

## Law and Politics in Environmental Protection: A Case Study on Korea

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### **Abstract**

*While law played an instrumental role in Korea's economic development, it has not been as effective in the field of environmental protection. Although Korea has successfully modernized its formal environmental law system, its practical application has fallen well short of public expectations as compared to progress in the economic realm. Judicial oversight has been gradually increasing, yet the courts have exercised restraint in test cases brought by nongovernmental environmental and citizens' organizations. In this paper, the author attempts to explain why this divergence between legislative initiatives and administrative practices took place. Drawing on recent literature which sees the structure of government as dictated by politics, the author explores why the bureaucracy neither behaves as expected by the public nor performs as mandated by legislation, and why the courts just look on with folded arms. After pointing out the inherent limits of current efforts, the author concludes that establishing the "rule of law" concept more firmly in judicial, administrative, and legislative practice is crucial to furthering the quality of life as affected by the environment.*

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## I. Introduction

Until and even after the Asian financial crisis in late 1997, many developing nations looked to Korea as a model for rapid industrialization and economic prosperity. In this regard, the role of law in the Korean economic development process drew considerable attention from academic and policy circles. A recent study revealed that the Korean government intentionally and successfully utilized legislation in achieving its goal of economic development.<sup>1)</sup>

However, the same cannot be said of the role of law in the field of environmental protection. Though Korea accomplished modernization of environmental law system, its administrative practice, as compared to economic progress, falls well short of the public's expectation. From the 1990s, and in response to the public's growing concern for the environment, Korea created the new environmental law system modeled on that of the United States. It is therefore true that Korea's environmental legislation, both substantive and procedural, is up to the same level as that of developed countries. But similar in form, Korea and the United States differ in the extent to which they enforce their environmental law. We thus have a situation in which two countries with similar statutory structure perform in quite different ways, providing an ideal environment for comparative research to determine why their outcomes diverged.

Another aspect of the Korean environmental law regime which is worthy of note is that the courts' attitude in the field of private law differs from that of public law. Coupled with the weakness of the role of law in the environmental protection process, this characteristic provides a useful clue to enable us to understand Korea's political dynamics surrounding its environmental law regime.

In this article, I will discuss whether and to what extent law has played a role in Korea's environmental protection process. The question whether and to what extent law and legal institutions have had a positive impact on environmental protection depends largely upon the type of law concerned. My discussion is therefore divided into two parts, private law and public law. In discussing the interplay between law and environmental protection efforts, I use a political-economic intuition. It seems to me that economic intuition explains much (though not everything) about law-related

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1) Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 *the International Lawyer* 267 (Spring, 2000).

behavior in Korea. But though I use a political-economic approach, this paper does not provide any positive index. As befits an introductory essay, I have cut out all detail. Instead, I provide as many anecdotes as possible to describe the general trend of interaction between law and politics in the field of environmental protection.

I proceed as follows. In part II, I examine Korean government's effort to combat against environmental degradation. Korea has successfully modernized legal system for environmental protection, and the general public is well aware of the significance of environment, striving for participation in environmental policy-making. While the bureaucracy neither behaves as expected by the public nor performs as mandated by legislation, the courts just look on with folded arms. In part III, I discuss why law and legal institutions cannot play an instrumental role in environmental protection, drawing on recent literature which sees the structure of government as dictated by politics. In part IV, after pointing out the current efforts' inherent limit, I conclude that establishing the "rule of law" concept more firmly in the judicial, administrative, and legislative practice is crucial to furthering the quality of life as affected by the environment in the Korean peninsula.

## **II. The Role of Public Law in Korea's Environmental Protection Process**

### *A. Advanced Statutory and Institutional Structure*

While Korea realized tremendous economic expansion in a relatively short period of time, the pressure placed on the environment as a result of this expansion revealed the importance of balancing industrialization with environmental protection. As Korean people have accomplished a certain level of economic prosperity, they began to evaluate their surroundings and quality of life as affected by the environment. Korean people's growing environmental concern generated strong political demands that ambitious new environmental protection measures be adopted by legislation.<sup>2)</sup>

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2) During the past decades in Korea, economic development occurred, and economic development brought democracy into full bloom. In turn, democracy successfully created a social ambiance where people could bring environmental issues into light. Indeed, 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

Environmental problems can be viewed as instances of a market failure that occurs because the market price system fails to reflect and internalize to firms the costs to society of pollution, waste, and other environmental externalities that firms generate in competing for consumer favor.<sup>3)</sup> In theory, private law could solve this failure by making firms pay compensation to those injured by these externalities. But due to the intrinsic limitations of the civil law,<sup>4)</sup> private litigation is in practice institutionally unsuited to this task.

There are a variety of techniques that legislatures might select to deal with the failure of the market and of private law to protect the environment. For instance, the government could impose a tax or fee on pollution. It could issue a limited number of pollution licenses and allow them to be bought and sold in the market. It could subsidize measures to reduce pollution. It could disseminate information regarding a firm's environmental performance to consumers and investors, who might then use their market power to reward firms with superior environmental performance and punish those with poorer records. These alternatives have, until recently, played almost no role in Korea's environmental policy.

The overwhelming instrument of choice in Korea, as elsewhere, has been command-and-control regulation.<sup>5)</sup> Pursuant to legislation, government agencies adopt

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public protest and by means of litigation. *See generally* Hong Sik Cho, *An Overview of Korean Environmental Law*, 29 *Envtl. L.* 501, 507-511 (1999).

3) From an economic point of view, environmental degradation is nothing but externalities resulting from overuse or over-exploitation of scarce resources. While an individual receives all the proceeds from the overuse of resources, he incurs only a fraction of its costs because the effects of overgrazing are shared with others. Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243, 44-45(1968).

4) Doctrines of civil law, the equivalent of judge-made common law, allowing recovery in nuisance, negligence, trespass and in some instances strict liability enabled a private plaintiff to recover damages when a given defendant's conduct has caused the plaintiff identifiable, serious injury. However, private litigation has not proven wholly adequate to deal with many of the wide-scale environmental problems posed by industrialization and development. For general reference of the inefficacy of common law litigations in addressing environmental degradation, *see Reserve Mining Co. v. United States*, 498 F.2d 1073 (8th Cir. 1974); *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492 (8th Cir. 1975) (en banc). The inefficacy of civil law is aggravated in Korea because of its institutional setting. No system of class actions, citizen suit, or organization action (the equivalent of 'Verbandsklage' in German law) is available in Korea. The availability of injunction is also very limited in Korea. For Korean courts' efforts to respond to the limitations of the private law system, *see infra* note 43-45 and its accompanying text.

5) For general reference of the choice of regulatory instruments, *see* Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 *Harv. Env'tl. L. Rev.* 313 (1998) (applying interest-group theory to

specific prohibitions or requirements relating to pollution, waste, resource management, land use, and development. These regulations are enforced against firms and individuals through licensing and permit requirements, enforcement actions, and sanctions for violations. The statutory structure of the regulatory scheme to police externalities is explained below.

## 1. Constitutional Constraints

Constitutional limits on statutory delegation set the outer contours of Korean administrative law. The Constitution declares the National Assembly the sole lawmaking organ, although it gives the President authority to “issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Acts.”<sup>6)</sup> The Constitution adds that no person be deprived of life or liberty except according to due process established by law,<sup>7)</sup> and that property rights be guaranteed with their content and limitations determined by Act,<sup>8)</sup> and that local government shall only have the power to enact their own regulations within law and decrees.<sup>9)</sup> As noted earlier, the Constitution not only provides the

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explain the content of regulation); Robert W. Hahn, *The Political Economy of Environmental Regulation: Towards a Unifying Framework*, 65 *Pub. Choice* 21 (1990) (exploring models of instrument choice and theories of environmental standard-setting); Donald N. Dewees, *Instrument Choice in Environmental Policy*, 21 *Econ. Inquiry* 53 (1983) (analyzing effects on industry of different effluent charge or effluent rights schemes); James M. Buchanan & Gordon Tullock, *Polluters' Profits and Political Response: Direct Controls Versus Taxes*, 65 *Am. Econ. Rev.* 139 (1975) (explaining industry preference for command-and-control standards rather than taxes).

6) S. Korea Const. §75.

7) S. Korea Const. §12 (providing that “No person shall be punished, subject to preventive restrictions or to forced labor unless it is so authorized by an Act or without due process of law.”); S. Korea Const. §12 (providing that “For arrest, detention, seizure or search a warrant issued by a judge in due process of law upon request of a prosecutor shall be presented ....”) The Constitutional Court held in a series of decisions that Constitution §12 as a general clause of due process in Korea applies not only to criminal procedure, but also to administrative procedure. To name but a few decisions, Constitutional Court[hunbupjaepanso], 88 heonka 6 (Sept. 8, 1989) (S. Korea); Constitutional Court, 92 heonka 8 (Dec. 24, 1992); Constitutional Court, 94 heonma 201 (Dec. 29, 1994).

