
Against the Viability of Private Enforcement: Focusing on Korean Environmental Law

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Abstract

This essay concerns whether, how much, and under what condition private enforcement can solve the problem caused by under-enforcement of environmental law. Although the policy debate yields no universal conclusion, this essay concludes that the viability of private enforcement depends upon how well its specific design fits the relevant context.

With respect to the design of private enforcement, the following points should be noted. First, the essential question is whether and to what extent private individuals can be allowed to use the judiciary to compel far-reaching changes in society, especially where such changes are directed not at individuals' rights but at the public's common interest. Therefore, the question concerns a variety of complicated issues such as the proper role of courts in democratic government, the proper relationship between individuals and the community, and so on. Decisions regarding such issues must derive, at least in part, from a society's common set of ideological or other commitments. This essay argues that the existing enforcement scheme may properly reflect our society's common idea about such issues. Second, since the cost of private enforcement is higher than it looks, the decision of whether to adopt private enforcement in a particular context requires a pragmatic balancing that is best undertaken not by courts, but by legislatures responsible for the underlying law being enforced.

Having said that, this essay claims that the first step to remedy the under-enforcement problem must be to overhaul and realign the existing enforcement scheme. If this step is not sufficient, then let concerned citizens sue the government (not polluters directly) to correct government wrongful actions and inactions. Only concerned citizens in the context of neighborhood claims can detect legal wrongs easily and cheaply with relatively less cost on the existing enforcement scheme. If the "Private Attorney General (PAG)" type of private enforcement is chosen, then the government should retain the power to structure private settlement and rewards.

Given the current circumstances, this essay concludes that there is little likelihood and less need for the Korean government to adopt the PAG type of private enforcement.

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I. Introduction

While legal institutions influence social change, the extent of the influence depends upon the context. Although Korea has accomplished modernization of its environmental laws, their implementation, as compared to Korea's level of economic progress, falls well short of the public's expectations. In the 1990s, in response to the public's growing concern for the environment, Korea launched a new environmental law system modeled on that of the United States. One may well say that Korea's environmental laws, both substantive and procedural, are up to the same level as those of developed countries. However, Korea's environmental laws are not regarded as having been enforced to the same extent as its economic development-driving laws.

A number of issues arise from this disparity between the role of law in economic development and that in environmental protection. Among those issues, I have already explored the causes of the under-enforcement in a previous essay, the title of which is "The Pathology of Korea's Under-Enforcement of Environmental Law."¹⁾ In that essay I dealt with a number of theories developed to account for causes of under-enforcement that can be found in the three branches of government. Focusing on the applicability of these theories to Korea's case, I explored whether and to what extent under-enforcement may be attributable to the legislature, for inadequately designed legislation, symbolic legislation, or inadequate funding; to the bureaucracy, for abuse of administrative discretion; and to the courts, for their self-restrained posture. After indicating that all of these theories together fail to account for the whole picture, I pointed out that these theories fail to give enough weight to *popular will*, the most powerful force underlying Korea's environmental law regime. I concluded that the structure and process of government concerning Korea's under-enforcement is still driven by politics and that the Korean people still put more emphasis on the economy over the environment.

In this essay I will explore whether and to what extent "private enforcement" (hereinafter, "PE") can be an effective cure for the environmental under-enforcement problem. This essay proceeds as follows. Part II briefly touches upon the causes for

1) Hong Sik Cho, *The Pathology of Korea's Under-Enforcement of Environmental Law: Is Public Awareness and Deliberation the Key to Success?*, 4 UNIVERSITY OF TOKYO JOURNAL OF LAW AND POLITICS, at 47-64 (2007).

Korea's under-enforcement of environmental law. Only after becoming informed about the causes of under-enforcement can one begin to conceive of possible policy tools to rectify this problem. By claiming that the primary cause is insufficient environmental funding, this part finds the need to adopt PE that can subsidize government's insufficient enforcement. Part III describes PE's pros and cons from policy perspectives. Whether private suits for public interest can or cannot be an effective remedy for under-enforcement should be answered after considering the PE's own benefits and costs. Part IV summarizes and evaluates the status quo of Korea's environmental law regime. Costs and benefits of a particular form of private enforcement should be viewed against the backdrop of a state's existing enforcement scheme. This part proposes some elements to be considered when Korea designs its own PE regime.

II. The Primary Cause of Korea's Under-Enforcement and Its Policy Implications

1. Under-enforcement can be defined legally as enforcement performed below the level required by the relevant statutes.²⁾ As compared to this seemingly easy definition, it is tremendously difficult to tell in *practical* terms whether a given case is an instance of over or under-enforcement. It is so because the applicable laws and regulations not only mandate unclear requirements, but also allow some leeway to enforcers. For the purpose of this essay, it would suffice to say that most countries, including Korea, are plagued with under-enforcement because environmental law is not enforced as mandated by the text of environmental statutes.

2. A number of factors may determine the extent of enforcement, and plausible causes may be found in the three branches of government. Among a number of plausible causes for under-enforcement — including the legislature's inadequately designed legislation, symbolic legislation, the bureaucracy's abuse of administrative discretion, the courts' self-restrained posture, and limited funding — my previous

2) *Id* (quoting Joseph E. Sinnott, *The Classic Civil/Common Law Dichotomy and its Effect on the Functional Equivalence of the Contemporary Environmental Law Enforcement Mechanisms of the United States and Mexico*, 8 DICK. J. ENVTL. L. & POL'Y 273, 295-96 (1999)).

study revealed that limited funding is the most critical cause.³⁾

Funding theory is based upon the observation that the structure of government is generally dictated by politics. Among the tools that politicians use to control bureaucracy, budget control is the tool that funding theory focuses on. That is, it attributes enforcement deficiencies to the limited funding devoted to enforcement efforts. The theory was devised to explain why there is a disparity in the respective enforcement effectiveness of U.S. and Mexican environmental laws. Inadequate funding theory persuasively points out that the true reason for enforcement disparity can be found in non-structural influences on the system, particularly funding. Strengthened by evaluating the spending statistics and enforcement data in the U.S. and Mexico, inadequate funding theory shows that Mexico has steadily improved its overall performance as more money has been devoted to enforcement endeavors. Based on the funding theory, my previous study suggested an upgraded version of the inadequate funding theory.⁴⁾ It observes that in order to improve environmental conditions, a state should improve the ratio of the environmental budget to GDP. It is *not the amount but the ratio* of funding to GDP that determines the level of the environmental condition.

