Toward Transnational Studies of American Environmental Law: A Case of Joseph L. Sax across the Pacific

アメリカ環境法のトランスナショナル研究にむけて ジョセフ・L・サックスの太平洋を越えた役割を事例に

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本稿の目的は二つある。第一に、人文社会科学の分野において、とくにアメリカ研究のなかでも環境法を例にとり、国民国家の境界を越えた研究が最近になって盛んになっている歴史的文脈を整理することにある。実際に「トランスナショナル」と題する学会誌が登場するのは、ごく最近である。たとえば、*Journal of Transnational American Studies* と題した学術雑誌が創刊されたのは 2008 年であり、また *Transnational Environmental Law* の創刊は、2012 年である。人為的につくられた境界線に縛られない研究の必要性が、とくに 1970 年代以降、強く認識されているにもかかわらずである。第二に、こうした越境研究の重要性・可能性について、検証する。本稿では、アメリカ合衆国における環境法の父という異名をもち、公共信託論を唱えたジョセフ・サックスを例にとりあげる。日本の法学者である淡路武久らによれば、サックスは、1970 年に日本で初めて「環境権」が提唱されるにあたり、大切な役割を担っていたという。そして、サックスが受賞した数々の栄誉が米国を始め、ヨーロッパや日本で認められてきたのに対して、彼の功績は米国という国境の中で論じられてきた。人文社会科学のなかでも国民国家という伝統的な分析枠組みが強く残る法学と歴史学において、いかに国境を越える現象が大事な研究対象となりうるか、本稿の事例を通して指摘することにしたい。

I.

The purposes of this research note are two fold: first to contextualize the emergence of transnational studies, particularly that of American environmental law; and second to illuminate the importance as well as possibility of such study with an example of Joseph L. Sax whose influence went across the Pacific (“Hotei Toso no Juyosei”; “Machi no nakano Bunka Kankyo Hogo nado”). As Takehisa Awaji (2008, 204-5), a Japanese law professor, pointed out, as an advocate of the US “public trust doctrine,” Sax played a critical role in instituting Japanese “environmental rights” through his activities in the first international social scientist conference on pollution in March 1970. Including his vital task in this International Symposium on Environmental Disruption, his professional significance has been recognized by numerous awards beyond national boundaries: 1976 Environmental Quality Award, US Environmental Protection Agency; 1977 Elizabeth Haub Award, Free University in Brussels; 1984 William O. Douglas Legal Achievement Award of the Sierra Club; 1985 Environmental Law Institute Award; 2004 Distinguished Water Attorney Award; and 2007 Blue Planet Award in Japan, just to name a few.

Nonetheless, Sax has been remembered primarily as a “national” figure within nation’s boundaries of American legal history (DiMento 2008). This symbolizes the problematic nature of still powerful notion of nation-centered legal studies. In fact, as early as in the 1950s, there had been a number of cooperative projects involving law schools as well as legal scholars around the globe combine both training and the opportunity for research. For instance, Harvard, Michigan and Stanford Law Schools, six Japanese law schools and the Legal Training and Research Institute in Japan had been cooperating in a project for more than a half decade, that has had “appreciable” influence upon the participating lawyers across the Pacific (Howard 1959, 594). While, as Yasuhide Kawashima argues, “These American developments [of public

trust doctrine] stimulated the formation of a new environmental rights theory in Japan" (1987, 1178), according to Shiro Kawashima, "there is no [public trust] doctrine or its equivalent in Japan" (1994-1995,246). Therefore, it is important to re-situate Joseph Sax in a transnational context and re-examine his role in the history of environmental law.

II.

