PRINCIPLES OF SUSTAINABLE DEVELOPMENT IN KOREAN ENVIRONMENTAL LAW: TOWARDS THE EARTH CHARTER PRINCIPLES

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ABSTRACT: This research explores the Earth Charter and the principal Korean environmental laws, and identifies how the concept of sustainable development is approached by Korea. More specifically, this paper observes ethics and principles upon which Korean environmental law is based, tests these against those of the Earth Charter, and proposes some changes to be made for Korea to meet the Earth Charter benchmark. In so doing, the Resource Management Act 1991 of New Zealand is used as an example of an advanced environmental legislation that carries ethics of sustainability. The paper also discusses some barriers to and opportunities in building an ecologically sustainable society within the Korean socio-cultural context.

I. INTRODUCTION

The Republic of Korea ("Korea"), once called "the land of morning calm" and blessed with an astonishing natural environment, faces challenging environmental problems that threaten the well-being of its citizens as well as other living creatures. Now is the time to critically assess Korea's environmental law and policy in order to move forward towards an ecologically sustainable society.

Extensive damage to ecosystems in Korea first occurred during the Japanese occupation (1910-1945) and the Korean War (1950-1953). Environmental problems became further institutionalised in the 1960s under the leadership of former despotic President Chung-Hee Park,[1] a symbolic "hero" of the successful Korean industrialisation. His government initiated a developmental state based on an economic-growth-first policy. As in most developing countries, the people of Korea, soaked in post-war deprivation and widespread poverty, put their first priority on economic development over environmental protection. Korean government technocrats assumed, perhaps with the tacit consent of the populace, that environmental damage is the unavoidable byproduct of rapid economic growth. During this period, pollution was regarded as a symbol of increasing industrial capacity and a rising

[*] B.Sc., M.Sc. (Hons). This article was originally written in partial fulfilment of the requirements for the degree of Master of Environmental Legal Studies (M.EnvLS) at the School of Law, the University of Auckland. The author wishes to thank Dr Klaus Bosselmann for his invaluable comments on this paper, Dr Jae-Kyong Chun at the Korea Legislation Research Institute for his help in collecting resources, and Brian Myers for his edits. The author is responsible for all translations of Korean texts into English. English versions of Korean legislation translated by the Korea Legislation Research Institute were used as a reference when translating provisions of the Framework Act on Environmental Policy 1990, the Natural Environment Conservation Act 1991, and Act on Impact Assessment on Environment, Transportation, Disaster, etc. 1999. However, as these are not the official translations published by the Korean government, the author modified the translations in cases of unclear meanings and inappropriate uses of English terms.

[1] Following the Korean way of using names, his name often appears in literature as Park Chung-Hee.

living standard: "Dark smoke arising from factories are symbols of our nation's growth and prosperity".[2]

This growth-oriented ideology has manifested an economic miracle. In one generation, Korea has managed the transition from a rural, undeveloped society to a modern economy. Today Korea has the tenth largest economy in the world in terms of gross domestic product.[3] However, the "prize" of economic prosperity only came with an unquantifiable cost of environmental degradation.[4] As one commentator describes, it is "poisoned prosperity".[5] According to the 2005 Environmental Sustainability Index, Korea ranks 122nd out of 146 countries (29th out of the total 30 OECD countries).[6] The total carbon dioxide emission ranks 9th in the world contributing 1.8 percent of the world's total emission (as of 2002).[7]

Korea's pursuit of economic growth is a good example of unsustainable development where the highest priority is placed on economy with little regard paid to the environment. It was correct when the former Minister of Environment stated that "[the environmental] problems [in Korea] have arisen from the process of growth-oriented development that have so often exceeded the self-purification and reproduction capabilities of our natural environment."[8]

Policy and legal responses to such environmental problems have been slow and ineffective in safeguarding the health and safety of people let alone the well-being of other life forms. It was only in the fifth five-year Economic and Social Development Plan (1982-1986) that environmental conservation was first considered as a developmental issue.[9] Environmental legislation has always, and to a large extent remains, carefully devised not to hinder economic growth and development. As will be discussed in this paper, Korea's environment-related legislation is premised fundamentally upon a growth-oriented ideology and associated anthropocentric outlook, and the concept of sustainable development is not recognised as the fundamental guiding principle of society.

However, with civil society strengthening, non-governmental organisations and grassroots people have been increasingly exerting substantial pressure on politicians to strengthen

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[2] Extracted from a speech by Chung-Hee Park; cited in Hong-Sik Cho, "An Overview of Korean Environmental Law" (1999) 29 Environmental Law 501, 503. The statement is inscribed on a monument tower in the middle of Ulsan City which is regarded as a Mecca of Korean industrialisation.

[3] IMF, *IMF World Economic Outlook Databases* (2006) International Monetary Fund <http://www.imf.org/external/ns/cs.aspx?id=28> (at 19 April 2006).

[4] For general discussions on the environmental problems in Korea, see for example, Norman Eder, *Poisoned Prosperity: Development, Modernization, and the Environment in South Korea* (M. E. Sharpe, New York, 1996); John F. Devlin and Nonita T. Yap, "Sustainable Development and the NICs: Cautionary Tales for the South in the New World (Dis)Order" (1994) 15 Third World Quarterly 49; Jae-Yong Chung and Richard J. R. Kirkby, *The Political Economy of Development and Environment in Korea* (Routledge, London, 2002); Gyu-Ho Jeong, "Characteristics of Korea's Environmental Problems" (2004) Korea Focus 123; and Richard J. Ferris Jr., "Aspiration and Reality in Taiwan, Hong Kong, South Korea, and Singapore: An Introduction to the Environmental Regulatory Systems of Asia's Four New Dragons" (1993) 4 Duke Journal of Comparative and International Law 125.

[5] Eder, supra n 4.

[6] YCELP, *2005 Environmental Sustainability Index: Benchmarking National Environmental Stewardship* (Yale Center for Environmental Law and Policy, 2005).

[7] UNSD, *Carbon Dioxide Emissions* (2005) United Nations Statistics Division <http://millenniumindicators.un.org/unsd/mi/mi_series_results.asp?rowID=749&fID=r15&cgID=> (at 28 May 2006).

[8] Myeong-Sook Han, "Korea's Market-based Policies for Environmental Improvements" Paper presented to the 6th Mansfield Pacific Retreat, Jeju, Korea, 2003.

[9] Kem Lowry and Richard A. Carpenter, "Institutionalizing Sustainable Development: Experiences in Five Countries" (1985) 5 Environmental Impact Assessment Review 239, 244.

environmental laws, policies, and management practices and to steer the future trajectory of Korean society towards sustainable development. Similar to the rapid economic development, a rising public environmental awareness resulted in a dramatic transition to environmental activism in less then a decade. Today, environmental discourses such as sustainable development have become popular in the public arena.

Such a rise in environmental awareness and activism is well demonstrated in two recent environmental litigation cases, where civil society and grassroots people attempted to stop government-led development projects. In these cases, people began to claim for the nature's right.[10] Nevertheless, the government won both cases. The decisions of these cases have demonstrated the major limitations in Korean environmental law in realising a sustainable society. With existing environmental legislation, the future is opaque.

Yet environmental law and policy in Korea are at an early stage and are in the process of evolution and development. Albeit slow in progress, constructive improvements have been made in recent years via amendments to major environmental legislation incorporating key environmental principles articulated in the international arena as well as in Germany, the United States, and Japan in order to meet international standards. Since the 1990s, Korea has made a strong commitment to international environmental cooperation. In 1990, the Ministry of Environment ("MOE") gained cabinet-level status in the government administration and environmental law became sophisticated with a major environmental law reform in the early 1990s. The national environmental legal framework has remained the same since then.

Korean environmental law is in transition. Korea has yet to be recognised by the international community as a responsible and environmentally-conscious nation. There is still a long way to go. The direction is, however, set. Undoubtedly, the ideal of sustainable development is where Korea, along with other countries, should be heading. However, in light of innumerable possible interpretations of what sustainable development might entail, Korea is at a crossroad. Furthermore, the paradigm shift to sustainable development in both international and national levels is somewhat distracted by the predominant neo-liberal market ideology. However, this shift must and will occur sooner or later at the international level. Now is the time when States need to revise their own domestic laws against the benchmark set by the sustainable development agenda. However, the consensus reached at the Earth Summit and the World Summit on Sustainable Development, which is the current yardstick for most nations, is a failure in terms of making a commitment to an ecocentric ethic, the very essence of "ecologically sound and sustainable development". So, where should we be heading? The answer is the Earth Charter.

In this context, this article, as a preliminary study with an exploratory character, examines the Earth Charter and major Korean environmental legislation and policies, tests Korean environmental law against the ethics and principles of the Earth Charter, and further proposes some critical legal changes for Korea to meet the Earth Charter standard. The research questions addressed here are as follows:

- Is Korean environmental law adequately designed to pursue the principles of ecologically sound and sustainable development that the Earth Charter entails?
- What are the values and ethics upon which Korean environmental law is based?

[10] The idea of granting legally enforceable rights for nature was first advocated by Christopher Stone in his book, Christopher D. Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects* (Tioga Publishing Company, Portola Valley, CA, 1974).

- How is the concept of sustainable development approached by Korea?
- What could be done to the existing environmental law to adopt the Earth Charter principles?

In the analysis of Korean environmental law, some examples of the Resource Management Act 1991 ("RMA") of New Zealand are used. The RMA is widely acknowledged to be among the most advanced pieces of environmental legislation in the world for its attempt to incorporate the concept of sustainability as the paramount principle under which everyday decision-making processes take place. Further, the ethics and values of the RMA carry the elements of ecological justice and long-term considerations on the basis of ecocentrism, which are fundamental to the Earth Charter principles.[11] As comparative legal studies in the area of Korean environmental law have been severely limited to examples of Germany, the United States, and Japan,[12] so the RMA examples shall be one of the merits of this article, and will hopefully add new insight into wider discussions of Korean environmental law.

This article is organised as follows. Part II discusses the ethics and principles of the Earth Charter. Part III identifies and analyses the ethics and principles in Korean environmental legislation focusing on the constitutional environmental right, the purpose and the principles of three major pieces of environmental legislation – the Framework Act on Environmental Policy 1990, the Natural Environment Conservation Act 1991, and the Act on Impact Assessment on Environment, Transportation, Disasters, etc. 1999 – and two major environmental case laws – the *Saemangeum* and the *Dorongnyong*. Part IV integrates Part II and III by critically analysing how the concept of sustainable development is approached by Korea in light of the Earth Charter ethics and principles. Criticisms and suggestions for possible future direction are followed in Part V, with some comments on difficulties as well as hope and unique cultural and religious resources for a sustainable society in the Korean context.

II. THE EARTH CHARTER AND ITS PRINCIPLES

Environmental ethics based on ideas such as the intrinsic value of nature are the fundamental basis for creating new legal obligations for a sustainable society. In this respect, the Earth Charter, an international document stating fundamental principles and practical guidelines of ecologically sound and sustainable development (or "strong sustainability") based on an ecocentric ethic, is a benchmark for the future.[13] It provides an essential ethical foundation

[11] See for example, Klaus Bosselmann, "Ecological Justice and Law", in Richardson and Wood (eds), *Environmental Law for Sustainability: A Reader* (Hart Publishing, Oxford, 2006), 156-158.

[12] That is because the Korean legal system is heavily influenced by the German civil law tradition and the Korea environmental law is modelled after the United States and Japan. For studies on the German Constitution (Article 20a) and Korean environmental law, see for example, Gwang-Sam Mun, "Gibongwon-euroseoui Hwanggyeonggwon-gwa Gukgamokpyo-roseoui Jayeonhwanggyeong (Environmental Right as the Basic Right and the Natural Environment as the National Objective)" (2000) Hwanggyeongbeop Yeongu (Environmental Law) 219. For studies with examples of the United States and Japan, see for example, Byeong-Seong Jeon, "Urinara Hwanggyeongbeop-ui Baljeon-gwa Hwanggyeongjeogchaekgibonbeop-ui Jejeong (Development in Korean Environmental Law and Legislating the Framework Act on Environmental Policy)" (1992) 14 Hwanggyeongbeop Yeongu (Environmental Law) 75; In-Seon Seok, "Hwanggyeongjeongchaekgibonbeop-ui Gyubeomjeok Uimi-wa Hwakrip (Normative Meaning of the Framework Act on Environmental Policy)" (2001) 23 Hwanggyeongbeop Yeongu (Environmental Law) 189.

[13] ECI, *The Earth Charter Initiative Handbook* (Earth Charter Initiative, 2002). For a general introduction on the Earth Charter, see for example, William S. Lynn, "Situating the Earth Charter: An Introduction" (2004) 8 Worldviews 1; and Dieter T. Hessel, "Integrated Earth Charter Ethics" (2004) 8 Worldviews 47. In principle, the Earth Charter envisions ecocentrism as opposed to biocentrism of Paul Taylor in his book, Paul W. Taylor, *Respect for Nature* (Princeton University Press, Princeton, NJ, 1986). The focus of ecocentrism (a holistic or

for environmental law: "one which values the continued healthy functioning of ecosystems for the benefit of present and future generations of humanity and other living beings, in addition to valuing them as resources for human use".[14] It is anticipated that, in like manner to the United Nations Declaration on Human Rights, the Earth Charter will serve as a universal code of conduct to guide people and nations towards sustainable development.[15]

A. The Earth Charter as the Benchmark

The Earth Charter, often referred to as the People's Charter, is the founding document promoted by international civil society.[16] It was originally prepared by non-governmental organisations gathered in Rio de Janiero at the time of the 1992 United Nations Conference on Environment and Development (UNCED). Unfortunately, governments could not reach agreement on aspects of the initial draft of the Earth Charter and adopted instead the Rio Declaration on Environment and Development, a document that states principles of sustainable development with a very weak reference to environmental ethics.[17] Since then, the principles of the Rio Declaration have been followed by most states including Korea as a benchmark to achieve sustainable development. Meanwhile, after more than a decade of worldwide consultations with thousands of representatives of many interest groups and political-identity groups, the Earth Charter Commission issued a final draft of an "Earth Charter" in March, 2000.

But why should we abandon the Rio Declaration and adopt the Earth Charter as benchmark? In principle, the Rio Declaration is a failure because it defines sustainable development in anthropocentric terms. Principle 1, for example, is about the promotion and maintenance of the bases of human socio-economic development.[18] In other words, the Rio principles express a strictly utilitarian view of environmental protection preoccupied with the "use value" of natural resources. It imposes restraints on developmental activities only in so far as these would undermine the environmental basis for further development in the long run,[19] by

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systemic understanding of respect for nature) is on species or ecosystems rather than individual living organisms of biocentrism. For a detailed discussion see Clare Palmer, "'Respect for Nature' in the Earth Charter: the Value of Species and the Value of Individuals" (2004) 7 Ethics, Place and Environment 97. Palmer criticises the Earth Charter for being exclusively ecocentric and holistic as opposed to biocentric and individualistic thereby failing to adequately protect individual living beings appropriately. Palmer suggests that according to the Charter, in situations of conflict, species are given ethical priority over the lives of individual sentient organisms. Palmer argues such presumption is problematic.

[14] Prue Taylor, "Heads in the Sand as the Tide Rises: Environmental Ethics and the Law on Climate Change" (2001) 19 UCLA Journal of Environmental Law & Policy, 272.

[15] Ibid. See also J. B. Callicott, "The Pragmatic Power and Promise of Theoretical Environmental Ethics: Forging a New Discourse" (2002) 11 Environmental Values 3; Dieter T. Hessel, "Integrated Earth Charter Ethics" (2004) 8 Worldviews 47.

