

## Law and Development: Environmental Law in Asia

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## Law and Development: Environmental Law in Asia

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Many Asian countries have achieved considerable success in the area of economic development up to now. At the same time, however, they have run up against numerous social problems as a result. These problems include environmental pollution, urbanization, disregard for human rights, labor disputes, disparities in income, and the need for consumer protection. These are all extremely modern problems for developing countries compared with the traditional collection of problems which used to typify them, that is, poverty, unbridled population growth, malnutrition, and lack of educational services. This new set of problems cannot be handled by the conventional approach of increasing the size of the economy. They are problems which arise in the process of rapid development or the process of modernization. In the past, in Japan and elsewhere, these were thought of as problems accompanying strains of development, contradictions accompanying the increasing sophistication of capitalism, and other results of excessive zeal in capitalist production systems. Solving these problems requires the formation of a modern social order or civil society or guarantee of legal stability.

The industrialized countries overcame these strains in development to a considerable extent in the process of economic growth. Such an approach to development, however, would not be appropriate for the Asian countries and other developing countries in the future. The October 20, 2000 issue of the Japanese Yomiuri newspaper reported, somewhat exaggeratedly, that in order for all of the people in the developing countries and rest of the world to enjoy a standard of living comparable to Japan or the West, another two worlds' worth of energy and other resources would be necessary. In this way, development is an issue which must be simultaneously argued from two apparently contradictory positions, that is, reflection on the previous approach to development of the industrialized nations and the future direction of development of

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the developing countries.

The rise of the issue of the global environment clarified the fact that development is limited by the finite nature of the global environment and resources. The previous one-sided stance in development toward economic growth gave rise to environmental problems causing considerable harm in the industrialized countries and many developing countries. As a result, the best approach to development is a subject of hot debate. One term now being bandied about internationally is "sustainable development". This derives from the position that unlimited development is not possible. The problem is that restrictions on development are being predicted or discussed before the majority of developing countries have reached a basic level of development.

This paper studies the role played or should be played by the law in the development of the Asian region through environmental law. Environmental problems are extremely modern problems, which are just as hard to solve by the Asian countries as the industrialized countries, and these must be solved by the law. It is important how the current environmental laws of the Asian countries deal with the problems institutionally or how effectively environmental laws are applied to solve the problems. In fact, as will be seen later, many Asian countries have built up a considerable body of environmental laws and have established administrative organizations for their implementation. Society is watching to see if environmental laws are being efficiently implemented and if they are helping to solve specific problems. That is, there is a question as to if environmental laws in Asia are being efficiently applied in all aspects of prevention of problems, implementation, and dispute resolution. It is believed that a comparison of the basic positions in the environmental laws of different Asian countries with those of other countries will throw light on the role played by environmental laws in development.

Next, this paper will study the changes in the concept of development, the experience of Japan in environmental law, the features and issues in the development of environmental law in Asia, and the role played by environmental law in development.

## **I. Changes in Concept of Development - From "Development vs. Environment" to "Sustainable Development"**

The concept of "development" has changed dramatically this quarter century. That is, at the 1972 Stockholm UN Conference on the Human Environment, a

completely different situation ended up arising in the understanding of the "environment" from the then North-South issue. This was the "development vs environment" issue. The developing countries argued that pollution was a result of the excess consumption in the industrialized countries, that they actually wanted dirty smokestacks and polluting factories, and that imposing environmental restrictions would fetter the future development of the developing countries. On the other hand, the industrialized countries began arguing about the risk to the environment and environmental restrictions claiming that there are limits to the environmental capacity of the world and that international cooperation is necessary for protection of the environment. For example, the Club of Rome's "Limits to Growth" and the environmental report of the U.S. State Department reflect the stance of the industrialized countries at that time.

Seen from the current stage, however, this "development vs environment" issue can be said to be folding into the concept of "sustainable development". The concept of "sustainable development", formally adopted at the UN, focuses on the fair distribution of resources between the current generation and future generations. In fact, many industrialized countries and developing countries are searching for means for realizing this. This concept is being widely adopted in national policies or international environmental policies or in fields other than the environment and can be said to have become entrenched to a considerable extent as an idea for finding a balance between the environment and development.