3. One can find sources of funding mainly in the national budget. Funding is a mirror image of the political will underlying enforcement. The strength of political will is articulated in the specific amount of the environmental budget. Therefore, getting enough funding requires that the general public be aware of environmental problems and be ready to mobilize as a unified voice. However, it takes much time to transform the public's preference towards a more environment-friendly one. It would not be reasonable to expect politicians to take the initiative regarding environmental matters, at least in part because politicians' primary goal is re-election rather than pursuit of the common good. If improvement of enforcement level in a relatively short period of time is desired, therefore, the only source to resort to may be environmental activists. If environmentally spirited citizens voluntarily get involved in environmental enforcement by means of litigation, this can provide additional

3) For more in-depth reference, see *id.* The following relies heavily on *id.*

4) I first argued this theory in the international symposium held in Nagoya in July 9, 2005, under the theme of "Environmental Law in Asia: From Law-making to Enforcement and Compliance." Cho, Hong Sik, *A Lesson from the Recent Development of Environmental Law Regime: Are Public Awareness and Independent Courts the Key to Success of Environmental Enforcement*, PROCEEDINGS OF THE SYMPOSIUM, at 57-80 (2006).

resources to the government's efforts. In this sense, the environmental movement can be viewed as a kind of private subsidy to complement the government's enforcement efforts. Of course, however, private enforcement is *not* cost-free. Unless one can identify the pros and cons of private enforcement, one should defer judgment regarding private enforcement.

III. Pros and Cons of Private Enforcement

While private enforcement is legally permissible, the practical workability of private enforcement is debatable. Furthermore, when one considers private enforcement as a cure mechanism for the under-enforcement problem, one can develop a variety of forms of private enforcement. Each form of private enforcement has its own attributes. Such different combinations of attributes make each form of private enforcement distinguishable from the others in terms of costs and benefits.

1. Various Conceptions of Private Enforcement

1) The term "law enforcement" can refer to many different forms of enforcement. Here, as a matter of convenience, I divide enforcement into two kinds: private enforcement⁵⁾ and public enforcement. Legal rules can also refer to many different kinds of rules. Again here, I divide legal rules into subjective rules and objective rules. While a subjective rule aims to protect individual rights, an objective rule aims to maintain public order. Of course, protection of individual rights in a bipolar dispute may result in the maintenance of public order, but it is only an incidental effect of such protection. On the other hand, purposeful enforcement of an objective legal rule also has a secondary effect: it brings some benefit to the general public. However, the benefit is not a vested interest, but a sort of windfall incidentally given

5) Throughout this Article, the term "private enforcement" shall refer only to the private enforcement of public purposes, and not to the private enforcement of private rights by individual victims of illegal conduct. Cf. Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980). In much of the law-and-economics literature, private enforcement refers to all non-government enforcement as "private," regardless of whether the enforcer is a victim or acts as a "private attorney general."

	Private Enforcement	Public Enforcement
Subjective Individual Rights	Private enforcement of private rights by victims of illegal act “Private Law”	Government’s Paternalistic Intervention into Privacy “Paternalism”
Objective Legal Rules	Political Losers’ Attack against Representative Democracy “Lack of democratic legitimacy”	Public enforcement of legal rules by the government “Public Law”

Matrix 1. The Traditional View

by the government, at most a so-called “reflex interest” in continental terms.⁶⁾ With these two forms of enforcement and two kinds of legal rules, the four different kinds of law enforcements can be shown as in the above matrix 1.

2) The traditional perspective made a sharp distinction between the protection of individual rights and the enforcement of public purposes, and the latter task was assigned principally to the government.⁷⁾ Since private citizens were viewed as poor judges of public goods and values, the enforcement of such values has generally been a public monopoly.⁸⁾ In other words, the purposeful enforcement of objective legal rules has been deemed to belong exclusively to the government. Hence, individuals’ efforts to enforce objective legal rules, no matter how novel their motivation may be, have been viewed as political losers’ illegitimate attempts for political revival to the detriment of representative democracy. Absent a vested entitlement, an individual must utilize not the judicial process, but the political process to voice her cause. Unless an individual is democratically elected, she can effectuate her view of the common good only through her representatives. On the other hand, disposition of a vested right is entirely its holder’s discretion, as supported by the idea of “private autonomy.” If the government seeks to vindicate a citizen’s right without his consent, it is considered to be paternalistic intervention into the private sphere.⁹⁾ Traditionally,

6) For general reference of “reflex interest,” see e.g. Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 FORDHAM INT’L L.J. 396, 414-15 (1996).

7) For example, Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TULANE L. REV. 339, 346 (1990).

8) *Id.* at 349.

9) See, for general discussion, Donald VanDeVeer, PATERNALISTIC INTERVENTION (1986); Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659 (1990).

	Private Enforcement	Public Enforcement
Subjective Individual Rights	Private Autonomy	Received Insufficient Attention
Objective Legal Rules	Public Attorney General (“PAG”) A New Policy Tool	Government’s Traditional Realm

Matrix 2. The Modern View

discrete dispute resolution has been viewed as the basic purpose of private litigation. In this way the traditional conceptualization of the public/private distinction tends to raise a basic question about the role of private enforcers across substantive domains, including the domain of environmental protection.

However, the modern view begins to regard private enforcement of objective legal rules as “an efficient policy instrument and as a participatory, democratic mechanism” that can complement the government’s efforts by allowing concerned citizens to redress social wrongs.¹⁰⁾ This assessment is shared by a large majority of legal scholars and by social activists such as environmental advocates.¹¹⁾ In contrast, public enforcement of subjective individual rights has yet to receive any noticeable attention.