[16] For discussions on the process of creating the Earth Charter, see for example, Krista Singleton-Cambage, "Reinventing and Reinvigorating the Earth Charter: A Civil Society Movement" (1997) Colorado Journal of International Environmental Law and Policy 87; H. E. Anderson III, "The Benchmark Draft of the Earth Charter: International Environmental Law at the Grassroots" (1998) 11 Tulane Environmental Law Journal 109.

[17] Prue Taylor, "The Earth Charter" (1999) 3 New Zealand Journal of Environmental Law 193.

[18] Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (Routledge, London, 1998), 325-326; Klaus Bosselmann, "The Concept of Sustainable Development", in Bosselmann and Grinlinton (eds), *Environmental Law for a Sustainable Society* (New Zealand Centre for Environmental Law, Auckland, 2002), 85.

[19] Günther Handl, "Environmental Security and Global Change: The Challenge to International Law", in Lang, Neuhold and Zemanek (eds), *Environmental Protection and International Law* (Martinus Nijhoff Publishers, London, 1991), 80; cited in Taylor, ibid 326.

defining the limits of ecological sustainability by what can currently be sustained economically.[20] Such a "business-as-usual" approach is not effective in bringing about ecologically sound and sustainable development.

The Earth Charter, on the other hand, is about paradigm shift from economy (short-term) to ecology (long-term). It is based on an ecocentric ethic: the centre of concern about sustainable development is not "human beings" (Rio Declaration Principle 1) but the "community of life" (Earth Charter Principle I).

Based on such ecocentric outlook, the Earth Charter is designed to provide a practical tool and "a common standard by which the conduct of all individuals, organisations, businesses, governments, and transnational institutions is to be guided and assessed".[21] Although the Korean government's benchmark at the moment is the Rio Declaration and Korean environmental laws and policies still fall short of the Rio principles in some aspects, there is a strong necessity to look beyond them and to start acting now to incorporate and implement the Earth Charter vision and principles in an attempt to move forward towards a sustainable future. Time is not on our side. Today is the "critical moment in Earth's history, a time when humanity must choose its future".[22]

The essence of genuine sustainable development is described as improving the quality of human life while living within the carrying capacity of the Earth's ecosystem. Its two requirements are firstly, the commitment to a new, non-anthropocentric ethic, based on respect and care for the Earth, and secondly, the integration of conservation and development. These two aspects shall be discussed below.

B. Ecocentric Ethic and Intrinsic Value of Nature

As already stated, the Earth Charter is based on an ecocentric ethic and states "respect for life in all its diversity" as the ethical basis for sustainable development.[23] Humans are considered an integral part of earth's ecosystems, that we are "one Earth community with a common destiny".[24] This implies that the moral community extends beyond the human family to include the entire living world.

Thus, according to the Earth Charter ethics, human development is not at the centre of the development of life but merely part of it.[25] In essence this requires that decisions and activities which potentially impact upon the environment will no longer be dominated by a human-centred anthropocentric perspective.[26] In other words, environmental standards require more than protection of human health and development: rather, the protection of ecosystems determines environmental standards.[27] So the very first principle of the Earth Charter reads:

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[20] Taylor, supra n 14, 258.
[21] Preamble of the Earth Charter.
[22] Ibid.
[23] Klaus Bosselmann, "Rio+10: Any Closer to Sustainable Development?" (2002) 6 New Zealand Journal of Environmental Law 297.
[24] Preamble of the Earth Charter.
[25] Bosselmann, supra n 23.
[26] Taylor, supra n 18, 326.
[27] Ibid.

1. Respect Earth and life in all its diversity.
    a. Recognize that all beings are interdependent and every form of life has value regardless of its worth to human beings.

In this principle which sets the ethical basis and from which all others flow, the Earth Charter recognises the "value [of every form of life] regardless of its worth to human beings". Such value is often termed intrinsic value, inherent worth, or non-instrumental value.[28] Some legal implications of the recognition of the intrinsic value of nature are recognition of nature's right and restriction on the human rights and freedom.

C. Principles of "Strong Sustainability" in the Earth Charter

Among numerous principles of sustainable development, three key principles have been chosen for the purpose of this analysis. They are the principle of integration, the principle of equity (intragenerational, intergenerational, and interspecies justice), and the principle of "precautionary approach".

1. The principle of integration

The principle of integration forms the backbone of sustainable development and is central to its attainment.[29] What this means is that sustainable development is not just about environmental protection but about integration of the so-called three major pillars of sustainability: environment, society, and economy. The question, however, is how one integrates these often contradictory environmental, societal, and economic interests. Depending on the answer to this question, one gets anthropocentric (weak) or ecocentric (strong) sustainability.

The most cited and influential definition of sustainable development is contained in the Brundtland Report (*Our Common Future*), published by the World Commission on Environment and Development (WCED) in 1987. When the Brundtland Report was written the difference between anthropocentric (weak) and ecocentric (strong) sustainability was not apparent.[30] In the absence of clarifications, the concept of sustainable development was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Furthermore, the Report emphasised the importance of poverty eradication thereby achieving intragenerational equity or inter-societal justice between the rich (North) and the poor (South).[31] According to such a concept, the main concerns of sustainable development were social justice and equity issues (poverty and future generations) and less so with their ecological dimension.

[28] For a discussion on the concept of "intrinsic value of nature" in the Earth Charter, see for example, J. B. Callicott, "The Pragmatic Power and Promise of Theoretical Environmental Ethics: Forging a New Discourse" (2002) 11 Environmental Values 3, 18-20.
[29] See for example, Duncan French, *International Law and Policy of Sustainable Development* (Manchester University Press, Manchester, 2005), 54.
[30] Bosselmann, supra n 18, 85.
[31] Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing, Oxford, 2004).

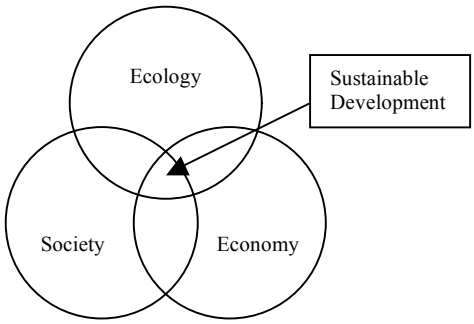

Figure 1. A diagrammatic representation of "weak" sustainability. The "interlocking circles" represent that sustainable development seeks common ground among social, economic and environmental objectives. Compromises and trade-offs in one sector are necessary to achieve improvement in another. (Source: Bosselmann, "The Concept of Sustainable Development", in Bosselmann and Grinlinton (eds), *Environmental Law for a Sustainable Society* (New Zealand Centre for Environmental Law Auckland 2002), 91.)

In other words, the Brundtland Report synthesises social, economic, and environmental concerns in a way that is essentially anthropocentric in its orientation. It perpetuated the traditional Western paradigm of "development" being anthropocentric, and material and growth oriented.[32] Such a "weak" sustainability resulted in, for example, Principle 4 of the Rio Declaration where sustainable development is thought to be possible through the incorporation of environmental concern into developmental activities.[33] The view is that society, economy, and environment are of equal importance. As a result, sustainable development is perceived as a balancing act between economic, social and environmental goals with trade-offs as a necessary outcome (Figure 1).

However, sustainable development is meant to be inclusive as well as cross-sectoral (i.e., strong sustainability or "ecologically sustainable development").[34] In this sense, the principle of integration of "strong" sustainability has two aspects to it, which I call horizontal and vertical integrations.

The horizontal integration is based on the recognition of interlinks among various causes of ecological crisis.[35] Seemingly independent environmental and socio-economic problems are interconnected directly and indirectly.[36] In view of this fact, the Earth Charter attempts to take a holistic or systemic view of interlinking cultural, social, economic, and political causes of injustice and privation, which in turn causally relate to environmental degradation. Such horizontal integration requires us to move away from current piecemeal and sectoral approach to holistic approach.

The vertical integration is based on the recognition of interdependencies of species living on Earth and their dependence on the ecological integrity of life-supporting ecosystems.[37] The

[32] Bosselmann, supra n 18, 85.
[33] French, supra n 29, 54-55.
[34] Bosselmann, supra n 18 and 23.
[35] Taylor, supra n 18, 326-7.
[36] For a diagrammatic representation of interlinkages between different environmental and socio-economic problems, see Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (RSVP, Auckland, 1995), 215. Also for a discussion on interlinks between population, poverty, and environmental degradation, see Partha S. Dasgupta, "Population, Poverty, and the Local Environment" (1995) 272 Scientific American 40.
[37] For detailed discussions on the concept of ecological integrity in the Earth Charter, see Brendan G. Mackey, "The Earth Charter and Ecological Integrity - Some Policy Implications" (2004) 8 Worldviews 76; and Brendan G. Mackey, "Ecological Integrity - A Commitment to Life on Earth", in Corcoran, Vilela and Roerink (eds), *The Earth Charter in Action* (KIT Publishers, Amsterdam, 2005).

natural sphere is paramount and cannot be balanced or compromised with socio-economic anthropocentric interests.[38] No species, including humans, can survive without respecting its ecological conditions. In this sense, anthropocentricity is as an absurdity: it puts the future of all living beings on Earth – including humans – in jeopardy.[39] There is a need to recognise the need for the continued ecological integrity for human survival as well as other forms of life on Earth. Bosselmann neatly summarises the vertical integration as follows:[40]

> There is a qualitative difference between the environmental dimension and the social-economic dimension of [sustainable development]. The former is the prerequisite for the latter, as there are clearly limits to the environment's capacity to provide the resource basis for socio-economic development. In other words, the natural sphere is paramount and cannot be compromised. The challenge of [sustainable development] is, therefore, not to find the right "balance" or "compromise" between the natural sphere and the human sphere, but to adjust the human sphere to the conditions set by the natural sphere.

In light of the fact that the continued existence of all forms of life including humans on Earth is dependent on the sustained ecological integrity of Earth's life support systems, the Earth Charter recognises the protection of ecological integrity as paramount (Principle II).[41]

When the vertical and horizontal integrations are taken together, we get the "ecologically sound and sustainable development" (Figure 2). What is the implication of this conceptual principle of integration in the real world? This diagram alerts us that socio-economic activities of human beings are only sustainable if they are considered in the light of an ecological threshold.[42] This requires a reconstruction of the economy to limit the extent of economic activities within the limits of our biosphere.[43] Current economic criteria and the operation of the market need to be recognised as notoriously ill-equipped to cater to long-term ecological objectives.[44] They should no longer remain as the primary or sole determinants; rather, ecological concepts such as the carrying capacity of ecosystems are the appropriate measure.[45] In other words, ecological thresholds (which include social considerations) need to replace the criteria based solely upon economic analyses.[46]

[38] Bosselmann, supra n 23.
[39] Klaus Bosselmann, "In Search of Global Law: The Significance of the Earth Charter" (2004) 8 Worldviews 62, 63.
[40] Bosselmann, supra n 23, 301-302.
[41] The concept of ecological integrity refers to "the full functioning of a suite of natural processes". See Mackey (2004), supra n 37, 76.
[42] Taylor, supra n 18, 40.
[43] Bosselmann, supra n 23.
[44] Tim O'Riordan and James Cameron, *Interpreting the Precautionary Principle* (Earthscan, London, 1994); cited in Taylor, supra n 14, 251.
[45] Taylor, supra n 14, 256-257.
[46] Ibid.

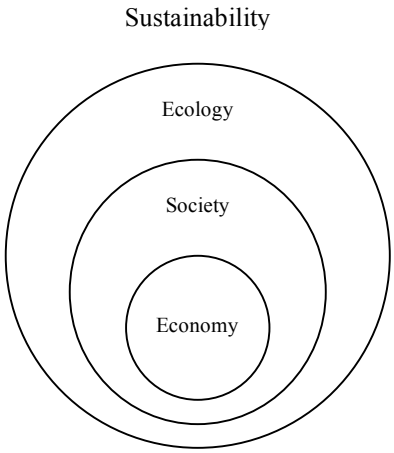

Figure 2. A diagrammatic representation of "strong" sustainability. The "nested egg" represents that sustainable development seeks consistency of both economy and society with the ecology of the Earth. It encourages (economic and social) development within the parameters of ecology. (Source: Bosselmann, "The Concept of Sustainable Development", in Bosselmann and Grinlinton (eds), *Environmental Law for a Sustainable Society* (New Zealand Centre for Environmental Law Auckland 2002), 91.)

2. The principle of equity: Intragenerational, intergenerational, and interspecies justice

Along with the principle of integration, the dual goal of intragenerational and intergenerational equity or justice has been recognised as a common denominator in various interpretations of sustainable development.[47] This dual goal is labelled as "environmental justice" referring to the distributional justice in environmental issues.

Since the Brundtland Report, environmental justice has been well recognised in both international and national law. For instance, the Rio Declaration states in Principle 3 that "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". In a similar but more rigorous fashion the Earth Charter states:

> *Principle 4.*
> Secure Earth's bounty and beauty for present and future generations.
> a. Recognize that the freedom of action of each generation is qualified by the needs of future generations.

Here the Earth Charter imposes a limit on fundamental human rights, our "freedom", for the needs of future generations.[48] The question is, however, do we know what those future generations need? What do we leave for the future? Preserved ecosystems or capital stocks?[49] Depending on what we leave behind, we get an anthropocentric or an ecocentric

[47] Bosselmann, supra n 18, 87-88.
[48] Ethical considerations and the ethical reasoning define the extent and limits of individual human rights. For example, "Human society, Leopold argues, is founded, in large part, upon mutual security and economic interdependency and preserved only by limitations on freedom of action in the struggle for existence – that is, by ethical constraints". See also J. B. Callicott, "The Conceptual Foundations of the Land Ethic", in VanDeVeer and Pierce (eds), *The Environmental Ethics & Policy Book: Philosophy, Ecology, Economics* (Thomson Wadsworth, Belmont, CA, 2003).
[49] Some argue, in overly optimistic manner, that resources are infinite because of ingenuity of human beings. See for example, Julian L. Simon, *The Ultimate Resource* (Princeton University Press, Princeton, 1981).

approach to intergenerational justice. The answer to the question is, quite frankly, "we don't know". But what is certain is that "any further diminishing of the planet's diversity and quality carries the risk of diminishing future options".[50] Therefore, preserving the ecological integrity is the only reliable solution.[51] When we give moral significance to ecological integrity, we arrive at an ecocentric approach to intergenerational justice which, in turn, extends to a concern for the planetary ecosystem. This so-called "interspecies justice" is based on a recognition of the intrinsic value of nature and the fact that humans are an integral part of nature. Interspecies justice is also known as "ecological justice" which is used to refer to "the justice of the relationship between humans and the rest of the natural world".[52]

Environmental and ecological justice taken together form the three fundamental elements of the principles of sustainable development:[53]

- concern for the poor (intragenerational justice or equity);
- concern for the future (intergenerational justice or equity); and
- concern for the planetary ecosystem (interspecies justice or equity)

Although the Earth Charter does not explicitly recognise interspecies or ecological justice, it recognises, as stated earlier, the core of ecological justice: interdependence of all beings and intrinsic value of non-human beings (Principle 1). The first set of principles on "respect and care for the community of life" and principles II:5 to 8 on "ecological integrity" further describe the interspecies justice that has been missing in the general discourse on sustainable development.[54] Principles III:9 to 12 on "social and economic justice" and IV:13 to 16 on "democracy, non-violence, and peace" then describe intragenerational and intergenerational justice."[55]

3. The principle of "precautionary approach"

The precautionary approach recognises that scientific uncertainty and risks of environmental harm (i.e., harmful consequences) are frequently inherent aspects of environmental management, and that a normative response is required.[56] It is about a "shift in decision-making in favour of a bias towards environmental safety and caution" and away from a belief in the supremacy of science to accurately gauge the health of the environment.[57] Therefore, the precautionary approach is more substantial than the principle of prevention. Most versions of the "precautionary approach" include the following components: a threat of serious or irreversible harm (evidentiary threshold); scientific uncertainty; full or partial reversal of the burden of proof; and measures taken in response, sometimes referred to as "precautionary measures" (proportionality of response).[58]

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[50] Klaus Bosselmann, "A Legal Framework for Sustainable Development", in Bosselmann and Grinlinton (eds), *Environmental Law for a Sustainable Development* (New Zealand Centre for Environmental Law, Auckland, 2002), 153.
[51] Bosselmann, supra n 39, 67.
[52] Bosselmann, supra n 11, 129.
[53] Bosselmann, supra n 39 and 50.
[54] Bosslemann, supra n 11, 162.
[55] Ibid.
[56] Taylor, supra n 14, 252.
[57] Taylor supra n 18, 330.
[58] Taylor, supra n 14, 254.