Sustainable development was first propounded in the report of the Brundtland Commission, "Our Common Future" (1), in 1987. This was an extremely epoch-making meeting of minds when considering the fact that the industrialized countries and developing countries had previously adopted a confrontational stance over the environment. The basic issue of "development vs. environment" however has implications on the eradication of poverty in the developing countries and is important for the industrialized countries as well and therefore should not be considered to have disappeared from the debate. Rather, the concept of sustainable development can be said to have succeeded in the sense of preparing a common foundation for discussion of the environment and development out of the confrontation between the industrialized countries and developed countries over the North-South issue. It is however unclear how much of a direction has been given to the basic solution of the environmental problem. Rather, it can be said to be still an issue left for future "political will".

## **II. Experience of Japan in Environmental Law - In Relation to Development**

### **1. History of Development of Environmental Law in Japan**

Japan has undergone numerous trials in its environmental law in relation to development. At the present time, the 1993 Environmental Policy Basic Law forms the pinnacle of the body of Japanese environmental law. That law was not, however, enacted early on by any means compared with the other industrialized countries or Asian countries. The present law was arrived at after repeated Japanese style seesawing between development and the environment and after repeated trial and error.

The history of environmental law in Japan can be roughly divided into five periods. These are closely related to the occurrence of environmental problems. The first period was at the start of the 20th century when Japan pushed forward with rapid economic development in order to increase its national standing and militarize. New mines were rapidly opened up and problems arose with pollution like in the Ashio Copper Mine Incident. This inflicted great harm to numerous residents and farmers. The mining law at that time had provisions relating to the protection of mining rights and restriction of mining activities, but no provisions relating to the prevention of pollution. During this period, there were truly no laws relating to pollution at all. Water and air pollution became problems, but these were settled privately by payment of compensation and forced relocation, but never by law.

The second period was when Japan was rebuilding its economy after the Second World War. Tokyo, Osaka, and other large cities suffered from terrible air pollution, water pollution, and other environmental problems. Local government agencies enacted laws in advance of the national government to deal with the situation. These included 1949 provisions for preventing pollution in Tokyo, 1950 provisions for preventing pollution from business in Osaka, 1954 provisions on general noise levels from locations other than factories in Tokyo, 1954 amended provisions on prevention of pollution from business in Osaka, and 1955 provisions for preventing pollution in Fukuoka prefecture and provisions for preventing noise.

Much sacrifice and loss were entailed however before pollution was officially recognized as a problem and dealt with by laws on the national level. The Edogawa

River was heavily polluted by discharge from the Tokyo Factory of Honshu Paper, for example. Fishing associations staged protests in front of the Tokyo government offices and the factory leading to numerous injuries. This is now known as the Urayasu Fishermen's Riot. The issue however was then raised for discussion at the National Diet and resulted in the establishment of two laws relating to water quality: a law for the protection of water quality and a law restricting factory discharges. These were the first antipollution laws in Japan.

In the 1950s, Japan was already building up its petrochemical industry and heavy machinery and chemical industries. An increasing number of petrochemical complexes were established in Yokkaichi and other cities. "Yokkaichi asthma" became a social issue. As a result, a law was established restricting smokestack emissions in 1962. The law, however, called first of all for a balance with industrial development and adopted restrictions on concentration rather than restrictions on total emissions therefore enabled the emission standards to be bypassed by just diluting the emissions. The regulations were also limited to specific areas. In other words, the law was peppered with loopholes.

The third period began in the 1960s when pollution began to become a huge problem throughout the industrial regions of Japan. Pollution became a serious social issue and finally prompted the country as a whole to start dealing with the matter. The public particularly focused on four major incidents involving pollution: mercury poisoning in Minamata Bay of Kumamoto prefecture, mercury poisoning of the estuary of Aganogawa river in Niigata prefecture, cadmium poisoning of Jinzugawa river in Toyama prefecture, and the asthma in Yokkaichi city of Mie prefecture. To deal with this, the Prime Minister's Office established a special liaison council to promote pollution countermeasures comprised of representatives from the different ministries. This was Japan's first environmentally related government organization. The council discussed the establishment of a basic law for the prevention of pollution. Local government agencies, the Japan Federation of Bar Associations, political parties, and various other organizations pressed strongly for its establishment, while Keidanren and the rest of industry opposed it as being premature. At the end of a heated debate, the basic law for preventing pollution was finally established in 1967. This was a comprehensive law and formed the first stage in Japan's efforts to curtail pollution.

