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Peter W. Schroth

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BOOK REVIEW

ENVIRONMENTAL LAW IN JAPAN. By Julian Gresser,¹ Kōichirō Fujikura² and Akio Morishima.³ Cambridge (Massachusetts) and London: MIT Press, 1981. Pp. xxi, 525. \$60.00.

Reviewed by Peter W. Schroth⁴

Japan is at least as industrialized as the United States, and has a population over half as large crowded into a chain of islands whose total land area is substantially less than that of California. Of the industrialized countries, only Belgium and the Netherlands have a larger population per square mile, and even this understates the crowding, for most of Japan is mountainous and only marginally habitable. Accordingly, Japan's industrial pollution problems showed up earlier, and are intrinsically more serious and less tractable than those of the United States. As a result (though the story is more complicated than this makes it seem), Japan's environmental law developed faster, and in several respects further, than that of the United States. Japan today is the only major country whose environmental law is further developed, in important ways, than ours, and (at the risk of joining the chorus of writers on the benefits of Japanese management, I will assert that) we have something to learn from her.

1. Visiting Professor, Massachusetts Institute of Technology, and Lecturer in Law, Harvard University; Professor of Law, University of Hawaii; Of Counsel, Manatt, Phelps, Rothenberg & Tunney, Los Angeles and Washington, D.C.

2. Professor of Law, Tokyo University.

3. Professor of Law, Nagoya University.

4. Visiting Professor of Law, Hamline University. ©Copyright 1981 by Peter W. Schroth

But the Japanese language, a serious handicap to the Japanese themselves, is an even greater handicap to foreign students of Japanese institutions. Few Americans take the trouble to study foreign materials even when they are easily accessible, and almost none do so when the task is more difficult. There are, to be sure, a few introductory books in English on Japanese law in general,⁵ and even a few articles on Japanese environmental law.⁶ But until the appearance of *Environmental Law in Japan*, there was no way for a reader limited to English (or even to Western languages) to get a general overview of Japanese environmental law that was not brief and superficial.

Environmental Law in Japan began as a course at Harvard Law School in 1976-77, when it was said to be not only the first American course on Japanese environmental law, but the first such course anywhere. The authors, who were the teachers of that two-semester course, include two English-speaking Japanese with substantial experience in the United States and one Japanese-speaking American with substantial experience in Japan. The product is in part a casebook (but with discussion instead of questions following the cases) and in part a detailed history and analysis of Japanese environmental laws.

I

The book consists of eight chapters, which are grouped into four parts, plus two documentary appendices. Part I (chapters 1 and 2) deals with the history of pollution and pollution-related disputes in Japan before the 1970's, and with the four leading pollution-damage cases of 1971-73 (Niigata and Kumamoto Minamata mercury poisoning, Yokkaichi asthma and Toyama "itai-itai" cadmium poisoning). This much the diligent reader could have found in English previously, and in fact the authors draw heavily on previous publications by Notehelfer,⁷ Upham⁸ and others.

5. E.g., H. TANAKA, *THE JAPANESE LEGAL SYSTEM* (1976); D. HENDERSON & J. HALEY, *LAW AND THE LEGAL PROCESS IN JAPAN* (1978); Y. NODA, *INTRODUCTION TO JAPANESE LAW* (1976).

6. See, e.g., notes 7 and 8 *infra*. Two more recent articles are Upham, *After Minamata: Current Prospects and Problems in Japanese Environmental Litigation*, 8 *ECOLOGY L.Q.* 213 (1979), and Hirano, *Penal Law Protection of the Natural Environment in Japan*, 13 *LAW IN JAPAN* 129 (1980). Another valuable source of information on Japanese environmental law is the *International Environment Reporter* (BNA). See also Schroth, *Comparative Environmental Law: A Progress Report*, 1 *HARV. ENV'T L. REV.* 603, 613-14 nn. 39 & 40 (1977).

7. Notehelfer, *Japan's First Pollution Incident*, 1 *J. JAPANESE STUD.* 351 (1974).

8. Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits*, 10 *LAW & SOC'Y REV.* 579 (1976).

Part II (chapters 3 and 4) goes much further, beginning with the first English translations of the opinions in the four cases. The technique, followed here and throughout the book, is to provide a general introduction to the topic, then extensive translations from the primary sources, and finally the authors' analysis. At the end of chapter 3, the authors discuss the development in the four cases of doctrines relating to fault, strict liability and willfulness; standard of care; joint liability; causation; damages; and statute of limitations.

