous philosophical ideas, with three main philosophical traditions influencing the development of the legal system in Asia: the Confucian, Legalist and the Buddhist. Traditional source of law in Asia especially derive from Confucian traditions.[30] This is not the place for such and extensive survey. For today's lecture it is sufficient to note the changes that have taken place since the late19th century and the early 20th century.

While almost every country of the Asian region has modernized its law since 19th century, sometimes almost to the point of wiping out the traditional legal order, custom persists even after modernization. Often the modes of implementation and attitudes toward enforcement of the "new" modern system reveal much about the continuing vitality of traditional legal attitudes. For example, environmental law, based on modern environmental

30) While the Confucian believes in a natural harmony between man's ritual propriety and the natural principles of the universe, the Legalists'theory, which originated in the third century B.C., argued that there should be government by law (obeying legal prescriptions) rather than government by men. These theories proved too remote and alien to the Chinese of the time and by 206 B.C., Confucianism was re-established as the favored philosophy and the ideology of the State by the Han dynasty.

law principles, remains very Asian in its actual functioning; traditional concept of nature reservation and harmony play the decisive role rather than the strict term of the statute. Since most Asian countries have adopted some form of the civil law, codification is an important component of almost every Asian legal system. The large number of the modern Asian codifications follow the plan of the German Civil Code, although the French civil law tradition has also influenced codifications in some Asian countries (e.g. Vietnam).

In many cases, the Western legal order was merely the last level of law imposed upon a culture that had undergone centuries of legal change. As a result, such cultures functioned under a legal system that was an amalgam of native and foreign elements.

The rules for monetary remedies available to pollution victims were greatly developed by the courts in the "big four" cases in Japan. These judgments transformed the victim's outrage into specific legal doctrines, and have profoundly influenced the subsequent conduct of the victims, industry, bureaucracy, and the Diet. However, environmental pollution cases continue to come before the court in large numbers. Given the type of remedies requested in the 1950s to 1970s, the plaintiffs'primary concerns were the recovery of damages. During this time, the national and local governments were rarely defendants. Presently, however, national and local governments are often named as defendants, and the recent concerns of plaintiffs are extending to environmental preservation. Frequently the remedy sought is a temporary and/or permanent injunction against the pollutant.

Some problems inherent in the civil and administrative litigation processes are important in light of their expected functions of providing remedies and environmental protection and will therefore be discussed below.[31)]

31) In Japan, the field of environmental disputes is one of the categories in which disputes are frequently resolved by alternative dispute resolution, mainly according to the Environmental Pollution Dispute Resolution Act, Law No. 108 of 1970. See Gresser et al., supra note 5, at 325-47; Yoshikazu Sagami, Kogai Hunso Syoriho (The Environmental Pollution Dispute Settlement System), in Environmental Policy, supra note 46, at 196-206. See also Yasuhei Taniguchi, Dispute Settlement Framework, in Zentaro Kitagawa, 7 Doing Business in Japan, X Ⅳ, at 1-4 to 1-6 (1982). Today, in Japan, it seems that environmental criminal law does not necessarily play an important role. See generally Hiroshi Oda, The Role of Criminal Law in Pollution Control, in Environmental Policy, supra note 46, at 183-94; Ryuichi Hirano, Penal Law Protection of the Natural Environment in Japan, 13 Law in Japan 129 (1980).

2) The Need to Develop A Comprehensive Theory: Constitutional Right to Healthy and Clean Environment?

The judicial system is supposed to allow the creation and development of a remedial process suitable to implementing permanent injunctions. However, despite judicial innovations in environmental protection, problems still remain.For example, one of the substantive problems is a debate over what right can give rise to an injunction: a real property right, personal right, environmental right, or other complex rights. Moreover, the courts have sometimes held that public interest in the use of a public facility outweighs the plaintiff's private interest in question.

The first step is to develop a comprehensive theory to protect and preserve the environment. For example, Korea has no comprehensive theory except for a constitutional right to a healthy and clean environment. Moreover, the Korean Supreme Court has consistently stated that the constitutional right to a healthy and clean environment is not self-executing. As a result, unless an environmental suit is based upon a specific statute, it must be pursued under tort or nuisance law. Unfortunately, there is a paucity of such precedents in Korea. For example, during the time when the enactment of a bill called the Wetlands Preservation Act was pending, one could not compel the government to consider the ecological value of wetlands before reclaiming them unless he or she was the owner of adjacent property. Except for property claims or tort claims, one could not find any legal grounds upon which to establish a claim.

As far as property claims concerned, the Japanese court has developed the abuse of right doctrine in a recent case, Mitamura v. Suzuki,[32] in which the plaintiff sought compensation for loss of enjoyment of sunshine and obstruction of ventilation resulting from defendant's addition of a second floor to his one-story house southern to the plaintiff's in a residential section. Deciding in favor of the plaintiff, the Japanese Supreme Court stated:

In all cases a right must be exercised in such a fashion that the result of the exercise remains within a scope judged reasonable in the light of the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show social

32) 26 Saiko Saibansho minji hanreishu. 1067 (Sup. Ct., June 27, 1972). About this case see Kazuaki Sono & Yasuhiro Fujioka, The Role of the Abuse of Right Doctrine in Japan, 35 Louisiana Law Review 1037-40, 1043-46 (1975).

reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope. Thus, the person who exercises his right in such a fashion shall be held liable because his conduct constitutes an abuse of right

A similar approach was used in solving a dispute where digging for the purpose of obtaining a hot spring on one person's land affected another's enjoyment of a hot spring already in use in a nearby area.[33] Some similar cases were found also in Korea. So the majority of environmental scholars in Korea and in Japan regarded the right acknowledged by court decisions as a kind of right to healthy environment or at least "a right to sunshine". However, the Korean Constitutional Court, as above mentioned, denied to classify this type of personal right as a kind of constitutional right to healthy environment. The Japanese courts seem to deny to classify the right to sunshine as an environmental right. Although the court's opinion did not explicitly recognize a right to sunshine, it encouraged residents to pursue remedies, including injunctions.

3) The Need to Soften Prudential Standing Requirements in Administrative Litigation

In Korea and in Japan, only litigation concerning "official acts" are governed by the administrative litigation. The laws and practices concerning administrative litigation have apparently inherited some measure of the previous administrative hostility toward judicial review. In general, the usefulness of the administrative litigation has been limited, partly because there is no obvious standard with which to identify an official act, and partly because many Korean and Japanese jurists and scholars have been unwilling to permit the liberalization of public law.

