

# Some recent trends of the Public Injury or Environmental Law<sup>1)</sup> in Japan<sup>2)</sup>

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## Introduction

This paper<sup>4)</sup> is a translation of the draft with some modifications and additions which was written for my speech in the Korean Environmental Law Association in Seoul on March 30, 1985. The draft was intended to introduce several recent trends of Japanese Environmental Law mainly for those foreigners who were interested in this field.

## Chapter 1. Interrelation between human being and natural environment

Generally speaking, history of human being is one of development of its labor productivity and economic activity. Changing its

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1) Kōgai Ho (public injury law in English) is usually interpreted as environmental law in the western world. For example, *Environmental Law and Policy in the Pacific Basin Area*, edited by Kato, Kumamoto and Mathews, 1981, Tokyo Univ. Press and unpublicized translations of *Japanese Laws* (1984) of this field by the Environmental Agency. However, it seems to me that Kōgai Ho or public injury law has a meaning somewhat different from environmental law in other countries. About what is the difference between these two words and where it comes from, I think, Japanese public injury law started from civil tort action or liability for damage caused by business activities. But, as described later, recently the notion of public injury law is changing from tort liability law to environmental law. Nevertheless the concept of public injury law is still predominant in the scholars of civil law. This caused me to use public injury law by the side of environmental law in this paper and to adopt both words in the similar meaning.

tool from stone to iron, mankind could increase its productivity and, in modern industrialized society, by adopting mechanized and mass production process, it could raise up so remarkably its labor productivity and standard of living as it had never seen before. However, as the process has mostly used fossile fuel as energy source on a wide scale, it is now criticized that there will be the limits to these human activities. The report of Roman Club<sup>5)</sup> enumerates five factors as to the limits to growth, that is, population of human being, agricultural productivity, industrialization, environmental pollution and consumption of unrennewable natural resources. Even though criticized as too pessimistic<sup>6)</sup>, it is indicating a serious problem which mankind

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  - 4) The writer wrote a paper "How the environmental pollution problems are handled by the Court, the Public Authority and the Citizens' Group of Environmentalist in Japan?" (in English) in Tokyo Kyoiku University's Shakai Kagaku Ronshu (The Journal of Social Sciences) No. 20 (1973). In this paper, the writer promised to write a paper on Japanese statutes of this field in English as the part two. However, I had been too busy to do that. The present one is not continued from the former one, but intended to explain the Japanese Public Injury or Environmental Law at the turning point, basing upon the writer's own experiences of a member of Kōgaitō Chosei Iinkai and Chuō Kōgai Taisaku Shingikai (the Central Council on Environmental Pollution Control from 1977-). The form of citations of Japanese legal materials here is mostly adopting "Form of Citation of Japanese Legal Materials" in 42 Washington Law Review, 589 (1967). Materials in Japanese cited here are so indicated. Materials without such indications except decisions of the court are in English.
  - 5) "The Limits to Growth, A Report for the Club of Rome's Project on the Predicament of Mankind" by D. H. Meadows and others, 1972, translated into Japanese by Ohkita.

has not tackled before. Of course, every country has endeavored to conserve natural environment. But, as the problem is closely connected with economic activities, people's endeavor of this kind is conditioned by the stage of their own economical development. This paper is aiming to introduce briefly what kind of measures have been taken and what kind of policies are going to be taken in this field in Japan.

## **Chapter 2. History of Environmental Law in Japan**

As almost all industrialized countries, Japan has rapidly intensified environmental pollutions after industrial revolution in the eighties of the last century with use of fossile fuel as energy source and concentration of population into urban areas. As to the history of Japanese Environmental Law, it may be divided into before and after the enactment of the first national law, Suishitsu Hozen Ho (hereafter cited as SHH, Water Quality Protection Law, Law No. 182, 1958), regulating discharge of waste into the public waters. In order to know characteristics of the Japanese Public Injury or Environmental Law, however, following divisions would be more appropriate.

### **1. The First Period (from 1880 to 1945)**

The first period started from around 1880, just the beginning of industrial revolution in Japan, and extending to 1945, the end of the Second World War. In this period, Japan has developed from a fuedal and agricultural to a highly industrialized country.

The main energy source for industry in this period was coal until the middle of this century. The first regulation against smoke or soot emitted from the factories using coal as energy source was Seizojo Torishimari Kisoku (Plant Regulation Rule of Osaka Prefecture) of 1888, which prohibited to establish a plant with a smokestack in the

- 6) "Mankind at the Turning Point, The Second Report to The Club of Rome" by M. Mesarovic and E. Pestel, 1974, translated into Japanese by Ohkita and Kaya.

old area of Osaka city. At this time, there were only a few legal regulations of national level, that is, provisions restricting activities which were “possibly to be injurious to public welfare” (Art. 20. Cl. 1 of the former Kasen Ho(River Law)of 1896), provisions not to afford a grant which would be injurious to public welfare or to withdraw grants afforded when they were found injurious to public interest (Articles 32, 39 of old Kōgyo Ho (hereafter cited as KH, or Mining Law) of 1905, and provisions making a proprietor of mining right to pay compensation for damage caused by his application for mining right or his operation of mining (Chap. 3 of 1896 KH). 1939 Amendment of KH has to be introduced here, because of its impact on development of public injury or environmental laws in Japan. Japanese mining industry had brought several calamities and had given damage to the nearby residents in its development<sup>7)</sup>. These calamities had aroused wide social concern and induced the Diet to introduce no-fault liability of the proprietor of mining right for the injuries caused by his operations. In 1939, the Diet enacted the Amendment under which the mining companies were made liable for damage of the residents caused by their activities without fault as an exception to the fault principle under Art. 709 of Civil Code and a new speedy and less expensive arbitration procedure was introduced (Chap. 5) (Law No. 23). In my opinion, the no-fault liability and arbitration procedure adopted by the Amendment has had great influence on development of public injury or environmental law for relieving injured people by the public injuries or environmental pollutions.

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7) The most notorious calamities caused by the mining corporations were caused by the waste discharged from the Asio Copper Mine and the smoke emitted from the Hitachi Copper Refining Plant and Besshi Copper Refining Plant. See, *Kindai Nihon no Kōgai* (in Japanese) (*Materials of Public Injuries in Modern Japan*) by N. Kamioka, 1971.

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Meanwhile, even though we had only local regulations as counter measures against air pollution regulating smoke or soot emitted from factories, the town planning law was enacted on national level. Against unplanned and rapid urbanization in the past, the Diet enacted Toshi Keikaku Ho (hereafter cited as TKH or Town Planning Law) in 1919 and Tokubetsu Toshi Keikaku Ho (Special Town Planning Law) in 1923. Under these laws, modern town planning started in Tokyo Metropolitan Area, Yokohama City and some other cities. These Laws were intended not directly to regulate environmental pollutions but primarily to protect public safety and public welfare (Art. 1 of TKH). Nevertheless, the fact that these laws were enacted was indicating intensified environmental pollutions caused by rapid urbanization and concentration of residents into the cities.