However, there are again weak and strong interpretations of the precautionary approach. The Rio Declaration, for example, states in regard to the precautionary approach:

> *Principle 15*
> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

While the Rio version of precaution recognises some fundamentals of the principle of precaution, such as scientific uncertainty, it falls short of the Earth Charter principle based on ecocentrism.

More progressive, ecocentric interpretations of the precautionary approach are sometimes referred to as the precautionary *principle*.[59] The difference is that the latter reverses the burden of proof to proponents of change/development to demonstrate some level of acceptability or safety. It is only then that the precautionary principle promises to be the "big balancer" in sustainable development and has far-reaching implications for decision-making.[60] Hence the Earth Charter recognises the importance of reversing the burden of proof as well as other associated principles specified in Principle 6.

> *Principle 6*
> Prevent harm as the best method of environmental protection and, when knowledge is limited, apply a precautionary approach.
>
> a. Take action to avoid the possibility of serious or irreversible environmental harm even when scientific knowledge is incomplete or inconclusive.
> b. Place the burden of proof on those who argue that a proposed activity will not cause significant harm, and make the responsible parties liable for environmental harm.
> c. Ensure that decision making addresses the cumulative, long-term, indirect, long distance, and global consequences of human activities.
> d. Prevent pollution of any part of the environment and allow no build-up of radioactive, toxic, or other hazardous substances.
> e. Avoid military activities damaging to the environment.

If the precautionary principle of the Earth Charter is implemented, it would dramatically alter how major developments which potentially affect the environment get assessed and proceed. No doubt many environmentally destructive activities currently taking place due to difficulties in proving the extent of environmental harm within scientific certainty would not be allowed. Also, for example, environmental impact assessments would not only be obligatory for all major projects, but would need to be conducted in a highly rigorous and comprehensive manner with greater concern for long-term and accumulated impacts (Principle 6.c).[61]

These examples imply that recognising scientific uncertainty and reversing the burden of proof require limitations on human rights and freedom to ensure ecological integrity. The

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[59] Ibid. However, some state that there is no disparity between uses of the two terms. They simply state the word "approach" is more often used in the international documents whereas in the domestic environmental law, the term "principle" is more often observed.
[60] D. L. VanderZwaag, "The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides" (2002) 33 Ocean Development & International Law 165, 166
[61] Mackey (2005), supra n 37.

extent of rights and associated responsibilities are to be determined by ecological factors. Such human rights which are subject to certain limitations are called "ecological rights".[62] In this case, freedom is determined not just by the laws of society, but also by the laws of nature.[63] Thus, this approach recognises that freedom to exercise human rights must now be exercised within an ecological context which preserves the ability of ecosystem to sustain themselves.[64]

III. PRINCIPLES OF KOREAN ENVIRONMENTAL LAW

The aim of Part III is to examine the constitutional environmental rights provisions and principal provisions (purposes and principles) of three major pieces of environmental legislation: the Framework Act on Environmental Policy 1990 ("FAEP"), the Natural Environment Conservation Act 1991 ("NECA"), and the Act on Impact Assessments on Environment, Transportation, Disasters, etc. 1999 ("AIA"). This Part also analyses two recent environmental cases seeking the Court's interpretation of these environmental legal provisions in Korea. These discussions are mainly descriptive and a critical analysis will follow in Part IV. As very little is written in English about Korean environmental law and institutions, the discussion will start by providing a general overview on the history of environmental law, policy, and institutions in Korea.

A. An Overview of Korean Environmental Law, Policy, and Institutions

Environmental law in Korea is a fragmented collection of purpose-specific statutes. There are about 80 environment-related statutes in Korea, 39 of which are under the jurisdiction of the Ministry of Environment ("MOE"). By and large, environmental law has been established in a piecemeal fashion: whenever environmental problems surfaced laws have been passed or amended.[65] Korea's environmental administration evolved from sanitary management to pollution prevention to environmental management and then to a precautionary approach and economic incentive.[66]

Korea's first national environmental law, the Pollution Prevention Act was enacted in 1963 in the midst of industrial development.[67] It dealt with public nuisance matters such as water pollution and noise. As it was designed not to act as a hindrance to industrialisation, it was ineffective in regulating pollution. In 1977, the Act was replaced by the Environmental Conservation Act, which introduced environmental impact assessment procedures and ambient environmental standards for water and air pollution, noise, and industrial solid waste. However, it was only passively enforced under the constraints of limited financial and organisational resources.

[62] Prue Taylor, "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 The Georgetown International Environmental Law Review 309; Bosselmann, supra n 11.
[63] Bosselmann, supra n 39, 69.
[64] Taylor, supra n 14, 256-257.
[65] Dong-Su Song, "Hwanggyeongbeop-ui Byeonhwawa Baljeonbanghyang (Development and Future of Environmental Law)" (2001) 25 Beophak Yeonggu (Legal Studies) 13.
[66] Myeong-Sook Han, "Korea's Market-based Policies for Environmental Improvements" Paper presented to the 6th Mansfield Pacific Retreat, Jeju, Korea, 2003.
[67] The Act is also known as the Public Nuisance Act in English literature.

In 1980, as part of a major constitutional reform, environmental human rights in the form of "the right to live in a clean and pleasant environment" was recognised in the Constitution. At the same time, a duty of the state and all citizens to protect the environment was also acknowledged in the Constitution. In 1987, this article was amended to recognise the State's responsibility to "ensure comfortable housing for all citizens".

In the same year, the first major government environmental organisation, the Environmental Agency, was established as a sub-cabinet agency under the Ministry of Public Health and Social Affairs. It was given a mandate to orchestrate environmental duties that were then spread amongst a host of ministries and agencies. Nevertheless, it only dealt with pollution problems, in particular remediation, leaving conservation issues unmanaged.

In the face of increasing environmental degradation which threatened the health and well-being of people, a major environmental law reform took place in the early 1990s. Modelled after United States environmental law, in 1990 the Environmental Conservation Act 1977 was divided into six major environmental statutes: the Framework Act on Environmental Policy, the Environmental Dispute Adjustment Act, the Air Quality Conservation Act, the Water Quality Conservation Act, the Noise and Vibration Control Act, and the Toxic Chemicals Control Act.[68]

In the same year, the Environmental Agency was upgraded to full ministry level as the Ministry of Environment.[69] The MOE is the centre of the environmental management system in Korea with primary responsibility for making environmental policies and devising comprehensive plans to prevent pollution and to preserve the environment.[70] Its regional and branch offices have implementation functions for the environmental legislation and regulations under the jurisdiction of the MOE.

The Framework Act on Environmental Policy (FAEP) which replaced the Environmental Conservation Act in 1990 forms the backbone of Korean environmental law. The FAEP provides basic policy foundations for environmental protection, and clarifies principles and basic policy directions for the nation's environmental conservation goals. Under the FAEP, Korea has medium-specific environmental statutes. They deal with more detailed regulations and emission limits targeting air, water, and waste, and with national and local regulations, to the extent that they are consistent with the FAEP.[71]

Environmental legislation under the FAEP can be divided into two broad categories: the laws concerning the conservation of the "natural" environment and those of the "living" environments. This interesting distinction between the "natural" and the "living" environments originates from the FAEP. It defines the "environment" as consisting of distinctive "natural" and "living" environments. The "living environment" is defined as the

[68] Although similar in form, Korea and the United States differ in the extent to which they enforce their environmental law. See Hong-Sik Cho, "Law and Politics in Environmental Protection: A Case Study on Korea" (2002) 2 Journal of Korean Law 45. And the Korean environmental legislation follow Japanese model in their structure. See Choong-Mook Kim, "Hwanggyeongjeogchaekgibonbeop-e gwanhan Yeonggu (A Study on the Framework Act on Environmental Policy)" (1991) 3 Gunsan Daehakgyo Jiyeokgaebalyeongu (Gunsan University Studies on Local Development) 93; Sang-Don Lee, "Environmental Protection in the Northeast Asia Region" (1991) 19 The Korean Journal of Comparative Law 117.

[69] MOE's executive functions were further strengthened in a government structural overhaul in December 1995.

[70] Article 40 (Ministry of Environment) of the Government Organisation Act.

[71] The basic structure is based on the United States which has a number of medium-specific statutes below the National Environmental Policy Act.

environment directly related to the daily lives of people, such as air, water, and waste; and the "natural environment" is defined as all natural, living and non-living, objects in ecosystems. Accordingly, the environmental legislation responsible for regulating the quality of air and water falls under the category of "living environment" legislation. The principal environmental legislation dealing with the "natural environment" is the NECA.

In the 1990s, the Korean government only *began* to utilise law and legal institutions as an instrument of change and endeavoured to implement them to a considerable extent in seeking to achieve environmental protection.[72] However the environmental law in Korea needs to be developed further. As one environmental law scholar points out, law is not yet effective in the area of Korea's environmental protection.[73]

Major Environmental Statutes under the Jurisdiction of the Ministry of Environment

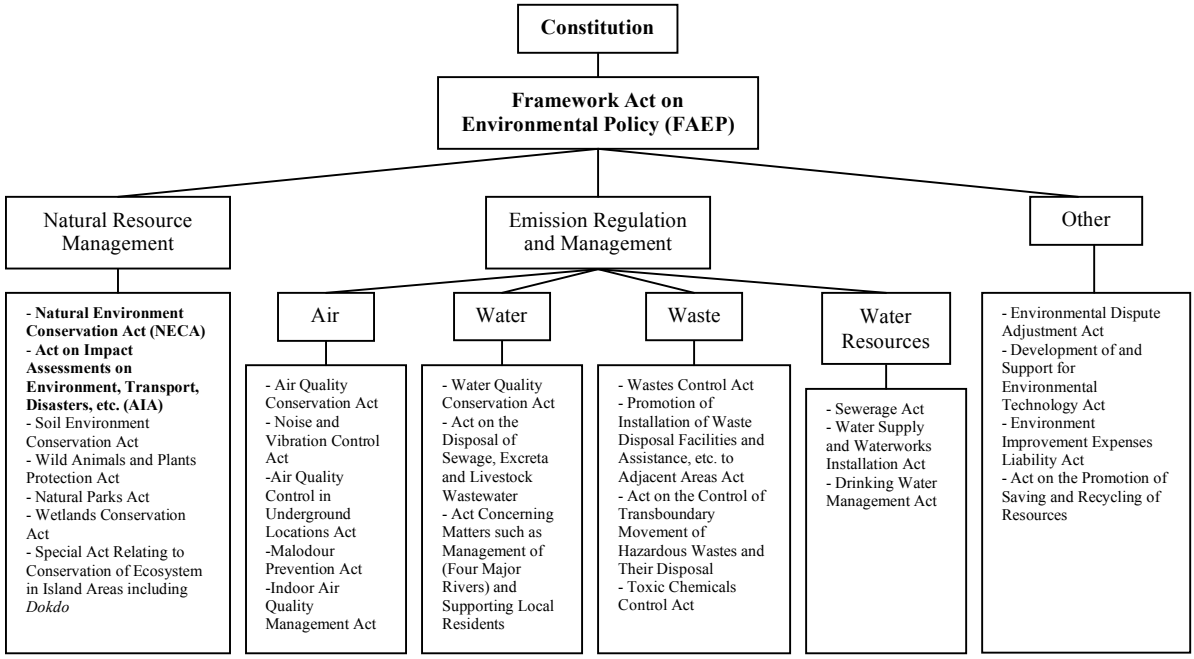

Figure 3. Major environmental statutes under the jurisdiction of the Ministry of Environment.[74] Those in bold type are the laws which this paper focuses on. (Source: MOE, *Current Environmental Legislation* (2006) Ministry of Environment <http://www.me.go.kr/kor/info/info_01_04.jsp> (at 11 April 2006))

As will be discussed later in this article, the concept of sustainable development is not visible at the "guiding principle" level in Korean environmental law in general. However, the notion of sustainability is becoming increasingly popular in the political agenda. In particular, the financial crisis in 1997 and the subsequent structural reforms brought the issue of sustainability to the political forefront. Economic issues were given priority over environmental issues due to the need of revitalising the economy. While the overwhelming instrument of choice in Korea has been command-and-control regulation,[75] in recent years,

[72] The same idea is shared by Cho, supra n 68.
[73] Ibid 52.
[74] For brief descriptions of major environmental legislation, see OECD, *Environmental Performance Reviews: Korea* (OECD Publications, Paris, 1997), 40-41.
[75] Command-and-control regulation: Pursuant to legislation, the government adopts specific prohibitions or requirements relating to pollution, waste, resource management, land use, development, etc. These regulations are enforced against individuals through licensing and permit requirements, enforcement actions, and sanctions for violations.

taking a neo-liberal economic point of view, the government has paid special attention to the introduction of market-based measures as a means of internalising environmental costs and encouraging sectors to operate in an environment-friendly manner, without increasing the overall administrative burden for enterprises. The government's adoption of market-based environmental regulatory measures reflects Korea's reluctance to put the environmental conservation agenda before economic development.

In 2000, a government organisation with the specific mandate of pursuing sustainable development, the Presidential Commission on Sustainable Development (PCSD) was established. It is an advisory body mandated to "provide advice to the President on environmentally sound and sustainable national development, and rational resolution of associated social conflicts".[76] Its main functions are to develop major policy directions and plans for sustainable development that integrate economic, social, and environmental concerns; to develop and implement major policy issues such as water and energy; to resolve social conflicts relating to sustainable development; to establish policies and programmes to address international agreements such as the Climate Change Convention, Agenda 21, and the Johannesburg Plan of Implementation.[77]

In the remaining parts of this section, the constitution's environmental human rights provision, principal articles in the FAEP and the NECA, and two legal cases will be discussed to investigate the core ethics and principles underpinning Korean environmental law and to gain an understanding of how Korea approaches and interprets the concept of sustainable development.

B. Constitutional Environmental Right in Korea

As mentioned, since 1980 the Constitution of Korea recognises citizens' "right to a healthy and clean environment" as part of one's basic human rights.[78] This constitutional environmental human right is at the top of the hierarchy in environmental laws in Korea. In 1987, Article 35 was amended to clarify the substance of the environmental right (Subsections 2 and 3 were inserted) and to specify affirmative state obligations (Subsection 3). Implications of Subsection 2 will be discussed later.

> *Article 35*
> (1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment.
> (2) The substance of the environmental right shall be determined by Statutes.
> (3) The State shall endeavour to ensure comfortable housing for all citizens through housing development policies and the like.