3) As shown in figure 1, there is a broad spectrum of law enforcement ranging from government’s exclusive law enforcement to discrete private litigation. Likewise, one can conceive of a wide variety of private enforcement equipped with different attributes. Here I describe only the “private attorney general” (hereinafter, “PAG”) found in the U.S. citizen suit provisions that authorize “any persons” to sue private parties for noncompliance with statutory provisions or with standards and regulations issued under the statute. Groups and individuals suing under these provisions have sustained no injury or at most, a minimal injury-in-fact. This form of PAG functions as a template for the ensuing discussion herein. Based upon it, it

10) Greve, *supra* note 7, at 340.

11) *See e.g.* articles and books cited at id. at 341, fn. 9, 10. Among them, a remarkably thorough and balanced treatment of environmental citizen suit provisions is Boyer & Meidinger, *Privatizing Regulatory Enforcement*, 34 *BUFFALO L. REV.* 833 (1985). A prominent critical contribution is JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989).

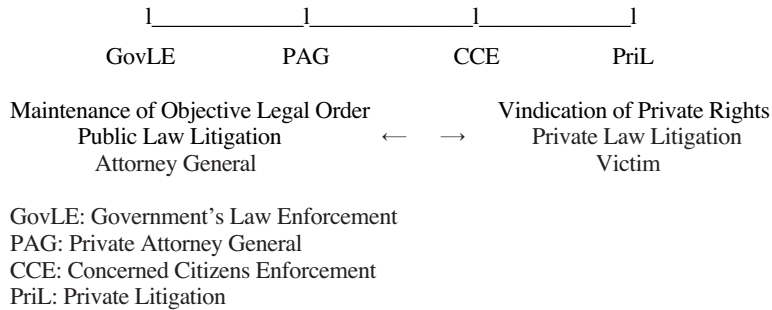


Figure 1. A Continuum of Conceptions of Law Enforcement

enables one to can develop a specific form of private enforcement that is aimed at a particular context.

4) The term “private attorney general” denotes “a plaintiff who sues to vindicate public interests not directly connected to any special stake of her own.”¹²⁾ PGA acts not as a victim who redresses a wrong done to her but as a “private attorney general.” The defining factors of a PGA can be stipulated as follows: i) effectuation of public interest (in other words, purposeful enforcement of objective legal rules, not vindication of a vested entitlement); ii) a high degree of independence from any control. To this list, some commentators add one more factor, a “*quasi-private* character of enforcement.”¹³⁾ The “quasi-private character” factor is seen for instance, in cases where citizen-plaintiffs seek to remedy neighborhood pollution. Such cases relate to claims that citizen-plaintiff are *concerned* with in one way or another. In other words, these cases have certain attributes of a private, remedial lawsuit. The U.S. Supreme Court seems to have taken this view, because the Court has determined that citizens must have some injury in fact, a sort of personal injury, to have standing to file a citizen suit, and that the injury-in-fact requirement is one of the constitutional requirements.¹⁴⁾

The remedies sought in PAGs’ actions tend to be broad: Rather than seeking redress for discrete injuries, PAG typically request injunctive or other equitable relief

12) Trevor W. Morrison, *Private Attorney General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005)

13) Greve, *supra* note 7, at 351 ff.

14) *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *Lujan v. Defenders of Wildlife*, 540 U.S. 555 (1992).

aimed at “altering the practices of large institutions.”¹⁵⁾ Understandably, the PAG has not been universally admired. While some view it as critical to the effectuation of the public interest, others are concerned about the danger of its abuse. Much of the debate relates to the disagreement about the underlying wisdom of relying on private actors to implement broad public norms. Occasionally in the U.S., arguments emerge about the constitutionality of doing so as well.¹⁶⁾

2. Policy Arguments in Favor of PAG

1) Its proponents claim that the PAG is a “cost-effective means of supplementing resource-constrained public enforcement.”¹⁷⁾ They think that private citizens may be able to enforce the law more cheaply than the government because individuals may be in a better position than the government to detect certain violations. Given the limited budget for environmental enforcement, a PAG can be regarded as a kind of private subsidy for governmental enforcement.

However, there are responses to the efficiency argument. Laws are usually over-inclusive. Thus, full enforcement of almost any statute would entail far more costs than benefits. More importantly, private citizens are generally poor judges of the interests of others, especially public interests,¹⁸⁾ and thus not every statutorily permitted enforcement action would be socially useful and productive. In contrast, public agencies are usually equipped with experts whose discretion is wiser than that of the PAG, and government enforcement is more stable and constrained.¹⁹⁾ Unwise private enforcement may also cause a chilling effect on the economy by opening the proverbial floodgates of litigation, meritorious or not.

2. The PAG is also viewed as a participatory, democratic mechanism because an altruistic PAG can ensure that enforcement is not wholly dependent on the current attitudes of public enforcers who have their own institutional and political biases.²⁰⁾ Given that bureaucrats’ policy preferences sometimes deviate from their principal,

15) Morrison, *supra* note 12, at 590.

16) For example, *id.*

17) Morrison, *supra* note 12, at 608.

18) For instance, Greve, *supra* note 7, at 349.

19) Morrison, *supra* note 12, at 594.

20) Greve, *supra* note 7, at 344.

i.e., the people, and are even “captured” by external forces, a PAG enables citizen self-help and greater participation.

However, there are many responses to the participation argument as well. The main argument is that public agencies are superior in terms of public accountability because they are subject to political pressures and budget constraints. The public, through its elected representatives, is able to express its preferences for more or less stringent enforcement. By contrast, there is no leverage with which the public can control the PAG. One cannot negate the possibility that a self-appointed ideologue under the guise of a PAG might use the courts to pursue her own goals and values.

