Theoretical Problems on Relief System for Injury Caused by Environmental Pollution and the Influence of Pollution Trial on Environmental Policy-making

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1 Experiences in Japan

The pursuit of private profit by industries with saving investment for preventing pollution, and the policy for high-degree economic growth adopted by the central government caused serious pollution-related damage. Above all, injuries to people's health and life should be noticed. The typical are Itai-itai disease caused by cadmium involved in the effluent from a mining industry, Minamata disease caused by methyl mercury from chemical industries, and asthma by air pollution in many districts.

The pollution-related victims have demanded the industries, which are alleged to be pollution sources, to compensate for the damage and take measures to prevent pollution. In Japan the traditional way of settlement of environmental disputes was extrajudicial settlement, where a certain sum of money was paid to victims and in return for it they were required to abandon any further claims, without making clear the cause and therefore any liability. In those cases above mentioned, the industries intended to settle the disputes in such a traditional way, and succeeded only with a part of Kumamoto Minamata disease patients. However, in the late 1960's victims brought lawsuits one after another against industries for damages. These included the Four Major Pollution Lawsuits; Kumamoto Minamata disease case, Niigata Minamata disease case, Yokkaichi air pollution case and Itai-itai disease case.

In these cases the ultimate purposes of victims were to make clear the causation and legal responsibility of the industries. Decisions in

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the early 1970's approved plaintiffs' claim and ordered defendants to pay damages. These decisions went beyond the traditional way of settlement and realized legally reasonable settlements, which have epoch-making significance in Japan. However, although thirty-nine years have passed since the occurrence of Minamata disease in Kumamoto Prefecture was socially known in 1956, complete settlement has never been reached until now. This will be explained later.

Beside injury by industries, there are injuries by airport (including the airbase) noise, shinkansen suprerexpress railways noise, and automobile noise and exhaust. It is impossible to reinstate the injured health or life to status quo. Therefore, it is clear that prevention of such an injury must be the most important. On the recognition of this fact lawsuits have been brought against administrative authorities since the late 1960's. But in these cases, the courts rejected any injunction, though the claims for damages were allowed.

Additionally I would like to mention two types of lawsuit pending at present. The first includes several Minamata disease cases, in which two legal issues are involved. One is what the criteria should be to judge whether a given patient suffers from Minamata disease or not. The other issue is whether or not the central and local governments should be liable for the failure to exercise the powers to control the industries not to cause such an injury. The second type includes five air pollution lawsuits for damages, in which the defendants are industries which are alleged to be major pollution sources in urban areas. And the legal issues are where the limit of their liability should be, and whether or not the effect of nitrogen oxides on the given pollution-related victims can be found.

2 Legal system concerning compensation for health damage

(1) The legal system available to get compensation for injury to health or life comprises the civil action and the administrative relief system. The claim for damages is guaranteed by the civil law. The important are provisions concerning torts in the Civil Code, the Mining Law, the Air Pollution Control Law, the Water Pollution Control Law and the State Redress Law.

Article 709 of the Civil Code is the general provision on tort,

which adopts the principle of fault liability. The requirements of tort under this article are an intentional or negligent act, injury to right, and causation between the two. The Mining Law, the Air Pollution Control Law and the Water Pollution Control Law adopt the principle of non-fault liability. The State Redress Law prescribes the governmental liability for damage caused by a civil servant through illegal exercise of the power or illegal omission to exercise the power, as well as for damage by the defect of public works.

The administrative relief system was established by the Pollution-related Health Damage Compensation Law of 1973. When the amount of compensation paid under this system does not cover the full damage that a victim has really suffered, he or she is entitled to a further claim for damages.

(2) The first issue in the environmental pollution trial was the criterion to decide the existence of factual causation. The burden of proof of factual causation is imposed on the plaintiff. The plaintiffs adopted the epidemiological approach to prove it. On the contrary the defendants, industries, sometimes argued that the epidemiological approach was not sufficient in proof of causation. They asserted that in order to prove a toxic material, such as cadomium, methyl mercury etc., to be the cause of a disease, it is necessary to make clear the amount of the material enough to cause the disease, and pathological mechanism from intake of the material to appearance of the symptoms of the disease. In the Itai-itai disease case, a district court held in 1971 that the proof based on the epidemiological approach was efficient in pollution cases. This decision was the first among the Four Major Pollution Lawsuits, which has been followed by subsequent decisions.