The crucial question regarding the constitutional environmental right is the meaning of the term "environment". What is the scope of the "environment" in the constitution? The definition determines the extent to which environmental human rights are exercised. Unfortunately, no definition is given in the Constitution, often resulting in conflicting viewpoints. The predominant view seems to be that "environment" in Article 35 refers to the

[76] Regulations of the Presidential Commission on Sustainable Development Article 1 (Mandate).
[77] Ibid Article 2 (Function).
[78] Since the Stockholm Declaration drew a connection between the environment and human rights in 1972 (Principle 1), virtually every constitution revised or adopted has addressed environmental issues. Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Transnational Publishers, New York, 2000), 27.

biophysical (natural and living) environment, exempting social, cultural, and economic environments.[79] However, some scholars as well as some lower court cases state that the term "environment" encapsulates all aspects of cultural and social environments as well as the biophysical environment.[80] Those who argue for the limited scope of the environment state that if the environment is holistically defined to include social and cultural environments, then the scope of the "environment" is too broad (i.e., that social and cultural environments are matters to be dealt under social welfare legislation and policies).[81] Such obscurity in the definition of the environment undermines the effectiveness of Article 35. Some scholars propose an amendment to the Constitution to narrow the constitutional environmental rights, so that the provision can be more effectively and efficiently upheld.[82]

Furthermore, the constitutional environmental rights provision has not been effective in protecting the promised right. Since the early 1990s, private citizens have attempted to pursue environmental goals through litigation based on Article 35 (because Korea has no comprehensive theory to protect and preserve the environment). However, the Supreme Court of Korea has construed the provision as not self-executing unless an environmental suit is based upon a specific statute (Constitution Article 35(2)). Otherwise, the case must be pursued under tort or nuisance law. In a number of nuisance cases in which plaintiffs based their claims on both the Constitution and property rights, the Supreme Court held that: [83]

> 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 "jori" [from the application of natural reason, an innate sense of justice, and the dictates of conscience].

Only in rare cases may a constitutional right to a healthy environment be established as a private right exercisable against others by interpreting tacit provisions and using "jori".[84]

In ethical terms, the constitutional environmental right in Korea is essentially anthropocentric. Environmental protection is not the goal, but providing a healthy and pleasant environment is the overall objective. The state and citizens are said to protect the environment, but for the sake of themselves. In other words, ecocentrism is not in

[79] See for example, Yun-Cheol Choi, "Uri Heonbeop-eseo-ui Hwanggyeonggwon Johang-ui Uimi: Gibongwon Bojang ddoneun Hwanggyeongboho? (The Meaning of the Environmental Right Provision in Our Constitution: Protection of the Basic Right or the Environment?)" (2005) 27 Hwanggyeongbeop Yeongu (Environmental Law) 373; Seong-Bang Hong, *Heonbeophak (Constitutional Studies)* (Hyeonamsa, Seoul, 2005); Hyeong-Seong Kim, "Heonbeopsang-ui Hwanggyeonggyujeong-ui Gyubeomjeok Uiui (Normative Meanings of the Environmental Provision of the Constitution)" (2004) 26 Hwanggyeongbeop Yeongu (Environmental Law) 115.
[80] Jae-Gyu Gang, "Hwangyeongbeop-ui Seonggyeok-gwa Hwangyeonghaengjeong Sosongjedo: Dorongnyong Sosong-eul Jungsimuro (Characteristics of Environmental Law and the Environmental Administrative Litigation System: The *Salamander* Case)" (2005) 27 Hwanggyeongbeop Yeongu (Environmental Law) 1.
[81] Mun-Hyeon Go, "Hwanggyeong Heonbeop-ui Baramjikhan Gyujeonghyeongtae (A Proper Regulatory Measures for the Environmental Constitution)" (2004) 26 Hwanggyeongbeop Yeongu (Environmental Law) 1.
[82] Choi, supra n 79.
[83] Supreme Court, 1995 DA 23378, Gongsa-jungji-gacheobun-iui, ("*The Busan University case*").
[84] Go, supra n 81. In some cases, against decisions of the Supreme Court, lower courts ruled that environmental interest per se, apart from land or buildings, needs to be protected. For example, Busan High Court 1995 RA 4; Seoul Civil District Court 1994 KAHAP 6253; and Cheongju District Court 1997 KAHAP 613. See also Hun Jeong, "Hwanggyeongboho-e gwanhan Heonbeopjeok Gyuyul (Constitutional Provisions on Environmental Protection)" (2003) 25 Hwanggyeongbeop Yeongu (Environmental Law) 433.

accordance with the Korean Constitution.[85] Indeed the anthropocentricity is inherent in an environmental human right.[86]

The practicality of the constitutional environmental right in effectively protecting the environment and the well-being of people is also questionable. Claims based on Article 35 of the Constitution are dismissed as groundless unless the litigant proves immediate and personal damage. Formulations of the constitutional environmental right are too vague and general in terms of their content, scope, and enforceability. Indeed, "the express [environmental human] rights […] are sometimes considered to be largely aspirational, expressing national goals and intents rather than justifiable rights".[87]

Rights come with duties. The Constitution of Korea not only awards people with environmental rights but also duties to protect the environment (the second sentence in Article 35(1) of the Constitution). The FAEP follows up on the constitutional environmental duty and specifies it in Articles 6(2), 6(3), and 24.

> *Article 6 (Rights and Duties of People)*[88]
> (1) All citizens shall have the rights to live in a healthy and pleasant environment.
> (2) All citizens shall cooperate with environmental conservation policies of the State and local governments.
> (3) All citizens shall endeavour to reduce the environmental pollution and damages incurred by their daily lives and to preserve the national land and environment.
>
> *Article 24 (Preservation of the Natural Environment)*[89]
> The State and citizens shall endeavour to maintain and conserve the order and balance of nature, in view of the fact that the conservation of the natural environment is fundamental to the human survival and living.

The FAEP specifies in more detail the duties of people to protect and preserve the environment by cooperating with environmental policies and endeavouring to reduce environmental impact in everyday activities. Yet the rationale given for such duties is anthropocentric. In other words, the natural environment is be to preserved for its instrumental value to human beings; conservation of the natural environment is a prerequisite to humanity's survival.

The principle of sustainable development is not present in Article 35 of the Constitution. However, some scholars attempt to interpret the provision as recognising intergenerational equity by putting forward some ambitious interpretations of Article 35. They contend that "all citizens" include not only the present generation but also future generations,[90] and furthermore, not only citizens of Korea but also foreign individuals – thereby meaning "humanity".[91] Yet such interpretations have not been tested in case law.

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[85] Choi, supra n 79.
[86] For a comprehensive discussion on the anthropocentricity of an environmental human right, see Taylor, supra n 62, 351-354. Also see for example, Kiss and Shelton, supra n 78.
[87] Michelle L. Schwartz, "International Legal Protection for Victims of Environmental Abuse" (1993) 18 Yale Journal of International Law, 374; cited in Taylor, supra n 62, 351.
[88] This article was fully amended on 30 Dec 2002 (Act No. 6846).
[89] This article was partially amended 31 Dec 1999 (Act No. 6097).
[90] Yeong Heo, *Hanguk Heonbeopron (Korean Constitutional Theory)* (Bakyeongsa, Seoul, 1995); Jun-Hyeong Hong, *Hangyeongbeop (Environmental Law)* (Bakyeongsa, Seoul, 2001).
[91] Hong, ibid.

C. Purposes and Principles of Principal Korean Environmental Laws

This section aims to investigate the purposes and principles of the principal Korean environmental laws, the FAEP, the NECA, and the AIA. In this analysis, the focus is on the principles of sustainable development.

1. Framework Act on Environmental Policy 1990

The FAEP is the main "framework" Act which sets the overarching principles and direction of environmental policy in Korea.[92] Grounded upon the environmental right recognised in the Constitution, the FAEP specifies rights and duties of people as well as obligations of the state.[93] The first chapter, "general provisions", consists of eight basic articles: purpose (Article 1); fundamental principle (Article 2); definitions (Article 3); obligations of the state and local governments (Article 4); obligations of business operators (Article 5); the rights and duties of citizens (Article 6); a rule of liability for causing pollution or the "Polluter Liability Principle" (Article 7);[94] precautionary approach to environmental pollution (Article 7-2); integrated consideration for environment and economy (Article 7-3), recycling and reuse of resources (Article 7-4), and the government's annual report to the National Assembly (Article 8).

Again the definition of the term "environment" is crucial. Subsections 1 to 3 provide the definition of the environment in the Act. This definition is also shared by other environmental legislation such as the NECA.

> *Article 3 (Definitions)*
> 1. The term "environment" means the natural environment and the living environment.
> 2. The term "natural environment" means the natural conditions (including ecosystems and natural scenery) which include all living beings in the underground, the earth's surface (including the seas), and on the ground, and the non-living things surrounding them.
> 3. The term "living environment" means the environment related to the daily life of human beings, such as the air, water, waste, noise, vibration, malodour, sunshine, etc.

Interestingly the FAEP distinguishes the "natural" environment and the "living" environment. However, both are essentially natural or biophysical environments as the air, water, and soil belong to nature. Implicit in the distinction is that the "natural" environment or ecosystems, as distinctive from the "living" environment, is somewhat detached from the humanity and that humans are not directly dependent on it (although indirect dependency is later acknowledged in Articles 1 and 2 by amendments).

Notably, social and cultural environments are excluded in the definition of "environment". With such a limited definition of the environment, the scope of the Act is severely restricted, and the extent to which the three pillars of sustainability, environment, society, and economy can be integrated is also limited.

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[92] The FAEP is also known as the Basic Environmental Policy Act (BEPA) in English literature.
[93] Seok, supra n 12.
[94] The 1999 amendment changed "Polluter Pays Principle" to "Polluter Liability Principle" according to which a polluter is held liable to restore the environment not only to pay the economic cost.

The purpose of the FAEP is stated in Article 1.

> *Article 1 (Purpose)*[95]
> The purpose of this Act is to have all the people enjoy healthy and pleasant lives by preventing the environmental pollution[96] and environmental damage[97] and by properly and sustainably managing and conserving the environment through defining the right and duty of citizens and the obligation of the State with regard to environmental conservation,[98] and determining the fundamental matters for environmental policies.

The FAEP is explicitly anthropocentric in its ethical underpinning. The ultimate goal of sustainable management of the environment is "to have all the people enjoy healthy and pleasant lives".[99] In order to achieve this anthropocentric end, the environment is to be protected and sustainably managed. The importance of the functions of ecosystems was acknowledged by inserting the term "environmental damage" in the FAEP in 1999. "Environmental damage" is defined as "the conditions which inflict serious damage on intrinsic functions of the natural environment". Implicitly, ecological integrity is recognised as important for the well-being of human beings.

It is obvious in Article 1 that sustainable development is not the guiding idea; rather, the goals appear to be environmental conservation and sustainable management of the environment. The most recent amendment in May 2005 inserted the word "sustainably" into Article 1. In this sense, sustainable management of the environment has not been the principal purpose of the main environmental legislation of Korea until 2005. Yet there is no definition of sustainability in the Act.

Since its inception, however, the FAEP has recognised intergenerational equity as a fundamental principle in Article 2. Although the FAEP does not use the term "sustainability", the Act requires the environment to be protected in a manner that enables future generations to inherit environmental benefits that the current generation enjoys. The early emphasis on intergenerational equity is indicative of Korea's adoption of the concept of sustainable development defined in the Brundtland Report 1987. Nevertheless, and perhaps not surprisingly, intragenerational equity and interspecies justice necessary for ecologically sound and sustainable development are not recognised in the guiding principles.

> *Article 2 (Fundamental Principle)*[100]

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[95] This article was partially amended on 31 May 2005, and was fully amended on 31 December 1999 (Act No. 6097).

[96] FAEP Article 3(4): The term "environmental pollution" means air pollution, water pollution, soil pollution, sea pollution, radioactive contaminations, noises, vibrations, malodour, sunshine interception, etc., which are caused by the industrial activities and other human activities, and which are such conditions as inflict damages on the human health or the environment.

[97] FAEP Article 3(4)2: The term "environmental damage" means the conditions which inflict serious damage on intrinsic functions of the natural environment by overhunting or overgathering wild animals or plants, destructing their habitats, disturbing the order of ecosystem, impairing natural scenery and washing away the topsoil, etc.

[98] FAEP Article 3(5): The term "environmental conservation" means the acts to protect the environment from any environmental pollution and environmental impairing, to improve the polluted or impaired environment, and to simultaneously maintain and create the conditions of delightful environment.

[99] This phrase is relatively recent as it was inserted by the 1999 amendment. Before then, the ultimate objective was "to prevent harm arising from environmental pollution and to properly manage and preserve the natural and living environments".

[100] This article was partially amended on 31 December 1999 (Act No. 6097). It is originally written in one long sentence.

> The fundamental principle of this Act is to have current citizens broadly enjoy environmental benefits and simultaneously to allow future generations inherit such benefits, by having the State, local governments, enterprisers, and citizens endeavour to maintain and create a better environment; to preferentially consider environmental conservation when they perform any act using the environment; and to devise joint efforts for preventing any environmental harms on the Earth, in view of the fact that creation of a pleasant environment through a qualitative improvement, conservation of the environment, and maintenance of harmony and balance between human beings and the environment are indispensable elements for the well-being and enjoyment of cultural life of citizens, the conservation of national territory, and the everlasting development of the nation.

These fundamental principles in Article 2 act as the overarching principles of environmental law and policy in Korea. This article is of supreme importance along with Article 35 of the Constitution. This article has been amended only once in 1999 to address international environmental cooperation.[101] Thus, the overarching principle of environmental law and policy has remained by and large the same since 1990.

Notably, a "preferential consideration" is given to environmental conservation when using the environment. This can be interpreted as a weak attempt to integrate environmental conservation as a component of development. The preferential consideration given to the environment does not mean that it is given a priority or higher importance than development. Further, the wording is weak: only "consideration" is to be given. It is questionable to what extent this phrase effectively and successfully protects the environment when faced with developmental interests.

Consistent with Article 1, the ethics of environmental conservation in Article 2 are anthropocentric. The fundamental objective is essentially "to have current citizens broadly enjoy environmental benefits and simultaneously to allow future generations inherit such benefits" by creating a better environment. The rationale for environmental conservation is also anthropocentric and development-oriented. It is the recognition that a pleasant environment and the harmony and balance between nature and humanity are prerequisites for the well-being of people, and further, the continued (economic) development of the nation.

Nevertheless, the acknowledgement of human dependency on the ecosystem and the importance of ecological integrity is meritable (Articles 1 and 2). Such concepts as the ecological threshold is also seen in Article 24 which states the fundamental principle regarding the natural environment conservation: "the conservation of the natural environment is fundamental to the human survival and livelihood" therefore the need to maintain and preserve the order and balance of nature (Article 24).

The principle of prevention and perhaps also precaution is recognised by the FAEP in Article 7-2 which was inserted by the 1999 amendment.[102] In the recent *Saemangeum* case, this Article was interpreted in a vague manner, by some progressive Supreme Court Judges as the "precautionary principle". This decision will be discussed later.

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[101] Article 17 (International Cooperation and Conservation of the Global Environment) also needs to be noted for stating specific commitments in international cooperation in environmental protection.

[102] For details on the principle of prevention, see Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002), 61-89.