As a result, it is very difficult for citizens to decide under which procedure to sue the government, either via an administrative or civil suit. The Osaka International Airport litigation is a case in point that demonstrates the difficult and confusing choice of possible actions facing plaintiffs. In this case, the plaintiffs chose to use civil procedure when bringing damage and injunction suits to prevent noise pollution. After a twelve-year dispute, the Supreme Court in 1981 permitted the recovery of a portion of the damages

33) Daimaru Besso Co. v. Takeishi, 12 Minshu 1640 (Sup. Ct., July 1, 1958).

sought, but dismissed the injunction because the plaintiff-petitioners had mistakenly chosen civil rather than administrative procedure.[34] The reason for this denial of injunctive relief was because such an injunction would have resulted in an impermissible interference in the administrative authority of the airport management and aviation administration.

The standing doctrine continues to restrict judicial review. Under the orthodox view, plaintiffs must establish having "the right recognized by statute"in addition to proving a causal relationship between the contested administrative act and the alleged adverse effect on the plaintiff's legal interests.[35] The right recognized by statute" means a legal interest created by statutory provisions vesting an administrative agency with the duty and authority to protect a personal interest. The doctrine also distinguishes between the legal interests of private individuals and those shared by the general public that may incidentally be adversely affected by an official act. These general public interests are often called reflex interests.[36] Traditionally, the courts have not recognized the standing of a party with only a reflex interest. In lower courts, however, the requirement of standing has sometimes been construed liberally. For example, in the Ikata Nuclear Power Plant case, [37] in which local residents challenged the Prime Minister's granting of permission to construct a nuclear power plant, standing was construed liberally.[38] But in the context of environmental protection cases, most courts are inclined to hold that residents have only reflex interests and thus do not have standing.[39] Moreover, in considering cultural

34) Judgment of Dec. 16, 1981, Saikosai [Supreme Court], 35 Minshu, No. 10, at 1369 (Japan). For other explanations, see Frank K. Upham, After Minamata: Current Prospects and Problems in Japanese Environmental Litigation, 8 Ecology L.Q. 213, 228-34 (1979).

35) See Gyosei Jiken Soshoho (The Administrative Litigation Procedure Act), Law No. 139 of 1962, at art. 9. "

36) See, e.g., Judgment of Mar. 14, 1978, Saikosai [Supreme Court], 32 Minshu, No. 2, at 211 (Japan).

37) Judgment of Apr. 25, 1978, Matsuyama [District Court], 29 Gyosai Geppo, No. 4, at 588 (Japan).

38) In analyzing the plaintiffs' standing in light of Article 24, Section 1 of The Nuclear Raw Materials Act, the court held that this Article protected not only the public interest but also the private legal interests of individual citizens who lived in outlying areas. See Kaku Genryo Busshitsu Kaku Nenryo Busshitsu Oyobi Genshiro No Kisei Ni Kansuru Horitsu (The Nuclear Raw Material Regulatory Act), Law No. 166 of 1957.

39) For example, when plaintiffs challenged the cancellation of the designation of a National Park Special District, the court held that the plaintiffs did not have standing because they only had

interests, in the 1989 Iba Ruins case, the Supreme Court held that the scholars engaged in studying Iba Ruins had no standing to challenge the administrative cancellation of the ruins' status as a Historic Site.[40] However, one of the few exceptions to the narrow construction of standing in environmental protection cases is the Nikko Taro Cedar Tree case. Here, the Nikko Toshogu Shrine sought to revoke an administrative act permitting road expansion. It is notable that the Tokyo High Court pointed out that preservation of scenic, historical, and cultural sites of value should be given the utmost consideration by administrative agencies because they enhance the people's ability to enjoy a healthy and cultural life.[41] This case is interesting in that the court suggested that scenic, historic, and cultural interests could be considered in construing the issue of standing.

Recently in 1989, the Supreme Court in the Niigata Airport case construed the matter of standing more liberally than ever before.[42] Here, local residents challenged the Minister of Transportation's granting of permission for the opening of a new cargo airline. The Supreme Court held that it was permissible to take into consideration not only the statute itself, but all other related statutes and regulations with the same common purpose when construing the matter of standing.[43] This is noteworthy because the Supreme Court took a step towards a liberal interpretation of the standing requirement.

Another principal barrier in the administrative litigation procedure is the ripeness doctrine, or proof of a judicially reviewable administrative act. Here, the focus is on whether an official act is in the nature of a disposition.[44] If not, the case is dismissed.

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reflex interests in the National Park Special District. Judgment of Oct. 14, 1955, Tokyo [District Court], 6 Gyosai Geppo, No. 10, at 2370 (Japan).

40) Judgment of June 20, 1989, Saikosai [Supreme Court], 1334 Hanji 201 (Japan). In this case, the Supreme Court held that the scholars had no legal interests in something designated as a cultural asset under Bunkazai Hogoho (The Cultural Assets Protection Act), Law No. 214 of 1950 (Japan). For an interesting example in the United States, compare Sierra Club v. Morton, 405 U.S. 727 (1972), where the court held that petitioner lacked standing to maintain the action because petitioner did not assert individual harm to itself or its members.

41) Judgment of July 13, 1972, Tokyo [High Court], 710 Hanji 23 (Japan).

42) See Colloquy, Kogai Kankyo Hanrei No Kiseki To Tenbo [History and Prospects of Environmental Pollution Cases], 1015 Jurisuto 227, 241-42 (1993) (Yoshinobu Kitamura speaking).

43) Judgment of Feb. 17, 1989, Saikosai [Supreme Court], 43 Minshu, No. 2, at 56 (Japan). The analysis for standing applied by the court was "the right recognized by statute" standard. However, this holding took into consideration all pertinent statutes and regulations in applying this standard.

In Japan as well as in Korea, this requirement has been interpreted very narrowly. For example, the Japanese Supreme Court has held that only official acts that "directly create rights and duties of specific individuals" satisfy this requirement.[45] Pursuant to this definition, intra-agency supervisory orders and approvals may not be challenged, because they do not directly create rights and duties of specific individuals. For example, in the Narita Shinkansen case, the Tokyo District Court[46] dismissed the citizens' challenge to the Minister of Transportation's formal approval of the official plan of construction for the Narita Shinkansen Line.[47] Thus, administrative guidance, environmental quality standards, and emission standards are difficult to bring before the court. Moreover, most government plans and policies, no matter how formal or final, have been deemed judicially unreviewable. For instance, a city plan which has the possibility to deteriorate the environment is not subject to judicial review at its creation stage, because the requirement of ripeness is not met until construction has begun.[48]

Korean courts presently apply a "legal interest"test for prudential standing, thereby prejudicing environmental interests. In other words, a plaintiff seeking redress for environmental harm must demonstrate injury to a legal interest in order to obtain judicial re view of governmental agency action.[49] Unless an interest is founded in a statute that is interpreted to protect the interest of a private individual, he or she cannot seek judicial review of governmental agency action. This means that individuals affected by a project cannot sue the government when it grants the permit for the project, because statutes are not interpreted to take into account the interests of local residents or the general public.