The basic law for the prevention of pollution, however, was restricted in how it protected the environment. First, there were only seven officially recognized types of

pollution, that is, air pollution, water pollution, soil contamination (added by an amendment in 1970), noise, vibration, land subsidence, and odors. Waste and other pollution problems were excluded from coverage. Further, while the law clarified the duties of the national government, local government agencies, business, and residents, it maintained a basic stance of stressing economic development over pollution. The law includes the phrase "to an extent not counter to balance with economic development", i.e., the "economic development balance clause". This meant the benefits of economic development had to be constantly weighed against the degree of tolerance of victims of pollution. Note that this law had provisions relating to the establishment of standards for discharge and environmental standards, plans for preventing pollution in specific areas, resolution of disputes regarding pollution, and relief to injured parties.

The fourth period began in 1970 with a string of legislation in the National Diet relating to pollution. The basic law for prevention of pollution was heavily amended and another 14 pollution related laws either established or amended. The National Diet came to be called the "Pollution Diet" due to the grand manner in which it took up the issue. The clause regarding a balance with economic development was deleted and the idea of giving priority to economic development over prevention of pollution disappeared from the law. The system of limiting regulation to only designated waters was abolished and regulations over water quality were expanded to cover the entire country. A law regarding waste disposal was established and penalties stipulated in another law concerning punishment of crimes of pollution relating to human health. The concept of "crimes of pollution" was established. In 1971, the Environmental Agency was established to coordinate government regulation of pollution - conducted piecemeal up until then. In 1972, a law was established for protection of the natural environment. This gave the Environmental Agency a mandate to plan, draft, and promote basic policies relating to the environment and to conduct a dual environmental policy of prevention of pollution and protection of nature. Considerable success was achieved by the application of this basic law.

At that time, in 1972, the UN Conference on the Human Environment was held in Stockholm. International interest in global-scale environmental problems soared. Further, as a result of the Conference, tremendous interest was generated in the international community over the severity of environmental problems in the developing countries. A great change occurred in awareness of the environment as a result of this Conference. The 1992 UN Conference on the Environment and Development had as its

main theme "development and the environment". The concept of "sustainable development" was adopted and a specific action plan for its realization, "Agenda 21", was adopted.

The fifth period was after 1993 and the establishment of a basic law for environmental measures. Influenced by the 1992 UN Conference on the Environment and Development, the new law incorporated the changing awareness of problems of the global environment, the concept of sustainable development, international cooperation in the environment, establishment of an environmental assessment law, the merging of the concepts of pollution and the natural environment, use of a basic plan for the environment, public participation, etc. This was in striking contrast to the former basic law on prevention of pollution. Since the establishment of the basic law, a series of laws have been established in Japan such as a recycling law, an environmental assessment law, PRTR law (related to environmental hormones), and a law relating to a recycling economy.

## **2. Features of Development of Environmental Law in Japan - From Perspective of Development and Environmental Law**

First, there is the point that environmental policy has been of a delayed type dealing with problems after the fact. The slowness of the central government, which had been stressing economic development at that time, in tackling environmental measures only aggravated the social turmoil. Environmental problems first broke out in local areas and became social issues there. The local governments then dealt with them separately administratively or legally. This did not allow problems to be prevented or predicted in advance. At the initial stage, there were no laws applicable to prevention of pollution either at the national level or the local level. Not only this, there was insufficient scientific know-how. Further, there was sometimes a lack of awareness of environmental protection or awareness of the public will. At the local level, grounds for a national law could not be found, problems could only be dealt with piecemeal, and problems could not be sufficiently solved.

Therefore, discussions could not be raised to the level of the National Diet. The Japanese system might appear at first glance to have been formed by a bottom-up approach, but this does not necessarily mean it was democratic. Criticism was therefore raised calling into question official responsibility for the inaction.



For example, the incidence of Minamata disease in Kumamoto prefecture, which resulted in over 30 deaths, was being roundly discussed until the causal relation with organomercury compounds became suspected. Official inaction, however, meant that countermeasures were delayed. The same type of mercury poisoning occurred again in the Aganogawa river estuary in Toyama prefecture and produced fresh casualties.