Article 7-2 (Prevention of Environmental Pollution, etc.)[103]

1. The State and local governments shall exert preferential efforts for an advance preventive management of pollution through an original reduction of the materials and sources for environmental pollution, and devise the policies promoting the voluntary efforts by business operators for the prevention of environmental pollution.
2. Business operators shall use the raw materials with less environmental pollution and improve their production processes at the entire phases of business activities such as production, sale, distribution and disposal, etc. of their products, and endeavour to make original reductions in generating the polluting substances and to minimise the harmful impact arising from the use and disposal of their products on the environment by means of the saving of resources and the promotion of recycling.[104]
3. The State, local governments and business operators shall make every effort to minimise the harmful impact arising from their administrative plans and development projects on the environment with the aim of preventing such administrative plans and development projects from damaging the national land and natural environment.[105]

Does this article recognise the precautionary approach? The answer is an obvious no. The FAEP falls far short of the precautionary approach. Rather, the FAEP sets the prevention principle, requiring the government and business operators to avoid or minimise the environmental impact by regulating the source or cause of a problem in advance. However, there is no mention about avoiding the use of the natural environment "even when scientific knowledge is incomplete or inconclusive" (Principle 6.a of the Earth Charter).

Rather than recognising the principle of the precautionary approach, Korea took a soft approach. The 2002 amendment added a new instrument, the Prior Environmental Assessment (PEA) (Articles 25-27) which is separate from the environmental impact assessment. It is a pre-assessment to be carried by the head of a relevant government ministry, prior to the consent, to examine environmental soundness or adequacy of a development project or plan which is subject to environmental impact assessment under Article 4(1) of the Act on Assessment of Impact on Environment, Transportation, Disasters, etc. 1999 (Articles 3(7) and 25). It further requires that projects to be implemented in an *environmentally sustainable* way in order to maintain appropriate environmental standards and the conservation of the natural environment (Article 25). It is significant because, for the first time, an assessment is required before consent is granted for a project with potentially high environmental impact and the assessment may well prevent that consent (Article 27(2)). Environmental impact assessment required in major development projects (Article 28) aims only "to minimise harmful effects on the environment".

The 2005 amendment to the FAEP added Article 25-5, along with others, under Chapter 4 concerning the PEA, for the first time obliges consultation with stakeholders to take place prior to granting consents to activities with potential impact on the natural environment. Opinions of interest groups such as local residents, relevant experts, environmental organisation, and non-governmental organisations are to be considered and be reflected in the assessment (Article 25-5). This shows how undemocratic the FAEP was before 2005 and how it carefully avoided concerns of grassroots organisations when promoting unilateral developmental projects.

Furthermore, it was only in 2002 that an integrated approach to the environment and the economy was adopted into the framework. The article reads:

[103] This article was newly inserted on 31 December 1999 (Act No. 6097).
[104] This subsection was partially amended on 30 December 2002 (Act No. 6846).
[105] This subsection was newly inserted on 30 December 2002 (Act No. 6846).

> *Article 7-3 (Integrated Consideration for Environment and Economy, etc)*[106]
> 1. The Government shall develop methods by which the environment and economy are evaluated in an integrated manner and take into account such integrated evaluation of the environment and economy when it devises various policies.
> 2. The Government shall assist in minimising the harmful impact on the environment through consultations between industries, regions and businesses within the environmental capacity.

Article 7-3 requires the government to develop methods on how the environment and the economy can be evaluated in an integrated manner and to "take into account" such an integrated evaluation when devising policies. Therefore, much depends upon the environmental planning system that is the responsibility of central government.[107] The government's position in the matter will be discussed later in Part IV.

Further, Article 7-3 requires the government to assist in minimising harmful impact on the environment within the environmental capacity. Notice the term "environmental capacity" which is newly inserted by the 2002 amendment. Is this the conceptual and functional equivalent of "carrying capacity" or the concept of "life-supporting capacity" in the RMA? The term "environmental capacity" is defined in Article 3(6).

> *Article 3(6)*
> The term "environmental capacity" means the limit to which the environment keeps its quality and absorbs, purifies and restores environmental pollution or environmental damage on its own.

The environmental capacity is here recognised as the threshold within which ecological integrity can be maintained. Read together with Articles 2 and 24, the limit or the finite capacity of the biosphere within which economic and developmental activities take place is further recognised by the concept of environmental capacity.

Nevertheless, there is no provision stating that environmental capacity be the bottom-line. Only the government is required to "take into account" the environmental capacity of the relevant area when utilising the environment (Article 14(5)) and to assist in minimising the harmful impact on the environment within the environmental capacity (Article 7-3(2)). Therefore, there is no binding effect.

> *Article 14(5) (Environmental Consideration for Development Plans and Projects, etc.)*
> 1. The State and the heads of local governments shall, when it or they develop their plans for the land utilisation and development, take into account the comprehensive national environmental plan, the City/Province environmental plan and the City/County/District environmental plan (hereinafter referred to as the "comprehensive national environmental plan, etc.") and the *environmental capacity* of the relevant area.

2. Natural Environment Conservation Act 1991

[106] This article was newly inserted on 30 December 2002 (Act No. 6846).
[107] Douglas Edgar Fisher, *Australian Environmental Law* (Lawbook, Prymont, 2003), 105-106.

Under the guiding principles of the FAEP and the Constitution, the NECA is responsible for the conservation of the natural environment as defined distinctively from other "living" environments. Biological diversity protection is also an issue under the NECA. Here we see how the Earth Charter principles under "ecological integrity" are implemented. The purpose of the Act is stated in Article 1.

> *Article 1 (Purpose)*
> The purpose of this Act is to promote sustainable use of the natural environment and to enable people to lead a comfortable and healthy life in a pleasant natural environment through systematic conservation and management of the natural environment which involve measures such as the protection of the natural environment from artificial damage and the conservation of ecosystems and natural scenery.

The ultimate purpose is to meet anthropocentric needs: to provide a pleasant natural environment for people, and to promote "sustainable use of the natural environment" which is defined as "[a use that] ensures the present and future generations to have the equal opportunity to use or to benefit from the natural environment" (Article 2(3)). The purpose section needs to be read together with the fundamental principles regarding the natural environment conservation provided in Article 3.

> *Article 3 (Fundamental Principles for the Natural Environment Conservation)*
> The natural environment shall be preserved in accordance with the following fundamental principles.
> 1. The natural environment shall be preserved as resources for all people in a manner to satisfy public interest, and be used sustainably for the present and future generations.
> 2. Conservation of the natural environment shall be harmonised and balanced with the use of national lands.
> 3. Natural ecosystems and natural scenery shall be preserved and managed to promote human activities, functions of the nature and the cycle of ecosystems.
> 4. Opportunities for all people to participate in the conservation of the natural environment and the sound use of the nature shall be increased.
> 5. When using or developing the natural environment, the balance of ecosystem shall not be destroyed and the value of the natural environment shall not be undermined. However, when natural ecosystems and natural scenery are destroyed, damaged, or disturbed, an endeavour to restore / restitute the natural environment to the maximum extent possible shall take place.
> 6. Burdens arising from the conservation of the natural environment shall be borne equitably, and benefits obtained from the natural environment shall be afforded first to residents of the region and interested persons.[108]
> 7. International cooperation for the conservation of the natural environment and the sustainable use of the natural environment shall be promoted.

The fundamental principles of natural environmental conservation are defined in both anthropocentric and ecocentric terms. The natural environment is essentially viewed as a public good for the people's use (Articles 3(1) and 3(4)), and is required to be preserved and managed to promote human activities (Article 3(3)). At the same time, however, ecosystems are to be protected in order to promote functions related to the nature and cycle of the ecosystem (Article 3(3)). Further, the NECA requires the balance of the ecosystem and the value of the natural environment to be maintained (Article 3(5)). Yet it is doubtful that the value recognised here is intrinsic or non-instrumental in its nature. Although one can observe

[108] The term "interested persons" means persons having legal title to land or public waters in a particular territory (NECA Article 3(15)).

both anthropocentric and ecocentric elements in the principles, in the overall context, anthropocentrism prevails.[109] The ecological integrity which the NECA endeavours to protect is to be preserved for human prosperity, recognising our dependency on it.

The NECA calls for prevention of extinction of endangered species by, for example, requiring the MOE to produce a basic policy for natural environmental conservation which necessarily includes a designation of ecosystems requiring conservation and the protection of endangered or ecologically important wild fauna and flora (Article 6(2)2).

The effectiveness of the NECA depends on the effectiveness and implementation of the government policies produced by the MOE. The conservation of biological diversity is, for example, left to the total discretion of the Minister of Environment. This Minister has the authority to designate areas of ecological significance with abundant biodiversity as a conservation zone (Article 12(1)1) and is required to draft and implement a plan to manage natural ecosystems and biodiversity within the zone. Although the NECA devotes a chapter (Chapter III: Articles 30-45) to the issue of biological diversity conservation, the articles are in a similar manner to Articles 6 and 12 – the matters are at the discretion of the Minister.

3. Act on Impact Assessments on Environment, Transportation, Disasters, etc. 1999

The FAEP requires environmental impact assessments to be conducted on development projects which may have an impact on the environment in order to evaluate the environmental impact in advance and to prepare measures to minimise adverse effects on the environment (Article 28). Details of the environmental impact assessment are provided in the Environmental Impact Assessment Act 1993. However, it was later replaced by the AIA, which states matters relating to four major impact assessment schemes in Korea: environment, transportation, disasters, and population (limited to the capital region). Three government administration organisations are responsible for these separate impact assessments: the MOE for the environment; the Ministry of Construction and Transportation for transportation; the National Emergency Management Agency (subordinate to the Ministry of Government Administration and Home Affairs) for disasters; and the Ministry of Construction and Transportation for population.

This Act is noteworthy not only for its importance in Korean environmental law in general, but also because of its explicit recognition of sustainable development as the purpose of the Act.

> *Article 1 (Purpose)*
> The purpose of this Act is to promote pleasant and safe life of citizens by ensuring sound and sustainable development by means of conducting an impact assessment and review on environment, transportation, disasters, and population in advance, when developing and implementing projects which have substantial impact on environment, transportation, disaster, and population.

[109] Furthermore, the beauty of nature is emphasised by the term "natural scenery". Arguably, the beauty is an anthropocentric term as what is beautiful is determined by human standards. In this sense, Aldo Leopold's ethical imperative: "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it does otherwise" can be seen as both ecocentric and anthropocentric. See Aldo Leopold, *A Sand County Almanac* (Oxford University Press, New York, 1949).

Unfortunately, the AIA does not elaborate upon what sustainable development means. The Act simply states it as a purpose of the Act. The non-existence of a definition of sustainable development needs to be considered, as it has important implications on, for example, the underlying assumption or the general perception on the concept of sustainable development. In the Act, as elsewhere in the environmental law of Korea, the means to realise sustainable development are deemphasised or virtually neglected. It seems that the term "sustainable development" is regarded as self-explanatory; it means human development that is sustainable.

This is understandable as the term "development" has an inherently anthropocentric connotation. Furthermore, connotation of the Korean counterpart of the English term "development" also needs to be noted. Among two possible Korean counterparts for the English term "development", *baljeon* and *gaebal*, which contain connotations of "advancement" or "progress" and "exploitation" or "utilisation" respectively, all Korean environmental legislation adopts the latter term. Both sustainable *baljeon* and sustainable *gaebal* are, however, used interchangeably. For example, the Presidential Commission on Sustainable Development uses the term *baljeon*. In the absence of a clear definition of sustainable development in environmental legislation, the choice of words carries significant implications in understanding the concept of sustainable development in legal and political discourses.

D. Korean Environmental Law in Practice

How does this environmental legislation work in practice? This section attempts to answer the question by examining two recent well-known environmental cases in Korea. They are the *Saemangeum* (Supreme Court decision, 2006) and the *Dorongnyong* (*Salamander*) (High Court decision, 2004). In both cases, the Court ruled that the development projects could proceed after weighing the benefits of development against environmental conservation.

1. The Saemangeum *case*

The *Saemangeum* project, launched in 1991, is a government-led development project to convert large tidal flats (40,100 hectares) into farmland by building the world's longest seawall (33 kilometres) on the west coast of the North Jeolla Province.[110] Major advocates of the project are the local government of North Jeolla Province and the Ministry of Agriculture and Forestry. Until now, about two billion US dollars have gone into the project (over 80 percent completed: 30.3 kilometres completed of the total 33 kilometres).

[110] The *Saemangeum* project was endorsed as a presidential pledge by all political parties between 1997 and 2002. Cho, supra n 68. The seawall is 500 metres longer than the Afsluitdijk in Zuiderzee, the Netherlands, previously the longest dyke in the world.

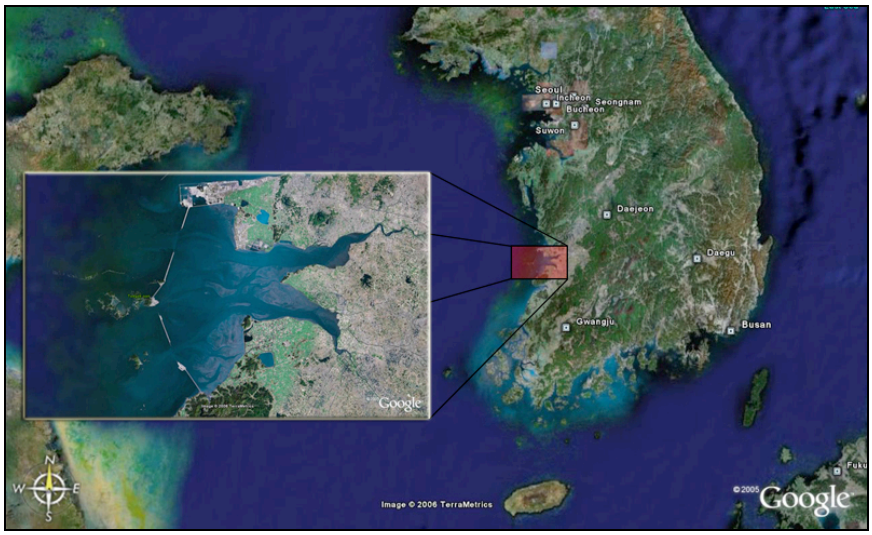

Figure 4. A map of Korea and the location of the *Saemangeum* tidal flats. The partly-completed construction of the seawall is visible in the map. (Source: Google, *Google Earth* (2005) Google <http://earth.google.com/> (at 18 April 2006))

This project has long been the target of criticism by civil society. Environmentalists oppose this half-finished land reclamation project, voicing worries about its detrimental impact on the environment. The *Saemangeum* mud flats are one of the five largest tidal flats in the world, are home to about 370 varieties of sea creatures, and are the nation's biggest stopover for migratory birds.[111]

The project was once suspended for two years at the demand of environmentalists in 1999. The government, however, resumed the project in 2001. In June 2003 some North Jeolla Provincial residents and environmental groups filed a law suit. After winning and losing the suits in District (2003) and High (2005) Courts respectively, the plaintiffs appealed to the Supreme Court against the Minister of Agriculture and Forestry and the provincial government. The verdict came in March 2006 and was against the environmentalists.[112] This section examines the Supreme Court decision, both majority and dissenting opinions, to find out how the Court interpreted the principles of Korean environmental law.[113]

Firstly, the Supreme Court of Korea held that Article 35 of the Constitution cannot be seen as establishing specific substance, subject, content, and means of exercise of the environmental right, and also held that Article 6 of the FAEP does not provide citizens with the specific right.[114] Thus, the environmental right recognised in the Constitution and the FAEP is not held self-executing and can only be exercised when explicitly stated in statutes (Constitution Article 35(2)).