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44) Gyosei Jiken Soshoho (The Administrative Litigation Procedure Act), Law No. 139 of 1962, at art. 3(2).

45) See, e.g., Judgment of Feb. 23, 1966, Saikosai [Supreme Court], 20 Minshu, No. 2, at 271 (Japan).

46) Judgment of Dec. 23, 1972, Tokyo [District Court], 691 Hanji 8, aff'd, Judgment of Oct. 24, 1973, Tokyo [High Court], 722 Hanji 52 (Japan).

47) Gresser et al., at 207. The court held that at the approval stage of a construction plan, it is not yet certain who will become an interested party when the plan is finally executed. Therefore, the plan and its official approval must be considered as abstract in nature. Id.

48) See, e.g., Judgment of Apr. 22, 1982, Saikosai [Supreme Court], 36 Minshu, No.4, at 705 (Japan).

49) See Dae-bup-won [DBW] [Supreme Court] 94 nu 14544 (Sept. 26, 1995) (S. Korea); DBW 94 nu 14148 (Oct. 17, 1995) (S. Korea); DBW 96 da 56153 (July 22, 1997) (S. Korea); DBW 97 nu 19571 (Sept. 22, 1998) (S. Korea).

Apart from the liberalization of standing and ripeness, preventive suits and duty-imposing suits[50] might be easier to bring under the Fundamental Act for Environment.[51] Moreover, the Administrative Process Act in Korea and in Japan will encourage the courts to enlarge the scope of the judicial review of administrative guidance. Much broader definitions of standing in the United States and elsewhere have enabled environmentally concerned groups and individuals to bring their grievances to court even if they are only indirectly affected by polluting activity.

4) The Need to Overcome the Barriers in Civil Litigation Including Injunction

In general, the Korean and Japanese civil judicial system, like Germany's, does not permit class action suits, pretrial discovery, jury trials, or punitive damages, and it has only a limited permanent injunctive remedy. Only in limited cases do the Korean courts provide permanent injunction remedies. Because Korea just like Japan is a civil law country, the Korean legal system does not have the concept of equity. The situation is same in Japan. Because Japan inherited a civil law tradition, it is generally said that the Japanese legal system does not contain the concept of equity.[52] This plays a crucial role in courts forming hostile attitudes toward injunctive relief. As a matter of fact, the Korean and Japanese courts seldom grant permanent injunctions against large-scale corporate or governmental projects for environmental reasons.

Even so, civil cases have brought many rewards in the environmental litigation field. Although the standing barrier in civil cases is less formidable than in administrative litigation, civil procedure presents several obstacles for citizens to overcome.[53] Generally,

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50) See, e.g., Naohiko Harada, Preventive Suits and Duty-Imposing Suits in Administrative Litigation, 9 Law in Japan 63, 69 (1976). A duty-imposing suit is a suit brought to impose an affirmative duty on the administration to confer a benefit on the plaintiff. Id.

51) In addition, it seems that its enactment in Korea and in Japan makes it possible both to change the burden of proof of illegality and to make the standard of administrative discretion control more clear.

52) See Shiro Kawashima, Minji Soshoho Kaisei no Kihon Mondai to Sashitome Sosho no Kisu [The Fundamental Problems in Civil Procedure Reform and the Future of Injunction], 799 Hanta 11, 14 (1993).

53) For an outline ofcivil procedure in Japan, see Yasuhei Taniguchi, Civil Litigation, in Zentaro Kitagawa, 7 Doing Business in Japan, XⅣ, at 10-1 to 10-87 (1982).

there are many problems in environmental civil procedure, but only a few special matters are discussed here.

However, even the relatively conservative Korean and Japanese courts have sometimes played creative roles in environmental litigation. First, the right to sunshine merits consideration. Historically, the Japanese people have been concerned with assuring the access to sunlight. Sunlight-related lawsuits increased significantly in the late 1960s and the early 1970s because people were affected by the construction of tall buildings. In 1972, the above-mentioned Mitamura case was brought in Tokyo for damages due to the obstruction of ventilation and sunlight. The Supreme Court[54] held that ventilation and sunlight were necessary for a comfortable and healthy life, and therefore deserved legal protection.[55] Although the court's opinion did not explicitly recognize a right to sunshine, it encouraged residents to pursue remedies, including injunctions. This issue arose out of citizens' reactions to the loss of the urban amenities sacrificed during the post-World War Ⅱ reconstruction period. In spite of a strict catalogue of codified rights, it is noteworthy, considering the role of the court in environmental protection, that the court in the Mitamura case effectively created a right to sunshine and remedies for the encroachment on that right.[56]

The second example of the court's creativity is the formulation of a duty on the part of businesses to complete the equivalent of an environmental impact statement. Several judicial decisions, in judging the legality of certain actions, have taken into consideration whether defendants should have conducted an investigation equivalent to an environmental impact statement, despite the absence of statutes requiring such a statement and apart from local ordinances that might require it. For example, in the Ushibuka Human Waste Treatment Plant case, the plaintiffs sought a preliminary injunction to prevent the plant's construction. The Kumamoto District Court[57] decided that the defendant should have conducted an expert survey regarding the tidal direction and speeds in the vicinity of the

54) The Judgment of June 27, 1972, Saikosai [Supreme Court], 26 Minshu, No. 5, at 1067 (Japan).
55) See Gresser etal., at 139-43. See also Upham, at 254-56; Kazuaki Sono & Yasuhiro Fujioka, The Role of Abuse of the Right Doctrine in Japan, 35 La. L. Rev. 1037, 1052-54 (1975).
56) See Gail F. Takagi, Designs on Sunshine: Solar Access in the United States and Japan, 10 Conn. L. Rev. 123, 142 (1977); Steven S. Miller, Let the Sunshine In: A Comparison of Japanese and American Solar Rights, 1 Harv. Envtl. L. Rev. 578, 581 (1976).
57) Judgment of Feb. 27, 1975, Kumamoto [District Court], 772 Hanji 22 (Japan).

contemplated site, and that the defendant should have undertaken an ecological investigation of the influence of waste water on fish and clams. It is notable that a decision like this, though merely casuistic, nevertheless fills a void in the law.