The causal material of a disease is usually looked for retrospectively after the occurrence of the disease. At that time the symptoms are clearly defined for the research. When the material was identified, we can ask a question; what effects have it caused on the population in the contaminated area? Epidemiological researches to answer this question have made clear the existence of non-typical or non-specific symptoms around the typical or specific symptoms. We know

at present the Hunter = Russell Syndrome as a typical and specific combination of symptoms of Minamata disease, and around it a variety of symptoms said to be non-typical or non-specific. Should a plaintiff with only a non-specific symptom, that is paralysis of the limbs, be recognized as a Minamata disease patient? This is an issue in the pending Minamata disease trials.

Argument about the limit of efficiency of an epidemiological research has been continued.

(3) The second issue in the pollution trials was concerned with fault. The trend of fault theory can be well illustrated by two final decisions in the Minamata disease cases, Niigata Minamata disease case (the first) and Kumamoto Minamata disease case (the first).

Fault can be established by proving the existence of foreseeability of an injury and avoidability of the risk on the part of defendant. The occurrence of Niigata Minamata disease was socially known in 1965. Until then researches after the cause of Kumamoto Minamata disease had been carried out, and a detective technique of methyl mercury had been developed. The district court declared in 1971, in the Niigata Minamata disease case, that the defendant industry had been negligent, since it had been able to foresee the existence of methyl mercury in the effluent from its factory and the occurrence of Minamata disease by the toxic material, and to prevent the disease by taking precautions including the ultimate way of stopping the operation.

According to this decision, the foreseeability and avoidability on the part of defendant, in the Kumamoto Minamata disease case, would have been denied. However, the court held the defendant negligent on the ground that the objects to be foreseen could be thought more abstractly; the causal material could be any unconfirmed toxic material instead of methyl mercury itself, and the disease could be any bad influence on human health instead of Minamata disease defined by its symptoms. This decision shows the point reached in the theory of fault, and stands in effect closely near the non-fault liability.

(4) The third issue has been joint responsibility of plural industries

for the injury caused by air pollution. In the Yokkaichi pollution case, one of the Four Major Pollution Cases, the court declared the defendants, six industries involved in or with close connection with a industrial complex, liable jointly for the pollution-related asthma (Article 719 of the Civil Code). This decision was followed by three district court decisions of 1991 and 1994, but these cases except one are pending now in the high courts. A case, Nishiyodogawa air pollution case, reached a judicial compromise in March, 1995. As above mentioned, in these the defendants were chosen among numerous pollution sources. However, although the courts declared joint liability, they limited the extent of liability to the portion of defendants' contribution to the regional air pollution. There remains the possibility for defendants to be allowed divisible responsibility in some conditions.

(5) The fourth has been the responsibility of the central and local governments. In the pending Minamata disease lawsuits, the plaintiffs are claiming damages against the central government and the relevant prefecture, as well as the industry, on the ground that the governments failed illegally to exercise the powers to prevent the disease. If the powers entrusted under the Food Sanitation Law and two water pollution control laws (Water Quality Conservation Law of 1958, Factory Effluents Control Law of 1958. Both were abolished in 1971.) etc., it was possible to lessen the number of patients and the degree of their injuries. Decisions of lower courts are now classified into two groups; one declared positively and the other negatively.

Noise pollution caused by airplane taking off and landing is also an important problem in Japan. The central government should be liable for injury, because it is the administrative organ of airports (Article 2 of the State Redress Law). This rule was adopted by two Supreme Court decisions in 1981 and 1993.

For the injury caused by the airbase, which is used exclusively by the American air force, the Japanese government should pay compensation under a special law enacted in connection with the U.S—Japan Security Pact (cf. Supreme Court decision in 1993).