Chapter 4 goes beyond the four cases, emphasizing more recent developments in both civil and administrative law. After two sections briefly introducing Japanese judicial procedure, section 3 discusses the right to sunlight; the development of a general right to environmental quality; judicial consideration of new environmental protection remedies, such as injunctions and the creation of non-statutory duties; and the lower court proceedings in the *Osaka Airport* case.⁹ Section 4 discusses recent judicial developments in administrative law, such as the right to a fair hearing; standing; ripeness; and public access to governmental information. Each topic includes extensive translations of the relevant cases. A final section briefly compares the roles of United States and Japanese courts in environmental litigation.

Part III (chapters 5, 6 and 7) deals with environmental protection legislation and its administration. Chapter 5 begins with an extended discussion of the nature and behavior of the Japanese bureaucracy, including such innovative devices as the Environmental Pollution Prevention Service Corporation (*Kōgai Bōshi Jigyōdan*).¹⁰ It includes

9. Both the District Court and the High Court announced their decisions in 1974, and lengthy translations are given in chapter 4. The case was appealed to the Supreme court, however, and although the authors predict a final decision in 1980 (the book appears to have been completed in 1979, with perhaps a few notes added in early 1980), there has been none as this is written in September 1981.

10.

The Environmental Pollution Control Service Corporation is a multipurpose, government-owned and -operated entity. It selects environmentally sensible sites, purchases land, builds green belts, installs pollution control and abatement equipment, and thereafter conveys title to the property to the concerned enterprises. The corporation also builds and sound-proofs housing for workers.

In addition to its direct involvement in pollution control, the corporation greatly facilitates administrative guidance of industry. Its most successful operation to date has been its direct loans, particularly to small- and medium-size enterprises, for the installation of pollution control equipment and waste treatment plants. It also provides its client enterprises with scientific and technical information and facilitates financ-

three case studies — in the manner of a political science text, rather than of a law-school casebook — on control of SO_x air pollution, automobile emission controls and environmental impact assessment. The chapter concludes with a four-page argument for the adoption by the United States of some Japanese regulatory techniques.

Chapter 6 is a discussion of the 1973 Law for the Compensation of Pollution-Related Health Injury.¹¹ Unlike the later toxic-substances measures in Europe and the United States,¹² which are primarily concerned with pre-manufacturing or pre-marketing tests — but rather like our Black Lung program¹³ — the Japanese law compensates certified victims of designated pollution-caused diseases. The fund from which benefits are paid is entirely financed by polluters, principally through emission charges and to a lesser extent through a tax on automobiles. Most of the chapter is a detailed explanation and evaluation of the operation of this law. In its final pages, the authors discuss proposals to adopt a similar system in the United States,¹⁴ this time concluding that expansion of judicial remedies would be preferable to adding another layer of bureaucracy.

Chapter 7 is a discussion of conciliation, mediation and arbitration in the settlement of environmental disputes. *Pace* John Haley,¹⁵ "Japanese society has historically favored extrajudicial settlement of disputes."¹⁶ In 1970, Japan adopted a Law for the Resolution of Pollution Disputes,¹⁷ which, as amended in 1972, established a seven-member Central Dispute Co-ordination Committee, numerous local review

ing for pollution control. By negotiating joint contracts with a number of enterprises, the corporation also encourages these firms to share information, pool funds for pollution control, and collaborate in a variety of other ways. Finally, the favorable tax treatment accorded facilities constructed or installed with the help of the corporation provides an economic incentive for some enterprises to reduce pollution.

J. GRESSER, K. FUJIKURA & A. MORISHIMA, ENVIRONMENTAL LAW IN JAPAN 262-63 (1981) (footnotes omitted) [hereinafter cited as ENVIRONMENTAL LAW IN JAPAN].

11. Kōgai Kenkō Higai Hō, Law No. 111 (1973).

12. See generally Schroth, *International Aspects of Toxic-Substances Control*, 1981 ABA ENV'T'L L. SYMP. 113.

13. Black Lung Benefits Act, §§ 401-435, 30 U.S.C. §§ 901-945 (1976 & Supp. III 1979).

14. E.g., H.R. No. 9616, 95th Cong., 2d Sess. (1978), discussed in ENVIRONMENTAL LAW IN JAPAN, *supra* note 10, at 322-23. These provisions were omitted from the final version of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (to be codified at 42 U.S.C. § 9601).

15. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

16. ENVIRONMENTAL LAW IN JAPAN, *supra* note 10, at 325.

17. Kōgai Funsō Shōri Hō, Law No. 108 (1970).

boards and thousands of local complaint counselors.¹⁸ The authors distinguish mediation, conciliation, quasi-arbitration and arbitration, noting that the last, being the least flexible, is rarely used. Six conciliation cases are described, and the resulting agreements are given in translation. Analysis shows that conciliation is much the most popular and effective of the extrajudicial procedures, and the authors very briefly conclude that its adoption should be considered in the United States.

Finally, Part IV (chapter 8) surveys Japan's record in international environmental matters, which in a word, is terrible:

Japan's remarkable domestic environmental achievements contrast with her bleak international performance. The discrepancy is perhaps most vividly expressed in Japan's reluctance to ratify a single major environmental convention. . . . Japan originally also opposed the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters because at the time Japanese industries wished to discharge cadmium and mercury. Ironically, this was the very period when the itai-itai and Minamata disease controversies were at their height. . . .

Ignoring the spirit of the Stockholm Conference in some international negotiations, Japan has actively violated it in others. Perhaps the most celebrated example is its intransigent opposition to a 10-year moratorium on whaling as recommended by that conference. . . . A second example is the annual slaughter of an estimated 300,000 to 700,000 migratory sea birds by the Japanese fishing industry. Despite the fact that many species involved have been listed for protection under the 1972 U.S.-Japan Migratory Bird Treaty, Japan until recently did not offer any practical solution to the problem.

Japan has also been reluctant to impose le-

18. The Central Dispute Co-ordination Committee (Kōgai to Chosen Iinkai) conducts mediation, conciliation and arbitration and makes quasi-arbitral determinations. The Local Pollution Review Boards (Todofuken Kōgai Shinsakai) mediate, conciliate and arbitrate minor disputes between private parties and between citizens and the government, but may not make quasi-arbitral determinations. The local Complaint Referral Service (Kōgai Kujo Sōdanin) gives advice to individuals, investigates pollution incidents and notifies the appropriate agencies of pollution disputes. ENVIRONMENTAL LAW IN JAPAN, *supra* note 10, at 326-29.

gal controls on the environmentally hazardous activities of its nationals abroad, despite the fact that Japanese industry's advance in Southeast Asia and other developing areas has provoked increasingly bitter pollution-related controversies since 1970. To date, none of Japan's environmental laws have been administratively interpreted to apply extraterritorially, and there is also little apparent governmental interest in using administrative guidance to protect the environment outside her borders.¹⁹

The chapter includes case studies exemplifying most of these positions, among them a brief summary of the dispute between Japan and the United States about whaling. After an attempt to account for the contradictions between Japan's excellent progress in domestic pollution control and her abysmal international record, the authors conclude by urging that steps be taken to improve.

II

I am not qualified to judge the accuracy of the translations or of most of the statements about Japanese law; perhaps Frank Upham's review, for the *Ecology Law Quarterly*, will do that. I can, however, discuss the success of *Environmental Law in Japan* as a book for American readers, and as a work of comparative law.

Let me begin with a complaint: the authors and their publisher appear to have conspired to limit this book to specialists. Especially in Part I, but also later in the book, the authors regularly take for granted a knowledge of many details of Japanese government and politics. For example, the acronym "MITI" is used frequently, but so far as I can tell it is never explained in the text or the notes. (For those who are not Japan scholars, the initials stand for "Ministry of International Trade and Industry.") One might have expected not only an expansion the first time the term appears, but also a sentence or two on MITI's role in the Japanese system. The same could be said about "SCAP" (which, for non-historians under 40, means "Supreme Command of the Allied Powers").