Secondly, the Court did not recognise the precautionary principle in Korean environmental law. While acknowledging possible marine environmental degradations due to the land reclamation project, the Court decided that the project should proceed with care in light of scientific uncertainty. In order to cancel the project, the adverse impact to the marine environment must have not been predicted or foreseen prior to the commencement of the project, or the adverse impact must be much greater than predicted.[115] In this case, the Court

[111] Ibid.
[112] The majority decision was supported by 11 out of the total 13 judges.
[113] Supreme Court, 2006 DU 330, Jeongbu-jochi-gyehoek-chwiso-deung, ("*Saemangeum*").
[114] Ibid 17.
[115] Ibid 17-18.

held that all adverse effects resulting from the project thus far have been taken into consideration before the project commenced. Therefore, there were no grounds to cancel the project. Furthermore, the Court placed the burden of proof on those who oppose the project due to an unforeseen environmental impact.

Thirdly, the Court held that as environmental and developmental values are both recognised under the Constitution, preservation of the environment cannot have priority over development. As such, the Court weighed the cost and benefit of environmental protection and ruled that the economic interests of the national community as a whole prevail over the environmental interests of some individuals.[116] The Court in theory recognised the existence of environmental rights and interests but these environmental concerns are subordinated to a cost benefit analyses. This process of balancing competing interests is a critical limitation on the current effectiveness of environmental protection.

Two judges out of the thirteen, Judge Kim and Judge Park, issued a joint dissenting opinion.[117] Their opinions are valuable as they provide possibly the most progressive interpretation of Korean environmental legislation. However, as five other judges have quite correctly pointed out in their joint separate opinion, the dissenting opinions of Kim and Park were by and large normative arguments grounded upon ethics rather than law. This implies that legal obligations based on environmental ethics do not yet exist in Korean law.
Firstly, the dissenters held that the value of nature is not quantifiable in monetary terms and thus cannot be weighed against competing economic interests.[118] For example, the values of biological diversity and ecological integrity are difficult to quantify in economic terms and there are some aspects that are not of use to the present generation but may be of use to future generations.[119] Taking into account the fact that many environmental benefits have not been discovered and that there is a possibility of serious impact on humanity from environmental damage, environmental damage should only be allowed in the face of an absolute necessity or, at the very least, only when the benefits far outweigh the environmental damage.[120] Even in this case, damage is only permissible to the least possible extent.

Secondly, the dissenting Judges held that the natural environment is the common heritage of both present and future generations which needs to be maintained as the basis of survival of both generations. Thus, the present generation must not utilise and damage the natural environment to meet the needs of the present. There is a limit to what we can use and we are obliged to ensure that development occurs in a sustainable manner.[121]

Thirdly, the dissenters stated that environment-related legislation such as the FAEP and the NECA recognise the principle of prevention (environmental pollution needs to be prevented rather than endeavouring to remedy the pollution), the precautionary principle (the environment conservation needs to be considered preferentially to take measures for precaution), and the principle of sustainable development (development that meets the needs of the present without compromising the ability of future generations to meet their own needs) in articles such as Articles 1, 2, and 7-2 of the FAEP and Article 3 of the NECA.[122]

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[116] Ibid 35-37.
[117] Judges Yeong-Ran Kim and Si-Hwan Park.
[118] Supreme Court, supra n 113, 20-21.
[119] Ibid 22-23.
[120] Ibid 20-21.
[121] Ibid 21-22.
[122] Ibid 22. In the brackets are the meanings of the principles as provided in the dissenting opinion.

They argued that Korean environmental legislation and the Constitution clearly state that the value of natural environmental conservation supersedes developmental and economic benefits and that the natural environment needs to be protected preferentially. In other words, the two cannot be weighed equally.[123]

Therefore, in accordance with the principle of prevention and the precautionary principle, Judges Kim and Park held that there is a strong need to take precautionary measures to prevent and minimise environmental harm before the harm occurs. They also argued that in light of scientific uncertainty in predicting how marine environmental changes might affect the *Saemangeum* region, ecosystems of the west coast, and the wider natural environment, the *concern* of a potential harm to ecological integrity itself was a sufficient reason to cancel the project.[124]

2. *The* Dorongnyong *case*

The *Dorongnyong* is the first legal case in Korea addressing the issue of legally enforceable rights for the natural environment. It was an attempt to cancel a proposed construction of an express railway tunnel through Mount *Cheonseong*, which was one of last remaining pieces of a major national development project to connect Seoul and Busan with express railways. The case tested the concept of interspecies justice. The case is presently ongoing as the plaintiffs, having lost at the District and High Courts, are preparing to appeal to the Supreme Court. This section examines the High Court Decision of 2004.[125]

Recognising that about thirty endangered species were under threat if the project proceeded and highlighting the fact that the government's environmental impact assessment neglected to fully address the issue,[126] two Buddhist temples and environmentalists filed suit. The action was filed against a private enterprise, the Korea Rail Network Authority, on behalf of one of the endangered species, the salamanders. Thus, for the first time in Korean legal history, non-human beings symbolically stood in the Court as plaintiffs represented by human friends under the title "Friends of Salamanders", seeking recognition of the intrinsic value and the right of nature. The claims put forward by the "friends" were grounded on what they called the "right to defend nature".

The Court held, however, in accordance with the Civil Procedure Act, that non-human beings are not eligible to be plaintiffs, and therefore do not hold legal rights. In a similar vein, the Court rejected the claims based on the "right to defend nature" as groundless. The Court found that any such right is not recognised in law, despite acknowledging that there is a normative necessity to protect nature. Thus, there was no case for the salamanders and the "Friends of Salamanders".

This left the Court with the claims of the Buddhist temples principally based on the constitutional environmental right. Following precedent, the Court again held that Constitution Article 35 does not give individual citizens specific rights. The Court based its decision on a cost-benefit analysis. It ruled that the public gain from the completion of the

[123] Ibid 22.
[124] Ibid 25-26.
[125] Busan High Court, 2004 RA 42, Gongsa-chakgong-geumji-gacheobun, ("*Dorongnyong*").
[126] Sang-Don Lee, "Strategic Environment Assessment and Biological Diversity Conservation in the Korean High-Speed Railway Project" (2005) 7 Journal of Environmental Assessment Policy and Management 287.

express railway connecting Seoul and Busan was huge, while the probability of invading the environmental interests of the plaintiffs (the Buddhist temples) was very low. In other words, the Court weighed both the potential public economic benefits from the development and the potential environmental benefits from conservation in quantitative terms. In the face of scientific uncertainty regarding the possible environmental harm, the Court overlooked potentially adverse environmental effects which, although of low probability, nevertheless had a high potential impact.

Furthermore, it is noteworthy that the Court did not look into international environmental conventions such as the Convention on Biological Diversity which Korea has signed and ratified despite the fact that the plaintiffs' claims were based on such international agreements and "soft law" documents.[127] The Court's ignorance can be seen as a violation of the Constitution as it states that such "[t]reaties duly concluded and promulgated under the Constitution and the generally recognised rules of international law shall have the same effect as the domestic laws" (Article 6(1)). In fact this provision is potentially very powerful. It means that Korea has a binding legal obligation to rules of customary international law, which includes the concept of sustainable development.[128] However, as evident in this case, international environmental agreements have little influence over national cases.

IV. KOREAN APPROACH TO SUSTAINABLE DEVELOPMENT

This section discusses how the concept of sustainable development is approached in Korean environmental law and policy: how the idea of sustainability is incorporated into legislation, case law, and environment-related decision-making. Further, this section attempts to integrate the principles of the Earth Charter (Part II) and the discussions on Korean environmental law and policy (Part III) to critically assess Korean environmental law and propose possible amendments for Korea to meet the benchmark set by the Earth Charter principles.

A. Principles of Sustainable Development in Korean Environmental Law

A statement of principle is concerned not with delimiting the outer margins of the statutory instrument but spelling out its motivating core: "a statutory principle should be a general formulation – a "first position" – but it must have a law-making content; it must not merely state a policy, or a philosophy, or an ideal".[129] In this respect, Korea has no guiding environmental principle except for the constitutional right to a healthy and clean environment.[130] Sustainable development is not recognised as the fundamental principle in Korean environmental law.[131] The mere need for a "sustainable management of the environment" to meet the future needs of humanity is recognised. In other words, Korean

[127] They are the Convention on Biological Diversity, the World Charter for Nature, the Rio Declaration, the Forest Principles, and the Montreal Process.
[128] Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, Cambridge, 2003), 254. See also Prue Taylor, "The Case Concerning the Gabčíkovo-Nagymaros Project: A Message from the Hague on Sustainable Development" (1999) 3 New Zealand Journal of Environmental Law 109; Bosselmann, supra n 50, 160.
[129] William Dale, "Principles, Purposes, and Rules" (1988) 9 Statute Law Review 15, 19. See also, Simon D. Upton, "Purpose and Principle in the Resource Management Act" (1995) 3 Waikato Law Review.
[130] See Cho, supra n 2 and 68.
[131] Hong, supra n 90, 71-72.

environmental laws does not try to define or seek to elaborate upon what sustainable development might entail, but simply state it implicitly as a purpose of the law.
There seems to be a general consensus in the legal, social, and political discourses in Korea that the rhetoric of sustainable development means continued human development or development that is sustainable for the sake of humanity.

1. Underpinning anthropocentric utilitarian ethic: Towards ecocentrism and recognition of intrinsic value of nature

While sustainable development is not the guiding principle in Korea, the constitutional environmental right sits at the top of the hierarchy. The concept of environmental rights is inherently anthropocentric.[132] The objectives (e.g. humanity's survival, living standards, health, aesthetics, and sustainable use of natural resources) and standards (the needs of humanity not of other species) are human-centred.[133] This means that the environment is only protected to the extent needed to protect human well-being. Implicit in the human rights approach to environmental protection is that natural resources exist only for human benefit and have no intrinsic worth.[134] This creates a hierarchy, according to which humanity is given a position of superiority and importance above and separate from other members of the natural community.[135] While there is little doubt that the environment will be protected to some extent under the exercise of this environmental right,[136] in the event that human interests do not coincide with nonhuman interests, the human interests will prevail. Also, only environmental degradation directly linked to the human environment will create legal grounds for action.

Furthermore, this concept does not necessarily capture all aspects of environmental concern, as its application would occur with respect to pollution, waste disposal, and other sorts of toxic contamination, since the most immediate threats to health and well-being concern contamination of air, water, and food. Indeed, as previously discussed, the FAEP divides the environment into two categories: the natural environment and the living environment. This distinction well reflects the constitutional environmental right and its anthropocentric ethical underpinning.

The fundamental problem with the recognition of this environmental right is, however, that it sits at the top of the legal hierarchy – the Constitution. As environmental rights are inherently anthropocentric, the recognition of constitutional environmental rights influences the overall ethical orientation towards environmental issues. In the Korean context, for example, the purpose and principles of the FAEP, the NECA, and the AIA are defined predominantly in anthropocentric terms stemming from the constitutional environmental

[132] Catherine Redgwell, "Life, the Universe and Everything: a Critique of Anthropocentric Rights", in Boyle and Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, New York, 1996).
[133] Taylor, supra n 62, 352.
[134] See Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, Oxford, 2005), 31-35; Taylor, ibid.
[135] Patricia Birnie and Alan Boyle, *International Law & The Environment* (Oxford University Press, Oxford, 2002), 257-258.
[136] Some commentators argue for the human rights approach to the environment has positive contribution to sustainable development. For example, Dinah Shelton, "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 Stanford Journal of International Law; and Holmes Rolston III, "Rights and Responsibilities on the Home Planet" (1993) 18 Yale Journal of International Law; cited in Taylor, supra n 62, 352-353.

human rights. The fundamental principle is to create a better environment so that the benefits of the environment can be enjoyed by present and future generations. In such a case, environmental protection serves solely human interests, reflected in thresholds for harm linked to human needs and concerns.

However, an environmental human right could be complementary to a wider protection of the biosphere *if* the intrinsic value of nature, independent of human needs, is recognised at the same level.[137] This means conventional environmental human rights become subject to ecological limitations which recognise and qualify that individual freedoms are exercised in an ecological context. Such human rights are termed "ecological rights".[138] The objective of such a paradigm shift from environmental to ecological rights is "to implement an ecocentric ethic in a manner which imposes responsibilities and duties upon humanity to take intrinsic values and the interests of the natural community into account when exercising human rights".[139]

The Earth Charter provides tools to achieve this end. It considers human rights not only as the basis of, but also a limitation to, human welfare and existence. Stressing the interrelations between human and non-human welfare, the Charter contains important procedural and substantial human rights (Principles I:3.a, II:7, 8.a, III:9.a, III:11, III:12, and IV:13) and also limitations to human rights (Principles I:1.a, 1:2.a, and II:6.a).[140] This dual approach of the Earth Charter is crucial for a constitution for sustainable development.[141] Further it implies that both human rights and sustainable development are capable of mutual co-existence. Indeed it assumes that "environmental protection, human rights, equitable human development, and peace are interdependent and indivisible".[142]

So, what could be done in the Korean context? Other environmental values or principles such as the intrinsic value of nature might be recognised in the Constitution. Korea needs to go beyond the recognition of the environmental right which was thought to be very progressive innovation of the time. Korea needs to recognise that a human rights approach is just "one useful part of the normative repertory of environmentalism", not everything.[143] At the FAEP and NECA level, the intrinsic value and the right of nature need to be recognised. It is imperative to develop the right in a manner which demonstrates that humanity is an integral part of the biosphere, that nature has an intrinsic value, and that humanity has obligations towards nature. Ecological limitations should be part of rights discourse.

A constitutional reform is necessary to amend Article 35 to change environmental human right to an "ecological right" which recognises the intrinsic value of nature. Otherwise (if the intrinsic value is recognised at statute level without a constitutional reform) the environmental human right may prevail over the intrinsic value of nature in cases where they come into conflict with each other. For example in New Zealand, although the RMA recognises the "intrinsic values of ecosystems" (Section 7(d)) in the "other matters" of Section 7 for which decision-makers are to "have particular regard", the effectiveness of such an ambitious recognition is quite limited as these "other matters" sit below the "matters

[137] Shelton, ibid.
[138] Taylor, supra n 62, 309.
[139] Taylor, supra n 14 and 62.
[140] Bosselmann, supra n 39, 69.
[141] Ibid.
[142] ECI, *The Earth Charter Initiative Handbook* (Earth Charter Initiative, 2002) in Introduction.
[143] James W. Nickel, "The Human Rights to a Safe Environment: Philosophical Perspectives on its Scope and Justification" (1983) 18 Yale Journal of International Law 281, 283.

of national importance" of Section 6 and "sustainable management" of Section 5 in hierarchy. Once the intrinsic value of nature is recognised in the constitution, the FAEP and the NECA will base their principles on the ethic of "respect and care for nature".

2. *Limitations on the principle of integration*

The RMA is remarkable for attempting to incorporate sustainable development into law as it is designed to integrate socio-economic and environmental issues.[144] The Act aims to ensure social, economic, and cultural well-being of people and communities through sustainable management of natural and physical resources. The purpose of the Act reads as follows:[145]

> *5. Purpose*
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The RMA obliges all natural and physical resources to be sustainably managed while "avoiding, remedying, or mitigating any adverse effects of activities on the environment".
How does the RMA define the term "environment"? The RMA espouses an ecocentric approach by providing a holistic definition for the "environment" (including humans and nature) in an attempt to ensure social, economic, and cultural well-being and health and safety of people and communities, including not only ecosystems and natural and physical resources, but also people and communities, and the social, economic, aesthetic, and cultural conditions related to the natural environment and the people within. It is also notable that, although in an implicit manner, humanity is regarded as an integral part of ecosystems (Section 2(1)(a)). The definition of "environment" in the RMA is as below:

> *2. Interpretation*
> (1) In this Act, unless the context otherwise requires, […] environment includes –
> (a) Ecosystems and their constituent parts, including people and communities; and
> (b) All natural and physical resources; and
> (c) Amenity values; and
> (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

[144] David Grinlinton, "Integrated Resource Management - A Model for the Future" (1992) 9 Environmental Planning Law Journal 4.
[145] For discussions on Section 5 of the RMA, see for example, B. V. Harris, "Sustainable Management as an Express Purpose of Environmental Legislation: The New Zealand Attempt" (1993) 8 Otago Law Review 51; Peter Skelton and Ali Memon, "Adopting Sustainability as an Overarching Environmental Policy: A Review of Section 5 of the RMA" (2002) 10 Resource Management Journal 1.