3. Policy Arguments against the PAG

1) The opponents’ arguments against the PAG emphasize the prospect of vexatious and abusive litigation.²¹⁾ They worry that a PAG might assert marginal or even phony claims to extract settlements. Although efficiency concerns may indicate a delegation of public tasks to a PAG, its opponents observe the need to be alert about the fact that a PAG is not altruistic, but acts on specific ideological and financial motives. In the U.S. experience, enforcement by “concerned citizens” without organized support has turned out to be a rare phenomenon, and substantial portions of settlements between PAGs and the government constitute direct transfer payments to environmental groups, including above-cost attorneys’ fees and payments for credit projects.²²⁾ Private enforcement has an inevitably reward-oriented nature, which means there are no altruistic enforcers.²³⁾ In the U.S., Congressional support for a PAG is regarded as an outgrowth of interest group politics.²⁴⁾ In other words, a PAG is an off-budget entitlement program for the environmental movement. According to such harsh criticism, a PAG is just a mercenary law enforcer for profiteering or a social advocate who advances political causes, and a PAG is only a means through which selfish individuals advance their own interests under the mantle of the public interest.²⁵⁾

21) Morrison, *supra* note 12, at 591, 610-18

22) Greve, *supra* note 7, at 351 ff.

23) *Id.* at 366 ff.

24) *Id.* at 341, 384 ff.

25) Morrison, *supra* note 12, at 611.

Worse, the public has no leverage over PAGs. Unlike public institutions, a PAG is not subject to *institutional checks* such as legislative oversight and public accountability. Uncontrollable PAGs can bring about excessive enforcement because the government cannot stop citizen suits by any means except by instituting its own proceedings. Thus, private parties can force the government into enforcement actions, including pointless or counterproductive ones. In addition, the existence itself of private enforcement weakens the bargaining leverage of the government. For instance, the fact that private settlements can be heavily discounted raises the specter of under-enforcement. This is why the U.S. Department of Justice has insisted that citizen suits and private settlements do not bar the government from bringing its own suit over the same violation. This may cause the problem of the “civil equivalent of double jeopardy.”²⁶⁾

However, there are also responses to these concerns. The proponents of PAGs argue that ideological and pecuniary motivations may count as a virtue. Self-interest is not inherently evil. As Keynes observed, danger may exit not in self-interest, but rather in ideas about how to use self-interest and for what purpose. Whether or not a PAG can contribute to efficient enforcement depends on how well its institutional design fits a certain situation.

2) The bitterest criticism against the PAG may be about the need for coordinated and consistent enforcement.²⁷⁾ Private enforcement could produce piecemeal, sometimes erratic and excessive lawsuits that reflect disparate concerns rather than constitute a coordinated enforcement program, and thus burdening the judicial system as well as the defendants. In contrast, exclusive enforcement authority provides more certainty and specificity regarding a particular enforcement program and centralized and more orderly development of precedents applicable to various facts.

A response is that mechanisms can be developed to facilitate doctrinal coordination and coherence without losing the PAG’s deterrence power.²⁸⁾ Citizen suit provisions do not permit the government to preserve its discretion or a coherent enforcement scheme by terminating private actions or by unilaterally adjusting or

26) Greve, *supra* note 7, at 376.

27) Morrison, *supra* note 12, at 616.

28) *Id.* at 617.

withholding private rewards. In contrast, traditional bounty-hunter (*i.e.*, “Sheriff’s Deputy”) provisions seen in the U.S. granted the government discretionary authority to deny rewards and to terminate private enforcement actions, thereby having the advantage of permitting extensive private enforcement, while tempering its intrinsic dangers.²⁹⁾ Again, a PAG’s efficacy depends on how well its specific design fits the relevant context.

4. Evaluation of the PAG and Policy Implication

1) Contemporary policy arguments for and against the PAG show that views on the matter have changed over time. Although policy debate yields no universal conclusions concerning the utility of the PAG, the U.S. experience leads at least to the following conclusions: i) a PAG’s cost is higher than it looks; ii) evaluation of a PAG depends on the time and place concerned and cannot be made without their regard; and iii) the decision of whether to deploy a PAG in a particular context requires a *pragmatic balancing* best undertaken not by courts but by legislatures responsible for the underlying law being enforced.³⁰⁾

The U.S. Supreme Court’s attitude towards PAGs has also vacillated through the six decades’ history of the PAG. Over the past decade, however, the U.S. Supreme Court can be viewed to have supported public/private distinction by having limited the power and influence of PAGs in the environmental area by strict new standing requirements, an expansive view of state immunity, and limitations on attorney fees. On the other hand, it has left the government a relatively free hand to enforce the laws directly, thereby favoring direct government enforcement.³¹⁾

2) The essential issue concerning the PAG is whether and to what extent private individuals can be allowed to use the judiciary to compel far-reaching changes in the activities of the public, especially where those activities are directed not at individuals’ rights (life, liberty and property) but at the public’s common interest. Therefore, the question of the suitability of the PAG concerns a variety of complicated issues such as the proper role of courts in democratic government, the proper relationship between individuals and the community, and so on. The

29) Greve, *supra* note 7, at 375.

30) Morrison, *supra* note 12, at 596.

31) *Id.* at 595.

resolution of those issues must derive, at least in part, from a common set of ideological or other commitments. I suppose that the existing enforcement scheme was made to reflect society's common idea about such issues. Therefore, the first step to remedy the under-enforcement problem must be to overhaul and realign the existing enforcement scheme. If this step is not sufficient, then let concerned citizens sue *the government* (not polluting entities directly) to correct wrongful government actions and inactions. This step is the cheapest way to solve the problem. Next, when one explores the need to adopt PAG as an alternative tool, there should be, again, a division of labor between private and public enforcers. This division of labor would assign the task of designing and implementing a coherent and efficient enforcement scheme to public officials, and it would direct "concerned citizens" to fill the gaps in the government's enforcement scheme. Why *concerned* citizens (rather than any persons)? Only concerned citizens in the context of neighborhood claims can detect legal wrongs easily and cheaply with relatively less adverse impact on the public/private distinction that I claim should be cherished. Organizations or individuals, not involved in the dispute one way or another, seem to bring more costs than benefits to the overall enforcement scheme, including "holding-up" operations, extortions, and, more importantly, distortion of the political process. Errant or excessive claims have a bad influence on citizens' consciousness about the significance of environmental protection, thereby harming the environmental movement as well. Therefore, the preferred form of PE would be "concerned citizens" rather than *actio popularis* citizen suits. In this view, an optimal incentive system would combine very low search and detection costs with a categorical prohibition on above-cost rewards to PAGs.