Along the same lines, much depends on knowing something about the roles of the ruling Liberal Democratic Party (LDP) and minority parties such as the Socialists and Democratic Socialists in Japanese politics. A naive reader might get halfway through the book without

19. *Id.* at 354-55 (footnotes omitted).

realizing the LDP's importance. Even Japanese geography is taken for granted: although the book includes many maps and charts, there is no general map of the country to give the reader a sense of the locations of the places involved in the various cases. (On the other hand, the authors have not omitted an explanation of the court system, although they have hidden it in the notes, and their explanation of the functioning of the bureaucracy is, as already noted, excellent.)²⁰

A good editor might have been able to improve the book in these and similar respects, but the responsibility is mostly the authors'. Some problems, however, are clearly the fault of the publisher. The small, crowded type is more difficult to read than a newspaper, because there is less contrast and the columns are wider. In such an expensive book, this is inexcusable, though perhaps we should be grateful that it is bound in signatures, rather than the increasingly common, and misnamed, "perfect" binding. I have enough experience with publishers to be quite sure that the high price, tiny print and low contrast are not to be blamed on the authors. Indeed, I can almost hear the MIT Press telling them that the high price is necessary because the market is so limited, which must be the ideal example of a self-fulfilling prophecy.

III

As its title indicates, *Environmental Law in Japan* is more concerned with description of a foreign system than with comparative law. It is nevertheless comparative in important ways, especially in that it is obviously intended for an audience whose background is in the United States (but which is already fairly familiar with Japan). Thus even when comparison with American rules and institutions is not explicit, it is implicit in the choice of points to be mentioned and emphasized.

Chapters 4 through 7 conclude with sections devoted to comparison of Japan and the United States, and especially to the possibility and advisability of adoption here of laws based on the Japanese models. Taken together, these four sections total only thirteen pages — one-fortieth of the total — yet if the book is intended to influence American policy making, they represent its *raison d'être*.

I wish that there were more explicit comparison. A little more

20. My other complaints tend to be of a technical nature, so I will omit all but two and relegate even those to a footnote. The first is that the dates of the translated and summarized decisions usually are not given in the text; one must search for them in the notes at the back of the book. Second, it seems to be the duty of reviewers to comment on typographical errors, supposedly so that they may be corrected in a second edition, but more likely just to prove that they have really looked inside. There are indeed a few, and some are even significant, such as "1876" for "1896" on page 6 and "is not illegal" for "is illegal" on page 136. But there are surely no more than is typical for a volume of this size.

about the differences between practice and traditions in Japan and the United States at many points in the book would have helped to broaden the audience; as it is, for example, the full implications for the United States of the innovations in Japanese tort law will be clear only to a reader thoroughly familiar with American tort law. Because a substantial part of the relevant Japanese civil law and civil procedure is based on French and German models, it looks familiar to those who know something about any of the European legal systems; I would have been grateful for some indication of the extent to which the similarities are either helpful or misleading.

With respect to critical evaluation of the legal systems under study, much writing on comparative law seems to me to fall into two categories: either studied neutrality, carrying inoffensiveness to a cloying extreme, or aggressive denunciation of one system, coupled with emphasis on the virtues of the other. Primarily, I think, because all of the authors have been advocates of reform in their own countries, *Environmental Law in Japan* avoids both of these models; if anything, it tends to emphasize the faults rather than the successes of both systems. It may be more reasonable to trace this tendency to the subject matter, which naturally focuses on reform, than to the authors' talent for theoretical innovations, but it is nevertheless refreshing, and deserving of imitation.

Further to one of my favorite themes, the authors make it clear that all of the Japanese legislation was drafted with full awareness of that of Europe and the United States. A few examples are given of citation of American precedents to the Japanese Supreme Court.²¹ Consideration of foreign precedents for their persuasive value is common in many countries; it is we who are unusual in that consideration of foreign law is not common in our courts and legislatures. The decisions of the United States Supreme Court, for example, are regularly discussed in the opinions of the courts of many other countries, but how often does our Supreme Court, or any other American court, mention the rule or reasoning of any other country's courts? Rather than congratulating ourselves on being a model for the world, we should be ashamed of our insular ignorance.

IV

In preparing an audience of American lawyers and policy makers to consider the transferability of Japan's innovations in environmental law, I would emphasize three points. The first is that Japan's environ-

21. *E.g.*, ENVIRONMENTAL LAW IN JAPAN, *supra* note 10, at 431 n. 88.

mental movement of the late 1960's and 1970's was "hot," whereas ours was, and remains, relatively "cool." There were citizens' movements in both countries, but in Japan there were also victims' movements, and on a scale that attracted worldwide attention.²² To be sure, the Americans had statistics showing that air pollution increased the number of deaths per 100,000, but most people could not spell Donora, never mind remembering what happened there in 1948. Even Love Canal is half forgotten, and I wonder how much attention it would have received if it had been located somewhere other than Niagara Falls. (In which state, reader, is the Valley of the Drums?)