8) S. Korea Const. §23 (providing that “Right of property shall be guaranteed for any citizen. Contents and limitations thereof shall be determined by Act”); S. Korea Const. §23 (providing that “Exercise of property rights shall conform to the public welfare.”).

9) S. Korea Const. §117 (providing that “Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of laws and regulations.”).

Korean people with a right to a healthy and decent environment, but also imposes on the government and people a constitutional duty to endeavor to protect the environment.<sup>10)</sup> Because of all this, agencies may regulate-but only if they stay within constitutionally and statutorily authorized constraints.

## 2. Statutory and Institutional Structure

Both Korea's environmental legislation itself, substantive and procedural, and its legal institutions, are set at the same level as those of developed countries. Since 1990, the Korean government has made a concerted effort to address the country's mounting environmental concerns.<sup>11)</sup> The first step was substantially to rework the existing legislation and promulgate new laws addressing pollution and other environmental issues. While Korea's legal system is heavily influenced by the civil law traditions of Germany, the new environmental law system is modeled on that of the United States. For example, the most important Korean environmental law, the Basic Environmental Policy Act (hereinafter "BEPA")<sup>12)</sup> is based on the National Environmental Policy Act (NEPA) of the United States. Further, just as the United States has a number of medium-specific statutes below NEPA, Korea also has similar statutes below BEPA. The Environmental Impact Assessment Act (hereinafter, "EIA Act")<sup>13)</sup> is one of those statutes. A number of statutes have been enacted more recently, and the specialization of environmental laws is still underway. In addition, an Administrative Procedure Act<sup>14)</sup> and Information Disclosure Act<sup>15)</sup> are also being put into effect.

Simultaneous with these legislative changes, the Environmental Administration, structurally organized to combat pollution, was upgraded to full ministry status as the Ministry of Environment (hereinafter, "MOE").<sup>16)</sup> Moreover, dispute settlement system

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10) S. Korea Const. §35 (providing that "All citizens shall have the right to a healthy and agreeable environment. The State and all citizens shall endeavor to protect the environment.").

11) For reference of Korea's legislative efforts to address environmental concerns, *see generally* Hong Sik Cho, *supra* note 2, at 503-508.

12) Law No. 4257 of Aug. 1, 1990, *amended by* Law No. 6097 of Dec. 31, 1999 (S. Korea).

13) Law No. 4567 of June. 11, 1993, *amended by* Law No. 6095 of Dec. 31, 1999 (S. Korea).

14) Law No. 5241 of Dec. 31, 1996, *amended by* Law No. 5809 of Feb. 5, 1999 (S. Korea).

15) Law No. 5242 of Dec. 31, 1996 (S. Korea).

16) Hong Sik Cho, *supra* note 2, at 505-06.

specifically designed to resolve environmental disputes was also set up.

### *B. Backward Administrative Practice and Self-restraining Court Attitude*

Despite this development of environmental law and institutions, it is not clear that it has had a meaningful impact on environmental protection. Notwithstanding their modernization in the last few decades, it appears that the current environmental law regime has yet to satisfy the social demand for resolving environmental problems. Putting everything together, I would say that, in the 1990s, the Korean government began to utilize law and legal institutions as an instrument of change and endeavored to implement them to a considerable extent in achieving environmental protection. However, this does not mean that the law necessarily had a positive impact on environmental protection. Instead, the rule of law is not fully present in the area of Korea's environmental protection.

#### 1. Administrative Practice: Sham Environmentalism

Although a reliable comprehensive survey of the implementing practice of environmental law is not yet available,<sup>17)</sup> the following account is widely shared in academia. Korea's administrative practice in implementing environmental law is underdeveloped relative to the level of environmental legislation.<sup>18)</sup> In other words,

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17) MOE issues Environmental White Paper every year. Environmental White Paper 2000 does provide a large number of statistical indexes concerning the quality of environment. For example, the quality of water in the Han River, the main river in Korean peninsula, has deteriorated from BOD 1.2 ppm in 1989 to BOD 1.5 ppm in 1999. MOE, Environmental White Paper 2000, 363 (Dec., 2000) (S. Korea). However, this essay decides not to take these indexes into account for the following reason. First, while some indexes claim the ameliorating trend of environment, others deteriorating trend. Given that situation, there is no reliable way to figure out the general trend. Second, even if the general trend turns out to be in favor of deteriorating environment, it cannot be taken on its face unless its causes can be revealed. For example, although the quality of water in the Han River gets worse, it may not result from loose law enforcement, but from increase of economic activities. Unless the causes are profoundly analyzed, the result cannot be taken to prove any claim in this article.

18) The bureaucracy here means Korea's bureaucracy as a whole. It is needless to say that MOE has strived to protect the environment ever since its creation. As expected, however, MOE currently stands only "at the low end of the bureaucratic pecking order with respect to prestige, influence, and the power to move events." Richard J. Ferris, Jr., *Aspiration and Reality in Taiwan, Hong Kong, South Korea, and Singapore: An Introduction to the Environmental Regulatory Systems of Asia's Four New Dragons*, 4 Duke J. Comp. & Int'l L. 125, 162 (1993).



even if the legislature passes environmentally ambitious legislation, the bureaucracy vitiates its goal by administrative practice. If the president, e.g., can manipulate regulatory practice to renege on a deal made between ruling and opposing parties in the legislature, and courts are not able to provide any appropriate judicial review of this manipulation, then any legislation cannot do so either.

One of the government's typical failures to take environmental concerns seriously is the long-standing controversy on the "Saemangeum" project. The "Saemangeum" project, launched in 1991 to convert large tidal flats into huge farmland by building the world's longest seawall on the west coast of the North Cholla Province and to create a fresh-water lake for agricultural irrigation, has long been the target of criticism by civic environmental activists, who dubbed it a potential environmental disaster and demanded it be scrapped right away. The Saemangeum mud flats, one of the five largest tidal flats in the world, are home to about 370 varieties of sea creatures and are the nation's biggest stopover for migratory birds. The most contentious environmental issue now surrounding the project is the quality of water in the planned lake that will store water from two rivers that, unless the seawall blocks their path, will flow out to the West Sea. MOE and environmentalists have opposed this half-finished reclamation project on the ground that the water quality of the fresh-water lake cannot be maintained as clean as was initially intended.<sup>19)</sup> In contrast, advocates of the project such as the Local Government of North Cholla Province and the Ministry of Agriculture and Forestry continue to insist that the project should proceed, though with additional measures to prevent water quality deterioration. Environmentalists have called on the Government to halt the project, voicing worries about its detrimental impact on the environment. In the wake of protests from environmentalists, the Government began reassessing the project's feasibility in May 1999, leading to the suspension of the project.

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19) On March 8, 2001, MOE maintained this objection, stating, "even if all the proposed pollution prevention measures of a controversial reclamation project are taken, it would be very difficult for the fresh-water lake to meet the standards initially intended." Jae-soon Chang, *Ministry's Comments Reflect Opposition to Reclamation Project*, Korea Herald, March 6, 2001. Environmentalists say, "it is virtually impossible to meet the intended quality of the lake's water without additional treatment facilities that will push up the project's budget." According to some activists, "the total project cost will be as high as \$ 5 billion, about three times the original budget, claiming that canceling the project would save taxpayers' money." Jae-soon Chang, *Environmentalists Urge Government to Cancel North Cholla Silt Reclamation Project*, Korea Herald, March 6, 2001.

After more than two years of research and discussion on the feasibility of the project, the Government finally decided to push ahead with this controversial reclamation project on May 25, 2001.<sup>20</sup> During the last two years, the Government seemed to be stalling for fear that a green-light decision would inevitably invite a wave of criticism. However, the Government also appeared unwilling to cancel a project that has already swallowed up such a huge amount of money. More than one billion dollars has been spent on a project that is now more than 70 percent complete.

The government's stalling posture towards the Saemangeum project is all the more astonishing in that earlier this year, the government finally scrapped another fresh-water lake, "Shiwha Lake," the construction of which was completed a number of years ago, on the ground that the water quality of Shiwha Lake's fresh water deteriorated much more than expected and with no hope of finding a way of improving the water quality. The decision to create a fresh-water lake in Shiwha is now criticized as the most prominent failure of policy choice made by the government towards the environment. In finally abandoning any idea of a fresh-water lake in Shiwha, the government wasted two thirds of a billion dollars. A probe into the procedures taken for pushing forward the Shiwha project reveals how backward environment-related law practice has been. Pursuant to the pertinent provisions of the EIA Act, an environmental impact assessment should have been prepared at the time when the construction plan of Shiwha project was notified to the public. However, the Shiwha EIA was only prepared nine months after the notice.<sup>21</sup> So far as the Shiwha project is concerned, the EIA process was nothing more than a sham.