Apart from substantive problems, there are also several procedural obstacles. Despite the relative availability of temporary injunctions,[58] the courts have seldom ordered a permanent injunction in the context of environmental suits against large corporations and public utilities.[59] For example, plaintiffs seeking an injunction against factories which emanate excessive levels of noise have often lost because of procedural problems. This occurs partly because the content of such a complaint is too vague to properly inform the defendant what he is defending against, and partly because the remedies sought by the plaintiff are too complex for the court to implement.[60]

The Civil Procedure Act of 1890 does not explicitly require strict specificity in complaints. Even so, in the 1991 Osaka Nishiyodogawa case,[61] the Osaka District Court held that a complaint seeking an injunction was dismissed due to vagueness even though it stated that defendants should not be permitted to make more than 0.02 ppm density of NO<2> per day, a seemingly precise standard.[62] Moreover, in the Kawasaki Steel Company case,[63] the Chiba District Court held that even if the court should issue an injunction ordering the defendant to maintain a specific density of NO<2> less than a certain standard, the court could not implement such a vague decision with direct or indirect coercive measures.[64] In the Route 43 case,[65] residents sought a permanent

58) The suit for provisional relief is based on the Civil Provisional Remedy Act of 1989. Minji Hozenho (Civil Provisional Remedy Act), Law No. 91 of 1989.

59) Compare actions in the United States where injunctive relief is more freely granted. For an interesting case under the Endangered Species Act of 1973, 16 U.S.C. 1531-1543 (1988), see TVA v. Hill, 437 U.S. 153 (1978) (discussing protection of snaildarters' habitat).

60) For a discussion of those problems, see Shiro Kawashima, Sashitome Seikyu [On the "Abstract Claim" in Injunction], 981 Jurisuto 68 (1991); Sashitome Sosho ni okeru Kyosei Shikko no Igi to Yakuwari [The Significance and Role of Implementation Process in Injunction], 971 Jurisuto 260 (1991).

61) Kawashima, at 68.

62) Judgment of Mar. 29, 1991, Osaka [District Court], 1383 Hanji 22 (Japan).

63) Judgment of Nov. 17, 1988, Chiba [District Court], Hanji, Heisei 1 Nen 8 Gatsu 5 Nichi Go 161, 219 (Japan).

64) For a discussion of the creative implementation process in U.S. environmental litigation, see Timothy G. Little, Court-Appointed Special Masters in Complex Environmental Litigation: City

injunction to prevent traffic noise. Initially, they lost because their complaint was held to be vague. On appeal in 1992, the Osaka High Court[66] held that because the remedy sought was clear to the defendants and the court could coerce the decision indirectly by awarding money damages, the plaintiffs'complaint seeking an injunction against traffic noise exceeding specified noise limits during a certain period of the day was legitimate. While this decision is clearly a step in the right direction, it is unclear whether this decision created a precedent on the required amount of specificity in a complaint. Therefore, the courts' generally hostile attitude toward permanent injunctions may not have been truly been changed within the Japanese civil judicial system.

5) Active Role of Judiciary towards Policy-making

Generally, ordinary citizens have strengthened their negotiating power againstpowerful industries and the governments through the judicial process. As a result, the judicial process and remedies have been indispensable in establishing fair procedures and opening government decisions to public scrutiny. However, one must remember the conservative, restrained character of the Japanese judicial system. The Japanese courts ordinarily focus only on the dispute resolution aspect, unlike the U.S. courts which focus not only on dispute resolution but also policy-making.[67] In fact, the Korean and Japanese courts have often explicitly avoided getting into judicial policy-making. For example, in the Osaka International Airport case, the Supreme Court avoided making a judgment on the soundness of the administrative policy of the airport by dismissing the injunction before the trial.[68]

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of Quincy v. Metropolitan District Commission, 8 Harv. Envt'l L. Rev. 435, 449-67 (1984).

65) Judgment of July 17, 1986, Kobe [District Court], 1203 Hanji 1 (Japan).

66) Judgment of Feb. 20, 1992, Osaka [High Court], 1415 Hanji 3 (Japan).

67) See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976) (discussing the difference between traditional litigation and the new public law litigation that judges engage in); Owen M. Fiss & Doug Rendleman, Injunctions 528 (2d ed. 1984).

68) See also Upham, at 260-67 (describing the Lake Biwa case). The Lake Biwa case was dismissed before trial by the Judgment of Mar. 8, 1989, Otsu [District Court], 35 Shomu Geppo, No. 8, at 1450 (Japan).

Ⅲ. Environmental Criminal Law

1. Criminal Enforcement

Japan's environmental crime laws have not been enforced with the same rigor as those in the United States. One important consideration in understanding the current difference in enforcement strategies in the United States and Japan is public opinion regarding the criminalization of acts of pollution. In the 1960s and 1970s, there were a number of highly publicized intentional acts of pollution in both Japan and the United States. In Japan, most attention was centered on the "Big Four" pollution cases,[69] while in the United States, media attention focused on the Love Canal scandal.[70] In the years following this period of elevated environmental consciousness, neither country experienced a pollution incident that gripped national public attention in the same manner as the events of the previous decades. This changed in 1989, however, when America experienced one of the worst and most publicized acts of pollution in its history, the Exxon Valdez oil spill in Prince William Sound, Alaska.[71] There is strong evidence that the Exxon Valdez

69) McKean, at 20. The "Big Four" cases include the Niigata and Kumamoto cases (involving mercury poisoning), the Yokkaichi City case (involving air pollution from oil refineries and petrochemical and power plants), and the Toyama itai-itai case (involving cadmium poisoning). Gresser et al., at 29-30.

70) Love Canal was a residential area of Niagara Falls where large quantities of solid and liquid waste had been buried underground. In 1978, these wastes began to seep into the basements and playrooms of houses. Roger C. Dower, Hazardous Wastes, in Public Policies for Environmental Protection 151, 151 (Paul R. Portney ed., 1990). Two hundred and thirty-seven families had to be permanently evacuated from their homes. Joel A. Mintz, Enforcement at the EPA: High Stakes and Hard Choices 93 (1990), at 33. As Roger Dower notes, "One can almost mark 1978 as the year when public attention shifted radically toward the view of hazardous waste disposal as a national environmental problem.... Today, no other environmental problem is more well-publicized or higher on the public agenda than hazardous wastes ...." Dower, at 151. For more on the publicity surrounding Love Canal, see Alexa B. Pappas, The Clean Air Act Amendments of 1990 Enhanced Criminal Liability, 3 Vill. Envtl. L.J. 181, 204 n.16 (1992).

71) The T/V Exxon Valdez ran aground on Bligh Reef in Prince William Sound on the evening of March 23-24, 1989, and spilled approximately 11 million gallons of North Slope crude oil, making the Exxon Valdez spill the largest oil spill in U.S. history. The oil spread through

spill was a crucial event in the development of American public attitudes towards environmental crime,[72] because it generated a renewed sense of public outrage over pollution.[73] However, Japan did not experience an incident analogous to the Exxon Valdez spill until 1997.