A decade later in 1932, the Governor of Osaka Prefecture issued Baien Boshi Kisoku (hereafter cited as BBK or Soot Restriction Rule) (No. 36). Even though BBK was applicable only to Town Planning Areas of Osaka City, Sakai City and Kishiwada City, it prohibited soot emission from the factories' stacks of over the third degree of Ringelman's Chart for more than three minutes per hour and also authorized the officers of the Prefecture to enter the factory and inspect its emission device, and if necessary, the Governor to instruct the proprietor to modify its emission device or restrict its use. The Governor of Tokyo Prefecture issued Kōjō Torishimari Kisoku (Factory Control Rule) in 1929, Kōon Torishimari Kisoku (Excessive Noise Control Rule) in 1937 and, by abolishing above mentioned Kōjō Torishimari Kisoku, issued Kōjō Kōgai-oyobi-Saigai Torishimari Kisoku (Rule to prevent Public Injury and Disaster caused by Factory), (Metropolitan Police Bureau Rule No. 14) in 1943. The last mentioned rule adopted a permit system for establishing factories and started to control emission of noise, vibration,

noxious gas and waste water from the factories. These rules were indicating that the measures for preventing and controlling environmental pollutions at that time were pointed exclusively against the factories and their activities.

In this period, Japan had been progressing toward a country of heavy and chemical industries from one of light industry and agriculture. In 1911, Kōjō Ho (Factory Law) was enacted for protection of the factory workers. Japanese Laws of this period was characterized by its indifferent attitude to conservation of natural environment. Japan was so far behind U.S.A. which started to protect natural environment from the beginning of this century<sup>8)</sup>. Another feature of Japanese approach or attitude in this period was that she was making much efforts in relieving injured farmers or fishermen by water or air

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8) After 1960, state constitutions of Florida, Illinois, Michigan, New York, Pennsylvania, Rhode Island, Virginia and others, have been amended for protection of environment. It must be remembered, however, that movement for natural environment or conservation had started from the beginning of this century, even if the movement was most intensive in the sixties and seventies. For example, Art. 13, Sec. 175 of Virginia Constitution, which recognized natural oyster bed as special status, Art. 1, Sec. 25 of California Constitution (Amended, Nov. 8, 1910) which assured people's right on fishing on the state publicly owned waters, and especially Art. 14 of New York Constitution (Amended, 1938) which prescribed protection of wild forests and animals as state policy and restrained violations of these provisions by the suit of people. See, A. E. Dick Howard, *State Constitutions and the Environment*, Va. L. Rev. Vol. 58, (1972). On the other hand, Japanese people had been very proud of colorful smoke emitted from the factories until the end of the second period, that is, about 1958, because it was indicating prosperity of the industrial areas. J. Gresser, *The 1973 Japanese Law for the Compensation of Pollution Related Health Damage: An Introductory Assessment*, Law in Japan, Vol. 8 (1975), at p.97. As will be described later in this paper, recently people is changing for conservation of environment. In my opinion, this change will necessitate some modifications of public injury law in its content and notion.

pollutants discharged from operation of factories or minings. I believe, these features have made Japanese Laws and decisions of the court to adopt "Public Injury" in place of 'Environmental Pollution'.

2. The Second Period (from 1945 to 1958)

This period covers from the end of the Second World War to 1958 when energy source changed from coal to oil and has brought restoration and remarkable growth to Japanese economy<sup>9)</sup>. In this period, heavy and chemical industries which consume huge amount of oil was completed. This changed the major air pollutant from soot into sulfar dioxide. However, the approach for preventing public injury did not make any modification and the measures of the same kind were adopted as those in the first period. Several local authorities such as big cities and those local authorities which had industrial districts in their areas enacted Kōgai Bōshi Jōrei (Prevention of Public Injury Ordinance). Tokyo Prefecture in 1949, Osaka Prefecture in 1950 and Kanagawa Prefecture in 1951 successively enacted the Ordinances of this sort. As heavy and chemical industry has progressed after 1955, Tokyo Prefecture Council and Osaka Prefecture Council amended the above mentioned ordinances and adopted more rigid measures against the public injuries. Also in 1955, Fukuoka Prefecture Council enacted Ordinance of the same content. Under these amended ordinances, the amount of noise, gas, particulates and vibration emitted from the designated factories were controlled and the officers were authorized to inspect the factories and to order or advise their managers to modify their devises, in order to correct their unlawful activities.

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9) Environmental problems and the economy in Japan is briefly sketched in "Environmental Problems and the Economy in Japan and Malaysia" by Prof. I. Niimi in Water Management and Environmental Protection in Asia and the Pacific, ed. by Kato, Kumamoto and others.

The major pollutant of air in this period was soot produced by consuming coal as energy source. At this time our knowledge about the pollutants was rather limited. There were some pollutants which were later found injurious to human health such as mercury, cadmium and sulfur dioxide. The injuries caused by these pollutants will be introduced later.

### 3. The Third Period (from 1958 to 1973)

This period started from 1958 when so-called Suishitsu Hozen Ho (hereafter cited as SHH) (Protection of Water Quality in Public Waters, Law No. 181) was enacted and continued to 1973 when the first crude oil shortage occurred. In this period, the change of energy source from coal to oil was completed. By developing heavy and chemical industries, Japan has made so remarkable economical progress as she had never seen before. At this time, the present system of counter measures against public injuries or environmental pollutions intensified by rapid development of these industries was also completed in Japan.

Legal control on the national level started from that against water pollution. Even though we had several tort actions on water pollutions<sup>10)</sup> on which the court ruled for the injured, there was almost no statutory or legal control on it at that time. The waste discharged into Edo River from Jujō Paper Mill killed a lot of shellfish on the lower river. It aroused not only disputes between fishermen and Jujō Co. but also wide social concern. Then the Diet enacted the before-mentioned SHH and Kōjō Haisui Kisei Ho (hereafter cited as KHKH) (Control of Waste from Factory Law), (Law No. 182, 1958). Under SHH, the Director General of the Economic Planning Agency was

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10) We have several books on cases and materials of tort actions on water pollution. But they are all written in Japanese. As a handy one, Y. Nomura's "Cases on Kogai" (1971) would be useful.



authorized to designate certain public waters and to prescribe Water Quality Standard on waste discharged therein. Under KHKH, the factory manager was obliged to notify its treatment devices with the Minister and the Minister was authorized to instruct the manager to change or improve the devices and, if necessary, to suspend them temporarily. Even though these Laws were abolished and replaced by Suishitsu Odaku Bōshi Ho (hereafter cited as SOBH) (Water Pollution Control Law) (Law No. 138, 1970), the water quality system with its items (pH, BOD or COD, SS, DO) is mostly adopted under the present Law.