Just as 2008 publication of *Journal of Transnational American Studies* (*JTAS*) suggests, in the first years of the twenty-first century, scholars in the field of humanities and social sciences have started to broaden the interdisciplinary study of American cultures in a transnational context. This is the first academic journal explicitly focused on the "transnational turn" in American Studies. This is the phrase Shelley Fisher Fishkin, Professor of American Studies at Stanford University, coined in her 2004 American Studies Association presidential address. She argued, "The goal of American studies scholarship is not exporting and championing an arrogant, pro-American nationalism but understanding the multiple meanings of America and American culture in all their complexity":

> Today American studies scholars increasingly recognize that that understanding requires looking beyond the nation's borders, and understanding how the nation is seen from vantage points beyond its borders. At a time when American foreign policy is marked by nationalism, arrogance, and Manichean oversimplification, the field of American studies is an increasingly important site of knowledge marked by a very different set of assumptions – a place where borders both within and outside the nation are interrogated and studied, rather than reified and reinforced. (Fishkin 2005, 20)

The *JTAS* aims to bring together the numerous contributions to transnational American Studies from scholars who focus on such traditional scholarship as race, class, gender as well as topics as diverse as cultural studies, media studies, performance studies and law. As this new periodical symbolizes an open-access forum for Americanists in the global academic community, scholars question boundaries both within and outside the nation and focus instead on the multiple intersections and exchanges that flow across those borders. Moving beyond disciplinary and geographic borders that might limit the field of American Studies, the editors of this new journal argue, it is a new vehicle that brings together innovative transnational work from diverse, but often disconnected, sites in the U.S. and abroad.

Where does this "transnational" American Studies come from? The term is relatively new as the founding year of the *JTAS* illustrates. According to Ian Tyrrell (2007), historically its trend in the 1990s was associated with work in American Studies, particularly in the field of history. Transnational history has been defined and advocated by David Thelen, Thomas Bender, and others who concerned the movement of peoples, ideas, technologies and institutions across national boundaries. It applies to the period since the emergence of nation states as important phenomena in world history. While this epoch can be dated from the time of the Treaty of Westphalia in 1648, which set out the international law of relations between sovereign states, it is principally used to describe histories of the period since the birth of the American nation.

Responding to the need of "globalizing" historical inquiries, in 1992 the *Journal of American History* devoted a special issue to "internationalizing" American history. The journal's editor, Thelen, also organized a special seminar on "transnational" approaches at the Institute for Social History in Amsterdam, in 1998. In the following year he published the participants' work as another special issue, "The Nation and Beyond: Transnational Perspectives on

United States History." Meanwhile, the Organization of American Historians had begun, allied with Thomas Bender and New York University, another project to make American history moving beyond the national boundaries. For instance, a series of conferences held at La Pietra in Florence, Italy, led to the 2002 publication of *Rethinking American History in A Global Age*, with contributions by key La Pietra participants. This book became the standard introduction to the new approach. Though closely associated with American history, soon work was appearing on many other aspects of transnational history (Bayly 2006).

The new transnational history was related to, but not the same as globalization or comparative history. As Tyrrell (2007) argues, globalization is generally rejected because of its links with modernization theory, its focus on unidirectional activity, on the homogenization of the world, just to name a few. However, it is recognized that global perspective should be part of transnational history. In contrast, transnational history is "a broader church" that encompasses global history because the US itself was connected globally. Trans-cultural or inter-cultural relations were possible competitor terms but practitioners at La Pietra considered these as too broad and vague. Thus, the transnational history concept enabled scholars to recognize the importance of the nation while at the same time contextualizing its growth. Moreover, advocates of transnational history generally distinguished their work from comparative history. In the end, Tyrrell concludes, transnational history aimed to put national developments in context, and to explain the nation in terms of its influences beyond the boundaries.

Though the "transnational" research project was relatively new in the historical discipline, the term was an older one in social science discourse. For instance, it was used in political science to describe the activities of multinational corporations and international labor unions in the 1970s. Robert Keohane and Joseph Nye edited *Transnational*

Relations and World Politics. A slightly older usage came from the field of law, as discussed in detail later, where the American judge and academic Philip C. Jessup was using the term and developing the field of "transnational law" (TL) in the 1950s in response to the growth of new supra-national institutions, including the United Nations agencies. According to Jessup, the subject "is the law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching on up to the so-called 'family of nations' or 'society of states'":

> Human society in its development since the end of the feudal period as placed special emphasis on the national state, and we have not yet reached the stage of a world state. These facts must be taken into account, but the state, in whatever form, is not the only group with which we are concerned. The problems to be examined are in large part those, which are usually called international, and the law to be examined consists of the rules applicable to these problems. But the term "international" is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states). (Jessup 1956, 1)