In contrast to the United States, Japan generally did not need a criminal enforcement program to ensure regulatory compliance by its regulated industries. In the United States, where industry and government often view each other more as adversaries than allies,[74] criminal enforcement was necessary to prevent pollution by companies that ignored or flouted environmental laws.[75] Such tactics were not as necessary in Japan. Commentators have noted that in Japan, industry has a more cooperative relationship with the governmen t[76] and does not oppose regulation in the same manner as industry in the United State

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Prince William Sound, the Gulf of Alaska, and lower Cook Inlet, and affected more than 1,200 miles of coastline, including portions of the Chugach National Forest, Alaska Maritime, Kodiak, Alaska Peninsula/Bechrof National Wildlife Refuges, Kenai Fjords National Park, Katmai National Park and Preserve, and Aniakchak National Monument and Preserve. Summary of Injuries to Natural Resources As a Result of the Exxon Valdez Oil Spill, 56 Fed. Reg 14,687, 14,687-88 (1991). As a result of the spill, over 1,000 sea otters and over 36,000 birds, including over 144 bald eagles, died. Id. at 146890-91.

72) A 1991 study showed that 84% of Americans believe that damaging the environment is a serious crime. Theodore M. Hammett & Joel Epstein, U.S. Dep't of Justice, Local Prosecution of Environmental Crime xiii (1993).

73) See Webster J. Arceneaux Ⅲ, Potential Criminal Liability in the Coal Fields Under the Clean Water Act: A Defense Perspective, 95 W. Va. L. Rev. 691, 706 (1993). The Exxon Valdez spill has also been deemed the "the largest environmental crime in U.S. history." Thomas Koenig & Michael Rustad, "Crimtorts" As Corporate Just Deserts, 31 U. Mich. J.L. Ref. 289, 331 (1998).

74) Gresser et al., at 280.

75) See Carr et al., at 5.

76) The contrast between the two nations was noted by a group of state officials from the U.S. Council of State Governments, which toured Japan in 1988 to learn more about environmental management there. Council of State Gov't, Environmental Management in Japan: What Can the States Learn? 4 (1988). A report summarizing their conclusions noted: Enforcement of environmental standards is handled in a much less confrontational way. Use of litigation is considered to be an absolute last resort. Instead, negotiation and consensus building is the route taken. Their process may take a considerable amount of time, although U.S. litigation can also be a lengthy process. There appears to be a cultural aversion to litigation that does not exist here [in the U.S.]. Id.

s.[77] The principal methods of inducing compliance with environmental regulations in Japan have been discussion, negotiation, and warning.

Rather than employing coercive measures, Japanese governmental administrators responsible for ensuring regulatory compliance are known to prefer a technique called "administrative guidance."[78] Administrators encourage violators to comply by utilizing the leverage they have to deny licenses or required permits.[79] While not unique to Japan, administrative guidance has been particularly successful in Japan,[80] and the government has been able to persuade industrial facilities to comply with even the strictest regulations without having to resort to formal legal mechanisms.[81] Administrative guidance, however, generally has focused on achieving compliance with emission standards, and criminal enforcement is still needed to deter violations by companies that generate or handle environmentally harmful substances such as petroleum or industrial waste.

One final factor that may explain why criminal prosecution for environmental violations is less common in Japan is the role of the judicial system. Like prosecutors in the United States, Japanese prosecutors have broad discretion in deciding whether to prosecute an offender. Prosecutors in both countries are undoubtedly influenced by the likelihood of obtaining a conviction, which in turn is influenced by legal precedent.[82] American

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77) Gresser et al., at 280.

78) Shiro Kawashima, A Survey of Environmental Law and Policy in Japan, 20 N.C. J. Int'l L. & Com. Reg. 231, 257-58 (1995).

79) Id. The only limitation on an agency using administrative guidance is that it cannot violate the law. Susan Ridgley, Environmental Protection Agreements in Japan and the United States, 5 Pac. Rim L. & Pol'y J. 639 (1996), at 655.

80) Marshall Lee Miller et al., Environmental Law in Japan: An Overview, 2 E. Asian Exec. Rep. 3, 20 (1980).

81) See generally Michael K. Young, Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan, 84 Colum. L. Rev. 923 (1995). While Japan is not the only country that utilizes administrative guidance, Japanese bureaucrats are unique in the extent to which they rely on informal mechanisms to achieve regulatory goals. John O. Haley, Administrative Guidance Versus Formal Regulation: Resolving the Paradox of Industrial Policy, in Law And Trade Issues of The Japanese Economy 107 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).

82) See Lynda J. Oswald, Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters, 85 Mich. L. Rev. 152, 173 (1986) ("A number of other factors may influence the prosecutor's decision to charge, including ... the perceived likelihood of

prosecutors have the benefit of relatively favorable legal precedent in the area of environmental crime, which helps explain why the prosecution of environmental crimes has been more common in the United States.[83] American courts have decided dozens of important environmental crime cases over the past thirty years and have been receptive to progressive criminal liability theories such as the "responsible corporate officer" doctrine.[84] Courts have also liberally construed statutes such as the Clean Water Act ("CWA") in a manner that does not require prosecutors to prove that violators actually knew that their actions violated the law.[85]

In animportant case decided last year, the Ninth Circuit Court of Appeals held that an individual can be held criminally liable for a violation of the CWA that is caused by "ordinary negligence" rather than by "criminal negligence," which is more difficult to prove.[86] Commentators have noted that this decision "will likely draw the attention of criminal prosecutors and may lead to more aggressive enforcement actions."[87] With the

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conviction.") (citing United States v. Saade, 652 F.2d 1126, 1136 (1st Cir. 1981); United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978)); Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, 19 UCLA L. Rev. 1, 11 (1971); Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961).

83) See Joshua D. Yount, The Rule of Lenity and Environmental Crime, 1997 U. Chi. Legal F. 607, 610 (1997).

84) This doctrine allowsthe government to hold a corporate officer criminally liable for public welfare offenses, regardless of his or her participation, as long as he or she is in a position of power to prevent and correct the violation. See Kevin A. Gaynor et al., Criminal Enforcement of Environmental Laws, in Environmental Litigation 225-25 (Janet S. Kole & Larry D. Espel eds., 1st ed. 1998.

85) See Christine L. Wettach, Mens Rea and the "Heightened Criminal Liability" Imposed on Violators of the Clean Water Act, 15 Stan. Envtl.L.J. 377, 384-87 (1996) (discussing United States v. Weitzenhoff, 1 F.3d 1523 (9th Cir.), reh'g denied and amended, 35 F.3d 1275 (9th Cir. 1993)).

86) United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999). Hanousek sought a jury instruction that would require the jury to find criminal negligence, "a gross deviation from the standard of care that a reasonable person would observe in the situation." Id. at 1120 (quoting the American Law Institute's Model Penal Code 2.02(2)(d) (1985)). The court, however, instructed the jury that the government was required to prove only that the defendant acted negligently, which it defined as failing "to use reasonable care." Id.