On the other hand, the term "environment" in Korean environmental law refers to the biophysical environment, thereby failing to integrate social, cultural, and economic aspects into the sustainability formula. The environmental legislation in Korea, therefore, is focussed on environmental conservation, not integrated and sustainable development. The principal purpose of the FAEP is not sustainable development, but narrowly defined "proper and sustainable management and conservation of the 'environment'" which is again narrowly defined as the biophysical environment (both "natural" and "living" environments) carefully excluding the social, cultural, and economic considerations. The FAEP stresses the physical variables, leaving out social variables, including equity in resource distribution. In this respect, the sustainable development discourse is too focussed on environmental issues leaving too little for the overall (socio-economic) context.

In the FAEP, Articles 2, 24, and the term "environmental capacity" defined in Article 3(6) acknowledge that humans are dependent on ecosystem functions and that the life-supporting capacity of the environment is limited. These articles, especially the term "environmental capacity" can be interpreted as both an explicit and implicit recognition of an ecological threshold within which human (socio-economic) activities should take place. However, as discussed earlier, the FAEP does not impose any restriction on human rights or freedoms with the term environmental capacity. The concept is used only for the government to take into account when devising policies.

On the other hand, the RMA has an ecological bottom-line. Paragraphs (b) and (c) of subsection 5(2) of the RMA, which is identified as the ecological function of "sustainable management", express long-term considerations on the basis of ecocentrism.[146] This ecological function is linked with the management function – the use, development, and protection of resources, which includes social, economic, and cultural well-being and the health and safety of people and communities – with the word "while", the correct interpretation of which would suggest that all management functions are to be conducted in an ecologically sound way as defined in paragraphs (a) to (c). In other words, the use and development of natural and physical resources are to be used and developed while safeguarding the life-supporting capacity of air, water, soil, and ecosystems, and avoiding, remedying, or mitigating any adverse effects of activities on the environment.

What should be done to Korean environmental law with respect to the principle of integration? Firstly, a holistic definition of the "environment" which encompasses social, cultural, and economic spheres should be created. The current narrow definition meaning the biophysical environment limits the scope of environmental law to environmental protection and restricts any possibility of sustainable development. As stated earlier, sustainable development is not merely about the conservation of nature, but integration of social, economic, and environment concerns under the guiding principle of sustainability.

Secondly, environmental legislation needs to reflect interlinks between various causes of environmental degradation and the overarching purpose of environmental legislation needs to incorporate, beyond "healthy and pleasant lives", concern for social, economic, and cultural well-being. This, however, needs to be accompanied by a hierarchy of conflicting interests as all environmental problems boil down to a conflict between or among different social, economic and political interests.[147] Reflecting the Earth Charter's ideal, the "respect

[146] Bosselmann, supra n 11, 157. See also Taylor, supra n 18, 39-40.

[147] The RMA does not resolve this issue. The principle of sustainable management is not clearly stated in the RMA, thereby leading to obscurity within the concept of sustainable management. The judiciary is expected to

and care for the community of life" needs to be placed at the top of the hierarchy, above other social, economic, and political interests. This can be done by recognising the intrinsic or non-instrumental value of nature.
Thirdly, the utilisation of the concept "environmental capacity" needs to be expanded to function as the benchmark for an ecological bottom-line ensuring sustained ecological integrity. This must be accompanied by the development of proper ways to measure the environmental capacity. Scientific uncertainty should not be an excuse for overestimating the carrying capacity of the environment.

Fourthly, in order to effectively integrate cross-sectors and to abandon the current piecemeal approach for an inclusive approach to environmental conservation, more fundamental changes are needed. A law reform which merges major environmental legislation, such as the NECA, and separate legislation dealing with air, water, and soil quality, for example, could be merged into single legislation under the FAEP stating the overarching principle of sustainable development. New integrative environmental legislation should recognise the physical connections between air, land and water and remove arbitrary differences in the management of land, air and water.

Fifthly, an institutional reform is necessary to facilitate more effective inter-ministerial coordination of environmental issues. Integration of environmental concerns in other policies (external integration) used to take place at the highest level in the Environmental Conservation Committee established by Article 36 of the FAEP.[148] Its members were ministers of relevant ministries. However, the committee no longer exists as Article 36 was repealed in 2002. Instead, the role of the Environmental Conservation Advisory Committee established by Article 37 of the FAEP was expanded and strengthened. The committee currently has two hundred members, 188 of which are from civil society and the remaining 12 places are filled by high-ranking MOE officials. Nevertheless, the abolition of the Environmental Conservation Committee is a step backward regardless of whether it was effective or not.

Sixthly, such law and institutional reforms alone are insufficient to bring about the fundamental changes that are required to incorporate the Earth Charter principles. A social reform is needed to restructure the economy. Notions of economic development need to be reformed to make them consistent with the ability of ecological systems to sustain themselves. The FAEP is a good example on how the principles of the Rio Declaration based on neo-liberalism and neo-classical economic structure shape municipal environmental

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settle the matter. See for example, the *NZ Rail* case: "There is a deliberate openness about the language, its meanings and its connotations which I think is intended to allow the application of policy in a general and broad way". In a word, the RMA does not give a clear ecological and ethical directive. See for example, Klaus Bosselmann and Prue Taylor, "The New Zealand Law and Conservation" (1995) 2 Pacific Conservation Biology 113. For more critiques, see for example, Gordon Smith, "The Resource Management Act 1991: "A Biophysical Bottom Line" vs "A More Liberal Regime"; A Dichotomy?" (1997) 6 Canterbury Law Review 499; Hugh Barton, "New Zealand Double-Think: Many a Slip between Intention and Reality" (1998) 13 Planning Practice and Research 453; Brendan J. Gleeson, "The Commodification of Resource Consent in New Zealand" (1995) 51 New Zealand Geographer 42; Kerry James Grundy and Brendan J. Gleeson, "Sustainable Management and the Market: The Politics of Planning Reform in New Zealand" (1996) 13 Land Use Policy 197; Janet McLean, "New Zealand's Resource Management Act 1991: Process with Purpose?" (1992) 7 Otago Law Review 538; Jeff Murray and Simon Swaffield, "Myths for Environmental Management: A Review of the Resource Management Act 1991" (1994) 50 New Zealand Geographer 48. In general, the criticisms on the RMA can be divided into three categories: (1) legislative indeterminacy; (2) ineffective practice (with no problem with the Act itself); and (3) effects-based approach in neo-liberal context.
[148] OECD, supra n 74, 124.

laws.[149] The neo-liberal underpinnings dilute and distort the very meaning of sustainability as, according to neo-liberal doctrine, sustainable management of the environment (FAEP Article 1) is primarily concerned with controlling environmental harm, while relying on the invisible hand of the market to allocate resources and to determine the macro scale of economic activity.[150] Thus, implicit in neo-liberal ideology, is the idea that the environment is part of the economy. Consequently, there is a limit to which sustainability can be accomplished.

Korea takes a traditional environmental management approach which considers sustainability as one of a variety of aspects to be weighed against each other. Sustainable development appears as a legal concept under which its "costs" are weighed against economic (social and other) benefits. Korea needs to realise that "[o]ur environmental, economic, political, social, and spiritual challenges are interconnected".[151] As the RMA has demonstrated, it is possible for environmental legislation to take a holistic approach to the environment and to integrate social, cultural, and economic aspects, and further recognise the ecological conditions as paramount; no compromise or trade-off between environmental and socio-economic interests is required.

3. From environmental to ecological justice

Without a proper integration of ecology, society, and economy, Korean environmental legislation has adopted a very narrow definition of environmental justice. Environmental justice, let alone ecological justice (between species), concerning spatial and temporal distribution of resources between human beings is not properly addressed in the environmental legislation. While intragenerational equity concerns are intentionally excluded, the focus lies only on intergenerational equity between present and future generations. Some say Korea needs to integrate the notion of intragenerational equity into its environmental agenda,[152] but the dominant mood is that social welfare law and policies should be left alone to address the matter. Indeed, even the progressive judgment from the Supreme Court understands the concept of sustainable development only in relation to intergenerational equity.[153]

Intergenerational equity is recognised as a fundamental principle in Korean environmental legislation, but without specific definition and guidelines. Such specification could be in the

[149] The seeds of economic neo-liberalism were built into the Rio discourse. Rio framed the sustainability agenda in terms of economic growth by allowing market-forces to work efficiently to achieve economic growth accelerated by expansion in free trade and investment. For example, Chapter 2 of Agenda 21 recommended "promoting sustainable development through trade liberalization and making trade and environment mutually supportive" (Article 3). See Bosselmann, supra n 23. The RMA is also founded on neo-liberal ideology. For discussions on the RMA in this respect, see Kerry James Grundy, "Sustainable Management: A Sustainable Ethic?" (1997) 5 Sustainable Development 119.

[150] Ibid; Kerry James Grundy and Brendan J. Gleeson, "Sustainable Management and the Market: The Politics of Planning Reform in New Zealand" (1996) 13 Land Use Policy 197.

[151] Preamble of the Earth Charter.

[152] See Seong-Bang Hong, "Hwanggyeong-Gibongwon: Hanguk-heonbeop Je 35 Jo-e Daehan Haeseokronjeok Ipbeopronjeok Sogo (Environmental Basic Rights: An Interpretive and Legislative Study on Constitution Article 35)" (2000) 22 Hwanggyeongbeop Yeongu (Environmental Law) 473, 481-483.

[153] The dissenting opinion of Judge Kim and Judge Park in the *Saemangeum* case. This will be discussed later in the paper.

form of restrictions on human rights and freedoms as in the Earth Charter (Principle 4.a),[154] as well as a temporal guideline. For example, the RMA states that "the *reasonably foreseeable* needs of future generations" are to be protected.[155] Albeit still vague as to how "reasonably foreseeable" is to be interpreted, the RMA still attempts to provide a more specific requirement for effective implementation of intergenerational justice.

Furthermore, Korean environmental legislation does not draw a clear distinction between an anthropocentric or ecocentric approach towards intergenerational equity. Such an absence of a clear approach, along with other reasons, resulted in the *Salamander* case. It is acknowledged that any further environmental impact could possibly take us to the point of no return, and that what future generations need is the proper functioning of an intact ecosystem. The bottom-line is that we protect the ecological integrity for the future of both humanity and all other forms of life. To facilitate a successful and effective transition from an anthropocentric to ecocentric approach, the non-instrumental value nature needs to be recognised in the constitution, thereby imposing moral and legal imperatives.

4. The precautionary principle?

An OECD report states that Korea formally adopted the principle of precautionary prevention in 1996, but needs to elaborate it further so as to strengthen prevention and avoidance of environmental risks.[156] Indeed, as previously discussed, Article 7-2 falls far short of the precautionary approach. Case law shows that courts in general did not recognise such a principle except in the dissenting opinions of the two judges in the *Saemangeum* case. They placed the burden of proof on those who oppose the use or development of the environment which may result in adverse impact on nature. Indeed, Article 7-2 is not a principle which courts take into account when judging cases. It only obliges the state and businesses to endeavour to minimise the harmful impacts on the environment from their developmental plans and projects. In short, Korea does not yet have the principle of the precautionary approach of the Earth Charter or even of the Rio Declaration.

One of the fundamental principles of natural environment conservation established in the NECA (Article 3(5)) seems, however, to recognise some type of precautionary principle. It states that "when using or developing the natural environment, the balance of ecosystems shall not be destroyed and the value of the natural environment shall not be undermined". It goes on to state that, when natural ecosystems are destroyed, damaged, or disturbed, however, people shall endeavour to restore/restitute the natural environment to the maximum extent possible.

At the outset, this appears to be similar to Section 5(2)(c) of the RMA which is often referred to as recognising the precautionary principle.[157] Although Article 3(5) of the NECA and Section 5(2)(c) of the RMA are similar, the difference lies in the word "any adverse effects" and the definition of "effect" in the RMA. The term "effect" is broadly defined to include

[154] Also see Article 5 (Intergenerational Equity) of the IUCN Draft International Covenant on Environment and Development.
[155] Emphasis added in italic.
[156] OECD, supra n 74.
[157] *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66; *McIntyre and others v Christchurch City Council* [1996] NZRMA 289. For a summary of the cases in respect to the precautionary principle in the RMA, see for example, Ministry for the Environment, *National Guidelines for Managing the Effects of Radiofrequency Transmitters* (MfE, Wellington, 2000), 70-79.

"Any potential effect of low probability which has a high potential impact" (Section 3(f)). In other words, the RMA takes a more precautionary approach than the FAEP and the NECA because the RMA requires resource uses to avoid, remedy, or mitigate any potential adverse effect of low probability but high potential impact. Such an approach may have yielded a different result in, for example, the *Dorongnyong* case.

At most, some kind of "precaution" in Korean environmental law is only realised through the PEA which was introduced in 2002.[158] It is a move away from traditional authoritarian state-led development projects to a more democratic decision-making procedure. The government has begun to listen to and consult local residents, civil society, and other stakeholders, to take into account different social, cultural, and economic concerns relating to the environment before it makes decisions on development and resource issues.

B. Sustainable Development in National Environmental Policy

In the absence of clear ethics and principles of sustainable development in environmental legislation, the substance of sustainable development is by and large determined by the government and its effectiveness is totally dependent upon the effectiveness of the policies of the state agencies. Therefore, it is crucial to examine how sustainable development appears in national policy and vision statements and how the government implements measures to achieve sustainable development in Korea.

In principle, the Korean government committed itself to the objectives of the Rio Declaration and the Johannesburg Plan of Implementation and supports them as guiding principles.[159] For example, Principles 1, 3, and 4 of the Rio Declaration constitute the essence of the national environmental law in Korea.[160] Furthermore, Korea follows the approach outlined in Agenda 21. As of December 2004, 210 out of 250 local governments have Local Agenda 21 in place and 19 are at the drafting stage.[161] The participation rate stands at 91 percent, one of the highest in the world. As the MOE acknowledges, however, they are poorly implemented.[162]

1. Green Vision 21 and National Vision for Sustainable Development

The FAEP requires establishment of a 1ong-term environmental policy plan every ten years. In accordance with this requirement, the Green Vision 21 was prepared as the first long-term environmental policy in January 1996. It provides a set of policies and some quantitative targets to be achieved by 2005. It aims to achieve "environmentally sound and sustainable development", or more specifically, "to improve the quality of life by harmonising preservation and development within the limits of the nation's environmental resources, with

[158] FAEP Articles 25-27.
[159] See OECD, supra n 74, 173.
[160] *Principle 1*: Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature; *Principle 3*: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations; and *Principle 4*: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.
[161] MOE, *Hwanggyeong Baekseo (The White Book of the Environment)* (Ministry of Environment, Seoul, 2005), 72.
[162] Ibid.

the benefits to accrue equally to this generation and succeeding ones".[163] It covers a wide range of environmental issues for achieving sustainable development: enforcing regulations; introducing economic measures for improving environment quality; chemical substance management; promoting environmental industry or technology; leading roles in global environmental measures; and clarifying budget and financial resources for accomplishing the vision.[164]

These policy goals were rearticulated in the National Vision for Sustainable Development declared by the President on 4 June 2005:

> *Vision*: Build an advanced country while maintaining balance between the economy, society, and the environment.
> *Principles*: Awareness on the limits of natural resources; precaution and integration of policies; and participation and responsibility.
> *Goals*: Integration of development and conservation strategies; improvement of the living environment; establishment of an environment-friendly economic structure; establishment of a policy framework for the resolution of conflicts; and active participation in international efforts to address global environmental issues.