Indeed, the first usage of the term "transnational law" continues to be disputed. According to Peer Zumbansen (2006), while scholarship focused on the origins of the term for a long time, it has since become apparent that the real challenge of TL lies in its scope and conceptual aspiration. Alongside the domestic-international dichotomy that marked international law for a long time, TL offers itself as a supplementary and challenging category within interdisciplinary research on globalization and law. As famously conceptualized in a series of lectures by Philip C. Jessup at Yale Law School in 1956, Zumbansen argues, TL "breaks the frames" of traditional thinking

about inter-state relationships by pointing to the myriad forms of border-crossing relations among state as well as non-state actors. His framework would help to reflect on the dichotomies underlying and informing international law while moving onward to embrace a wider and more adequate view of global human activities. Jessup wrote that he should use the term "transnational law":

> to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories. (Jessup 1956, 2)

As Clara Altman, a legal historian wrote in her blog entitled "The Challenges of International Legal History" in January 2011, legal historians had a range of interests in the field of transnational studies. At the 2011 American Historical Association conference in Boston, she wrote:

> I attended several panels that addressed the meaning, practice, and implications of international [law] and transnational [legal] history, and the particular challenges of researching, writing, and publishing beyond the traditional borders of national histories.

Furthermore, she continued, legal historians now have excellent examples of work that helped to internationalize the study of legal history, and that have posed significant challenges to several traditional areas of historical inquiry. He pointed to Paul Halliday, *Habeus Corpus: From England to Empire*, Liz Borgwardt, *A New Deal for the World: America's Vision for Human Rights*, and Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy*. These authors encouraged many to think more globally about American

legal history and convinced many that there is still a great deal more to study about the implications of American law for the world, and world history for American law (Altman 2011).

Reflecting on these comments on international legal history, Altman (2011) wondered about the specific challenges that legal historians would face when doing transnational work. In her research on law in the Philippines in the early twentieth century, she had to reconcile and account for various legal traditions, institutional forms, jurisprudential disagreements and overlapping codes. She has found that in many cases one can answer the more technical questions with further research. The more difficult issues, it seems to her, are those that concern some of the enduring questions in the study of American legal history. Transnational legal histories push scholars to think about the relationship between law and society in new ways. It is because they have embraced geographic and cultural difference and expanded the understandings of legal agents and modes of exchange. Or it is because traditional definitions and understandings of "law" and "society" do not quite fit the nature of international legal institutions and aspirational international agreements.

III.

Why then do we need the transnational institutionalization of environmental law across the Pacific? According to one of the first Japanese environmental social scientists, Nobuko Iijima, no Japanese environmental institution can be free from American influence across the Pacific. In the textbook of environmental sociology, she argued:

> nobody can deny the influence of the US government on the Japanese governmental response to public nuisance problems around the year 1970. This year, American government, through the state of the union address by the President, showed the

> active attitude toward the environmental problems. After the end of the Second World War, Japanese government has constantly and positively accepted political, economic, and cultural influence of the United States. Therefore, Japan cannot escape from American influence only in the case of anti-pollution policies. (Iijima 1993, 24)

She concludes, "I will not ask which factor, namely the harsh realities of pollution victims, the severities of anti-pollution movement, or American influence, had the greatest impact on the Japanese governmental response" (Iijima 1993, 24).

In addition to academics, legal practitioners acknowledged the US as a role model for Japanese environmental problem solving. For instance, in September 1970 the Japan Federation of Bar Associations pointed out the fact that in 1970 US President Richard Nixon sent a special message to the Congress on February 10 and realized 23 legislations and 37 action plans with multi-billion dollar budget. And the Associations asked the Japanese government to follow the lead of the United States counterpart.

In fact, the year 1970 was an important historical marker. In Japan it was the year when the Japanese government, during the special session, passed fourteen major pieces of environmental legislation. For example, in 1970 the Basic Law for Environmental Pollution Control of 1967 was revised and strengthened, and all references to the need to harmonize environmental protection with economic expansion were removed. Instead, criminal penalties were instituted for certain violations of the civil code. In addition, increased powers to regulate air and water pollution within their jurisdictions were delegated to the local governments. Moreover, mechanisms for identifying, certifying, and compensating pollution victims were created. All of them ultimately led the following regular Diet session to establish a new and independent government agency, the Environmental Agency, with

the specific power to consolidate the administration of environmental protection.