Second, Japan has experienced this split desire over "development and the environment" several times before. Before this was overcome, sometimes a large number of casualties had to be produced. The same is true in many other Asian countries which have oriented themselves toward economic development. Close to 100 years ago when Japan was just starting to modernize, the country adopted a policy of rush industrialization to strength its military and economy. At the time, there was neither the idea of environment protection or related laws. Next came the period of high economic growth after World War II when pollution became an important social issue in Japan as a whole. Society at that time was also more strongly oriented toward economic development rather than the environment. This may be seen from the clause calling for a balance with economic development. This finally ended due to the effect on Japan of the changing awareness of the environment at national forums such as the Stockholm UN Conference on the Human Environment and the escalation of the debate of pollution in Japan to the National Diet level.

Third, however, it should be emphasized that the inherent issue of the "development vs environment" cannot be decided in Japan. While the term "sustainable development" has entered the popular lexicon, this concept is extremely weak in terms of solving actual problems. The tradeoff between development and the environment will always be an important issue as in the process of establishment of an environmental assessment law, in public works projects, including dam construction now underway in Japan, in the tradeoff between the construction of the Olympic facilities in Nagano and the environment, in the environment considerations when the Japanese government provides environmental aid, and in the approach to other individual projects.

### **III. Features and Issues in the Development of Environmental Law in Asia**

There is no need to discuss the development of environmental laws in Asia here once again, but of course many Asian countries have achieved considerable progress. Here, the state of establishment of laws in each country can be viewed from a table prepared in advance (see Table 1) (2), so only the main features and issues will be pointed out (3).

The establishment of environmental law in the Asian countries can be said to have been prompted by the outbreak of problems in those countries, the levels of their economies and societies, the will and need for solving the problems, and international influence. In particular, many Asian countries began establishing laws after the 1972 Stockholm UN Conference on the Human Environment. At the same time, however, in the 1970s, many Asian countries adopted priority industrialization policies and went too far in development without giving due consideration to the environment. This brought pollution upon them and led to much destruction of the environment. The rising interest of society in environmental issues was another factor.

The first characteristic of the establishment of environmental law in the Asian countries is a tendency for an expansion of coverage from the initial focus on prevention of pollution to protection of the natural environment and protection of the larger global environment in turn. In the process of rapid economic development, industrial pollution first becomes serious, so laws begin being set up relating to the prevention of such pollution. Later, however, the scope of protection gradually expands. Further, along with the expanded coverage of protection, changes are seen in the techniques used for protecting the environment. That is, economic, educational, awareness-lifting, and participatory means are adopted instead of just the old means of planning and regulation.

Second, in the initial stage, in most countries, the national government begins establishing the laws for dealing with environmental issues. For example, in the Philippines, the Environment Policy Act and the Environmental Code were established in the mid-1970s. This was however under the Marcos regime, when government was at its peak of heavy handedness. The law was modeled on the American environmental law and was quickly put into force as a symbol of the level of development of that

country. A similar government led stance was also seen in Singapore. From this, the national governments at that time can be said to have been strongly aware of future needs or to have played a strong role overall. At the present time, however, environmental laws are conversely being reworked to meet with the actual conditions on those countries.

Third, the industrialized countries and the international community can be said to have had a strong influence on the establishment of environmental law in the Asian countries. For example, in addition to the international effort of the Stockholm UN Conference on the Human Environment, there were the programs of UNEP and ESCAP and other international organizations. At the present time, for example, developments are being seen such as the formulation of Agenda 21, the incorporation of the Bazelle Convention into domestic laws, etc. Further, the international private sector led environmental management techniques of ISO 14000 are being widely adopted.

Fourth, a common problem in many Asian countries, large problems remain at the stage of enforcement of the laws. That is, the laws cannot be enforced or applied efficiently due not to the fact that insufficient environmental laws have been established, but rather despite considerable environmental laws being established. Pointed to as behind this are the weakness of the legal infrastructure as a whole, the lack of experience and human resources, the weakness of organizations for administering the environment, the lack of lower level regulations to complement higher level regulations, orders, and laws, and the lack of scientific and technical know-how. Further, corruption and other problems currently in the spotlight are other reasons behind the inefficiency of administration of the environment.