Decisions, which held the government liable for environmental pollution, may be important for relief of victims, and also important in the sense that those have a great impact in social and political context.

(6) The fifth issue is concerned with the way of assessing the amount of damages. The traditional way is still prevailing in practice, by which the total amout of damages paid to an individual plaintiff is assessed by summing the damages for each item of loss. The loss can be classified into pecuniary loss or non-pecuniary one. The pecuniary loss is divided into loss of earnings and expenses including those to be certainly necessary in the future. Damages for non-pecuniary loss are called consolation money.

In the process of environmental litigation another way of assessing damages has been developed. It excludes estimation of each item of loss and requires to estimate the loss as a whole, though it is accompanied with every effort to make clear the reality of loss from various viewpoints. Courts have accepted this way in effect in the cases in which the plaintiffs claimed damages in this way. But the courts have understood their claims as those for consolation money without any intention of further claims. The reasons why such a way has been developed and accepted are as follows.

a The number of plaintiffs in a pollution lawsuit amounts to scores or hundreds. Requirement to estimate each item of loss on the ground of evidence with all of the individual plaintiffs may delay the decision and therefore make the speedy relief of plaintiffs impossible.

b In many cases the victims were farmers or fishermen. When the business was carried out by a family, even though a member suffered health injury, it was difficult to estimate the loss of earnings, or, if possible, the amount of damages would be likely to be small, because the loss of earning capacity with one was possibly covered by other members of the family. Therefore the amount of damages assessed by the traditional way could not be accepted by victims in the light of severity of the injury.

c Health and life must be of equal value among all people.

However, the amount of loss of earnings differs in each case. As the loss of earnings is the main item of loss, it may cause the great difference in damages to be paid to the individual plaintiffs.

d To bring, proceed with and win a lawsuit, the plaintiffs must overcome many difficulties, such as gathering facts of evidence, formation of public opinion favourable to the lawsuit, collecting a fund, taking countermeasures against various hostile social actions and so on. In these circumstances the most important is strengthened solidarity of plaintiffs. The great difference in the amount of claims by individual plaintiffs is undesirable.

e It is significant that the function of consolation money to adjust the total amount of damages has been accepted in theory and practice. Consolation money is originally damages for pain and suffering. Assessment of the amount depends on judges' discretion. In assessing the amount, judges are allowed to take account of the various factors in a given case. When they hold that the total amount, which is assessed by the traditional way, is small and will not be accepted by common sense in the light of the severity of injury, they can enlarge the total amount to a proper extent by expanding the consolation money. Following this direction, in pollution cases the court can assess the amount of consolation money, considering the fact that the plaintiffs abandon any further claims.

By these reasons, the way of claim for damages for inclusive damage or damage as a whole, without itemization of loss, has been prevailing in pollution cases.

Usually the compensation is paid in a lump sum. Periodical payments are available, but the plaintiffs have not asked such a way of payment, for there is insecurity with the defendant's financial position in the future.

3 Administrative system for relief

(1) An administrative system for relief of pollution-related patients was established by the Pollution-related Health Damage Compensation Law of 1973 (amended in 1987). The decision of 1972, in the Yokkaichi pollution case, had a direct influence on this legislation.

To receive compensation under this law, a patient must be certificated officially by the governor of a relevant prefecture or the mayor of a designated city, whose decision should be made on the opinion of the Pollution-related Health Damage Certification Council.

Certificated patients are classified into two categories. The first is the patient of non-specific disease caused by air pollution, and in order to be certificated, it is necessary for a patient to satisfy the requirements concerning the designated area for the relief, the designated disease and a certain period of residence. The second is the patient of specific disease, and also to get the certification, he should satisfy the requirements concerning the designated area and disease. The designated specific diseases comprise three kinds; Minamata disease, Itai-itai disease and chronic arsenic toxicosis.

Certificated patients are entitled to receive compensation under the law. When a certificated patient died or a patient was certificated after death, the compensation is paid to his or her survivors. The compensation includes medical care benefits, compensation for medical treatment, compensation for physical handicap, survivors' benefits and so on. These compensations are paid in principle periodically.