We find another important American influence on Japanese environmental law in the year 1970. In March of that year the first International Symposium on Pollution by world-wide social scientists was held in Tokyo which invited Joseph L. Sax of Michigan Law School, the author of revolutionary 1970 article "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" and the founder of *Environmental Law Reporter*. ("Kokusai Kogai Shinpojiumu"). This 1970 Tokyo symposium, with the help of Sax, for the first time suggested "environmental rights" as the key legal principle to tackle environmental problems. It was defined as "a human right to a decent and healthy environment" and six months later the Japan Federation of Bar Associations echoed it in their Human Rights Symposium in Niigata (Nito and Ikeo 1971).

According to Simon Avenell (2012), it grew out of Swedish ambassador Sverker Astrom's appeal for greater attention to the environment at the 1968 UN General Assembly. In response, the International Social Science Council established a standing committee on environmental disruption. Shigeto Tsuru was the head of the committee. He and Allen Kneese from Resources for the Future organized the symposium which received financial and logistical support from Tokyo and Osaka cities, the Japanese Ministry of Education, and the Tokyo Electric Power Company. Symposium participants included members of the Pollution Research Committee, Tokyo and Osaka City officials, and representatives from the Ministry of Health and Welfare. Overseas participants included legal expert Joseph Sax and numerous economists including: Allen Kneese, theorist of market systems sensitive to common property resources; Wassily Leontief, advocator of national accounting for externalities; Marshall Goldman, examiner of the Soviet Union's pollution; and Karl William Kapp, founder of ecological economics.

These foreign powerhouse participated in a pollution tour of Japan. The committee members took them to Tokyo Bay, Yokkaichi, Osaka, and Mount Fuji where they breathed pollution firsthand. The Tokyo Declaration was signed by the participants, which asserted that all people and future generations have "a fundamental right with respect to the environment." It was the idea of environmental rights that would carry over to the landmark UN conference in Stockholm two years later (Avenell 2010, 20-22; Tsuru 1970, xiii; Tsuru 1972, 67).

Coming as it did on the heels of the Tokyo Pollution Prevention Ordinance in 1969, the symposium added steam to the struggle for national regulatory reform, realized only months later at the Pollution Diet. Overseas participants left Japan with a new appreciation for life in an "advanced polluted nation." Deeply moved, one of the key symposium participants, Sax obtained a copy of the distressing film *Cries from Minamata*, which he later screened for specialists at Resources for the Future (Miyamoto 2006, 108; Tsuru 1972, 17).

Joseph L. Sax, according to Richard Lazarus of Georgetown University Law School, would be on everyone's list if legal scholars were asked to name the most significant natural resources law scholars of modern times. "During the past four decades," Lazarus wrote, "Joe Sax has remained one of the constant, eloquent voices in the public policy arena, promoting doctrinal reform responsive to the needs for resource conservation and preservation and environmental protection." He concluded, "It is hard to conceive of another scholar who has so much influenced and prompted not only further legal scholarship, but also changes in the law itself -- through judicial decisions, legislative enactments, and executive branch actions" (Lazarus 1998, 325-6). And Sax himself, upon the reception of Blue Planet Award in Tokyo in June 2007, looking back the past three visits to Japan including the one in 1970, recalled "this distingueished prize gives me the opportunity to return again to Japan, where I have on three previous occasions come to work on environmental issues with Japanese colleagues who did

pioneering work in the field of environmental law at a time when it was dismissed by many as a passing fad" (Sax 2007, 8).

The public-trust doctrine in natural resources law, advanced by Sax, is by no means an entirely new idea but, like the privacy doctrine of *Warren and Brandeis*, is built upon the tradition of common law and a series of court cases. These American developments stimulated the formation of a new environmental rights theory in Japan. This theory holds that an injunction should be granted irrespective of whether there exists a direct danger to health, where environmental quality is threatened. Scholars and courts supporting this doctrine argue that such environmental rights are implicitly recognized in "the pursuit of happiness" in the Constitutional Article 13 and "the right to maintain the minimum standard of wholesome and cultural living" in Article 25 (Sax 1970; Takahashi 1975, 291-2; Sakuma 1977; Upham 1979; Gresser 1981, 136).