Japan had Minamata, which was much worse than Love Canal, and, more significantly, she had it in a densely urbanized country, where it could not be hidden or ignored or forgotten. Neither statistics nor pictures of the redwoods could evoke the same profound moral response.²³

My second point is that American courts have the reputation of being activist — common law is by definition more activist than most countries think their courts are — but in dealing with pollution the Japanese courts were much more creative than ours. For example, the duties imposed on all Japanese companies by the courts under the "common law" of the last ten years go further than those imposed by statutes such as the Clean Air Act²⁴ and the Clean Water Act²⁵ in the United States, and a great deal further than our law of nuisance:

[I]ntegrating the holdings in [three of the four leading] decisions, the courts imposed a formidable array of specific obligations on the actual conduct of chemical manufacturers. First, they ruled that companies must be aware of the amount and nature of the chemical used, the concentrations in

22. Perhaps it has been long enough that some readers of this review will not have seen W.E. SMITH & A.M. SMITH, *MINAMATA* (1975). If so, this gap in their education should be considered an emergency, to be dealt with by cancelling this afternoon's appointments and hurrying to the nearest general library. See also N. HUDDLE & M. REICH, *ISLAND OF DREAMS* (1975).

23. The moral dimension may also be seen as in part a confrontation between a traditional way of life based on personal relationships and the more objective, impersonal and legalistic Western way: perhaps another stage in working out the inherent contradiction of Japanese law, with its French, German and American — and, going back further, Chinese — legal forms and its own quite different ethics, morality and social traditions. For a discussion of a related point, see *ENVIRONMENTAL LAW IN JAPAN*, *supra* note 10, at 43.

24. 42 U.S.C. §§ 7401-7642 (Supp. III 1979).

25. Federal Water Pollution Control Act, §§ 101-518, 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979).

the factories' effluent, the existence of by-products, and the possible toxicities individually and synergistically of all original substances, by-products, and reagents. Second, the courts required chemical manufacturers not only to be aware of the dangers of already studied toxic substances but also to peer into the unknown. To meet these obligations, they demanded that a chemical manufacturer employ the best available techniques to analyze the contents of its effluent, the best monitoring equipment to ascertain the effects of discharges on the health of exposed populations and the environment, and the best control technology available anywhere in the world. They required industry to keep a continuous vigil for adverse health or environmental effects and to be familiar with all current scientific theories and research on the toxicity of chemicals employed or produced. Indeed the courts even advanced two steps further. The Niigata Court instructed industry: (1) to "take the strictest safety precautions to prevent even the slightest danger to humans and other living things"; and (2) "if a danger to human health remains, curtailment or cessation of operations may be necessary."²⁶

This was a striking instance of judicial activism in Japan, but the Japanese courts have become gradually more activist since the 1950's in many fields, including products liability, medical malpractice and civil rights. Only recently, for example, the Supreme Court has begun to exercise its power to declare statutes unconstitutional,²⁷ something the courts have done in only a handful of countries throughout the world.²⁸

And finally, I would note that just as international agreements are reached most readily on technological matters,²⁹ the more technical matters of scientific proof ought to be among those most readily shared by widely separated legal systems. That is, what may be of particular

26. ENVIRONMENTAL LAW IN JAPAN, *supra* note 10, at 126.

27. See Higuchi, *Evolution Récente du Contrôle de la Constitutionnalité sous la Constitution Japonaise de 1946*, 31 REVUE INTERNATIONALE DE DROITE COMPARÉ 21 (1979).

28. See generally Schroth, *Marbury and Simmenthal: Reflections on the Adoption of Decentralized Judicial Review by the Court of Justice of the European Community*, 12 LOY. L.A.L. REV. 869 (1979).

29. See Schroth, *supra* note 12, at 133-34.

interest to us in considering possible American legal reforms from the Japanese experience may be not so much the distribution of responsibility among the legislative, administrative and judicial branches as the methods of proof used in establishing causation. Unfortunately, however, these are among the least likely points even to be noticed by the appropriate decision makers on our side of the Pacific Ocean.

V

In case my emphasis on its minor faults has left the reader in doubt, I think this is a wonderful book, the best book on foreign or comparative environmental law that has appeared so far. American environmental lawyers should borrow it from their libraries (unless they are polluters' lawyers, who can afford to buy it) and struggle with its tiny, gray print and unfounded assumptions about their prior knowledge of Japan. It more than repays the effort.