## 2. Judicial Review: Self-restraining Posture and Conceptual Jurisprudence

As noted earlier, the Constitution sets basic (if loose) constraints on how broadly the legislature can delegate rule-making. Together, the Constitution and various regulatory statutes guarantee most regulated parties a right to a hearing on issues directly affecting their welfare.<sup>22</sup> If an agency decides such an issue against them, they

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20) Ji-ho Kim, *Gov't Decides to Resume Reclamation amid Protests*, Korea Herald, May 26, 2001.

21) Hak-bong Cha, *Shiwha lake will remain sea water lake after wasting about \$ 1 billion*, Chosun Ilbo, Feb. 12, 2001 (S. Korea).

22) Constitutional Court of Korea declares that a right to a hearing is constitutionally guaranteed on such issues. Constitutional Court, 90 heonka 48 (Nov. 19, 1990).

can usually petition for reconsideration within the agency. Along with administrative review, Korean law also gives courts power to review administrative decisions. Guaranteeing effective legal remedies against wrongful administrative acts is an indispensable element of the rule of law. The Administrative Litigation Act (hereinafter, “ALA”)<sup>23)</sup> modeled on the 1962 Japanese Law on Litigation of Administrative Disputes, has been strongly criticized for its obsolescence in that it allows too limited judicial review in terms of ripeness requirements, standing, and types of remedies enforceable against the state.<sup>24)</sup> And the Korean courts are under such a strong siege of conceptual and formal jurisprudence that they could not have taken a positive role in overcoming this limit by an activist interpretation of the statute’s words. Furthermore, Korean courts are judged traditionally to be very deferential to agencies’ discretionary decisions. All these constraints take many, if not all, disputes involving basic policy issues and a large number of parties out of ambit of judicial review, and keep in the courts only the more routine cases.

#### (a) Administrative Disposition

Korean courts will review an agency determination under the general administrative litigation rules only if it involves an “administrative disposition”—a test paralleling the U.S. doctrine of “ripeness.” “Disposition” does not refer to all action that an agency might take. Rather, it refers to the actions that a national or public organization (the subject of public powers) takes that directly structure or determine the rights and duties of citizens. This reads as enormously nebulous, and indeed has been creating tremendous barriers against people who try to rebut administrative actions for their own interests.

The concept of administrative disposition is clear only in routine cases. Typically, if an agency rejects a permit application, it exercises its public powers. It determines the rights of the applicant and thus subjects itself to judicial review under administrative litigation rules. By contrast, if an agency buys a fleet of cars on the open market or

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23) Law No. 3754 of Dec. 15, 1984, amended by Law No. 4770 of July. 27, 1994 (S. Korea).

24) With respect to remedies, permanent injunctions are not available against state, and temporary injunctions are allowed only in very limited cases. See generally Joon-Hyung Hong, *Administrative Law in the Institutionalized Administrative State*, in *Recent Transformation in Korean Law and Society* 47, 56 (Dae-Kyu Yoon ed., 2000).

builds for them a large garage, it exercises only private powers. Necessarily it does not determine the rights and duties of citizens and makes no administrative determination. The agency must follow, of course, the usual rules of property and contract. Courts will review its actions under the usual rules of civil procedure.

However, there is a gray zone of administrative acts that causes some problems in construing “administrative disposition.” No matter how egregious an administrative act, there is no way to enjoy judicial review unless the act is subsumed within the concept “administrative disposition.” A variety of types of administrative action that seem to constitute the exercise of public power are determined not to fall within the concept “administrative disposition.” Take the example of an environmental impact assessment. It is deemed not to be an administrative disposition. Since EIAs directly affect only the agency’s internal affairs (though it is one of important proceedings constituting final administrative action having outside effects), it is not an administrative disposition, which keeps the person interested in the content of an EIA from suing the agency involved. From the Korean courts’ point of view, an EIA is a purely intra-agency affair. It does not directly bind the general citizenry. A plaintiff who wants to contest the appropriateness of the procedure and content of an EIA can simply wait for the agency involved to make a final disposition. Then—but only then—will the courts resolve the issue. But as might be expected, the project involved will often be complete by the time the court is ready to give judicial review. Then, it is too late to gather spilt water.<sup>25)</sup>

### (b) Standing

For a petitioner to challenge an agency, he must have standing to sue. In Korea, standing is so narrowly formulated that any litigation to vindicate collective interest is not allowed.<sup>26)</sup>

To have standing, a petitioner must have a “legal interest” in the case.<sup>27)</sup> Again, the

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25) Furthermore, there are a couple of provisions in ALA which may work for the Government’s prerogative. For example, even in cases where a demand of the plaintiff is deemed reasonable, if the revocation of an administrative disposition, etc. is deemed extremely inappropriate to the public welfare, the court may reject the demand of the plaintiff. *See* Administrative Litigation Act §28.

26) Joon-Hyung Hong, *supra* note 24, at 56.

27) *See* Administrative Litigation Act §12.

routine cases are clear: an agency refuses a petitioner a permit for his store-he has standing; an agency closes his store-he has standing. It is odd, but important from the viewpoint of public policy, cases that are obscure and that sometimes seem to track the “zone of interest” inquiry in the United States. As disputes became more complicated with rapid industrialization in terms of numbers of the parties involved, complexity of relation among the interests concerned, and so forth, the number of obscure cases is increasing.

To explore the obscure, let us consider disputes over nuclear reactors. Although Korea depends heavily on nuclear power, the reactors have their fair share of opponents, both opponents of nuclear power generally and opponent of nuclear power in their backyards. When these opponents challenge the reactors’ permit, they generally lose on the grounds that they do not have standing. Crucial for our purposes here, they do not lose on the substantive ground. The courts instead hold that, although the industry regulatory statute emphasizes safety concerns, the safety clause exists to protect the abstract public interest in general rather than any concrete individuals’ interest, and that nearby residents thus do not have standing to challenge the safety of the reactors. To determine whether the applicants have standing, the courts look to the regulatory statutes involved. The nuclear regulatory statute mentions safety concerns only indirectly, but does not articulate the interests of neighbors. Instead, it emphasizes sensible overall safe design. Given the stress on general public welfare rather than more local and individual concerns, the neighbors are held to lack standing no matter how much they are concerned about safety matters involved in the reactor.

Recently, however, the Supreme Court has *slightly* changed its attitude toward the environmental activists. In contrast to earlier cases, the Court has begun to confer standing on individuals living within the area of land on which the environmental impact is being assessed (the so-called “environmental impact assessment area”).<sup>28)</sup> The Court reasons that individuals living within EIA area have a concrete, specific interest (rather than an abstract, general interest that any number of the general public can share with others) to be protected by EIA Act that developer is alleged to have violated.

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28) Supreme Court[Daebupwon], 97 nu 3286 (April 24, 1995) (S. Korea).

### (c) Standard of Review

Courts review most agency decisions under a standard that leaves the agency substantial flexibility. In administrative cases, the petitioner bears the burden of persuasion. What he must generally prove is illegality or an abuse of discretion. Under the ALA, he must show that the agency acted illegally, or “exceeded the scope of its discretion, or abused its discretion.”<sup>29)</sup> Generally speaking, Korean courts are very deferential to agencies’ discretionary decisions.<sup>30)</sup> Therefore, petitioners can challenge agencies’ decision only if they can show, for example, that the decision lacked a basis in fact, or was egregiously inappropriate in the light of prevailing social norms and the agency therefore either exceeded or abused its discretion.

## 3. Public Law v. Private Law

Compared to its role in the field of public law, Korean court has played at least an identifiable (though not a major) role to protect the environment in the field of private law, especially civil law, the equivalent of judge-made common law in the United States. In the recent decade especially, Korean courts can be congratulated for having endeavored to create, specify, and realize property rights in environmental resources and to correct externalities by awarding damages and giving injunctive relief.

### (a) Property Law

As noted above, Korea’s economy developed at an inefficiently rapid pace at the expense of some scarce resources (including human resources) whose property rights were not specified or realized in the market. Basic to environmental protection is a legal regime that effectively lets people capture and realize the property rights to scarce resources that are valuable in environmental terms.<sup>31)</sup>

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29) Administrative Litigation Act §27.

30) For example, Supreme Court, 99 du 2970 (July 27, 2001) (upholding an agency’s decision to proceed with a land developing project in spite of its negative environmental impact assessment); Supreme Court, 99 du 9902 (June 29, 2001) (the same content).

31) Harold Demsetz correctly claims that “a primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities.” Harold Demsetz, *Toward a Theory of Property Rights*, 57 American

In most important respects, Korean property law has tried to provide such a regime. Based on the German Civil Code enacted in 1960 and embroidered through case law and occasional special statutes, it has defined, specified, and realized property rights to environmentally valuable resources, and let people control those resources and exclude others from them, and transfer them.