When comparing the development of environmental law in Asia as whole against that of Japan specifically, it is possible to take note of the difference in the time of outbreak of the environmental problems and the nature of the same, the international background at the time and the consequent effects, the knowledge or lack of the same regarding precedents or methods of dealing with environmental issues, and the extremely short time frame, a compressed time frame, in which economic development was achieved by the NIEs etc. Environmental laws continue to be based on the traditional legal systems, but are technical by nature themselves, so many countries exhibit a positive stance to the establishment of laws while incorporating new fields such as labeling, ISO14000, recycling, etc.

#### **IV. Role Played by Environmental Law in Development**

The environmental problems surrounding the industrialized countries or the developing countries are important, urgent issues for the present. In particular, many countries in the Asian region have embarked on fast track industrialization programs in recent years. Population pressures and the load on resources are mounting and many countries are experiencing the effects of pollution and destruction of the natural environment. An environmental crisis triggered by Asia and possibly affecting the world as a whole is feared. The modern environmental issues include not only traditional pollution limited to specific areas as in the past, but also harm to large numbers of people in widespread areas and the natural biosystem. For example, they are understood as including global environmental issues where the environmental impact affects the world at large, natural disasters, and the issue of the serious effect which the small amounts of hormone destabilizing chemical substances known as "environmental hormones" such as dioxins and PCBs have on the survival of humanity and other creatures or the biosystem.

Seen in this way, environmental issues are not limited to specific areas of the industrialized countries or the developing countries. To solve the problems, it is necessary for the national governments, local governments, business, NGOs, individuals, etc. to find means for solving them together in accordance with each of their roles in the overall framework of effort by the international community. If not, then an overall solution will be difficult. That is, even if one country were to take a stand for the protection of the environment, if a "free rider" country ignored environmental protection, the road toward solving global environmental problems would become longer. In this sense, there is a need to restudy environmental governance at the domestic level along with environmental governance at the global level.

Many suggestions can be gleaned when viewing development and the environment in the Asian region from the standpoint of environmental law.

First, the concept of development itself is changing. The general thinking regarding development has been changing in a major way as a result of environmental issues. The old one-sided emphasis on development stressing economic effect has come under fire and is no longer being accepted either at the industrialized countries or soon even at the developing countries. Rather, a balance between development and the environment is being called for and participatory development is taking its place.

Behind this has been the excessive destruction of the environment caused by the unsystematic, reckless development in the previous half-century and conversely the spread of environmental awareness and its victory over one-sided developmentalism.

Second, view historically, the relatively new field of environmental law has developed rapidly before other fields of law in the Asian countries. This is believed because of the practical need for solving pressing environmental problems through environmental law in many Asian countries - where the rule of man is usually dominant over the rule of law and politics usually takes precedence over law. In particular, in the fight between development and the environment, the position of protection of the environment often clashes with the position of priority to development and resolution by law is considered essential.

Third, while the environmental law of the Asian countries has developed so rapidly, new issues are rising. As already seen, there is the problem of the enforcement of environmental law. This is now a common theme in many countries. Various environmental problems or environmental disputes are raising their heads in the process of development. Environmental problems are matters for social concern. As expectations rise in society for solving these problems, enforcement of environmental law will be debated further.

Fourth, there is the internationalization of environmental law. The international community or neighboring countries are having a strong effect on the Asian countries. Not only the recent remarkable development of international environmental law, but also the progress made in environmental law in Japan, the West, and other industrialized areas and the establishment of laws among Asian countries is all having an effect on each other. This may be considered a new mode of development or propagation of law different from the traditional hand-me-down method of Asia in the past.

At the present time, sharp criticism is being leveled against the conventional type of development targeting solely economic growth. There is talk of such development forcing western European culture on the developing countries, anti-development sentiments, concerns beyond development, post-development anxieties, the feeling that dream of development is over, etc. These are all criticisms of the past stance of "development" which adopted a one-sided stance of economic growth. That is, they are criticisms of the stance taken toward development up until now of proceeding with development without paying much attention to political development and the quality of social development such as democratization, development of human

resources, creation of a participatory society, protection of human rights, and protection of the environment. On the other hand, a loud warning bell has been sounded about the current and future approaches to development. That is, even if the developing countries try out methods of development the same as those of the industrialized countries, they may not find they fit them. Further, there is the fact that there are limited available resources in the global environment. In this sense, it is necessary to reexamine the inherent meaning of development from the standpoint of global governance.

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