In 1962, Baien Haishitsu Kisei Ho (Smoke Emission Control Law, Law No. 146) was enacted. In order to prevent the ground subsidence in Tokyo and Osaka, the control on pumping up of ground water started under the Amendment of Kōgyō Yōsui Ho (Industrial Water Supply Law, Law No. 99, 1956) and so-called Biru Yōsui Ho, correctly Kenchikubutsuyō Chikasui no Saishu no Kisei nikansuru Hōritsu (Building Water Supply Law, or Law to restrict to take the ground water for buildings, Law No. 100, 1962). But as these Laws could not control the pollutions effectively, several local authorities in intensively polluted areas enacted the ordinances which are purporting to regulate emission of pollutants exempted in the Laws or controlled pollutants outside the designated areas by the Minister<sup>11)</sup>.

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11) As to jurisdiction, the laws controlling pollutions are divided into two types. The first type is applicable to the whole areas of Japan as the present laws controlling air or water pollutions. The second type is applicable to certain areas, that is, those designated by the Minister or other national agency. This type is usually adopted in the measures against locally intensified pollutions, as the laws controlling on noise, vibration and soil pollution. The so-called Biru Yōsui Ho is one of those laws of the second type. The Law is purporting to restrict pumping up of ground water in the areas designated by the Minister as the district where ground subsidence is markedly going on.

In this period, the unknown diseases, later found to be caused by small amount of heavy metals discharged from factories, were reported in the areas around Minamata City of Kumamoto Prefecture, Agano River Basin of Niigata Prefecture and Jintsu River Basin of Toyama Prefecture. Terrible conditions of the patients of these diseases absorbed wide social concern and sympathy, and then necessity of relief of those patients was strongly demanded. In order to meet these demands, the Government provided several subsidies for measures or equipments of the enterprise to prevent these diseases and the Public Injury Prevention Corporation was established in 1965, in order to award loan to enterprises for their preventive measures or their implementation. Under these circumstances, public opinion made strong demand for enactment of a basic law on the preventive measures against public injuries. In 1967, Kōgai Taisaku Kihon Ho (hereafter cited as KTKH or Basic Law) (Basic Law for Environmental Pollution (Public Injury) Control, Law No. 132) was enacted.

KTKH or Basic Law is enacted for the purpose of identifying the responsibilities of the enterprises, the National and the Local Authorities with regard to public injury control and determining the fundamental requirements for control measures, in order to promote comprehensive policies against public injury thereby ensuring the protection of the health and the conservation of their living environment (Art. 1). Backed by intensive and passionate tone of the press, in 1970, the Diet deleted a famous clause of the Law that conservation of environment must be in balance with economic development (Art. 1, Cl. 2).

The 1970 Amendment of KTKH or Basic Law means that pollution control should be promoted actively even if it may slow down economic development. Furthermore it is more important that the present Public Injury or Environmental Law of Japan is built upon

the 1970 Amendment. The major points of the Law only will be introduced here, because it is impossible to discuss the details of its legal structure in this short paper.

The American Environmental Law is consisting of two parts, that is, control of business activities and conservation of natural environment. Even though they are closely connected, they are treated as different on some legal points. For example, as control of business activities belongs to the matter of experts, the public authorities staffed with experts are expected to play major role. On the other hand, as conservation of natural environment does not necessarily need experts' knowledge, public involvement in decision-making in this field is widely encouraged. In Japan, these two parts are more distinct and separated than in U.S.A.. Japanese Diet, Public Authorities and Courts have been putting much more emphasis upon remedy of injuries caused by pollutions than upon conservation. As will be mentioned later, it is one of the reasons why Kankyō Eikyō Hyōka Hōan (Environmental Impact Evaluation Bill) could not be passed by the Diet.

Concerned with conservation of natural environment, KTKH or Basic Law provides only "The Government shall, in conjunction with other means prescribed in this Section, endeavor to protect the natural environment as well as to conserve green areas." (Art. 17.2). In this field, we have Shizen Kōen Ho (hereafter cited as SKH) (Natural Park Law) of 1957, Shizen Kankyō Hozen Ho (hereafter cited as SKHH) (Natural Environment Conservation Law) of 1972 and so on. SKHH is prohibiting or rigidly restricting various human acts to be performed within the wilderness area, except where the Director General of the Environment Agency has specifically granted a permit for scientific or otherwise for the public good, or where the act is performed as an

emergency measure to cope with as extraordinary situation (Art. 17). The Law is deemed as composing a land use planning, together with SKH.

Concerned with emission control, KTKH or Basic Law is naming air pollution, water pollution, soil pollution, noise, vibration, ground subsidence and offensive odors as the seven typical public injuries or pollutions. In order to prevent and control these pollutions, the Diet passed seven Control Laws (one law per one pollution) from 1968 to 1976. The measures taken in these Laws are divided into two kinds.

The first one is to establish the Emission Control Standard.

“1. In order to prevent public injury, the Government shall take measures for the control of the emission of pollutants responsible for air, water and soil pollution, establishing standards to be observed by the enterprise.

2. In order to prevent public injury, the Government shall endeavor to take measures to deal with noise, vibration, ground subsidence and offensive odors, in a manner similar to that referred to in the preceding clause.” (Art. 10 of KTKH).

The second one is to establish the Environmental Quality Standard.

“With regard to environmental conditions relating to air, water and soil pollution and noise, the Government shall establish environmental quality standards, the maintenance of which is desirable for the protection of human health and the conservation of the living environment.” (Art. 9, Cl. 1 of KTKH).

Emission control of the pollutants from factories or establishments is effectively enforced through imposing criminal penalty on violations of the standards without any warning or instruction in advance (Articles 13, 33 of Taiki Osen Bōshi Ho (hereafter cited as

TOBH) (Air Pollution Control Law), Articles 12, 31 of Suishitsu Odaku Bōshi Ho (hereafter cited as SOBH) (Water Pollution Control Law). On the other hand, the court ruled that the Environmental Quality Standard is the goal desirable for protection of human health but is not an action which has legal binding force on the enterprise, Hanrei Jihō No. 1614 (Tokyo Dist. Ct. Sept. 17, 1981). The ruling means that the standard is not an act in Gyōsei Jiken Soshō Ho (Administrative Litigation Law, Law No. 139, 1962) under which an legal act only can be set aside through an administrative litigation raised by aggrieved persons. Of course it does not mean that the standard has no legal meaning at all. It may have some legal meanings when people wants to attack the public authority for its maintenance or when injured persons raise tort actions to the courts on account of damage caused by pollutions violative of the standards<sup>12)</sup>. In tort actions concerning operation of the public airports and the New Tōkaidō Railway raised by nearby residents, violations of the standards on noise and vibration are main issues about tort liability of the owner or operator.

Emission control on the enterprise has been very effectively performed, especially that on air pollutants. As mentioned before, after the energy source changed from coal to oil in the second period, sulfur dioxide has become the major air pollutant. In this period we have been very successful in decreasing sulfur dioxide in ambient air through almost whole areas of Japan. Now nitrogen oxide is newly emerging as the major air pollutant. Then the business circle is complaining against Kōgai Kenkohigai Hoshō Ho (hereafter cited as

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12) The environment quality standard is usually used as the base upon which local authorities are formulating public injury control programs (Art. 19 of KTKH). Then if it can not be attained, local authorities may be held liable for the damage caused by the pollutions.