The right to sunshine and a view are a good example to start with. With both population growth and limited land availability, resources appeared to be becoming more and more scarce to people. Those living in urban area, especially, were becoming more and more nervous about the space they were supposed to share with others. In the past, quarrels over the amount of sunlight and view they could enjoy were rare. However, as the density of cities assumed a serious proportion, landowners tried to construct higher and higher buildings, which in turn made neighbors retaliate with their own property claims.

Korea's nuisance law mitigates many of the otherwise more serious problems that arise when people live and own property close to and on top of each other. In applying that law, Korean courts use a sensible cost-benefit analysis which closely follows the Learned Hand formula<sup>32)</sup> often used in the United States. Based on the determination that the adverse effect of constructing too high a building on the surrounding neighborhood overwhelmed the interest that the land-owner might have, Korean courts enjoined the landowners from constructing the building beyond a certain height.<sup>33)</sup> If landowners were left to construct buildings as high as they wanted, it would, the courts determined, have blocked the sunlight and view and caused an unreasonable infliction of distress and loss of property value to neighboring land-owners. The courts successfully specified and established the property rights for the open space over the

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Economic Review Papers and Proceedings 347 (1967). By internalizing externalities, property rights lead individuals' activities in a socially desirable direction. By paralleling the private and social rates of return, property rights make individuals responsible and accountable for their activities. Overall, Korean court decisions in the field of private law are illustrative of judicial efforts to create, specify, and realize property rights over resources that are newly recognized as scarce, and to police externalities on them.

32) The famous cost-benefit formula that Learned Hand applied in *United States v. Carroll Towing Co.* is as follows:

- (1) the probability that [the barge] will break away;
- (2) the gravity of the resulting injury, if she does;
- and (3) the burden of adequate precautions. 159 F.2d 169 (2d Circuit, 1947).

33) See, e.g., Supreme Court, 98 da 47528 (July 27, 1999) (a permanent injunction against a land developer).

land by giving neighbors property interests to sunlight and a view.<sup>34)</sup> In the process of dealing with this type of cases, Korean courts faced a central and perennial tension in property law: how generally to enforce an owner's interest in his property, yet sometimes to limit the use to which he can put it. Korean courts are deservedly said to have successfully weighed the competing landowner's interest and his neighbors' interest.

The Constitution provides that "all citizens shall have the right to a healthy and pleasant environment."<sup>35)</sup> Because Korea has no comprehensive theory to protect and preserve the environment, such as the public trust doctrine in the United States, private citizens have attempted to pursue environmental goals through litigation based on this provision. However, the Supreme Court of Korea has construed the provision as not self-executing unless a number of preconditions are satisfied.<sup>36)</sup> In a number of nuisance cases in which plaintiffs based their claims on both the Constitution and property rights, the Supreme Court held that "in order for this constitutional right to be acknowledged as a right to be exercised as a matter of private law, the right's owner, counter-parties, content, and means of exercise must be explicitly identified by statutory provisions, or must be implicitly established by interpreting the purposes of relevant provisions and using 'jory' [from the application of natural reason, an innate sense of justice, and the dictates of conscience]."<sup>37)</sup> Only in rare cases can a constitutional right to a healthy environment be established as a private right

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34) *See, e.g.*, Supreme Court, 98 da 23850 (Jan. 26, 1999) (a monetary damage awarded to a neighboring landowner).

35) Korea Const. §35.

36) Supreme Court, 94 ma 2218 (May 23, 1995); Supreme Court, 95 da 23378 (Sept. 15, 1995); Supreme Court, 96 da 56153 (July 22, 1997). According to the Supreme Court, "the content of this Constitutional provision is not so sufficient that it cannot be interpreted to give individual people a concrete private right which can be claimed immediately vis-a-vis other individuals. That is because this provision does not provide clearly the content and scope of the environment to be protected, scope of persons who are to use the right to a healthy and decent environment, and so forth. That is also because if the right to a healthy and decent environment is recognized as a concrete private right to be immediately claimed by individuals, it inevitably causes restraints and limits on exercise of private property rights by counter-parties against whom the right to a healthy and decent environment is claimed.... Basically, the Legislature representing people rather than the Court must determine, by statute, which of a legal interest, 'preservation of the environment' and another legal interest, 'protection of individual freedom for industrial development' (both of which contradict with each other) must be chosen as a priority and how the two interests are to be harmonized and balanced."

37) *Id.*



exercisable against others by interpreting tacit provisions and using jory. 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, while the enactment of a bill called “the Wetland Preservation Act”<sup>38)</sup> was pending, one could not compel developers to consider the ecological value of wetlands before reclaiming them unless he or she was the owner of adjacent property.<sup>39)</sup> Except for property claims, one could not find any legal grounds upon which to establish a claim.

However, a new construction was for the first time adopted by one lower court in 1998.<sup>40)</sup> A land developer tried to develop a hot spring resort in an upstream region. People living downstream were worried that the resort’s waste water would contaminate their only source of drinking water. Because those living downstream lived not adjacent to, but far removed from the upstream resort, they could not base their claims on any property right. Moreover, the Civil Code<sup>41)</sup> does not allow injunctive relief for most tort claims. Therefore, the only way to stop the developer constructing the hot spring resort was by resort to the constitutional right to a healthy and clean environment. The three-judge panel of the district court held that the preconditions suggested in the Supreme Court’s earlier decisions were met in this case, so that those living downstream could prevent the development of the resort. The court established for the first time the right of those living downstream to drinking water exercisable against the upstream developer. Some of the considerations given by the court for its decision were as follows: the Constitution, the BEPA, and the Drinking Water Management Act<sup>42)</sup> all explicitly created a right to clean drinking water; according to ‘jory,’ clean water is essential to people’s survival; and therefore the right to enjoy clean water is superior to any other interest. After the judgment was handed down, enormous controversies ensued. The Supreme Court has yet to have its say on this issue.

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38) Law No. 5866 of Feb. 8, 1999 (S. Korea).

39) See Supreme Court, 95 da 23378 (Sept. 15, 1995); Supreme Court, 96 da 56153 (July 22, 1997).

40) Cheongju District Court[Cheongju-ji-bup], 97 kahap 613 (Feb.26,1998) (S. Korea).

41) Law No. 471 of Feb. 22, 1958, amended by Law No. 5454 of Dec. 13, 1997 (S. Korea).

42) Law No. 4908 of Jan. 5, 1995, amended by Law No. 6103 of Jan. 7, 2000 (S. Korea).

(b) Korea's Tort Law

Korean courts also police negative “externalities” by providing some protection to private plaintiffs suffering personal or property damage as a result of environmental disruption. The Nakdong River case demonstrates well the shortcomings of private litigation. In 1991, Phenol leaked into the Nakdong River. Underwater pipes carrying Phenol from a factory to a holding tank burst, polluting the water supply of residential areas. The alleged result was an increased number of miscarriages among pregnant women, as well as an increase in the number of voluntary abortions performed for fear of birth defects. In this case, the responsible company paid more than 20 billion won (approximately \$25 million), but which only accounted for the cost of cleanup of the river. The amount did not include any damages for the victims.<sup>43)</sup>

As noted above, judicial remedies are often inadequate because of difficulties in tracing and quantifying injury. Furthermore, the Korean courts, according to the Civil Code, do not award unforeseen extraordinary damages. Neither do they award nominal, stigma, or punitive damages. However, courts have attempted to respond to the limitations of the private law system by relaxing traditional standards of proof,<sup>44)</sup> encouraging quasi-class actions,<sup>45)</sup> and devising creative new remedies.<sup>46)</sup> Not unexpectedly, these innovations strain the courts' traditional institutional role and have proven controversial.

Another pitfall of private litigation is the limited availability of injunctions. As noted above, the Civil Code bans injunctive relief in most tort cases.<sup>47)</sup> Because Korea is a civil law country, the Korean legal system does not have the concept of equity. This absence plays a crucial role in courts forming hostile attitudes toward injunctive relief. In fact, Korean courts seldom grant permanent injunctions against large-scale

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43) Sang-Yeol Park, *Environmental Law in Korea*, Journal of Environmental Law and Practice 32, 38 (Nov./Dec., 1993).

44) Supreme Court, 72 da 1774 (Dec. 10, 1974) (accepting, for the first time, the so-called “probability theory” by loosening the burden to prove causation between the defendant’s act and environmental damage); Supreme Court, 81 da 558 (June 12, 1984) (accepting the probability theory by loosening the burden to prove causation); Supreme Court, 89 daka 1275 (July 23, 1991) (the same content).