The policies essentially aim to integrate environment (conservation) and economy (development) to maintain balance between competing interests. As discussed earlier, the FAEP includes a provision that requires the government to consider the environment and economy in an integrated manner when developing policies and assist businesses and industries to operate within the environmental capacity (Article 7-3). This is the only legal provision in Korean environmental law attempting to integrate the environment and the economy. However, as discussed before, the FAEP is designed to leave the matter to the discretion of the government so as not to hinder economic growth. How does the government, then, approach the challenge to integrate environmental and economic concerns?

2. "Integrated consideration" for environment and economy: Market-based approach to sustainable development

In attempting to integrate environmental conservation and economic development, the Korean government, under the slogan of "harmony of environmental protection and economic growth",[165] takes a neo-liberal market-based approach to regulate economic activities relating to the environment. The underlying perception is that "market failure has accounted for the aggravation of environmental problems" due to "the insufficient reflection of environmental resources like water and air as currency value in the decision-making process of an economic entity".[166] Such a market-based anthropocentric approach is

[163] Meehye Lee and Zafar Adeel, "Managing Air Pollution Problems in Korea", in Adeel (ed), *East Asian Experience in Environmental Governance: Response in a Rapidly Changing Region* (United Nations Publications, New York, 2003). Also see OECD, supra n 74, 123.
[164] Guiding principles of the Green Vision 21: reinforcing pollution prevention methods rather than pollution control; integrating environmental and economic policy; environmental policies based on market economy and democracy; expanding and enforcing the Polluter-Pays Principle; and promoting international cooperation.
[165] MOE, *Green Korea 2005: Towards the Harmonization of Human and the Nature* (Ministry of Environment, Seoul, 2005).
[166] Han, supra n 8.

fundamentally deceptive as only nature's instrumental (economic) value to humans is taken into consideration.

Nevertheless, the objectives set by the government in an effort to integrate the environment and the economy are (1) to support innovation of environmental technology to become a key environmental industrial country by 2007; and (2) to create environmental markets and establish the basis for environmental and economic integration through the enforcement of the extended producers responsibility system and water-saving action plans.[167] The emphasis is on developing economic instruments and the research and development of eco-industries and environmental technology in order to accomplish continued economic growth while still protecting the environment to the extent possible. In other words, Korea is running after two hares: to create a win-win situation for its environment and its economy by holding down the (economic) costs of environmental conservation. While acknowledging the importance of continued ecological integrity for survival of present and future generations, Korea can be seen as having taken a compromising technocentric and market-based approach towards sustained economic development. What Korea has envisioned is not environmentally sound and sustainable development, but environmentally sound economic development.

V. HOPES AND BARRIERS IN THE KOREAN CONTEXT

This section explores the legal, institutional and cultural contexts of Korea to identify some of the major hopes and obstacles in the path towards an ecologically sustainable society. Culture acts as both a barrier and an opportunity for Korea in achieving sustainable development.

A. Barriers in the Korean Legal Institutional Context

The role of law is not as instrumental in Korea's environmental protection as in its economic growth because of "a weak environmental law regime coupled with the inherent limit of Korea's legal infrastructure results in arbitrary discretion enjoyed by the regulator".[168] The problem is one of the Korean political and legal system in general. Because Korea has a highly centralised system of government – strong executive with weak legislative and judicial branches – the government agencies are provided with virtually unlimited discretionary power to exercise their own authority. As such, the bureaucracy does not perform as mandated by legislation and the courts look on with folded arms.[169] Therefore, even when ambitious legislation is enacted the law in practice often falls far short of the public's expectation. This is partly because there is nothing in the environmental legislation, nor indeed elsewhere, to hold state agencies accountable, judicially or otherwise, for the way in which their policies are created and implemented. The exercise of the Korean government's discretion as a keeper of the environment should be monitored and checked. Korea is in need of an independent watch-dog similar to the Parliamentary Commissioner for the Environment of New Zealand.

[167] MOE, *Environmental Policies for 2003* (Ministry of Environment, 2003), 25-29; MOE, supra n 161, 217-247.
[168] Cho, supra n 68, 78.
[169] Cho calls the practice of the bureaucracy "sham environmentalism".

The same is no doubt true of the liability rules created by the legislation. While there have been examples of actions for damages to recover compensation for losses, they have played very little part in securing the protection of the environment.[170] In order to successfully gain a legal remedy, a litigant must prove immediate and personal damage.

Furthermore, it is very unlikely that an individual will win against the government in a legal case. The judiciary is heavily influenced by the government.[171] To keep the public interested in environmental protection and to achieve sustainable development, the Courts should become a forum in which the public may play a contributory role with viable and innovative legal theories.[172] Likewise, the bureaucratic structure should be reformed to free judges from the control of other political actors.[173]

B. The Hope: Traditional Cultural Resources and Grassroots People

The famous essay, *The Historical Roots of Our Ecological Crisis* (1967) by Lynn White Jr., which held the anthropocentricity of Judeo-Christianity responsible for environmental problems, marked the start of a search for a new (non-western) ethical framework to guide humanity in dealing with nature.[174] Daoism and Buddhism in particular, along with many other non-western philosophical and religious worldviews, have been identified as containing resources for a new environmental ethic. The Earth Charter's ethics are some examples of fruits of research and adaptation of fundamental environmental ideas of the East

[170] Fisher, supra n 107, 106.
[171] Cho, supra n 68, 77-78.
[172] Cho, supra n 2, 513.
[173] Why does Korea experience such problems? Along with political and institutional reasons, there are also cultural reasons. The Korean legal system is based on traditional Confucian concept of law and governance and blended with continental European civil law traditions. "Rule of man" (or "rule of virtue") not "rule of law" present in the Confucian cultural context. Also the notion of "rule *by* law" is often noted to describe the situation in Korea (along with other East Asian countries such as China). Korea is not a typical "rule-oriented" or "rule-based" society. Korean people still adhere to a culture based not upon rule, but upon human relationship. Consequently, "most Koreans, government officials and citizens alike, widely see all bodies of law as goals rather than strict standards that demand immediate compliance. Naturally, this has give rise to a good deal of confusion and variability in enforcement and compliance." Eder, supra n 4, 26. For an analysis from a political-economic approach, see Cho, supra n 68. Furthermore, environmental law is regarded as periphery. For example, it is not included in the Bar exam. Hong-Sik Cho, "Hwanggyeongbeop Somyo: Hwanggyeongbeop-ui Wonri, Silje, Bangbeopron-e gwanhan Silheomjeok Yeongu (Sketching Environmental Law: A Experimental Study on its Principles, Practices, and Methodology)" (1999) 40 Seoul Daehakgyo Beophak (Seoul National University Legal Studies) 318. For discussions on cultural aspects, see for example, JaHyun Kim Haboush, *The Confucian Kingship in Korea: Yongjo and the Politics of Sagacity* (Columbia University Press, New York, 2001); Rak-Hyun Kim, *Environmental Conflict in Korea from a Confucian Perspective: Community Responses to the Siting of a Radioactive Waste Disposal Facility in Buan County* (M.Sc. Thesis, The University of Auckland, 2005); Sang-Jun Kim, "The genealogy of Confucian *Moralpolitik* and its implications for modern civil society", in Armstrong (ed), *Korean Society; Civil society, democracy and the state* (Routledge, London & New York, 2002); R. Peerenboom, "Confucian Harmony and Freedom of Thought: The Right to Think Versus Right Thinking", in De Bary and Tu (eds), *Confucianism and Human Rights* (Columbia University Press, New York, 1998), 57-62; Chaihark Hahm, "Constitutionalism, Virtue, and Propriety", in Bell and Hahm (eds), *Confucianism for the Modern World* (Cambridge University Press, Cambridge, 2003); Chaihark Hahm, "Law, Culture, and the Politics of Confucianism" (2003) 16 Columbia Journal of Asian Law 253; Chaihark Hahm, "Rule of Law in South Korea", in Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (RoutledgeCurzon, London & New York, 2004).
[174] Lynn White Jr., "The Historical Roots of Our Ecologic Crisis" (1967) 155 Science 1203.

Asia, such as doctrines of respect for nature, interdependence, harmony, and integration between life forms of Daoism and Buddhism.[175]

The hope lies within the grassroots of Korea and their traditional East Asian cultural and philosophical resources. Although Korea is constantly bombarded with western culture, at the sub-conscious level exists a resilient East Asian way of life. Indeed, drastic socio-economic changes have occurred in just one generation. Yet, it has only been one hundred years since the formal socio-political ideology of the state, Confucianism, was replaced with modern political ideas. Over 90 percent of Korean people are adherents of Confucian culture,[176] and 47 percent are Buddhists.[177] Such statistics signify that traditional cultures and religions exert huge influences over Korean society despite the fact that they are not visible at the formal level.

Such cultural resources crystallise at the formal societal level by empowering grassroots people and civil society to demand more stringent environmental law and policy. Korean civil society is powerful and has brought about democratisation in Korea.[178] Those who devoted themselves to the democracy movement in the 1970s and 1980s became environmental activists, enabling the birth of powerful environmental organisations in Korea.[179] In fact, the Korea Federation for Environmental Movement (KFEM) founded in 1993 is the largest environmental organisation in Asia.[180] Activities by such environmental non-governmental organisations have been the predominant factor behind the public's increased environmental awareness. Environmental activism has manifested in widespread public support in cases such as those discussed in this paper, the *Saemangeum* and *Dorongnyong* cases.[181] For example, the "Friends of Salamanders" have some two hundred thousand registered supporters.

It is important to note here that the environmental discourses of these Korean environmental movements are soaked in traditional environmental ideas.[182] Environmental activism will

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[175] In the East Asian tradition, there is no concept of nature that is against or separated from culture or artificiality as in the West, but only a holistic view of nature that views culture or humanity and nature as one entity. Hong-Key Yoon, "A Preliminary Attempt to Give a Birdseye View on the Nature of Traditional Eastern (Asian) and Western (European) Environmental Ideas", in Ehlers and Gethmann (eds), *Environment Across Cultures* (Springer-Verlag, Berlin & Heidelberg, 2003), 133-134.

[176] Byong-Ik Koh, "Confucianism in Contemporary Korea", in Tu (ed), *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (Harvard University Press, Cambridge & London, 1996), 199.

[177] Buddhism is the biggest religion in Korea in terms of number. The percentage of Buddhists is calculated among religious people which constitute 53.9 percent of the total population of people aged 15 or more. For the statistics, see KOSIS, *Number of People Active in Religious Activities* (2006) Korea National Statistical Office <http://kosis.nso.go.kr/cgi-bin/sws_999.cgi?ID=DT_1WDA011&IDTYPE=3&FPUB=3> (at 19 April 2006).

[178] See Miranda A. Schreurs, "Democratic Transition and Environmental Civil Society: Japan and South Korea Compared" (2002) 11 The Good Society 57.

[179] Sunhyuk Kim, "Democratization and Environmentalism: South Korea and Taiwan in Comparative Perspective" (2000) 35 African and Asian Studies; Sunhyuk Kim, "Civil Society and Democratization", in Armstrong (ed), *Korean Society: Civil Society, Democracy and the State* (Routledge, London, 2002); Su-Hoon Lee, "Environmental Movements in South Korea", in Lee and So (eds), *Asia's Environmental Movements: Comparative Perspectives* (M.E. Sharpe, Armonk, 1999).

[180] For comprehensive discussions on the history of environmental movements in Korea, see for example, See-Jae Lee, "Environmental Movement in Korea and Its Political Empowerment" (2000) Korea Journal 131; Lee, ibid. The secretary-general of the KFEM, Choi Yul, is a former democratisation movement activist who was imprisoned for six years during Park Chung-Hee's authoritarian regime.

[181] Also for a discussion on the traditional cultural discourses observed in the biggest environmental protest movement in Korean history against the siting of a radioactive waste disposal facility, see Kim, supra n 173.

[182] See ibid.

certainly continue to grow, probably at an exponential rate, fuelled by the invisible yet powerful cultural resources concerning the environment and nature embedded within Korean society.

In this way, traditional environmental ideas might be increasingly reflected in environmental legislation. Arguably, there is already some indication of this. For example, the notion of harmony in Article 2 of the FAEP, "To maintain harmony and balance between human beings and the environment", which reflects the Daoist environmental philosophy, may be a sign of unconscious legal utilisation of ethical resources derived from tradition.

Korea has surprised the world in many respects; for example, its rapid economic development; democratisation and transfer of power from military rule to a civilian government in the late 1980 and economic liberalisation in the 1990s. Only very optimistic observers could have foreseen these positive changes. For this reason, Korea was once referred to as "one of the most improbable places on earth".[183] Once enough motivation has built up for secure environmental protection, the advancement in environmental law and its practice ensuring adequate environmental conservation for sustainable development may be the next improbable case in point.

VI. CONCLUSION

The current ecological crisis is also an ethical and legal crisis. A new ethical framework is needed to create new legal obligations in relation to the environment. We need to learn from the great ecological wisdom and rich diversity of cultures across the East and the West. The Earth Charter is the fruit of such efforts. It is a synthesis of the legacy from all corners of the world. The Earth Charter's vision of strong sustainability based on an ecocentric ethic must be embraced in both national and international laws. This will inevitably occur because humanity is beginning to realise where we stand today: "a critical moment in Earth's history, a time when humanity must choose its future".[184]

Korean environmental law is still evolving towards recognising the principle of sustainable development articulated in the international arena. Sustainable development is yet to be recognised as the overarching guiding principle of Korean society. Currently, sustainable use and management of the natural environment to ensure future generations an equal opportunity to enjoy healthy and pleasant lives is recognised in the major environmental legislation.

Although a viable discourse on sustainable development has become increasingly common in Korea, it is still limited to the definition articulated in the Brundtland Report. In this respect, the concept of "sustainable development" in the Korean context as implicitly expressed in law and policies means the following: sustained economic development to ensure healthy and pleasant lives of both present and future generations of humanity (mainly the Korean citizens) while recognising the importance of maintaining harmony and paying consideration to the environment and the economy. Unlike the RMA, the environmental

[183] U.S. Ambassador James T. Laney, speech before the Fulbright Forum, Seoul, April 1994; cited in Eder, supra n 4, 171.
[184] Preamble of the Earth Charter.

legislation in Korea lacks ethics and values.[185] Ethical norms and values such as ecological justice and the intrinsic value of nature which undergird the Earth Charter principles will need to be added into the public discourse on sustainable development in Korea.

All of these factors suggest that Korea is in need of laws, institutional (bureaucratic and judicial), and social reforms to bring about changes necessary for a paradigm shift from economy to ecology. However, such changes need to come from the people, and from their heart, by realising that "when basic needs have been met, human development is primarily about being more, not having more".[186] If Korea is to be a role model, as it previously was for its economic development model, there needs to be a successful transition from growth-oriented economy towards an ecologically sound and sustainable society in the relatively short future. One hopes that Korea's civil society and grassroots organisations equipped with the cultural and religious resources of East Asia such as Daoism and Buddhism will soon bring about a successful bottom-up paradigm shift from economy to ecology.

[185] For discussions on ethics of sustainable management in the RMA, see Malcolm Grant, "Sustainable Management: A Sustainable Ethic?" (1995) Resource Management News.
[186] Preamble of the Earth Charter.