KKHH)<sup>13)</sup> (Pollution-Related Health Damage Compensation Law, Law No. 142, 1970), which prescribes that the payments to patients or diseased due to sulfur dioxide to be covered by the pollution load levy upon the proprietors of sulfur discharging factories, because the number of the patients is still increasing now, even though sulfur dioxide has remarkably decreased. Compared with air, water quality has not been so improved. It means that the traditional measure of regulation on effluent discharged from factories or establishments (Art. 1 of SOBH—Water Pollution Control Law) could not achieve its purpose and new measures have to be adopted as will be introduced later<sup>14)</sup>

13) About unique content of KKHH, see "A System of Relief for Pollution-Related Injury" by Prof. Y. Kanazawa, *Law in Japan*, Vol. 6, 65-72 (1973). As a comment on the Law from the standpoint of an American lawyer, Professor Gresser's article is very useful. Prof. Gresser is highly appraising the Law as follows. "The Act's most innovative aspect is its application in administrative practice of statistical proof methods for pollution disease causation developed by the four celebrated pollution trials (the Itai-itai disease case, the Niigata and Kumamoto Minamata disease trials and the Yokkaichi trial—added by the writer). A second important conceptional advance is its finance of compensation payments through a pollution levy.—From theoretical perspective, the Act's integration of compensatory, regulatory and fiscal objectives suggests a different approach to environmental management to be considered beside direct regulation, subsidies and current experiments with various environmental charges." J. Gresser, *The 1973 Japanese Law for the Compensation of Pollution-related Health Damage: An Introductory Assessment*, *Law in Japan*, Vol. 8, 91-135 (1975), at p. 131. Despite many advantages pointed in the article, I think, there are much difficulties in adopting this system in the other countries. The following introduction of Prof. Gresser's article is very suggestive. "A central barrier for the American environmental lawyer venturing into this field is that a foreign approach, devised for the exigencies of another setting, may offend basic values and sensibilities. The establishment of a system compensation to victims of pollution in Japan, for example, may outrage some American public interest lawyers uncompromisingly committed to preventive litigation." *supra*, at p. 92.

14) About present condition of air and water, see White Paper on the Environment of 1984 (in Japanese), p. 2.

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As mentioned before, Japanese Environmental Law is emphasizing relief measures for damage caused by environmental pollutions. KTKH or Basic Law says that "the Government shall take the measures necessary to establish a system for the settlement, by such means as mediation and arbitration, of disputes which arise in connection with public injury." (Art. 21). In order to implement this article, Kōgai Hunsō Syori Ho (hereafter cited as KHSB) (Law for Settlement of Disputes relating to Public Injury (Law No. 108, 1970) was enacted and intended to settle the disputes fairly and quickly by mediation, arbitration and decision (Art. 1 of KHSB). KKHH or Basic Law, mentioned above, is, by providing for compensation to make up for health damage due to marked air or water pollution over considerable area as a result of business activity or other human activities and by undertaking the necessary programs for their welfare, to provide for speedy and fair protection of victims of such health damage (Art. 1). Those patients or survivors of the diseased who are certified by the Governor of the Prefecture that they died or are suffering from designated diseases set forth under the Law are entitled to be compensated (Articles 4, 5 and 6 of KKHH). The compensations paid under KKHH are consisting of medical care expense, compensation for handicaps, compensation for survivors, lump compensation for survivors, child compensation allowance, medical care allowance and funeral expenses (Art. 3). All the compensations and expenses shall be paid by Kōgai Kenkōhigai Hoshō Kyōkai (Pollution-Related Health Damage Compensation Association). As to the disease caused by certain air pollutants, two-thirds of the whole amount payments to cover compensations and expenses shall be covered by the pollution load levy collected from the proprietors of the factories according to their amount of emission of pollutants by the Association (Articles 49 and

52)<sup>15)</sup>. As control on sulfur dioxide has been effectively implemented and its amount has remarkably decreased, those business who are paying pollution load levy are complaining that the levy should be reduced<sup>16)</sup>.

Lastly an unique law was enacted in this period. That is Hito no Kenkō nikansuru Kōgai no Shobatsu nikansuru Hōritsu (abridged as Kōgai Zai Ho) (Law for the Punishment of Crimes Relating to the Public Injury which Adversely Affects the Health of Persons—abridged as Public Injury Punishment Law, Law No. 142, 1970). The purpose of the Law is to contribute to the prevention of public injury adversely affecting the health of persons, in combination with the control measures based upon other laws or ordinances designed to prevent such injury, by punishing those acts, etc. which cause such injury in the conduct of business activities (Art. 1). Under the Law, a person who knowingly endangers the lives or health of the public by discharging

15) The content of KKKH is introduced in detail in English. Prof. Kanazawa, *supra*, Law in Japan, Vol. 6, pp. 65-72 (1973), Prof. Gresser, *supra*, Law in Japan, Vol. 8, pp. 91-135 (1975).

16) Prof. Gresser introduces the opinion of the planner of KKKH in his article. "Planners within the Environment Agency now note that victim incident is expected to peak in the late 1970's and then to begin to decline as pollution prevention control technology and other pollution prevention measures begin to take effect. As a result, compensation payments required for pollution diseases now designated are also anticipated to rise and then to decline until their need is eliminated". Gresser, *supra*, at p. 118. The anticipation of the planners does not come true. Pollution control measures against SO<sub>2</sub> have developed and ambient air quality has been remarkably improved, but the number of designated patients suffered by air pollution is still increasing even after 1980. The ratio of increase in number of the patient over the previous year is still 4.3% in 1980, 3.8% in 1981, 4.0% in 1982, 3.8% in 1984 and 3.0% in 1984, even though the ratio is becoming smaller. White Paper on the Environment of 1984, p. 333. Then proprietors or operators of steel mills or electric power plants are requesting to reduce pollution levy in proportion to decrease of SO<sub>2</sub> discharged from these mills or plants.



those substances which adversely affect the health of persons (including the substances which become so hazardous when accumulated in human bodies) in his business activities shall be punished by imprisonment for not more than seven years or a fine not exceeding five million yen (Art. 2). In case of a person who endangers the lives or health of the public through failure to exercise necessary care, he shall be punished by imprisonment for not more than five years or a fine not exceeding three million yen (Art. 3). Furthermore, the Law provides presumption of causality between the act of emission of injurious substances and the damage to human health by shifting burden of proof upon the person who discharged the substances (Art. 5).

We have only two reported cases prosecuted under the Law. Both of them were concerned with emission of chlorine gas from the factories (Hanrei Jiho No. 987, Osaka High Court, Nov. 6, 1979, Hanrei Jiho No. 992, Tsu District Court, March 7, 1979). Even though the number of the cases is very small, existence of the Law itself seems effective as a deterrent to public injury.