45) Korean law has no provision for no class actions. Although parties to a large suit can sometimes choose representative litigants (Civil Procedure Code §49, Law No. 547 of Apr. 4, 1960, amended by Law No. 5809 of Feb. 5, 1999 (S. Korea)), the judgment will bind only the parties named. I call this type of large suits “quasi-class actions.”

corporate or governmental projects on environmental grounds. As noted above, however, Korean courts have begun to expand the exceptions to the damage-only rule. They do so most readily when plaintiffs claim nuisance-related damages. If a plaintiff complains of nuisance from a neighboring building, Korean courts increasingly grant injunctive relief, though they could simply determine the present value of his expected future losses and award him damages instead.<sup>48)</sup>

### (c) Summary

Fundamental to environmental protection is a legal regime that effectively lets people capture and transfer the returns of scarce environmental resources, and forces firms and people to internalize costs. In most important respects, Korean property law provides such a regime by defining rights to recently-recognized scarce environmental resources, letting people control those resources, excluding others from them, and letting people transfer them. Korean tort law also provides such a regime by forcing firms and people to pay for the costs they impose on third parties. And Korean courts have handled industrial pollution disputes between private parties well. This is noteworthy especially in that Korean courts have not done the same in disputes between the regulator and the regulated as explored earlier. I will explore why this discrepancy between public and private law happens in the part III.

### C. Summary

To summarize the foregoing observations, the following three factors clearly typify Korea's law and practice for environmental protection: *legislature's advanced legislation*, *agencies' backward practice*, and *courts' little oversight*. Though Korea has accomplished modernization of legal system for environmental protection, administrators have yet to comply strictly with legal constraints. Judicial oversight has

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46) See, e.g., Supreme Court, 90 gaka 5198 (Dec. 27, 1991) (using the relevant statistical data in calculating the amount of damage).

47) Traditionally the only exceptions to this rule appeared in cases where a tortfeasor had sullied the victim's good name and the courts ordered newspaper notices as relief. See Civil Code §§764, 394.

48) See, e.g., Supreme Court, 95 da 23378 (Sept. 15, 1995); Supreme Court, 96 da 56153 (July 22, 1997).

been gradually increasing, yet it is still short of the public's expectation. Compared to court's role in the field of private law, it may well be argued that courts have kept a self-restraining posture in disputes between the regulator and the regulated.

Figure 1 shows how different the goal of legislation and the reality of administrative practice are from each other. Curve A, representing the target of environmental enactments, is located on the right side of Curve B, which represents the level of administrative enforcement efforts. The larger the discrepancy between A and B becomes, the less enforcement of environmental statutes actually takes place.

Administrative discretion is the core reason for this discrepancy. Although it is an essential element of administration, discretion also means arbitrary implementation from time to time. Discretion is liable to be wielded in a discriminatory manner, with bias toward a specific group of people or firms or sometimes even toward a specific goal or ideology.

In explaining the divergence between Curve A and B, two viewpoints can be taken. One might think that the legislature set a high compliance level because it wanted to make companies more environment-friendly. One might also think that in the public interest, e.g., from a fear that strict enforcement shrinks the national economy, bureaucrats used administrative discretion to stifle policing, causing the real compliance level to fall far behind the targeted compliance level. However, this naive viewpoint, assuming only public-minded political actors, does not explain why apparently independent courts have kept silent on administrators' aberrations.

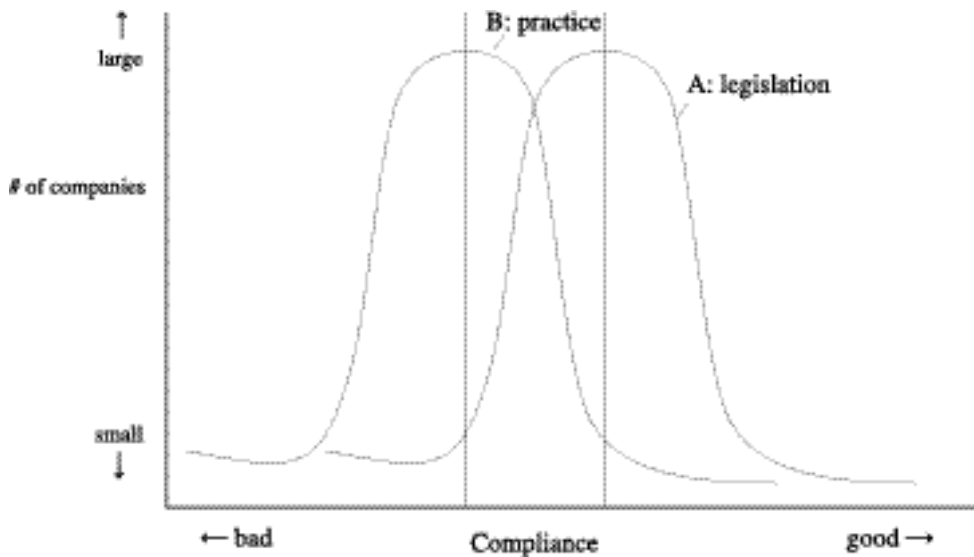
The development history of Korea's environmental law may give a clue to advanced environmental legislation. Until 1990, environmental law was in existence in Korea, but not enforced and, thus, was virtually meaningless. While the government itself undeniably took an initiative to address the country's mounting environmental concern in 1990 by substantially reworking the then-existing legislation and promulgating new laws, its action was spurred by "growing public discontent over environmental issues rather than the result of critical introspection."<sup>49)</sup> The advanced legislation was a response to public demand. In this sense, the level of environmental legislation shown in Curve A reflects the level of public awareness developed in this way. Unfortunately, however, history does not provide any plausible explanation of

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49) Hong Sik Cho, *supra* note 2, at 508 (citation omitted).

backward environmental law practice and little judicial oversight. It is probable that, until we explore the politics surrounding the environmental law regime we will fall short of grasping a plausible explanation for the status quo. Drawing on recent literature that sees the structure of the administrative process as dictated by politics, I will now explore the political dynamics surrounding Korea's environmental law regime.

[ Figure 1 ] Comparison between Korea's legislation level and Korea's practice level<sup>50)</sup>



50) This figure was first suggested by Professor Jung-Gil Chung at Faculty Seminar held at SNU Law School on May, 2000.

### **III. The Political Economy of Public Law in Korea's Environmental Protection Process**

#### *A. Introduction*

As we have seen, Korea has an advanced legal structure for environmental protection, and the general public is well aware of the importance of the environment, striving for participation in environmental policy-making. While the bureaucracy neither behaves as expected by the public nor performs as mandated by legislation, the courts just look on with folded arms. In sum, the Korean environmental law regime can be characterized as legislature's advanced legislation, agencies' backward practice, and courts' little oversight.

Then, a critical question arises at this juncture: why is this so? Have politicians let or meant the bureaucracy to misbehave? If so, why did they modernize environmental law? While courts have handled well private litigation involving environmental claims, why haven't they monitored and policed the bureaucracy to the same extent? Is there any particular political backdrop to the Korean environmental law regime?

It is tempting to attribute this to the backwardness of Korea in general. But it would be wrong to do so. As noted earlier, Korea has accomplished enormous, rapid economic development through the state's developmental policy and instrumental legislation. If we consider how instrumental the role of law has been in Korea's economic success, we cannot put the Korean government's environmental practices down to its general backwardness.

One might attribute the bureaucracy's slack to the discretionary or symbolic nature of environmental legislation. In fact, a number of pieces of U.S. environmental legislation were criticized in that they were too ambitious to enforce in practice.<sup>51)</sup> By enacting this type of statute, legislators reap the political benefits of voting for health and the environment and against trading lives for money, and successfully sidestep the difficult policy choices that must be made in regulating public health and the environment. The symbolic legislation itself frequently means too much discretion for regulators concerning whether and how to proceed with it. Thus, while the statute,

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<sup>51)</sup> John Dwyer, *The Pathology of Symbolic Legislation*, 17 *Ecology*. L.Q. 233 (1990). The following relies on this article.

literally read, promises a risk-free environment, the actual impact of the statute on environmental protection is purely nominal. As explored later, however, this may not be the case with Korea. Put simply, a theory developed in the U.S. may be inapplicable to Korea, with its different political and institutional setting. In this sense, it is worth trying to unravel the complicated and dynamic reasons for Korea's case.

To see the logic behind the pattern of environmental law in Korea, the following question should be answered: in what circumstances would rational, self-interested politicians anywhere want courts to police what bureaucrats do? That politicians modernized environmental law can be reasonably supposed to mean that they wanted courts to police bureaucrats more strictly whenever bureaucrats vitiate goals of modernized environmental law. If politicians wanted to have a stronger grip over bureaucrats, they did not have to revise strict environmental law. Politicians are elected by voters, but bureaucrats are hired to keep office (directly or indirectly) by politicians. If they wanted, politicians could hire their bureaucrats on terms that let them fire or demote the bureaucrats whenever the bureaucrats misbehaved. They could do so without modernizing environmental law. Therefore, the question is why politicians sometimes think they can improve their electoral chances by enacting strict statutes and letting more constituents sue the bureaucracy-in fact, by delegating their control over bureaucrats to judges.<sup>52)</sup>

In this part, I briefly summarize the relevant theory that can explain the political dynamics in Korea. I then apply the theory to Korea's situation, and finally show some implications.