The fund for compensation is collected from polluters on the ground of the Polluter Pays Principle. 80% of the fund concerning the first category is supplied by the charge in response to pollution load amount from factories and other enterprises, and 20% by a part of motor vehicle weight tax. The total fund concerning the second category is supplied by the special charge imposed on the industry that caused the designated disease.

(2) In 1988 the central government nullified the designation of all of forty-one areas concerning the first category of disease through the amendment of the Cabinet Order for enforcement of Pollution-related Health Damage Compensation Law. Though compensation is continued to the patients and the survivors who have been already entitled to the benefits, it became impossible for a patient of the disease caused by air pollution to be officially certificated on and after

March 1, 1988.

This nullification has been criticized as retrogression of the environmental policy.

The areal requirement for the certification of the first category of patient was that the area, where the patient was dwelling, was designated under the law. The necessary conditions for the designation were that the concentration of sulfur dioxide was of high level in the area and that the proportion of people, with the symptoms of asthma, to the population was considerably large in comparison with that in an unpolluted area. The average concentration of sulfer dioxide reached the highest point in 1967, and afterwards it has been continuously improved. At present in almost all areas it fulfills the Environmental Quality Standard. Considering only this fact, it may seem to be reasonable to have nullified the designation. However, sulfur dioxide was chosen as an indicator of air pollution. Then even if the concentration of sulfur dioxide was reduced, this does not mean that the combined pollution was also reduced. Because nitrogen oxides and suspended particulate matters are considered to be main causal materials, the criticism against the nullification is reasonable.

As for Minamata disease, there remain over 2500 persons, who applied for certification, but whose applications are pending, because the governor has delayed the decision. This took place for several reasons, but shows a defect of the existing system.

The criteria, on which the governor should decide whether the applicant should be certificated or not, were shown by the Environment Agency. I think they do not reflect the recent medical research and are unfavorably strict to the victims. The pending Minamata disease lawsuits are those brought by patients whose applications were denied, or whose applications remain still pending. The district court decisions showed two trend. One was about as same as the official criteria, and the other adopted other criteria which are more favorable to patients.

4 Legal system concerning damage to property

When an act, causing damage through environmental pollution, satisfies the requirement of tort under relevant provisions of the Civil

Code, the Mining Law etc., the sufferer is entitled to claim for damages. Expenses paid by a local government to eliminate sludge from a river or a port under the control of the government, and expenses of the local government to clean the contaminated underground water to be supplied for drinking water, these are compensated, if the causal act is tortious.

In addition, there exists a legal system to demand industries, which caused environmental pollution, to bear a part or whole cost necessary for the pollution control projects by the central or local government. The projects include, for example, soil dressing in the ag ricultural land contaminated over a certain standard and dredging (See the Law concerning Enterpreneur's Bearing the Cost of the Public Pollution Control Works of 1970).

5 System of administrative settlement of pollution disputes

Disputes may be settled by the court. Furthermore in Japan, a system of dispute settlement by an administrative commission has been established by the Law concerning the Settlement of Environmental Pollution Disputes of 1970. At state level the Environmental Disputes Coordination Commission, and in each prefecture the Prefectural Environmental Disputes Council etc. are set up. The Commission and the Council etc. make efforts to settle the disputes by means of mediation, conciliation or arbitration. In 1992, the Commission newly accepted seven applications for settlement, and the Councils etc. thirty-seven in all.

6 Pollution lawsuits and their function in environmental policy-making

Disputes take place when the pollution-related injury has occurred, or the danger of injury is existing. Pollution sources may be factories, other enterprises, airport, super-express railways, highway and so on. Those who plan the construction of such facilities and administrate these facilities belong to either private or public sector. Development by the private sector needs usually various permissions by the relevant administrative agencies. And the agencies are entrusted the power to control pollution under the laws, such as the Air Pol-

lution Control Law of 1968 and the Water Pollution Control Law of 1970.

We know the tight connection between the industry and the government or administrative organ. Accordingly residents or citizens have not been allowed chances to express their opinions in the process of making a development plan, as well as in the administrative process of permission. Residents protested the industry etc. against pollution, and claimed damages again and again. But they could hardly reach the settlement through negotiation in good faith. The government was usually reluctant to exercise the power to control pollution.