### **Chapter 3. Recent trends of Public Injury or Environmental Law and Environmental Impact Assessment Bill**

Japanese system of Public Injury or Environmental Law was mostly completed, based upon the Basic Law and Natural Environment Conservation Law in the third period. The main characteristics of the system may be summarized as follows. First, as to emission of the pollutants on which the emission standards are prescribed is strictly enforced against the factory or establishment (Art. 10 of KTKH or Basic Law) and, in cases of the pollutants injurious to human health, the emission may be penalized. Second, our system is endeavoring to relieve the injured by public injury and settle disputes concerned with it, when human health damage occurs. In order to

facilitate the purpose, no-fault principle for tort liability, which was firstly adopted in the 1939 Amendment of Kōgyō Ho (Mining Law), is prescribed in air and water pollution (Art. 25 of TOBH—Air Pollution Control Law, Art. 19 of SOBH—Water Pollution Control Law), and KKHH (Pollution-Related Health Damage Compensation Law) is providing various sort of compensations for health damage or injured persons and KHSH (Law for Settlement of Disputes relating to Public Injury) is intended to settle disputes between the injured and the pollutant enterprise by arbitration or administrative procedure. It is generally recognized that the system has worked very effectively and decreased pollutants. Recently, however, these laws and the measures taken therein are criticized as not enough to control new pollutants and to improve quality of people's life. The Diet and Local Authorities are enacting laws and ordinances, to meet these demands. What kind of laws and ordinances were enacted and also why the Environment Impact Assessment Bill could not become a law will be explained here.

#### 1. Needs to control new pollutants and polluters

Japanese industries have been gradually changing after the first and the second crude oil shortages. They have raised up the price of oil and have given a blow to the industries which were consuming huge amount of oil. Electoric products and automobiles manufacturing industries have become the major parts of Japanese industries in place of steel or chemical products manufacturing ones. Then the content and amount of pollutants from the factories have been changed and then control of new pollutants becomes a necessity. On the other hand, the Report of OECD "Environmental Policies in Japan" (1977) may be cited as one of those critics against Japanese Public Injury or Environmental Law at that time. The Report says that although Japanese

environmental policies largely succeeded in abating pollution, they did not succeed in eliminating environmental discontent, and that the real cause of environmental discontent was not—and is not—increasing pollution, but decreasing environmental quality<sup>17)</sup>. The environmental quality is concerned with amenity which has been neglected in Japanese environmental policies. In order to assure amenity, the Report says that the Government should consider to adopt a new type of policy such as public involvement in decision-making on environmental issues. I do not think that public involvement in decision-making will be a panacea. However, its comment that the past policy has been concentrating its efforts on emission control but not so much on amenity of life will be very useful for future improvement of our environment<sup>18)</sup>. The Environment Agency is now going to recognize amenity of life

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17) OECD, *Environmental Policies in Japan*, p. 87.

18) Prof. F. Utsunomiya is emphasising amenity as the target of environmental policy in Japan. As a political scientist, he is proposing community strategies as follows, after suggesting that the issue of amenity will become the local goals in the coming decade for both environmental policy and citizens' movements in Japan. Firstly, an open society and for that purpose public participation and freedom of information should be institutionalized at the national and local levels. Secondly, there is a need for reorganizing Japanese political system toward a decentralized one. Thirdly, planners must be trained and reoriented to have a wider sense of art and beauty. F. Utsunomiya; *Community strategies for Improving Our Quality of Life*, "Environmental Law and Policy in the Pacific Basin Area", ed. by Kato and others (1981), at p. 147. I entirely agree with him about the third point. However, about the first and the second points, I agree with him only partially, not entirely. Prof. Utsunomiya is deemed to assert to reorganize Japanese administration basing upon grassroot democracy. When I stayed in the United States in 1971, there were some who support the grassroot democracy. However, many scholars of conservation were deploring that grassroot democracy and too much decentralized administration in the United States were impeding development of environmental law, because residents in the local communities were usually favoring for development. The matter

as a new target of its policy. Even if amenity is recognized as an important aspect of human life, we have several problems to solve. The first question is that test of amenity is very subjective and is not so easy to be applied to various conditions of our environment. The second question is concerned with theory of Japanese law. As mentioned before, our legal system is constructed upon control of the seven typical pollutions prescribed in KTKH or Basic Law. If we take amenity as a new target, we have to modify our legal system including KTKH or Basic Law. Some laws and ordinances towards the new

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is almost the same in other countries. French scholars is describing the role of local authorities in France as follows. One of the main problems to face is not the enactment of legislative rules, but their implementation. This is the position in most industrialized countries. Local authorities frequently are unable or unwilling to cope with the new tasks which the protection of the environment imposes upon them. Two other problems are linked with that of implementing existing rules: the proper balance between centralization and decentralization, and public participation in the task of protecting the environment. A. Ch. Kissand C. Lampbrechts; *Legal Protection of the Environment in France—The Position at April 1976—*, “European Environmental Law” by S. Ercman (1977) p. 344. Even if the specialities in French law where centralization is very strong are ignored, the proper balance between centralization and decentralization is an absolute necessity for the enhancement of amenities in all industrialized countries. Of course I have an opinion that our administration has many defects and must be reformed in various points. However, I do not think that all the problems will be solved if it is decentralized. It seems to me that Prof. Utsunomiya is pushing his opinion too much for decentralization. Based upon my own experiences of participating in drafting the Environment Impact Assessment Bill for several years, lack of strong support of the Bill by the nation resulted in its failure to pass the Diet. If we want to improve environmental quality or amenity as the new target, it must be backed by the people on the national level. It means necessarily some centralization. Then the problem is what is the adequate balance between centralization and decentralization. But it must be answered in the future Japan too.

direction were enacted recently, but without any amendment of KTKH or Basic Law. Such efforts of the Government, the Diet and local authorities will be introduced here.

a) Traffic pollutions. Even though public injury caused by traffic facilities became very serious, the present measures against air and noise pollutions emitted from these facilities are not so effective to control so complex pollutions of this kind. The report of the committee on it is indicating difficulties to decrease these pollutions.

In 1982, the Environment Agency established a study group on Traffic Pollutions. The group had made research on public injuries or environmental pollutions produced by automobiles, aircrafts and New Railways (Shinkan-sen) for two years and made two propositions as follows. It proposes, firstly to establish a desirable system of transportation of goods through routes which are separated from residential areas and do not produce public injuries or pollutions and to allocate the cost of decreasing public injuries or pollutions upon its sources, and, secondly to establish harmonious relation between transportation and land uses by improving quality of traffic facilities and developing reasonable town planning. The report continued to say that there are so many difficulties in removing these pollutions drastically and that comprehensive measures against them should be considered even if they might not be accomplished until the twenty-first century<sup>19)</sup>.