### *B. Theory*

I employ the microeconomic theory of principals and agents to explore the political dynamics of Korea's environmental law regime. The principal-agent relationship is a powerful tool with which to analyze the structure of government as dictated by politics because the sheer scale and complexity of modern government compels politicians to delegate certain tasks to administrative agents.

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52) For a persuasive answer to the same question in the case of Japan, see Ramseyer & Nakazato, *Japanese Law* 212 (1999).

Applying Mancur Olson's logic of collective action,<sup>53)</sup> the production of public goods will tend to be too low. To generate the provision of collective goods, there must be some coordination and cooperation among group members. To induce such coordination and cooperation from individualistic members, they must be subject to coercive sanctions for failing to contribute to group efforts, or else they must be selectively induced to contribute by being rewarded with private benefits in exchange for their contributions. To build the incentive and sanction system, group members must organize themselves into an organizational structure so that the organization may mobilize the public to participate in providing public goods. Organization activities logically need delegation.

The most important way the public responds to the dilemma implied by the logic of collective action is by delegating political authority to representatives who in turn can provide public goods such as clean air and national parks. Delegation, though in itself a public good, is a low-cost alternative to providing collective goods because there are such fewer legislators than the public that coordination and cooperation among them are relatively easier. However, legislators must also deal with their own set of collective action problems. Like the public, legislators also respond to their own collective action problems by delegating authority over many regulatory matters. Administrators who are delegated authority by legislators also have their own collective action problems. Collective action problems go on and on.

However, delegation is burdened with its own serious costs, which is a consequence of the inevitable discrepancy between what the delegators ("principals") want and the delegates ("agents") actually deliver. Because agents have incentives to shirk whenever their own interests diverge from the interests of those they represent, and because agents are seldom perfectly loyal to their principals, principal-agent relationships are not cost-free. Instead, they suffer from more or less "slack", *i.e.*, room for agents to pursue their own interests to the detriment of their principals' common interests. Naturally, delegators-principals monitor their delegates-agents to guard against slack.

The public looks for mechanisms for monitoring their legislators to minimize "slack" and thereby to ensure that the regulation really reflects the public's values and

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53) Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965). For a helpful summary of Olson's theory, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *Colum. L. Rev.* 1 (1998). The following relies on Croley's article.



preferences. Voters elect politicians to provide various services, and they hire the bureaucrats to deliver those services. To improve their electoral odds, rational self-interested politicians then monitor their agents so that bureaucrats may deliver public services the public prefers to have.

There are a variety of mechanisms to monitor agents. Executive branch, political parties, parliaments, and courts can control bureaucratic discretion. J. Mark Ramseyer and Minoru Nakazato suggest a helpful summary of schemes for politicians to adopt for control of their agents as follows:<sup>54)</sup>

First, to induce their bureaucrats to perform, politicians could monitor them through their staff. ... In effect, they could assign those staff to play “police patrol.”<sup>55)</sup> Second, politicians could turn to the courts. ... To ensure that bureaucrats serve their constituents efficiently, promptly, and predictably, ... , politicians can give their constituents an incentive to sue if bureaucrats do anything else. Last, politicians can use their staff as private administrative-law-judge equivalents. [A majority politician’s staff] can... choose the cases that most effectively promote his electoral odds. In those politically attractive cases, [he] can intervene in the bureaucracy on behalf of constituents.

In addition to the above items, there is another mechanism to control agents, professional indoctrination. For instance, by requiring that all senior civil servants be trained as lawyers, politicians might make their agents cling strictly to the text of statutes. All senior civil servants are *de facto* trained as lawyers in Japan, and were formerly required to be trained as such in Germany.<sup>56)</sup>

Which mechanism politicians adopt to control their agents depends upon a number of factors. First, whether or not politicians adopt a strong administrative law regime

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54) Ramseyer & Nakazato, *supra* note 52, at 212-13.

55) This mechanism involves direct manipulation of bureaucratic personnel process. For example, politicians can influence selection, career advancement, and retirement of bureaucrats. Hierarchical structure helps reduce monitoring costs, as more senior agents help monitor and discipline junior ones. By advancing loyal agents and punishing disloyal agents, politicians provide an incentive to perform. For more reference, see Tom Ginsburg, *Dismantling the Developmental State?: Administrative Procedure Reform in Japan and Korea* 32-3 (1999) (unpublished manuscript, on file with the author).

56) *Id.* at 33 (quoting William Bishop, *Comparative Administrative Law*, in the New Palgrave Dictionary of Law and Economics 327, 330 (Peter Newman, ed., 1997).

will depend upon availability and costs of other mechanism to control bureaucrats.<sup>57)</sup> *Institutional design* decides *availability* and *costs* of other mechanisms. In case of a high likelihood of courts serving as effective agents of the legislators, an open system of administrative law is desirable. If judges are quite independent, there is little reason to entrust the task of monitoring bureaucrats to them.

Second, the attractiveness of one mechanism depends on the *structure of politics* itself. Strong political parties likely to be in power a long time can provide qualified and motivated personnel to police the bureaucracy. Thus, they do not prefer a strong administrative law regime. On the other hand, weak parties are likely to prefer to use courts to protect their policy bargain from repeal by later coalitions because they anticipate electoral loss.<sup>58)</sup>

Third, *cultural infrastructure* is another important factor. For instance, the self-restraining tendency of courts reduces the agency costs of courts generally. Strong professional norms of fidelity to law tend to increase the agency costs of courts.<sup>59)</sup> Any factors influencing the formation of cultural infrastructure also play a part. For instance, the structure for appointment and advancement of judges has an effect on the agency costs of courts. Where judges are appointed and advanced in a bureaucratic structure, the agency costs of courts are less than where judges are elected.

In sum, whether politicians can turn to courts for control of their agents depends upon the agency costs of courts vis-a-vis other available mechanisms: i.e., politicians give the courts narrow or broad discretion to review administrative disputes according as politicians control bureaucrats more or less efficiently with other mechanisms.

### *C. Application*

How does the above theory fit Korea's experience with respect to environmental protection efforts? As noted above, while Korea has strong legislation, the bureaucracy has not yet shown enthusiasm and motivation for environmental protection, resulting in shirking administrative practices. In order for the theory to fit Korea's case, it should successfully answer the questions already asked: Why didn't advanced legislation

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57) *Id.* at 34-5.

58) *Id.*

59) *Id.* at 34.

produce strong law enforcement in Korea? Did Korea's politicians fail to ensure that bureaucrats abide by the law? Or did they really mean the bureaucracy to shirk from environmental protection efforts? If so, why were politicians so steeped in modernizing environmental protection law? Did they pretend to care about the environment under the guise of strong legislation? While courts have handled well private law litigation involving environmental claims, why have they monitored and policed the bureaucracy so poorly? Why do they maintain a self-restraining attitude toward bureaucratic shirking? On the other hand, how did courts respond to bureaucrats' shirk? Did they give activist judicial review or just keep self-restraining posture?

In sum, the following explanation can be provided. First, politicians enacted such ambitious legislation in order to reap the political benefit of voting for health and the environment and against trading lives for dollars. Second, while at the same time as politicians have provided for judicial review, they have let their bureaucrats shirk their environmental duty because they have a number of politically attractive goals other than environmental protection. Largely, the priority has been economic prosperity in Korea. Third, politicians hold a tight rein over both the courts and the bureaucracy, and therefore, politicians have given judges the discretion to reverse agency action-but judges have almost never exercised it.

In 1999, Ramseyer and Nakazato gave an insightful observation on the political-economical logic behind the pattern of administrative law in Japan.<sup>60)</sup> The same observation seems to apply to the case of Korea. Even loyal and tightly constrained bureaucrats sometimes make mistakes. Therefore, although politicians might manage bureaucrats strictly, if they also control the courts strictly, they may choose to give those courts the power to review administrative decisions to give themselves a long-stop in the case where the bureaucracy gets it wrong. On the other hand, if politicians keep a tight rein over both the bureaucracies and the courts, judges rarely reverse bureaucrats. Even if judges have the power to do so, since loyal bureaucrats will seldom err, loyal judges will rarely have reverse them. Furthermore, even if relevant law gives the tool by which the public actually sues against the government to correct bureaucrats' violation of the law, since judges are strictly loyal to politicians,

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60) Ramseyer & Nakazato, *supra* note 52, at 212-19.

politicians will have no fear in giving courts power of judicial review.

Specifically, the following factors can be taken as causes for the weakness of Korea's environmental law regime, the combination of developed environmental law system, poor administrative practices, and little judicial oversight. They consist of institutional, political, and cultural factors. These factors enable Korean politicians to keep a tight rein over both the bureaucracies and the courts.