V. Korea's Need to Adopt PAG Evaluated against the Backdrop of Its Existing Environmental Enforcement Scheme

1. Korea's Well-Organized Environmental Enforcement Scheme

The costs and benefits of a particular form of private enforcement should be viewed against the backdrop of each state's existing enforcement scheme. Only after such consideration can one successfully design an appropriate policy tool. Accordingly, we must carefully evaluate Korea's environmental law regime.

A. Constitutional Constraints and Statutory and Institutional Structure

Environmental problems can be viewed as instances of market failure that occur 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. In theory, private law could solve this failure by making firms compensate those injured by such externalities. But due to the intrinsic limitations of civil law,³²⁾ private litigation is in practice institutionally unsuited to this task.

There are a variety of techniques that legislatures could employ to deal with the failure of market/private law to protect the environment. The overwhelming instrument of choice in Korea, as elsewhere, has been command-and-control regulation.³³⁾ Pursuant to legislation, government agencies adopt 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.

Constitutional limits on statutory delegation set the outer contours of Korean administrative law. The Constitution declares the National Assembly as 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.”³⁴⁾ The Constitution adds that no

32) Doctrines of civil law, the equivalent of judge-made common law, allowing recovery in nuisance, negligence, trespass and in some instances strict liability enable 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 a general overview of the inefficacy of common law litigation 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 (other than securities class actions), citizens' suits, or organization actions (the equivalent of 'Verbandsklage' in German law) is available in Korea. The availability of injunctions is also very limited in Korea. For an overview of Korean courts' efforts to respond to the limitations of the private law system, see Hong Sik Cho, *infra* note 2, at 58-63.

33) For an overview of the options for regulatory instruments, see Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313 (1998) (applying interest-group theory to explain the content of regulation).

person can be deprived of life or liberty except according to due process established by law,³⁵⁾ that property rights shall be guaranteed with their content and limitations determined by Act,³⁶⁾ and that local government shall only have the power to enact their own regulations through laws and decrees.³⁷⁾ The Constitution not only provides the 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.³⁸⁾ Because of all this, agencies may regulate — but only if they stay within constitutionally and statutorily authorized constraints.

Korea's environmental legislation itself, both substantive and procedural, and its legal institutions are at the same level of development as those of developed countries. Since 1990, the Korean government has made a concerted effort to address the country's mounting environmental concerns.³⁹⁾ The first step was to substantially 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"), 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

34) S. KOREA CONST. § 75.

35) S. KOREA CONST. § 12 ① (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 ③ (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, Hun-Bup-Jae-Pan-So[HBJPS][Constitutional Court] 88 heonka 6 (Sept. 8, 1989) (S. Korea); HBJPS 92 heonka 8 (Dec. 24, 1992); HBJPS 94 heonma 201 (Dec. 29, 1994).

36) S. KOREA CONST. § 23 ① (providing that "Right of property shall be guaranteed for any citizen. Contents and limitations thereof shall be determined by Act"); S. KOREA CONST. § 23 ② (providing that "Exercise of property rights shall conform to the public welfare.").

37) S. KOREA CONST. § 117 ① (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.").

38) S. KOREA CONST. § 35 ① (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.").

39) Regarding Korea's legislative efforts to address environmental concerns, *see generally* Hong Sik Cho, *supra* note 7, at 503-508.

similar statutes below BEPA. The Act on the Assessment of Impacts of Work on Environment, Traffic, Disasters, etc. (hereinafter, “EIA Act”) is one of those statutes. A number of statutes have been enacted more recently, and the specialization of environmental laws is still underway. As of March 2005, thirty-nine environmental statutes are under the jurisdiction of the Ministry of Environment.⁴⁰⁾ The President, Prime Minister, and various ministers implement the statutes by issuing regulations in the form of decrees.⁴¹⁾ Environmental statutes and regulations are being enforced through gradually increasing criminal and administrative sanctions, as well as through civil liability.

In addition, Korean citizens have an array of choices in challenging administrative actions.⁴²⁾ While seeking administrative remedies remains an option, citizens no longer need to exhaust administrative remedies before going to court. They can pursue administrative appeals before a designated commission under the Minister of Legislation, or submit a petition to the National Grievance Settlement Committee under the Prime Minister. Especially with respect to environmental disputes, they can use the National Environmental Dispute Resolution Commission (NEDRC) and Local Environmental Dispute Resolution Commissions located in 16 cities throughout Korea.⁴³⁾ The 1996 Administrative Procedure Act expanded the scope of the formal records that are required when agencies make rules and administrative acts, established a presumption against administrative guidance, and set up extensive notice-and-comment type rulemaking procedures. The Law on Disclosure of

40) See the Appendix.

41) S. KOREA CONST. §§ 75, 95.

42) For more in-depth discussion of Korean administrative procedure reform, see Tom Ginsburg, *Dismantling the “Developmental State”?: Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 587, 606-611 (2001).

43) With these accomplishments, Korea has been providing citizens with a structured dispute settlement system that secures the citizens’ rights and mutual benefits even without going through traditional legal proceedings. Between 1991 and 2003, a total of 1,345 environmental disputes were reported and 1,016 of them were successfully settled. The disputes arising from noise and vibration marked 859 cases, which accounted for 84% of the total number of disputes, followed by 97 cases regarding air pollution (10%) and 47 cases regarding water pollution (5%). Among the 1,016 settled cases, 830 negotiation outcomes (approx. 83%) were mutually accepted by the concerned parties. The Commissions aim to further strengthen the expertise of the settlement coordinators while promoting scientific and structured negotiation procedures and increasing the transparency of the decision-making processes. See generally MINISTRY OF ENVIRONMENT, GREEN KOREA 2004: BUILDING AN ECO-COMMUNITY FOR THE 21ST CENTURY 35 (2004).