IV.

After 1970, Americans witnessed the explosive increase in the use of environmental law. Japanese legal scholars were well aware of these currents of change in the United States. For instance, Norihisa Ikuta, who introduced American environmental law in Japan for the first time in 1970, noticed Columbia, New York, Rutgers and Fordham Universities had opened environmental law courses in 1969 (Ikuta 1970, 143). Did this current of change come across the Pacific? The answer is yes and no. No, because considering the fact that the Japanese did not witness the creation of environmental law school until 1997, the answer is hardly positive. Or at least we may say, the manifestation was different on the other side of the Pacific. For instance, at the level of higher education in Japan, during the 1970s, we see the establishment of a very few environmental programs in art and design field, followed by engineering field during the 1980s.

It changed dramatically in the 1990s when we see the explosion of environmental programs in such fields as life science, agricultural science, home economics, and social science. And finally in 1997 Sophia University established Japan's first environmental law department, and since then, there has been no addition to it.

However, one may confirm the American influence across the Pacific because of the enormous interest in American environmental law by the legal scholars in Japanese universities where they did not create environmental law school per se but teach environmental legal scholarship with reference to American cases. For instance, the Public Nuisance Focus Research Group, led by Tokyo University Law Professor, Ichiro Kato, published a series of articles on "Japanese Public Nuisance Laws" in 1964 and "Foreign Public Nuisance Laws" in the following year, which ultimately turned into a monograph, entitled *Emergence and Development of Public Nuisance Law* in 1978. Meanwhile, in 1971 Watanuki Yoshimoto, Tsukuba University Law Professor, studied American Environmental Law as a Fulbright Visiting Scholar in the United States, began publishing a series of articles in the following year, starting with "American Environmental Law (Watanuki 1971, 1)."

A series of public nuisance cases received a great deal of public attention and media coverage and ultimately the Japanese government sought a radical solution to the problem. The environmental element of the social movements and political activism of the 1960s and early 1970s were manifest most strongly in Japan by local citizen groups that pressured the government to pass some of the world's most stringent pollution laws. In a series of lawsuits in the early 1970s, many judges decided in favor of a plaintiff and admitted corporations' responsibility for damages caused by their products or activities. In 1973 the Pollution Health Damage Compensation Law was legislated and provides industry funds for victims. That history has been told by political scientist Margaret McKean's 1981 book, entitled

Environmental Protest and Citizen Politics in Japan. She argued that Japanese environmentalism differed from the Western movement in that it sought to safeguard the environment in order to protect man rather than to save the environment for its own intrinsic value. In other words, McKean concluded, environmental problems have been defined as conditions that rend the fabric of society, not the web of nature.

Historically, as above-mentioned Ichiro Kato summarizes, in Japan during the late 19th century French law had the major influence while in the 20th century German law replaced French. Before World War II, Japanese considered British and American laws irrelevant because they were so different from the continental laws. Yet, after the Second World War, particularly through the Japanese Occupation, American law became the most influential in Japan. During the rapid economic expansion in the post-WWII period, Japanese coined the term "kogai" as the direct translation of public nuisance, which, according to Kato, mainly consisted of Japanese air, water and noise pollution (Kato 1964, 10-11). Here the Japanese legal scholars found the relevance of learning American public nuisance law and the legal cases in order to solve the Japanese public nuisance cases particularly during the 1960s. Traditionally, they argued, Japanese courts dealt with such problems as private nuisance cases. While Japanese interest in American public nuisance law at that time brought about ex post facto relief, Isshu Takahashi argues, American environmental law was already developing around the idea of salvation beforehand (Takahashi 290). And by the mid-1970s, facing the new realities of economic depression caused by the first oil shock, legal landscape in Japan was dramatically changing. Looking back the situation of 1975, law professor Toshiyasu Tomii lamented that:

> under the economic slump, people are losing sight on the harsh realities of pollution and environmental disruption or, with the victory over the five major pollution litigation with the enactment