### 1. Emperor-Style Presidential System

First, Korea maintains a presidential system. As compared to parliamentary government, a presidential system decreases the ability of majority politicians to control bureaucracy since the division of power between president and legislature weakens any politician's ability to discipline the bureaucracy. However, this is not the case in Korea. The president of Korea is equipped with a variety of tools and powers, which makes him even stronger than majority leaders under parliamentary structure. As most Koreans observe, Korea's presidents are reminiscent of old-style emperors in realizing their desire for power.<sup>61)</sup> First, checks and balances among president, legislature, and courts do not work, or remain weak due to the constitutionally reinforced supremacy of the presidential branch with executive powers over the other two bodies.<sup>62)</sup> The principle of checks and balances is "nullified by mutual deference and compromise among the three branches,"<sup>63)</sup> as has been the case for the past decades. As one politician of the ruling party said, "Korea's legislature is unable to perform its role because of the mighty authority of the emperor-style presidency."<sup>64)</sup> The legislature has hardly been a forum to find a better alternative for public interest

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61) For example, see Editorial, *A President, Please, Not an Emperor*, Chosun Ilbo, March 17, 2001; Dae-joong Kim, *The One Man Show Is Over*, Chosun Ilbo, March 17, 2001; Dae-joong Kim, *No Such Thing As Political Retirement*, Chosun Ilbo, March 3, 2001.

62) Ever since the first establishment of modern government in 1948, the Constitution has let the executive branch submit legislative bills. The executive branch can also exercise *de facto* control over legislative processes. So long as the President retains and exercises dominant power in legislation processes, the dynamics of checks and balances among the three branches cannot but be hindered. In addition, president has had the power to appoint Justices of both highest courts and make major decisions concerning their budgets. Joon-Hyung Hong, *supra* note 24, at 65-66.

63) *Id.* at 65.

64) Editorial, *A President, Please, Not an Emperor*, *supra* note 61.

but rather a place for passing bills proposed by the executive branch. Thus, the top priority for ruling parties has been to establish a majority in the legislature. Securing a majority in the legislature has been carried out through political reshuffles or realignments of political parties propelled by the president, who has a variety of apparatus to mobilize to get the job done.<sup>65)</sup>

Second, the bureaucracy has been extremely loyal to the president throughout Korea's history.<sup>66)</sup> Indeed, bureaucrats are faithful arms and legs for the executive in Korea. Through the presidential secretariat of the Blue House, the president control runs closely over administrative agencies. Agencies related to public security or law enforcement are most utilized in increasing the president's power. Public security authorities such as the Agency for National Security Planning, police agencies, the public prosecutor's office, the Board of Audit and Inspection, and military intelligence agencies are under the president's supervision, direct or indirect. Tax agencies are also strong instruments usable by the political elite to tame the business circle. In fact, this institutional design<sup>67)</sup> coupled with political structure gives rise to the rule of man rather than the rule of law.<sup>68)</sup>

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65) Jong-Sup Chong, *Political Power and Constitutionalism*, in *Recent Transformation in Korean Law and Society* 11, 26 (Dae-Kyu Yoon ed., 2000).

66) *Id.* at 16-20 (“[a]ll the bureaucracies including law enforcement agencies still function as functionaries to realize the will of political powers.”).

67) The first civilian government pursued a series of administrative reform programs during the period of president Kim Young Sam's term (1993-1997). The cause of the reform programs was to shake off the authoritarian image of the government by making the governing process more clean and efficient, and thereby to get political support from the general public. However, the underlying aim of the reform program was to increase political control over bureaucrats who had never experienced any transfer of power. By taking the reform initiative, the new government tried to make obvious the supremacy of the president, thereby grasping the strong rein over the bureaucracy. Joon-Hyung Hong, *supra* note 24, at 65-67. The second civilian government must be subject to the same characterization. For example, see Keun-il Ryu, *The Era of “Mind and Life,”* Chosun Ilbo, Dec. 21, 2001 (“[t]he first seven years of the “nineties-style democracy experiment” was a time when the “tycoons” operating their political cartels (“chongbol”) ruled with their own hands instead of by the rule of law, rivaling the business cartels (“chaebol”) or the military cartels (“kunbol”) of years past.”).

68) Jong-Sup Chong, *supra* note 65, at 74; Dae-Kyu Yoon, *Law and Political Authority in South Korea* 106-108 (1990).

## 2. Super-Strong Boss Politics

In addition to the Korean presidential system, the Korean political system concentrates a great deal of power in the single individual who occupies the presidency,<sup>69)</sup> which also contributes to creating Korea's weak environmental law regime.

In fact, Korean politics has been controlled by a number of super-strong presidents, *i.e.* military elites under the military regime and a number of political heroes after the long reign of military power. While military elites, including the late Park Jung-Hee, Chun Doo-whan, and Roh Tae-woo, mobilized various authoritarian apparatus, a number of political heroes, including Kim Young-Sam and Nobel Laureate Kim Dae-Jung, leading the two civilian governments, utilized hegemonic power acquired by fighting against the authoritarian regime. Commanding tremendous reputations through their life-long opposition and resistance against military rule, political heroes were capable of exerting enormous influence in Korean politics. They were also wise enough to take advantage of conspicuous localism, a deplorable antagonism among regions, so that each of them could have absolute power over politicians coming from their respective regions. By proving that they could win elections consistently and that they could raise money extravagantly, they could make other politicians delegate power to them. In this way, the civilian regimes could also wield as powerful a control over the bureaucracy as the previous authoritarian military regime.

As a result, bureaucrats as well as politicians work to please their bosses to the detriment of the principle of law. The government tends to be managed by presidential directives rather than the rule of law. The pervasiveness of politics over the rule of law has inevitably contributed to a broadening of the gap between practice and principle, the reality and the theory of law.

In addition, because legislators have also been under the control of super-strong presidents, the legislature has not played an appropriate role as an oversight organ. The legislature's role in checking the executive has been virtually nominal by blindly justifying the executive's agendas.<sup>70)</sup> In this sense, the law is still instrumentalized to realize the *rule of man* rather the rule of law.

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69) See generally Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (1989).

70) Jong-Sup Chong, *supra* note 65, at 26.

### 3. Informal Social Network

Ruling politicians can intervene directly with the bureaucracy by assigning staff to deal with administrative agencies on behalf of constituents.<sup>71)</sup> Politicians sell bureaucratic intervention services in exchange for support. But this is relatively costly form of monitoring, and involves scarce staff time. Generally, no single politician is likely to have the resources to provide enough such services to reduce agency slack.<sup>72)</sup>

However, there are a number of politicians who command such resources in Korea. As noted above, Korean politics have revolved around a number of political leaders rather than parties. In boss politics, a boss of party or group can usually wield hegemonic power. Boss politics based on boss' strongholds over regions has contributed to bring about frequent realignments of political parties depending on boss' interest. Naturally, political leaders run their parties as a personal vehicle to realize their political goal while party policies play a minimal role. Personal loyalty to their boss rather than ideology or expertise is the most important factor in assessing an individual's ability.<sup>73)</sup> To prove their loyalty to their boss, politicians build up informal social networks consisting of various persons, i.e., bureaucrats, businesses, judges, prosecutors, and so on. Furthermore, politicians endeavor to build as many and diverse relationships with each other as possible so that they can successfully prepare for possible political realignment and reshuffle to survive as legislators. In this way, boss politics functions to build a powerful informal social network.

Powerful informal social networks mean that politicians do have the human resources to intervene in the bureaucracy. These powerful informal social networks enable politicians to respond effectively and promptly to their constituents' complaints. Leaders of ruling party especially have successfully made bureaucratic intervention a major part of the services they offer their constituents.

But even worse, the informal social networks spawn a principle-ignoring attitude for the people. Legal framework is to hardware what its practice is to software.<sup>74)</sup> The way law functions is directly related to people's attitude toward law. The more

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71) Ramseyer & Nakazato, *supra* note 52, at 212-13.

72) *Id.* at 212-13, 216.

73) Jong-Sup Chong, *supra* note 65, at 25-6.

74) *Id.* at 27.

informal social networks function, the more people ignore law. People's attitude against principle and in favor of expediency, in turn, forms legal cultures that affect adversely legal practice. This is the so-called a *vicious circle of expediency*, through which a law-ignoring attitude takes firm root in the cultural infrastructure.

#### 4. Loyal and Indoctrinated Judiciary

Korean presidents have successfully maintained a loyal judiciary throughout history. The president has the power to appoint Justices of both the Supreme Court and the Constitutional Court, and both Courts, in turn, exercise indirect administrative control over lower court judges, which enables politicians indirectly to reward and discipline judges by the ideological character of their performance. In fact, the past military regime would not hesitate to discipline judges rendering anti-regime decisions by e.g. degrading them to remote posts of office.<sup>75)</sup> Moreover, Korean judges are typically appointed at a relatively young age and serve in bureaucratic structures much like the bureaucrats themselves.<sup>76)</sup> In addition, Korean judges are simply "generalized judges."<sup>77)</sup> Generalized judges by definition are not encouraged to develop specialized expertise, and Korean judges are rotated among various posts, which allows for political influence. For all these reasons, ruling politicians were able to keep their judges largely loyal throughout history.