Information gives citizens more information on which to base their complaints. These rules reinforce each other to open up policymaking and expand control of administration. Simultaneous with these legislative changes, the Environmental Administration, structurally organized to combat pollution, was upgraded to full ministry status as the Ministry of Environment.⁴⁴⁾ Moreover, the dispute settlement system specifically designed to resolve environmental disputes was also strengthened.

B. Courts' Self-Restrained Posture

(1) Public Law

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.⁴⁵⁾ If an agency decides such an issue against a party, the party 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")⁴⁶⁾ 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 due to strict ripeness and standing requirements, and limited types of remedies enforceable against the state.⁴⁷⁾ To be reviewable, administrative acts have to constitute formal "administrative disposition," an exercise of public authority that restricts a plaintiff's legal rights, and in addition must constitute the final and conclusive stage of the administrative process with immediate

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

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

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

47) With respect to remedies, permanent injunctions are not available against the 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).

effect.⁴⁸⁾ Moreover, just as United States⁴⁹⁾ courts did prior to the *Data Processing* decision, Korean courts presently apply a “legal interest” test for 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 review of administrative acts. This means that individuals affected by a project cannot sue the government when it grants the permit for the project, because statutes are interpreted to provide not a legal interest to local residents, but at most, “reflex interest” to the general public. Even if one could be successful in overcoming these hurdles, remedial provisions are minimal, so there is little incentive to sue.

Furthermore, Korean courts are criticized for having been under such a strong influence of conceptual and formal jurisprudence that they cannot take a positive role in overcoming these limits by an activist interpretation of the statute’s words. Finally, Korean courts are traditionally judged 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 the ambit of judicial review, causing the courts to handle only the more routine cases.

(2) Private Law

Compared to its role in the field of public law, however, Korean courts have played at least an identifiable (though not a major) role in protecting the environment in the field of private law. However, Korean courts’ practices still fall behind the expectations of the Korean people.

As noted above, the Constitution provides the people with a constitutional right to a healthy and pleasant environment. However, the Supreme Court of Korea has construed the provision as not self-executing unless a number of preconditions are satisfied.⁵⁰⁾ In a number of nuisance cases in which plaintiffs based their claims on

48) Concerning the concept of “administrative disposition,” see John K. J. Ohnesorge, *States, Industrial Policies and Antidumping Enforcement in Japan, South Korea, and Taiwan*, 3 *BUFF. J. INT’L L.* 289, 399 (1997).

49) *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-57 (1970) (discarding the “legal interest” test in favor of “zone of interest” test).

50) Dae-bup-won [DBW] [Supreme Court] 94 ma 2218 (May 23, 1995); DBW 95 da 23378 (Sep. 15, 1995); DBW 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-à-vis other individuals. That is because this provision does not provide clearly the content and scope of the environment to be protected, the scope of persons who are to use the right to a healthy and decent

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).”⁵¹⁾ Only in rare cases can a constitutional right to a healthy environment be established as a private right exercisable against others by interpreting tacit provisions and using *jory*. As a result, unless an environmental suit is based upon a specific statute that provides the parties involved with a legal interest, 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”⁵²⁾ was pending, one could not compel developers to consider the ecological value of a given wetland unless one was the owner of adjacent property.⁵³⁾ Except for property claims, one could not find any legal grounds upon which to establish such a claim.

Furthermore, according to the Civil Code, Korean courts do not award unforeseen extraordinary damages. Neither do they award nominal, stigma, or punitive damages. However, Korean courts have attempted to respond to the limitations of the private law system by relaxing traditional standards of proof,⁵⁴⁾ encouraging quasi-class actions,⁵⁵⁾ and devising creative new remedies.⁵⁶⁾ Not unexpectedly, these innovations

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 the 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 the legal interests, ‘preservation of the environment’ or ‘protection of individual freedom for industrial development’ (both of which contradict each other), must be chosen as a priority and how the two interests are to be harmonized and balanced.”

51) *Id.*

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

53) *See* DBW 95 da 23378 (Sep. 15, 1995); DBW 96 da 56153 (July 22, 1997).

54) DBW 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); DBW 81 da 558 (June 12, 1984) (accepting the probability theory by loosening the burden to prove causation); DBW 89 daka 1275 (July 23, 1991) (the same content).

55) Korean law has no provision for class actions (other than securities 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 these

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.⁵⁷⁾ 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 corporate or governmental projects on environmental grounds. 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 may simply determine the present value of his expected future losses and award him damages instead.⁵⁸⁾

C. Recent Developments in the Courts' Rulings and Judicial Reform Efforts Implemented by the Ministry of Court Administration

(1) Administrative Disposition

Korean courts may 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 actions that an agency might take. Rather, it refers to the actions which a national or public organization (the subject of public powers) takes that directly structure or determine the rights and duties of citizens. This requirement seems enormously nebulous, and has indeed been creating tremendous barriers against people who try to challenge administrative actions for their own interest.

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

types of large suits "quasi-class actions."

56) *See, e.g.*, DBW 90 gaka 5198 (Dec. 27, 1991) (using the relevant statistical data in calculating the amount of damages).

57) 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.

58) *See, e.g.*, DBW 95 da 23378 (Sept. 15, 1995); DBW 96 da 56153 (July 22, 1997).

administrative litigation rules. By contrast, if an agency buys a fleet of cars on the open market or 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 (although the agency must of course follow the usual rules of property and contract). In such case, courts will review its actions under the usual rules of civil procedure.

However, there is a gray zone of administrative acts that cause 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 of “administrative disposition.” A variety of types of administrative actions that seem to constitute the exercise of public power have been determined to not fall within the scope of the concept of “administrative disposition.” Consider, for example, an environmental impact assessment (“EIA”), which is deemed not to be an administrative disposition. Since EIAs directly affect only the agency’s internal affairs (though they are one of the important proceedings constituting final administrative actions having outside effects), they are not regarded as administrative dispositions, 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 relevant project will often have been completed by the time the court performs judicial review. Then, it is often too late to gather spilt water.⁵⁹⁾

In response to the criticism aimed at the concept of administrative disposition, the Ministry of Court Administration under the auspice of the Supreme Court has recently proposed a legislative bill (hereinafter, “Amendment Bill”) to amend the ALA. In this bill, the concept of “administrative act” is chosen instead of administrative disposition. Administrative act is supposed to encompass every kind of act driven by administrative agencies, including presidential/ministerial decrees

59) Furthermore, there are a couple of provisions in the ALA which may work for the government’s advantage. 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.

and administrative acts devoid of direct legal effect, neither of which is currently included under the concept of “administrative disposition”.