To implement the propositions, we have to overcome several problems. The major pollutants here are nitrogen oxide (NO<sub>x</sub>) emitted from automobiles, and noise and vibration emitted from almost all traffic facilities. After several times' improvement of engine, NO from one automobile has remarkably decreased, but, since the number of automobiles is increasing, the whole amount of NO<sub>x</sub> in ambient air is

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19) White Paper on the Environment of 1983, p. 148.

not decreasing and still large. As to noise and vibration produced by aircrafts and New Railways, it is very difficult to lessen, under the present technologies. Under these conditions, in order to assure quiet and comfortable lives to nearby residents, it would be necessary either to restrict use of the lands as residential areas along the public airports or railways, or restrict operation of the airports or railways. But either of these two measures can not be adopted here. Especially it is almost impossible to adopt the latter, because it means fundamental modification of the national policy on the whole transportation system of Japan. Thus, the control of traffic pollutions presented us a new problem about how to harmonize or to balance private interest with public interest with which we have not so much grappled before.

b) New approach to water pollution prevention. Even though air quality was remarkably improved, water quality is not so much improved. In order to improve it, newly enacted laws and ordinances are going to adopt new measures. The first law enacted for that purpose was Setonaikai Rinjisochi Ho (Interim Law for Conservation of Environment of Seto Inland Sea, Law No. 110, 1973) (hereafter cited as SKRH or Interim Law). As heavy and chemical industries had developed very rapidly in the areas around Seto Inland Sea and it is almost a closed water, its water quality has become very serious. To prevent the Sea to be worsened, the Law was enacted. Three years later, it was revised and newly named as Setonaikai Kankyohozen Tokubetsusochi Ho (Law concerning Special Measures for Conservation of the Environment of the Seto Inland Sea, Law No. 35, 1976) (hereafter cited as SKTH or Special Measures Law). The SKRH or Interim Law prescribed distinctly formulation of a plan for the conservation of environment of Seto Inland Sea, providing for provisional measures on tightening the control of the emission of pollutants into

Some recent trends of the Public Injury or Environmental Law in Japan

the Sea and adopted a permit system on installation of specified facilities in the Prefectures around the Sea (Art. 1). As provisional measures to tighten the emission control, the Law provided that the Director General of Environment Agency had to determine the limit of pollution load from factories in BOD for every Prefecture in 1976, aiming to cut it down to one-sevenths of that in 1972 (Art. 4). As activities of business, especially those of pollutants emitting industries, have been in a slump after 1973 on account of the crude oil shortage, pollution load in BOD was reduced more than the target amount prescribed in the Law. The Interim Law was replaced by SKTH or Special Measures Law. The Law inherited almost all articles of SKRH or Interim Law, but it repealed the clause about tightening the control of the emission of pollutants into the Seto Inland Sea and newly introduced "the prevention of damage from the eutrophication" and "the conservation of the natural seashore" as the purpose of the Law.

Koshō Suishitsu Hozen Tokubetsusochi Ho (Law Concerning Special Measures for Protection of Water Quality of Lakes and Ponds, Law No. 61, 1984), is another one which is taking almost the same approach to water pollution as SKTH or Special Measures Law. The purpose of the Law is to establish the fundamental policy for protection of water quality of lakes and ponds, and to contribute to assuring healthy and cultural life of people, by making a plan concerning measures for protection of water quality of lakes and ponds where it has become an urgent necessity to secure the environmental quality concerning water pollution and by providing special measures for regulating the facilities which discharge effluents causing water pollution (Art. 1). The Government shall establish Basic Policy for conservation of water quality of lakes and ponds and its content is set forth in detail here (Art. 2). However, it must be noticed that the Law is

not applied to all lakes and ponds. It is applied only to those lakes and ponds which are designated by the Prime Minister on proposal of the Governor concerned (Art. 4). Even though its applicability is limited, the Law is going to tighten the regulation of discharge of effluent as well as to promote construction of the facilities for protection of their water quality. That is, it controls effluents discharged into the designated lakes and ponds from those hospitals, waste treatment facilities and small sized livestock, which SOBH (Water Pollution Control Law) does not control. It means that emission control under SOBH (Water Pollution Control Law) is not enough to conserve water quality of the closed system such as a lake or pond. It is too early to know how much the Law will be able to improve their water quality, because implementation of the Law has just started.

Another example of the new approach is Biwako no Fueiyōka no Bōshi ni kansuru Jōrei (Ordinance to Prevent Eutrophication of Lake Biwa of Shiga Prefecture, No. 37, 1979). The purpose of the Ordinance is, concerning prevention of eutrophication of Lake Biwa, to confirm the responsibilities of the prefecture, the cities, towns and villages, the residents and the enterprises and to conserve the environmental quality of Lake Biwa, by taking measures for emission control, etc. (Art. 1). The main points of the Ordinance are as follows. It regulates emission of new substances such as nitrogen and phosphorus which are not controlled under SOBH (Water Pollution Control Law), and controls not only activities of the factories but also activities of the residents and farmers by prohibiting use and sale of syndet which contains phosphorus (Articles 7 and 18) and by putting farmers under obligation to use fertilizer and treat waste of livestock adequately (Articles 21 and 22). However, it must be added that violations of the provisions by residents and farmers are not



penalized and are guided only administratively by the Governor, in implementing these provisions (Art. 24).

Nitrogen and phosphorus have been known as major pollutants contributing to eutrophication of water<sup>20)</sup>. However, emission of them are not controlled under SOBH (Water Pollution Control Law), because they are not injurious to human health and not easily eliminated by the secondary waste treatment. The ordinance is the first attempt to prohibit use and sale of syndet of the resident and retailer and to regulate activities of the farmers. There are certain limits to their enforcement because they are not enforced by criminal sanctions. But, after the Ordinance was enacted, the syndet manufacturers begun to produce and sell detergent without phosphorus and are contributing to prevent eutrophication of the Lake. An officer<sup>21)</sup> of the Shiga Prefecture told me that the water quality of the Lake was not changing before

20) On influences of syndet on human health and eutrophication, Prof. Nomura is describing as follows. Throughout Japan, skin diseases such as skin irritations and diaper rash have become a subject of discussion, and the government conducted research and declared that syndet had little possibility of injuring people's health unless its use considerably deviated from its original purpose and directions. In Shiga Prefecture, a people's campaign against the production and use of syndet was inaugurated in 1972. Initially, the subjects of the campaign were the unfavorable influences on people's health and safety, such as hand skin irritations, teratogeny and carcinogenicity. At that time, however, they could not successfully obtain widespread sympathy. In 1977, however, red water occurred in the lake, and the administrative policies and people's campaigns came to a turning point,--- Thereafter the campaign advanced with big strides. Y. Nomura; *Eutrophication and Syndet Regulation, "Water Management and Environmental Protection in Asia and the Pacific"*, ed. by Kato, Kumamoto and Mathews and Sutamiharadja (1983), 127-134, at 127, 129. This shows that not the influences of syndet on human health but those on eutrophication of the lake have induced enactment of the ordinance. Prof. Nomura's article is introducing the main features of the ordinance more in detail.

21) Prof. T. Kira, Director of Institute of Lake Biwa, Shiga Prefecture.

and after the Ordinance became effective but would have gotten worse without it. In my opinion, the Ordinance is indicating that, in order to improve amenity of human life, we have to control emission of such substances as nitrogen or phosphorus by prohibiting certain activities of citizens and farmers as well as those of industry. On the other hand, the public sewage system and waste treatment facilities in Japan is still behind other developed countries and their construction is expected to be accelerated in the future<sup>22)</sup>.