87) Kurt Weissmuller, 9th Cir. Holds Project Manager Criminally Liable Under CWA, 15 Envtl. Compliance & Litig. Strategy 4 (1999).

help of such favorable case law, the Department of Justice's Environmental Crimes Section has achieved an overall conviction rate as high as ninety-five percent.[88] The high conviction rate in turn encourages prosecutors to prosecute future cases.

In contrast, there have only been two landmark environmental crime cases in Japan, both of which were decided by the Japanese Supreme Court in 1988 after nearly a decade of litigation. The first case involved the Chisso Corporation, a company that gained international notoriety for its discharge of methyl mercury-contaminated wastewater into Minimata Bay.[89] The mercury found its way into the food chain and concentrated in human brain tissue, causing the dreaded "Minimata disease."[90] A lower court found the president of the company and the factory manager guilty of negligently causing the deaths of seven people.[91] In 1988, the Japanese Supreme Court affirmed the lower court rulin g.[92] Although this was the first time that the Supreme Court upheld the criminal conviction of a top corporate official in a pollution case, the case has limited value as precedent because it was prosecuted under the Criminal Code and not under an environmental crime law.[93]

In 1988, the Supreme Court reviewed a second environmental crime case involving the Nippon Aerosol Company.[94] In 1974, an apprentice tank truck driver connected a pipe

88) Marzulla & Kappel, at 201. Between October 1, 1987 and May 31, 1993, there was an overall conviction rate of 91.1%. Christopher Huber et al., Environmental Crimes, 33 Am. Crim. L. Rev. 607, 612 (1996).

89) For more on the facts and procedural history of this case, see Frank Upham, Japan v. Kawamoto: Judicial Limits on the State's Power to Indict, 13 Law in Japan 137 (1980).

90) Id. at 137; Lower Court Rulings on "Minimata Disease" Case Upheld, Jiji Press Ticker Service, Mar. 1, 1988, available in LEXIS, Asia/Pacific Rim Archive News [hereinafter Minimata Disease]. This case was the only one of the "Big Four" pollution cases that resulted in criminal sanctions. Oda, at 187. Symptoms of Minimata disease included "concentric constriction of the visual field, poor motor coordination, disturbances in sensation, loss of speech or hearing, tremors, and convulsions in the limbs." McKean, at 50. The disease can strike and kill in a matter of weeks and causes birth defects in children. Id. at 50-51. By 1979, it was estimated that there were 10,000 Minimata victims. Id. at 57.

91) Oda, at 187. When the case was appealed, the appellate court upheld the judgment of the district court. Id.

92) Id.

93) Id. at 187.

94) Id. at 188-89.

incorrectly, causing a discharge of chlorine gas into the air.[95] The discharge caused numerous health problems in the surrounding community.[96] The apprentice, his colleague, his supervisor, and the head of the production department were prosecuted for violations of the Environmental Pollution Crime Law[97] and, in 1979, a lower court found all four employees guilty.[98] The head of the department and the supervisor were found negligent because they allowed an inexperienced apprentice to handle the pipe without adequate training.[99] The court ordered the company to pay a fine equivalent to $ 10,000 and the employees were given four-month suspended sentences.[100] In 1988, however, the Supreme Court reviewed the case and reversed the conviction of the company, holding that the discharge was an accident and that there were limits on how far the law could be applied in accident cases.[101] While it is difficult to gauge the effect of these two cases on the enforcement of environmental laws in Japan, it is apparent that Japanese prosecutors do not have the benefit of favorable case law enjoyed by American prosecutors. This is

95) Two employees accidentally opened the wrong valve after liquid chlorine in a reserve tank had accumulated, and the liquid chlorine turned to gas and flowed out. Court Finds Chemical Firm Innocent, Employees Punished; Nippon Aerosol Co., Japan Econ. Newswire, Oct. 27, 1988, available in LEXIS, Asia/Pacific Rim Archive News [hereinafter Nippon Aerosol Co.].

96) One hundred and twenty-six inhabitants experienced dermatitis, and 44 citizens living near the factory suffered from acute laryngitis. Oda, at 188-89. In Yokkaichi, theeyes and throats of more than 10,000 residents were affected

97) Id. at 188. The prosecutor in the case, Katsuhiko "The Bear" Kamazuki, has recently gained celebrity status in Japan for his prosecution of corruption in Japan's Finance Ministry. See KazuhiroShimamura & David Williams, Japan Scandal Bear, Agence France Presse, Mar. 8, 1998, available in LEXIS, World News Database, Bus. Anal. & Country Info and Selected Legal Texts and Codes File.

98) Oda, at 188 (citing Judgment of the Tsu District Court, Mar. 7, 1979. Nagoya Appellate Court, Jan. 24, 1984 (Japan Aerosol Case)).

99) Id. at 188.

100) Gresser et al., 261 n.211.

101) Nippon Aerosol Co., Japan Econ. Newswire, Oct. 27, 1988, available in LEXIS, Asia/Pacific Rim Archive News. The decision did include some favorable holdings. The court affirmed the lower court convictions of the four employees, four-months in prison and two years of probation. Id. The court also found that persons can be held liable under the law even if the discharge is the outflow of waste carried out as part of a factory's normal operations. Id. The court also held that supervisors can be held criminally liable for negligent acts of employees. Id.

another factor that may explain why prosecution is less common in Japan than in the United States.[102)]

In summary, there are a number of possible explanations for Japan's reluctance to prosecute polluters as frequently as the United States. These include the different chronologies of major pollution events in Japan and the United States and the different regulatory environments, organizational frameworks for enforcement personnel, and case law of the two countries. As Japan looks to its future, it must decide whether the current level of criminal enforcement provides sufficient deterrence for intentional and reckless acts of pollution.

2. Environmental Criminal Law Theory

To compare two legal systems with respect to a limited area of penal politics, such as environmental criminal law, would not generate particularly interesting results if it turned out that the systems in question were based on vastly different fundamental goals, ideas, and perspectives. No deep gap, however, separates the basic principles of American and Asian criminal law,even though the history of criminal law and its theoretical foundations have taken entirely different paths in the twosystems. Neither in the United States nor in Asia may the legislature decide entirely at its own discretion which conduct should be criminalized and which should not.