The Amendment Bill is considered to follow the French model by allowing objective recourse against excessive power which focuses on control of the legality of all executive decisions except for the “acts of government.” In a procedure of objective recourse, the particular issue of the plaintiff’s rights is not taken into consideration, and the court will not decide on this matter. Since the famous decision of the Conseil d’Etat (Council of State) in the case *Dame Lamotte* in 1950, the significance of the recourse against excessive power has not been challenged. In the *Dame Lamotte* decision the Council stated that “this recourse is open even in the absence of a text against any administrative act, and it has the effect to ensure the respect of the legality in accordance with the general principles of the law.” The concept of objective recourse is an original institution of the French administrative system that reflects the significance of the legal order based on the preeminence of sovereign law (“loi”) as opposed to the constitutional protection of individual rights. In this respect the French legal system is inherently in tension between private subjective rights and public order.

(2) Standing

For a petitioner to challenge an agency, she must have standing to sue. In Korea, standing is so narrowly formulated that any litigation to vindicate collective interest is not allowed.⁶⁰⁾

To have standing, a petitioner must have a “legal interest” in the case.⁶¹⁾ Again, the routine cases are clear: an agency refuses a petitioner a permit for her store — she has standing; an agency closes her store — she has standing. It is the odd — but important, from the viewpoint of public policy, cases that are unclear. Such unclear cases sometimes seem to follow the “zone of interest” line of inquiry in the United States. As disputes became more complicated in terms of the numbers of parties involved, the complexity of relations among the interests concerned, and so forth, the number of unclear cases is increasing.

To explore such unclear cases, let’s consider disputes over nuclear reactors.

60) Joon-Hyung Hong, *supra* note 29, at 56.

61) *See* Administrative Litigation Act § 12.

Although Korea depends heavily on nuclear power, the reactors have their fair share of opponents, both opponents of nuclear power generally and opponents of nuclear power in their backyards. When these opponents challenge the reactors' permits, their claims are usually dismissed on the grounds that they do not have standing. Crucial for the purpose here, they do not lose on substantive grounds. 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' interests, 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 and does not articulate the interests of neighbors to be protected. Instead, it emphasizes sensible and 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 the safety of the reactor.

Recently, however, the Supreme Court has been *gradually* changing 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").⁶²⁾ The Court reasoned that individuals living within an EIA area have a concrete, specific interest (rather than an abstract, general interest that any members of the general public can share with others) to be protected by the EIA Act that the developer is alleged to have violated.

In 2005, the Supreme Court further relaxed the standing requirement in a similar case.⁶³⁾ In this case, the Supreme Court conferred standing even to individuals living out of the area designated as the "vicinity impact area" by the relevant statute if they successfully prove that there is a fear that their environmental interests are damaged by the allegedly unlawful construction of, in this case, a trash-incinerator. The Court reasoned that the relevant clause is provided to protect concrete individuals' environmental interests rather than the abstract public interest in general.

Furthermore, the "Amendment Bill" no longer sticks to a "legal interest" test for standing. Under the legal interest test, a plaintiff seeking redress for environmental

62) DBW 97 nu 3286 (April 24, 1995) (S. Korea).

63) DBW 2003 du 13489 (March 11, 2005) (S. Korea).

harm must demonstrate injury to a legal interest in order to obtain judicial review of governmental agency action. Unless an interest is founded in a statute that is interpreted to protect the interest of certain individuals, they cannot seek judicial review of governmental agency action. However, the Amendment Bill discards the legal interest test by cutting out the nexus between the relevant statute and standing. Instead, the Amendment Bill provides a standing clause that confers standing to any one who has “a *legally just* interest.” Under this clause, judges rather than legislators decide who can file an administrative litigation because judges can ground their determination of whether to confer standing on the Constitution, Constitutional principles, courts’ decisions, and maybe even natural law, not to mention the relevant statute.

(3) 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 she must generally prove is illegality or an abuse of discretion. Under the ALA, she must show that the agency acted illegally, or “exceeded the scope of its discretion, or abused its discretion.”⁶⁴⁾ Generally speaking, Korean courts are very deferential to agencies’ discretionary decisions.⁶⁵⁾ Therefore, petitioners can challenge an agency’s decisions only if they can show, for example, that the decisions lacked basis in fact or were egregiously inappropriate in the light of prevailing social norms and the agency therefore either exceeded or abused its discretion.

Again, however, Korean courts are getting more active in dealing with administrative cases. In the famous Saemangeum case, for instance, the Seoul Administrative Court has ruled in favor of environmental conservation by determining that the relevant agency’s decision lacked basis in fact. As a result, the court ruled it necessary to cancel or change the permit to reclaim the public water area because the environmental, ecological and economic damage expected from the project is huge and irreversible. They listed the following reasons to support their

64) Administrative Litigation Act § 27.

65) For example, DBW 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); DBW 99 du 9902 (June 29, 2001) (the same content).

ruling to change or cancel the original permit: the possibility of using land reclaimed through the project for agriculture is very low; it is anticipated that the water quality in the reclamation reservoir will be too poor to use for agriculture; estimates of economic benefits to be derived from converting the existing area to agriculture are flawed; and massive damage will be caused to the tidal-flat ecosystem. The court added that no decision has yet been made on the end-use of the land to be reclaimed, but reiterated that it cannot be used for agriculture, as water in the reclamation reservoir created for that purpose will be too polluted. The court did not rule against continuing work to reinforce the existing sea wall, but it did rule against further construction required to close the remaining 2.7 km stretch that remains open. (Earlier, the court had tried to suggest a way forward by recommending that further research be conducted before their final ruling was made.) The court also recommended that the government should halt the project and set up a committee of experts to fully review the potential environmental and economic consequences of the reclamation. The court further suggested that parliament should enact a special law to help iron out such issues. Although, environmental groups and local fisherman welcomed these recommendations, the government and the ruling Uri Party openly rejected them.