Finally, Korean judges are very much indoctrinated with the result that the courts themselves adopt self-restraining postures. A continental tradition, i.e., strict conceptual and formal jurisprudence, has played a major role in forming courts' posture. Conceptual jurisprudence has discouraged judges from departing from the text of statutes. Seemingly, judges are so much steeped in conceptual and formal jurisprudence that they cannot distinguish between indoctrination and professional

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75) In fact, under the authoritarian governments, presidents did not hesitate to discipline disloyal bureaucrats and judges. President Park, e.g., fired large numbers of bureaucrats in 1961. One of the things which gave birth to the Fourth Republic in 1973 was an adverse decision of the Supreme Court. The new Constitution allowed President Park to replace judges who had voted against his policies with other, more obedient judges. Dae-Kyu Yoon, *supra* note 68, at 185-6. The creation of the Fifth Republic in 1980 was followed by a purge of some 18,000 bureaucrats. Ginsburg, *supra* note 55, at 38.

76) Ginsburg, *supra* note 55, at 35.

77) *Id.* at 37-38.



fidelity to law. In fact, judicial activism has never been present in Korean court history. Since the late 1980s, the Constitutional Court and Supreme Court have made vigorous decisions. Although both Courts sometimes nullified some legislation and precedents, they also revealed their own limits in many more cases.

#### *D. Some Plausible Explanations for the Courts' Posture*

Under this political and institutional structure, my earlier discussion implies that Korean courts would seldom reverse agencies. Through their tight control over the bureaucracy, a number of almighty political leaders minimized agency decisions that threatened their electoral advantage. Through their informal social networks, politicians directly maneuvered the agency decision process to restrain agency decision-making to their political gain. Through their stable, well-paid, and long-term leaders, ruling politicians made credible promises to their constituents. Through their faithful corps of judges, ruling politicians reversed those rare residual agency actions-but only those actions-disadvantageous to politicians.

A couple of judicial decisions noted earlier are conducive to understanding the political dynamics surrounding Korean courts. In choosing when to encourage judges to reverse agencies, rational, self-interested politicians should differentiate among disputes by their political impact, especially on their electoral odds. Some disputes they should find more advantageous politically to delegate to judges than others. For example, minor, everyday problems are more probably best delegated to judges since judges generally deal well with routine cases. However, when politicians come up against group claims involving many complainants, politicians prefer courts not to consider them, forcing the complainants to ask the politicians themselves to intervene with the bureaucracy. When these complainants are satisfied with what they have got, they will more likely support the politicians. Thus, as long as they can easily intervene in the bureaucracy politicians want to keep the more politically salient cases under their own control, delegating the less salient to the courts to resolve.<sup>78)</sup>

Korean court decisions concerning administrative law largely reflect this dynamic. For instance, the rules governing standing do not restrict judicial review in routine

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78) This observation was originally made to explain Japanese administrative law practice by Ramseyer and Nakazato. Ramseyer & Nakazato, *supra* note 52, at 217.

cases. Instead, the standing rules restrict judicial review in far-reaching, large-scale cases involving a large number of complainants. This is exactly what rational leaders of a ruling party would want. Why should they intervene in minor everyday disputes in exchange for small political returns? These disputes do not concern broad policies. For such routine cases, indoctrinated judicial review is more than enough. However, leaders of ruling party will never let other actors get control of disputes involving multiple complainants or broad policy issues. Such large-scale projects as the Saemangeum and Shihwa reclamation affect many constituents. Therefore, politicians try to decide such disputes themselves, thereby demonstrating their political power to their potential supporters. Toward that end, Korean administrative law successfully removes the court from the scene. Put simply, Korean law hands over routine cases with trivial political implications to the judges, and keeps others to the ruling politicians. Ironically, rigorous conceptual jurisprudence contributes a lot to this case. More precisely, Korean judges have yielded, consciously or unconsciously, to politicians' scheme by sticking to conceptual jurisprudence.

#### **IV. Concluding Remarks**

The role of law is not as instrumental in Korea's environmental protection as in its economic growth. While legislation necessary to environmental protection has been enacted to the level of developed countries, the law in practice falls far short of the public's expectation. In this sense, the law cannot be said to produce any meaningful impact on achieving environmental protection. And a weak environmental law regime coupled with the inherent limit of Korea's legal infrastructure results in arbitrary discretion enjoyed by the regulator.

Although my analysis is basically one of political economy, I cannot avoid commenting on Korea's underlying culture. As established in the case of the close tie between political power and economic tycoons in Korea, Korea is not a typical "rule-oriented" or "rule-based" society. Although their cultural unwillingness to file a suit is being diluted, Korean people still adhere to a culture based not upon rule, but upon human relationship.<sup>79)</sup> With this observation, it would be tempting, but wrong, to

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79) Koreans have not been considered culturally litigious. Instead, Korean society has been conventionally seen as valuing consensus and avoiding courts. Pyong-Choon Hahm, *Korean Jurisprudence, Politics and Culture* 250 (1986).

conclude that the trend is not changing. Even though relevant data is not available, it cannot be doubted that Korean people are also changing culturally, keeping pace with intensifying modernization process. However, there is something else necessary for this change to have a meaningful impact on Korean society, namely a legal infrastructure supporting that cultural change institutionally. Unfortunately, Korea falls far short in this regard.

Detailed legislation, enacted to implement an advanced environmental policy, cannot function without an advanced legal infrastructure such as the legal profession and dispute settlement system. No matter how good substantive rules and standards adopted by new legislation may be, their values are set at naught if a legal system supporting their enforcement does not follow. In this regard, Korea is in need of judicial reform in its broad meaning.

Above all, Korea is lacking in human legal resources.<sup>80)</sup> For instance, new legislation gives members of the public a right to file suit against a polluting corporation. To solve a collective action problem, for instance, it is often necessary for lawyers to take the initiative in bringing suits. But because of a lack of lawyers and supplementary dispute settlement rules and procedures, only a very few well-qualified lawyers in Korea have an incentive to represent environmental interests rather than corporate or personal interests. In addition, it is doubtful how responsive the already heavily burdened judges would be in dealing with this type of complex case requiring expertise in environmental matters. Also, the Ministry of Justice apart, there are only a handful of lawyers within the executive branch who serve as government officials. To my knowledge, there is only one lawyer in the Ministry of Environment. This is due to a shortage of lawyers in Korean society in general. In most cases, non-lawyer government officials are drafting important legislative bills and, consequently, most regulatory laws tend to be discretionary by their nature and rarely subject to judicial review.

The above observation is also true with the administrative sector.<sup>81)</sup> The exercise of the government's discretion as an environment keeper should be monitored and checked by some other mechanism. This is due to the danger of government failure. To correct government failure, e.g. regulatory capture problem in the area of

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80) The following relies on Seung Wha Chang, *supra* note 1, at 283-86.

81) *Id.* at 285-86.

environmental protection, Korea needs to set up a legal system under which even the regulators are required to function according to the duly established and transparent rules-laws and regulations. As noted above, especially in case of discretionary legislation, governmental agencies are provided with virtually unlimited discretionary power to exercise their own authority. If Korea looks on this case with folded arms, government law practice will, in the long run, possibly result in another government failure that causes more severe effects than even market failure. In order to avoid this result, the environmental protection effort must be accompanied by legal reform that directs the regulator to exercise its regulatory authority in accordance with the rule of law. To realize the rule of law within the executive branch, there must be a comprehensive review of all laws and regulations that authorize the executive to exercise its discretionary power. Then, and only then will such laws and regulations, as well as the legal institutions, be transformed to a rule-based legal system. In summary, a serious effort to realize the rule of law within the executive branch should accompany the current environmental protection effort.

There must be a similar change in the legislative system.<sup>82)</sup> The institutional strength of the legislative branch in enacting laws and regulations is weak, and this intensifies the weakness of the Korean legal system in general. Most legislative bills are drafted and proposed by the executive branch. In order to restore the checks and balances between the executive and the legislature, there should be reform within the legislature to strengthen its capacity to enact laws. And the executive branch itself cannot be expected to submit the legislative bills imposing strict legal requirements on the executive.

The courts too are not excepted. The bureaucratic structure should be reformed so that judges can be completely freed from the control of other actors. Judges should also reconsider the long-standing conceptual jurisprudence, and shake off self-restraining attitude so that they can cope with new and complicated problems.

The recent move by the legislature to perfect a legal framework for achieving environmental goal seems to be heading in the right direction. However, unless fundamental reforms in the legal infrastructure are taken, including the legal profession, environmental protection efforts will be doomed to be of only a cosmetic nature.

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82) *Id.* at 286.