## 2. Environmental Impact Assessment Bill

The fact that the Environmental Impact Assessment Bill could not get approval of the Diet and was scuttled in 1983 is indicating one of the recent trends of Japanese Environmental Law. In Japan as in USA, Environmental Impact Statement is estimated as one of the important measures to prevent environmental deterioration in advance, after it was adopted in Sec. 102(1)(C) of the Environmental Policy Act of U.S.A.<sup>23)</sup>. In my opinion, its basic philosophy is to emphasize the environmental aspect of development activities which was entirely neglected before and to minimize their adverse effects upon human environment in the future. Then, it is directly in conflict with our traditional philosophy which are emphasizing control of business activities and relief of damage caused by them. But, considering that it is recognized as an important procedure

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22) The public sewage system are provided only for 34% of the whole population in Japan at the end of FY 1984. White Paper on the Environment of 1984, p. 250.

23) From the standpoint that environmental impact assessment is a necessity for better planning or development in Japan, Prof. Katō is introducing oppositions or objections against environmental impact assessments in Japan and U.S.A. I. Kato; Environmental Assessment in Japan, "Environmental Law and Policy in the Pacific Basin Area", ed. by Kato, Kumamoto and Mathews (1981), pp. 153-156.

for further improvement of environment, Kawasaki City Council in 1976, Hokkaido Prefecture Council in 1978 and Tokyo Metropolitan Council in 1980 enacted Environment Impact Assessment Ordinances. Backed by enactment of these ordinances, the Director General of the Environment Agency established Specialists Committee of Central Council on Environmental Pollution Control (hereafter cited as Central Council) which made research on the matter from 1972 to 1975 and publicized its result. In 1979, based upon the result, Section of Environment Impact Assessment under the Central Council released the summary of their investigation. In 1980, the Government introduced Environment Impact Assessment Bill based on the summary mentioned above before the Diet. The bill was deliberated therein over several sessions but was scuttled by the dissolution of House of Representatives in November of 1983. Then the Government is trying to implement the Assessment under the decision of the Cabinet Council on Aug. 28, 1984. The decision is enforcible only inside the Central Government and not applicable to the works of the local authorities as well as private sector. However, it is hoped, the local authorities would respect and implement the decision too.

There are various reasons why the Diet did not pass the Bill. In my opinion, the main reasons are as follows. First, the content of the Bill is said usually as the procedure for decision-making on the big scale projects or development plans. But, including the Judiciary, the Japanese are not used to the doctrine of due process of law in Anglo-American Law. Under the doctrine, the court does not question the merit of the case except a few cases, if its procedural requirements are satisfied. In Japan, however, the court and people usually put more emphasis on its merit. The business is afraid that if the Law were enacted it would increase and intensify the troubles with the local

residents in constructing public works. Second, the enterprise is fearful that, if enacted, the law would increase the number of suits already raised by local residents against construction of socially important public works and make actually impossible it. Third, proponents of conservation movement did neither estimate nor support the Bill strongly because the projects which have to be assessed under the Bill is not so comprehensive but limited to big ones, and public involvement is not fully realized in its procedures, for example public hearing process and so on<sup>24)</sup>. My opinion is a little different from these critics against the Bill. As I have participated on making the Bill as a member of Section of Environmental Impact Assessment, my opinion may be a little too favorable for the Bill. First of all, against fears of the business and the enterprise, I think that they are groundless. When the Law is enacted, it may increase suits raised by citizens on lawfulness of the assessment process in the beginning as in U.S.A., and it will take some time for the court and people to realize the procedural importance of assessment. However, if they could realize it, test of lawfulness of projects or development plans would be more clear and distinct and, in the long run, the number of unreasonable complaints against construction of public works will decrease. Second, against criticism from conservationists, my opinion is that, even though the Bill may not be a perfect one, it will be able to contribute to conservation of natural environment because the Bill is going to take a new approach for it on the national level. I am sorry to say, my

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24) Prof. Awaji of civil law would be the only scholar who have manifested oppositions against the Bill. "Legal doctrine of the Environmental Right and the Court Decision on it" (in Japanese), by T. Awaji (1980) pp. 199-209. However, several scholars or lawyers told me privately that the contents of the Bill would not enlarge but curtail the residents' rights.

opinion could not become majority. As this is connected with the present theories of judicial decisions and legal scholars on conservation<sup>25)</sup>, it will be discussed here.

### 3. Judicial decisions on conservation of environment

As mentioned before, Japanese Environmental Law has emerged and developed as Public Injury Law. Public Injury or *Kōgai* is defined as it means "any situation in which human health and the living environment are damaged by air pollution, water pollution, soil pollution, noise, vibration, ground subsidence and offensive odors, which arise over a considerable area as a result of industrial or other human activities." (Art. 2 of KTKH or Basic Law). Starting from this definition, the courts have decided on many cases. Since some of major civil cases in this field were already introduced in another paper of mine<sup>26)</sup>, the recent trend of judicial decisions only will be sketched here.

We have so-called the big public injury cases, all of which are tort actions; Mercury Pollution cases (Agano River case, Hanrei Jiho No. 642, Niigata District Court, Sept. 26, 1971, Minamata cases<sup>27)</sup>), Cadmium Pollution case (Itai-itai disease case, Hanrei Jihō No. 635' Toyama District Court, June 30, 1971, affirmed Hanrei Jihō No. 674,

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25) Y. Watanuki; "Task and prospect of Environment Impact Assessment Bill" (in Japanese), *Horitsu no Hiroba* (Law Forum) Vol. No. 4.

26) Y. Watanuki; "How the environmental pollution problems are handled by the Court, the Public Authorities and the Citizens' group of Environmentalist in Japan?" (in English), *Tokyo Kyoiku University's Shakai Kagaku Ronshu* (The Journal of Social Sciences) No. 20. J. Gresser; *supra* footnote (8), pp. 102-106.

27) Concerned with patients of Minamata disease, we have two decisions of Kumamoto District Court, *Watanabe v. Chisso K.K.*, Hanrei Jihō No. 696, Kumamoto District Court, March 20, 1973, and *Morieda v. Chisso K.K.*, Hanrei Jiho No. 927, Kumamoto District Court, March 28, 1979.