Although the constitutional conditions for criminalizing conduct are not identical in both systems, they resemble each other in several respects, including their vagueness. Limitations upon criminal legislation in the United States and Asia are flexible and are derived in similar ways from the constitution. In the United States, for example, the

102) Commentators have noted that corporate managers in Japan are often acquitted in environmental crime trials. An example is the 1973 Morinaga Milk Case, which involved the contamination of dry milk by inorganic mercury and caused a number of infants to die or become sick. Oda, at 195. Ryuichi Hirano, Comment, Penal Law Protection of the Natural Environment in Japan, 13 Law in Japan 129, 132 (1980). While the head of the production section was found guilty of negligent homicide and negligent bodily injury, the manager of the plant was acquitted. Id. A similar result was reached in a case involving the death and injury of a number of people from polychlorinated biphenyl ("PCB") contamination of rice bran oil. Id. at 132-33. The plant manager was convicted, but the president of the company was merely discharged. Id.

criterion of "social harm" is acknowledged as the leading principle of criminalization.[103] Similarly Asian criminal law recognizes the principle of social harm under the strong influence of German conception of "Sozialschaden",[104] which is defined as harming or endangering a legal interest ("Rechtsgut").[105] Because legal interests (Rechtsgueter) are generally defined to encompass all conditions and purposes which are useful for individuals or society, the Sozialschaden principle places only a very broad and vaguely defined limit upon the legislature's discretion.

The difference between American law and Asian law on this point is one of form rather than substance. In Asia one invokes the criminal law concept of the legal interest as a prerequisite for criminalization, which is considered lacking in the case of behavior that is merely immoral. In the United States, by contrast, one does not draw on criminal law concepts but, instead, relies on constitutional limitations on the scope of the criminal law, such asthe right to privacy and the prohibitions against vague or retroactive criminal legislation. As these limitations are vague, however, the method of argumentation has little substantive significance. Clearly, the principle of social harm in the United States and the protection of legal interests ("Rechtsgueterschutz") in Japan or Korea leaves the legislature vast discretion in matters of criminal law.

Despite the basic similarity between the constraints upon criminal lawmaking in the United States and Asia, the degree to which these constraints are enforced by the courts in both systems differs in two respects. First, for example, the Korean Constitutional Court

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103) See, e.g., N.Y. Penal Law 1.05(1) (McKinney 1989 & Supp. 1997) ("Conduct which Causes or Threatens Substantial Harm to Individual and Public Interests"); Model Penal Code 1.02(1)(a) (Proposed Official Draft 1962); see also Joshua Dressler, Understanding Criminal Law 1, 69, 95-99 (2d ed., 1995); George Fletcher, Rethinking Criminal Law 472-83 (1978); Joel Feinberg, Harm to Others 227-32 (1984); Paul H. Robinson, The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception, 5 J. Contemp. Legal Issues 299 (1994). For a quantitative analysis, see Andrew von Hirsch & Nils Jareborg, Gauging Criminal Harm: A Living-Standard Analysis, 11 Oxford J. Legal Stud. 1 (1991).

104) Claus Roxin, Strafrecht Allgemeiner Teil 10-28 (2d ed., 1994); Hans-Heinrich Jescheck & Thomas Weigend, Strafrecht Allgemeiner Teil 7-8 (5th ed., 1996).

105) In Germany, the concept of Rechtsgut is grounded in the German Constitution, 21 BVerfGE [Decisions of the Federal Constitutional Court] 391, 403;25 BVerfGE 269, 286; 50 BVerfGE 142, 153. For the most recent critique of the Rechtsgut concept, see Otto Lagodny, Strafrecht vor den Schranken der Grundrechte (1996).

examines every law that touches upon the constitutional rights of citizens under the so-called proportionality principle (Verhaeltnismaessigkeitsgrundsatz). This principle consists of the following sub-principles: the law in question must be (1) generally appropriate to achieve the intended aim, (2) necessary in that there are no less intrusive alternatives available, and (3) narrowly appropriate as determined by an analysis of its actual costs and benefits. Altogether, criminal law may be invoked only as the last resort, or ultima ratio, for the effective protection of all legal interests.

Although the Korean Constitutional Court repeatedly has declared that the legislature enjoys some leeway in assessing these factors, it has claimed for itself the competence to evaluate the legislature's assessments. In this way, the Korean Constitutional Court enforces the limitations upon criminal lawmaking with an intrusiveness far in excess of that displayed by American courts under the proportionality principle of American constitutional law.[106)]

Second, from the state's duty to protect the constitutional rights of its citizens in connection with the proportionality principle, the Korean Constitutional Court derives the legislature's affirmative constitutional duty to criminalize harmful or dangerous conduct, provided that protection cannot be effected by less intrusive means. Under its constitutional jurisdiction, the Constitutional Court thus reviews not only the decision to criminalize a given conduct but also the decision to decriminalize such conduct or the failure to criminalize it in the first place.

Let menow shift from the general to the specific and address the conditions for the use of penal law in the context of environmental law. In the United States, penal provisions for the protection of the environment[107)] are part of specific laws dealing with the administration of resources like the Clean Air Act or the Clean Water Act. In scholarship, they have received less attention within the context of criminal law. Leading criminal law text books and case books either do not cover environmental criminal law at all or at best treat it as a topic of marginal interest.

In Asia, environmental criminal law suffered a similar fate until 1970. In that year,

106) See Joshua Dressler, Understanding Criminal Law (2d ed., 1995), ch. 6.

107) See Barry Kellman, Criminal Law and Environmental Protection, 65 Int'l Rev. Penal L. 885 (1994); Stephen Thamann, Landesbericht USA, in Umweltstrafrecht in England, Kanada und den USA 317 (Albin Eser & Guenther Heine eds., 1994).

Japan introduced a special penal law protecting the environment, and 1990 Korea followed the enactment of Japanese type of environmental criminal law. Since then, the criminalization of environmental harms has become a major field of criminal law theory. The result has been a refinement of the application of the general conditions of criminalization discussed above to the case of environmental harms.

1) Legal Interest

At present, there are four theories of the legal interest protected by environmental criminal law: the anthropocentric theory, the ecology-centered theory, the compromise theory, and the theory of administrative management.

⑴ Anthropocentric Theory

The anthropocentric theory aims to protect the interests of individuals living in the present, who, for example, might become ill from polluted air. Under this theory, harming the environment is relevant to the criminal law because it endangers humans. Damaging the environment without posing a serious danger to the well-being of specific individuals thus would not be considered criminal wrongdoing. On this ground, some Korean proponents of the anthropocentric theory argue that existing penal prohibitions are illegitimate.

⑵ Ecology-Centered Theory

In sharp contrast to the anthropocentric theory, the ecology-centered theory holds that environmental functions and components as such are entitled to penal protection. Pollution of air or water, for example, in itself constitutes a wrongdoing that calls for punishment. Obviously, this approach justifies an extreme expansion of environmental criminal law and generally is considered a violation of the fundamental principle of social contract theory that the scope of state actions should be limited to the protection of its citizens.

⑶ Compromise Theory

Most legal scholars endorse the compromise theory, which aims at protecting environmental goods not fortheir own sake but according to their function and importance

for the population. Although this approach appears sound, like all compromise theories it suffers from a lack of criteria for distinguishing between its two extreme versions. How, for example, can one justify criminal punishment for pollution that does not endanger humans, if supposedly nature is protected only as a means to the well-being of individuals? Moreover, this theory yields no guidance regarding the differentiation between necessaryand therefore legaluse of natural resources, on one hand, and harmfuland thus unlawfuloveruse of the environment, on the other hand.