(4) Types of Remedies

In Korea, environmental victims' concerns are diverse; they range from recovery of pollution damage to permanent injunctions for environmental preservation. Recently, more attention has been focused on the availability of injunctions. However, constraints inherent in the litigation process keep the courts from playing their expected role. As in Germany and Japan, class actions, pretrial discovery, jury trials, and punitive damages are not available in Korea. Only in limited cases do the Korean courts provide permanent injunction remedies.⁶⁶⁾ Furthermore, the Korean courts usually concentrate only on dispute resolution, as opposed to the United States courts, which also focus on policy making in addition to dispute resolution.⁶⁷⁾ These

66) Because Korea is a civil law country, the Korean legal system does not have the concept of equity. This plays a crucial role in courts forming hostile attitudes toward injunctive relief. As a matter of fact, the Korean courts seldom grant permanent injunctions against large-scale corporate or governmental projects for environmental reasons.

67) Sang-Hyun Song, *The Roles of Judges in Korea*, in *KOREAN LAW IN THE GLOBAL ECONOMY* 300-05 (Sang-

obstacles must be overcome in order for environmental victims to enjoy substantial protection from environmental degradation. Given the high level of public awareness about the significance of environmental protection, the courts' activism and creativity may make a difference in Korea's environmental quality by filling a void in the law. Again, the "Amendment Bill" provides permanent injunction remedies by adding a new type of administrative litigation in which the courts can obligate the relevant governmental agency to implement its legal duties.

2. Korea's Need for PAG and Viable Design of Private Enforcement

1) In the field of environmental protection, the Korean legislature has never enacted a PAG. (Hence, Korean courts have never had the chance to decide whether there is a constitutional standing requirement such as a minimal injury in fact requirement as in the U.S.) Korean courts have insisted that only the Legislature can authorize a PAG. Therefore, at least in the environmental area, Korea does not have any PAG.

However, in my view, a PAG is not necessary, at least for the time being. First of all, as noted above, Korea is equipped with a well-organized environmental enforcement scheme the modernization and specialization of which is still underway. If means of litigation against the government are needed to strengthen enforcement, the first step is not to adopt a PAG, but to let people use the procedure that exists to correct government wrongful action and inaction. Second, environmental activists are enormously active in Korea. As noted above, by voluntarily monitoring and reporting environment-degrading activities, environmental activists subsidize the governmental efforts to protect the environment. Throughout Korea's history, nongovernmental environmental organizations have played a major role as "a formidable policy-influencing force and unofficial pollution watchdog." Since the creation of the Korean Federation for Environmental Movement, the first environmental NGO launched in Korea, diverse NGOs have been born. As of December 2003, more than 300 NGOs are reported to play a role in the field of environmental protection.⁶⁸⁾ According to a poll, two thirds of Korean people think that Korea's environmental NGOs make positive contributions to solving

Hyun Song ed. 1996).

68) MINISTRY OF ENVIRONMENT, ENVIRONMENTAL WHITE PAPER 2004, 130.

environmental problems.⁶⁹⁾ Third, Korean people have turned out to be extremely litigious, which dilutes the need to devise more incentives for the people concerned to, in the capacity of PAG, sue directly against polluting entities. The number of administrative litigations has rapidly increased from about 22,000 in 2004 to the high level of about 26,000 in 2005. In this context, the Korean government's recent efforts to liberate justiciability in revising the ALA are noteworthy. Fourth, Korean courts have begun to take an active posture toward welfare rights litigation, including environmental litigation to such an extent that they proposed their own amendment bill to the ALA. Only with judicial follow-up can environmental litigation have an impact on environmental enforcement. Korean courts are so much more (though in a relative sense) *isolated from the political process* that they may stick more strictly to the texts of statutes enacted to protect the environment. In addition, public involvement by means of litigation means decentralization of the monitoring and enforcing function. Individuals' suits against bureaucrats can result in informing politicians of bureaucratic failures to follow legislative instructions. The courts can serve as a mechanism to discipline bureaucrats and as a quality-control system in judging whether the public's claims have merits.

2. In case that private enforcement is found necessary to strengthen the enforcement level in Korea, I would advise the following: First, the legislature in charge of the underlying law must decide whether and to what extent a PAG is allowed. As noted above, private enforcement of public interest brings out a number of complicated policy issues. Only the Legislature that represents the Korean people may and should decide such issues. Second, in deciding whether to deploy and how to design private enforcement mechanisms in a particular context, the Legislature must engage in a kind of pragmatic balancing. Especially in designing the proper form of private enforcement, the Legislature must take into account the relevant costs that are calculated against the background of the existing enforcement scheme. Third, if other conditions are the same, the form of concerned citizen enforcement is preferable over *actio popularis* type of citizen suits. If PAG type of private enforcement is chosen, then the government should retain the power to structure private settlements and rewards. Why? It is because too much judicial review may not be judicious. The courts' unreasonable involvement on the side of the activists

69) THE SURVEY OF PUBLIC OPINION, *supra* note 50, at 26-27.

may break the balance established among the three branches. It would be fatal to the courts' integrity if they respond favorably to ideological activists by reaching pro-environment decisions in an unprincipled manner, or altering generally applicable rules to make them to apply differently in environmental cases. In such case, the court would not be a deliberative forum, but a bloody arena that interest groups use to substantiate their negotiating power. The PAG type of private enforcement would augment such possibility for courts to abuse their judicial power. In short, the trial should remain a judicial process, not a political process.

KEY WORDS: environmental law, under-enforcement, private enforcement, public enforcement, subjective rule, objective rule, public law, paternalism, democratic legitimacy, funding ratio, private subsidy, citizen suit, Private Attorney General, *actio popularis*, concerned citizen suit, pragmatic balancing, judicial power, democratic government