> of pollution laws, people think the problem is long gone. (Tomii 1976, 67)

The Japanese legal system provided little access to the courts for ordinary citizens. Vagueness of the laws gave the government maximum interpretive discretion. Civil laws gave the average citizen no power to sue an offending company. Indeed, as early as in 1970 Norihisa Ikuta analyzed *Scenic Hudson Preservation Conf. v. FPC,* 354 F2d 608 with a hope that Japan would establish a foundation for environmental lawsuits (Ikuta 1970, 148). However, forty-some years later, Japanese Constitution does not have any specific provision regarding the environmental rights. Thus, environmental rights in Japan refers to a set of rights that cover the conservation of the environment through the invocation of human rights already stipulated in the Constitution. Among the Constitutional basic rights, the right to pursue happiness, stipulated in Article 13, and the right to live, in Article 25, are typically quoted for possible invocation of environmental rights.

Indeed, Joseph L. Sax was aware of and recognized such problem. He stated:

> there remains a pervasive problem that vexes every effort to state principles of environmental protection in the form of legal rights: what is the source of the claim that there is a fundamental environmental right, and how is one to determine its content? (Sax 1990-91, 93-4)

One question is who holds the environmental rights. A dominant view is that it is natural persons. However, limiting eligible plaintiffs to individuals will generate numerous legal problems. In Japan, Tsuneyoshi Yamamura (1996), among others, have proposed the "rights of nature." It seeks to make nature itself eligible to be the plaintiff.

Some, including a constitutional law scholar Motomi Yajima (1997, 98), argue that it will be unnecessary as long as an environmental protection organization is given such standing but admit that there is a need for further discussion on this matter.

V.

This paper has first contextualized the emergence of transnational studies in humanities and social sciences and then examined the critical role of an American legal scholar, his idea, and environmental law across the Pacific. As Natsuki Aruga, a "transnational" Japanese Americanist, suggested, the definition of transnational studies center on the "subject" of study that moves from one nation to others. In this paper, it was Joseph L. Sax, his idea of "public trust doctrine" and newly emerged environmental law that moved beyond the national boundaries. Indeed, it is a case study of the movement of peoples, ideas and institutions across and through national borders. In this familiar mode of transnational studies, one "follows the subject as it moves across national boundaries, thus the study becoming transnational" (Aruga 2011, 42). In short, transnational studies examine "units that spill over and seep through national borders, units both greater and smaller than the nation-state" (Seigel 2005, 63).

In fact, in 1992, the founder of *Vanderbilt Journal of Transnational Law*, Harold G. Maier wrote a short forward, commemorating the twenty-fifth anniversary of the journal, entitled "Some Implications of the Term 'Transnational.'" In it he argued:

> I think it is safe to say that no other body of law has changed as much during the Twentieth Century as has the law applicable to international matters. (Maier 1992, 147)

Furthermore, in April 2012, Cambridge University Press launched a

new academic journal, aptly entitled *Transnational Environemntal Law* (Heyvaert and Etty 2012). In 1956 when Phillip C. Jessup coined the term "transnational law," he did so with the recognition that human affairs could not properly be confined by the artificial territorial boundaries of nation-states. Indeed, just as this legal journal of transnational studies that selected Jessup's characterization, this paper has emphasized global interdependence rather than the political competition suggested by the older, and more familiar terms.

* This paper is based upon Joseph F. DiMento and Kazuto Oshio "Forgotten Paths to NEPA: A Historical Analysis of the Early Environmental Law in the 1960s United States" *Journal of American and Canadian Studies* 27 (2010) as well as Kazuto Oshio "Environmental Law Schools: A Japan/US Comparison" paper presented at the American Society for Environmental History/ National Council on Public History Joint Annual Conference, Portland, Oregon, 13 March 2010, and financially supported by Daizaburo Yui "Comprehensive Studies on the Cultural Transformation and Border-transgression of the 1960s United States" Japanese Society for Promotion of Science, Grants-in-Aid for Scientific Research Basic Research (A) Project, 2007-2011 as well as Shitsuyo Masui "America and the Atlantic World Searching for an American Identity from Transatlantic Perspective" Sophia Intrauniversity Research Collaboration Fund, 2011-2014.

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