Kanazawa Branch of Nagoya High Court, Aug. 9, 1972), Air Pollution case (Hanrei Jihō No. 672, Yokkaichi Branch of Tsu District Court, July 24, 1972) and Osaka International Airport case (Minshu Vol. 35 No. 10, Supreme Court, Dec. 15, 1981). Even though the legal basis of the former three groups of cases is Art. 709 of Civil Code and that of the last one is the provisions of Kokka Baisho Ho (National Tort Claims Act), the main issues in all these cases are casual relation between the damage and the acts of defendants, intention or fault on the side of defendants enterprizes, lawfulness of their acts and calculation of the damages. Recently, in order to prevent future damage, petitions for injunctive relief to prohibit defendants' future business activities have been raised by local residents. In these cases, petitioners are basing their actions upon their environmental rights or personal rights. As to legal basis for injunctive relief, several court rulings are recognizing people's personal right but none has recognized people's environmental right<sup>28)</sup>. About public facilities established and managed by the National Government or Local Government, some lower courts granted injunctions of this kind, but in Osaka International Airport case, the Supreme Court dismissed residents' petition for injunctive relief forbidding the manager to permit the aircraft to use the airport after 9 o'clock P.M., because management by the airport authority is inseparably connected with regulaton of national traffic system by the Minister of Transportation for public interest and then the residents can not raise an civil action for it<sup>29)</sup>. It is not clear, however, how

28) Y. Watanuki; "Interpretation of the court upon environmental right and personal right" (in Japanese), Hanrei Jiho No. 1012, No. 1014, No. 1015, No. 1018.

29) Under Japanese law, all suits including not only those between private persons but also those of private persons against public authorities are divided into two sorts of cases, that is, private and public ones. Even though we have not the administrative court independent of the ordinary

far the ruling is applicable and has binding force on succeeding decisions of the courts. In my opinion, petitions for injunctive relief to forbid operation of the public facilities can not be granted except emergency cases directly dangerous to human life or health, because these facilities are established and managed for public interest as execution of laws or ordinances enacted by the people.

#### 4. Some Comments

As mentioned before, Japanese Public Injury or Environmental Law started from the doctrine of no-fault responsibility under Kōgyō Ho (Mining Law) and developed legal system of relief for damage caused by pollutants emitted from business activities. This is the main reason why environmental pollution is named Public Injury (kō-gai) here. On the other hand, emission control of pollutants discharged from factories or establishments to prevent pollution in advance has achieved remarkable results in the third period, that is, after 1958. The agreements for prevention of pollutions between the local authori-

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court, the applicable procedure varies according to which sort of case the suit belongs. For example, in cases of private law, plaintiffs are able to petition for injunctive relief based upon Civil Procedure Code, prohibiting certain actions of defendants, including public authorities. However, in cases of public law, plaintiffs are entitled to petition only for provisional orders based upon Administrative Litigation Law to halt executing of an agency action until the ruling is issued, but not for injunctive relief upon Civil Procedure Code. The decision of the Supreme Court ruled that the management of an international airport by the National Government is a public affair and its legal relation is public law and that people are not entitled to petition for injunctive relief based upon Civil Procedure Code. However, the decision does not indicate what action of the Government in the case is an agency action sueable under Administrative Litigation Law, against which plaintiffs can legally petition for a provisional order. Accordingly, legal scholars' views are mostly against the ruling of the Supreme Court.

ties and the proprietors of factories<sup>30)</sup> located therein are another measures to control pollution. However, our system is going to make some changes. In my opinion, the followings are main causes of these changes.

The first cause is the change of Japanese industry. After twice crude oil shortages in the seventies, even though heavy and chemical industries are still important, electric products and automobiles manufacturing industries have become major industries in Japan. This means that the amount of discharged pollutants which are controlled under the existing Laws has decreased. The success of SKRH or the Interim Law for conservation of the environment of the Seto Inland Sea in reducing the amount of pollutants discharged from the factories and establishments in three years to less than one-sevenths of the amount of those in 1972 is one of typical examples showing this change. Without this change, I think, even more enthusiastic endeavors of the National and Local Governments concerned to implement the Law would not be able to accomplish the target prescribed therein.

The second cause is necessity to control pollutants and polluters which have not been controlled before, to improve further the quality of environment or to enrich amenity of life. For example, in order to reduce nitrogen and phosphorus in discharged water for preventing further eutrophication of closed waters, not only emission of waste from factories or establishments but also use of syndet by citizens and discharge of waste of livestock have to be controlled and, to clean up quality of public water in general, public sewage system and waste treatment facilities have to be provided much more than the present. Another example is noise pollution. At present, noise is the source

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30) About the agreements for prevention of pollutions of this sort, see, Y. Watanuki; *supra* footnote (26), Tokyo Kyoiku University's Shakai Kagaku Ronshu No. 20, pp. 36-48.



of most numerous complaints by citizens. However, the Sōon Kisei Ho (Noise Regulation Law, Law No. 98, 1968) is controlling only noise generated by the operation of factories, construction works and motor vehicles (Chapters 2, 3 and 4). However, recently noise generated by daily lives of citizens or small sized shops becomes the major source of complaints<sup>31)</sup>.

In order to control these pollutants for amenity, it would be necessary to have cooperation of citizens or to control their activities, and people have to pay more tax needed for construction of public facilities. This means a change of our traditional approach which has been controlling mainly business activities.

Third cause is that public interest has been more emphasized than before. If one of the main purposes of the modern government is to improve people's lives, she has to build public facilities needed for people's demand, for example, electric power plants, waste treatment facilities and so on. In order to do that without adversely affecting our environment, the new approach which requests much more burden upon citizens and much more regulations of their activities than before would have to be reappraised, in place of the traditional one which is controlling mainly business activities. I believe, this approach would become a necessity for the future Japan to improve our environment, even though it will impose much more burden upon citizens than before.

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31) The number of people's complaints filed with local authorities on the seven typical public injuries or environmental pollutions is 52,638 in 1983, decreasing year by year from 79,727 at the peak in 1972. However, and is amounting to 20,966, 32.7 percent of all the complaints in 1983. the number of people's complaints about noise did not decrease so much. The number of complaints about noise emitted from shops and restaurants is 4,430, about 20 percent of all the complaints on noise in 1983. Annual Report of 1984 (in Japanese) by Public Injury Conciliating Committee, pp. 67-99.

Lastly, a few words will be added on several decisions of the courts and opinions of the scholars in this field. There were several decisions which took the traditional view without considering new trends described here. It seems to me, however, the decision of the Supreme Court on the Osaka International Airport case is going to take the new approach, even though not clearly. Among the scholars of environmental law, professors of civil law are most numerous, mainly because Japanese Public Injury or Environmental Law started and developed as one branch of tort law. They are used to adjusting conflicting interests of the litigants, through contending and proving on both sides in the court. This approach is reasonable in the cases concerned with private litigants only. However, in the cases concerned with public facilities, the traditional approach of civil law has certain limits to its application, because the court has to respect people's will manifested in the resolution of the Diet or the Local Councils, even if too much generalization should be avoided. Then what interpretation is reasonable for the cases concerned with public facilities? It is not so easy to answer the question, because it constitutes a part of the whole legal system of Japan and is unable to be handled as an isolated one. However, if I am permitted to be bold enough to answer the question, new interpretation of the unified judicial review over laws, ordinances and actions of the governments, national or local, should be adopted instead of the present dual system of public and private laws. The decision of the Supreme Court above mentioned may be estimated as one step toward the unified judicial review, under the Japanese positive laws based upon the dual system.