⑷ Theory of Administrative Management

The fourth theory claims that the only way to distinguish between legal and illegal use of the environment is to rely on the management of resources by a state agency. According to this view, the legal interest underlying environmental offenses is the distribution scheme chosen by the agency. Environmental offenses therefore are defined as offenses against the state. The consequence of this view is that environmental damages approved by a state agency are not punishable, no matter how disastrous their consequences.

3. Proportionality

On the second level of examination, the evaluation of environmental criminal law under the principle of proportionality, the difficulty of distinguishing between legal use and punishable misuse of the environment reappears. The proponents of the anthropocentric view stress that in contemporary industrial societies the vast majority of polluting acts are entirely legal, and that criminal prosecution thus tends to be limited to petty cases. Some of them argue that penal law is an entirely unsuitable means to protect the environment, or, even worse, that the use of criminal law in this area is harmful and counter-productive. They further argue that criminal law diverts attention from the real problem of legal pollution and serves as an alibi to prevent the necessary far-reaching changes in administrative or tax law concerning the consumption of natural resources.

4. Punishability

This attack on the appropriateness of environmental criminal law highlights the fundamental dilemma that all industrial societies must face; daily destruction and consumption ofnatural resources form their identity and distinguish them from preindustrial societies. This fact influences the third level of analysis, which addresses the methods by which a legislature can differentiate between punishable and non-punishable consumption of natural resources. If this distinction were based on exact quantities, which cannot be precisely defined by the legislature, an administrative agency would have to promulgate detailed regulations without gaps for all activities impacting the environment throughout the country. The protection of the environment then would be left not to the legislature, but to administrative agencies. Indeed, this is the prevailing strategy of environmental law in the United States and in Asia.

This administrative strategy, however, has three unpleasant consequences. First, criminal law by itself cannot provide effective protection for the environment since the administrative agencies may expose the environment to destruction by overly permissive regulations. Second, the scope of criminal law depends on administrative regulations, thus undermining the constitutional principle of legality which places decisions regarding the scope of penal law into the hands of the legislature (the principle of legality = "Gesetzlichkeitsprinzip"). Third, one may be forced to define the relevant legal interest ("Rechtsgut") as nothing other than the enforcement of management decisions by an administrative body, thus rejecting the idea of an environmental criminal law as such.

Avoiding these consequences requires drawing the line between legal and punishable use of environmental resources on the basis of some rather vague criterion, such as the avoidability of a given consumption of environmental goods with the most advanced technological methods ("Stand der Technik"or Best Available Control Technology). However, such an approach also will have grave, even intolerable, consequences, as the reach of environmental criminal law would be determined by those authorized to define "the most advanced technological methods."If technical engineers, and thus the industries behind them, would be authorized to do so, the potential polluter would decide what pollution is permissible. Obviously, it is not acceptable to let the person who is doing the

harm determine the wrongfulness of his conduct.

The alternative of letting the courts weigh the competing interests and, on that basis, define "the most advanced technological methods"once again conflicts with the legality principle. At any rate, using "the most advanced technological methods"as a criterion for legal use of environmental resources has another fundamental drawback; even enormous risks and harms would be legal, as long as effective measures for the elimination of harmful substances have not yet been invented. In other words, if the legality of uses of the environment turned on technological feasibility, the necessary consequence would be the triumph of technology over the environment.

Ⅳ. Resume and Conclusion

Northeast Asia has experienced explosive economic development since World War Ⅱ and at present there are developing countries and developed countries in Asian region according to their stage of development. Many countries in the Asian region have begun to realize that environmental law can be part of the answer to their regional and national environmental problems. Countries in East Asia such as Japan and Korea, have now relatively effective environmental legislation and implement of various environmental laws. However, the success ofevolutionary environmental law and legal theories could come at the costs of the past bitter experiences. In Japan, for example, the so-called "big four"cases radically altered the attitudes of people and courts toward environmental pollution. The Japanese "big four"judgments accelerated the establishment not only basic legal thinking and principles governing damage claims and criminal evidence, but also of a national compensation system for personal injury caused by environmental pollution in Japan as well as in the Asian region. Korea has also similar experience regarding the development of environmental program. As democracy has developed in Korea, the Korean people's awareness of environmental protection has dramatically increased, affecting governmental and business practices both in the form of public protest and by means of litigation. China was just beginning to develop environmental law in the late 1980s. Since then China has enacted a number of new environmental laws. Despite this increased

environmental lawmaking and increasing awareness of environmental problems, in the case of China's provinces, environmental law demonstrates not only the negative side effects of economic autonomy, but also the difficulty of enforcing national law when region do not see such enforcement as in their own interests.

Key words: environmental law in Asian countries, Big Four Pollution case in Japan, civil law, environmental administrative law, environmental criminal law

【국문 초록】

동북아시아의 환경법의 발전현황

조 병선(청주대학교 법과대학 교수)

아시아 국가들의 환경법의 발전현황 중에서도 동북아시아지역의 국가인 한국, 일본, 중국에 초점을 두고 비교법적으로 고찰하였다. 먼저 제1장에서 서론을 겸하여 아시아지역의 근대법의 계수와 관련하여 아시아법계의 특징을 개괄적으로 간략히 서술하였다. 제2장에서는 환경오염이라는 근대에 들어 아시아에 공통된 현상에 대응하는 판례 및 그 이론을 역동적으로 구성하면서 비교법적 고찰을 시도하였다. 먼저 개괄적으로 동북아시아지역의 환경문제와 그에 대응한 환경법제 및 판례와 이론의 발전을 한국, 일본, 중국의 경우를 들어 설명하였다. 그리고 비교법적인 관점에서 간략히 동북아법제의 문화적 배경을 검토하고 환경법 판례가 당면한 이론적 문제점을 한국, 일본, 중국의 경우 어떻게 해결하고 있는지 헌법적 환경권의 문제, 행정소송의 제문제, 민사소송의 제문제 등의 차례로 검토하고, 이와 관련하여 법원의 환경보호에 대한 전향적인 판례의 역할을 비교하였다. 그리고 다음 장에서는 환경형법의 문제를 한국, 일본, 중국의 경우를 환경형법의 이론적 문제점을 기준으로 하여 평면적으로 비교하면서 형법이론의 해결방향을 제시하였다. 이상의 검토한 결과를 간단하게 요약하면서 결론을 대신하였다.

주제어 : 동북아의 환경법, 환경보호를 위한 법원의 역할, 환경행정소송, 환경민사소송, 동북아의 환경형법