Since the middle of 1960's, we experienced serious environmental hazard. This fact and the growth of right-consciousness among citizens after World War II encouraged the anti-pollution movement in every district of Japan. The relation between citizens and the government or industries was never collaborative, but necessarily hostile. The anti-pollution movement has formed the counterpower against the government and industries. As to issues expected to be settled judicially, citizens brought finally lawsuits. Therefore I can say that the lawsuit was a strategic option in the anti-pollution movement.

The anti-pollution movement compelled the local government to improve its environmental policy, and subsequently the central government to do so. In the history of legislation, the two water pollution control laws of 1958, mentioned above and superseded by the Water Pollution Control Law of 1970, were the first legislation to control pollution, and enacted just after a famous fishermen's violent protest to a paper and pulp manufactory against damage to fishery caused by its effluent. In 1961, a large scale of occurrence of asthma in Yokkaichi City, Mie Prefecture, was socially known. Consequently movements against plans of constructing industrial complexes took place in many districts. It was in 1962 that the first law for air pollution control, the Smoke and Soot Regulation Law, was enacted. The movement in Sizuoka Prefecture succeeded in stopping the construction of an industrial complex planned there. In response to such movements the Basic Law for Environmental Pollution Control of 1967, which was superseded by the Basic Environment Law

of 1993, was enacted. The law included the notorious terms "harmony with the wholesome economic growth" to be considered in protection of living environment, which played in fact a role to prevent the development of environmental policy by the government.

About 1970, the anti-pollution movement was enhanced to the highest point. The Four Major Pollution Lawsuits and the Osaka international airport lawsuit were pending in district courts. During the 64th Session of the Diet in 1970, fourteen bills concerning environmental affairs passed the Diet, and at that time the notorious terms were eliminated from all laws. The district court decision in 1972, in the Yokkaichi pollution case, motivated the Pollution-related Health Damage Compensation Law to be enacted next year. Behind the legislation there existed a demand for speedy relief on the part of victims, and expectation on the part of industries that the enhanced anti-pollution movement would become calm, if they changed the traditional and arrogant attitude and paid some compensation without long delay.

The high court decision in 1975, in the Osaka international airport case, declared that the central government should not permit aircraft's landing and taking off between nine o'clock in the evening and seven in the next morning, except in case of emergency. Although this decision was reversed and remitted by the Supreme Court in 1981, it had a political influence, and the government took measures responding in fact to it.

After the first oil crisis in 1973, the economic stagnation changed the relation among political powers and made the environmental policy retrogress. The nullification in 1988 of the designation of area concerning the relief under the Pollution-related Health Damage Compensation etc. Law of 1973 (amended in 1987), and the change of the Environmental Quality Standard of nitrogen dioxide to a lower level in 1988 were remarkable examples.

Many pollution lawsuits are pending still now, and many citizens' or residents' movements are proceeding, which are taking up various issues.

At last I would like to consider the organizational conditions of the pollution lawsuit. Before World War II, victims' protest and de-

mand to the industries lacked almost always support by citizens and scientists. Their movements were isolated or disunited, and therefore could not succeed.

In the lawsuit, the main constituents are the victims themselves and a group of lawyers. This is as same as the ordinary suits. The characteristics of the recent pollution lawsuits consist in the continuous support by many academic scientists, engaged in medicine, technology, economics, meteorology, legal science etc., to research the content of injury, its cause, the social mechanism behind it and to find legal rules to settle the dispute, as well as the support by public opinion, citizens, mass media and trade unions. The victims have organized their associations in districts and continued to appeal or demonstrate for receiving general support. The group of lawyers has been the excellent conductor of the whole actions concerning lawsuits. Each association of victims and each group of lawyers have exchanged useful information through the nation-wide network, and assisted each other.

In these circumstances it has been possible to develop the legal theory concerning environmental problems through the judicial process. However, as for the lawsuit for an injunction, there exist many barriers to get over.