

Judicial review of public authorities' omissions in Japan

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1 Introduction

Before properly starting my talk on my topic itself, I assume it is important to provide you with an introduction to the Japanese judicial system.

The judicial system of Japan is composed of the three levels of courts: the Supreme Court, the high courts and the district courts. The article 76 of the Japanese Constitution prohibits the establishment of any extraordinary tribunal. It means that we do not have any specialized court, such as an administrative court or an environmental court. There are only specialized divisions in the ordinary courts.

There is not a specific Environmental Action. Litigations involving the Environment could be of a civil, administrative or criminal nature, which are ruled based on their respective procedure act. In addition to the judicial procedure, ADRs (Alternative Dispute Resolution) plays also an important role. Two laws provide legal ground for cases challenging omissions of public authorities: (a) the Administrative Case Litigation Act; and (b) the State Redress Act.

Finally, I would like to emphasize that in this talk, when I mention administrative omissions or failures, I will be referring to omission in setting regulation or inaction to enforce regulations.

2 Liability for Non-use of Regulatory Power: The Kansai Minamata Disease Case

The Article 1 of the State Redress Act sets provisions on the State liability for public officers exercising the authority of the State. The “exercise of authority” also includes the non-exercise or the inaction by the executive branch, i.e. non-use of its regulatory power.

The Kansai Minamata Disease Case brought the landmark decision related to the State liability for not using its regulatory power in the environmental matters. The Minamata Disease is one of the most serious infirmities caused by water pollution during a high growth period after World War II in Japan. It was discovered in Minamata city, Kumamoto prefecture, in 1956. This case was attributed to the methyl mercury that had accumulated in fishes and those who ate them had been poisoned

with it. The pollution caused also a congenital version Minamata Disease.

Even nowadays there are still many victims and several lawsuits are in course, which can be basically divided into two groups. On the one hand, some of the victims have won the cases seeking compensation from the polluter, the Company Chisso, provided that they were admitted as Minamata Disease patients. However, it is not always easy to diagnose Minamata Disease because in many cases its typical symptoms only partially appear. On the other hand, some victims litigated against the State and the prefecture on the grounds of non-use of their regulatory power against Chisso.

In the field of environmental law, specifically on pollution control, the executive branch is usually given considerable discretion as to how and when to exercise its regulatory power. Therefore, it may be often difficult to determine in what specific circumstances a non-exercise of regulatory power constitutes fault or negligence on the part of governmental authorities.

According to the Japanese Case Law, the failure of public officers in enforcing regulations is unlawful if such failure is deemed to be extremely unreasonable in light of three factors: (a) the purport and purpose of the laws and ordinances that are the basis of the authority; (b) the nature of the authority; as well as (c) the specific circumstances of the case.

Specifically about the Minamata Case, on October 15, 2004, the Supreme Court held that the failure of the national government to exercise the authority to make regulations and to enforce them under the Water Quality Laws in order to prevent the spread of health hazards that caused the Minamata Disease was an unlawful inaction.

The Court pointed out that the national government, as of the end of November 1959, recognized that a large number of people had contracted Minamata Disease and a considerable number of them had died of the disease. Furthermore, the government also recognized the high probability that the causative substance of Minamata Disease was a kind of organic mercury compound discharged from the company Chisso's plant. Finally, the Court also stated is also important to point out that the subsequent spread of Minamata Disease could have been prevented if the authority had been exercised at that time.

After this decision, several courts also admitted the State liability in other pollution cases. Most recently, on December 26, 2013, the Osaka High Court held that the national government was liable for failing to promptly issue the ministerial ordinances to regulate asbestos based on the Labor Standards Act and on the Industrial Safety and Health Act.

3 The Mandamus Action

The Administrative Case Litigation Act establishes 4 types of actions. The main one is the Kokoku Appeal, i.e. the judicial review of administrative dispositions.

For a long time, such law only provided the "action for the declaration of illegality of inaction" as the means to control omissions by public authorities. A standing requirement of this action is to demonstrate that a certain subjective right was clearly prescribed on related laws and regulations. However, the existing environmental law in Japan basically does not grant such for local residents or NGOs, the right to e.g. require a certain control measure against illegal polluters.

In 2004, the Administrative Case Litigation Act was revised and the "mandamus action" was introduced. It is an action through which the plaintiff is able to seek a certain act of an administrative agency (e.g. an order to suspend a factory's operation). This new type of administrative action does not require the clear demonstration of a certain right and has been effective on e.g. illegal dumping cases.

Before the introduction of the mandamus action, the civil injunctive relief against the polluter (not the government) was the typical measure to prevent pollution and damage by illegal dumping. The legal basis for the injunction is mainly a "personal right" ("jinkakuken" in Japanese) to life and physical or psychological health.

And in the some disposal sites cases, the lower courts have admitted right of neighborhood to live in a healthful and peaceful environment needs to be protected as part of an personal right (e.g. Sendai District Court: 3. 28.1992) and issued injunctions when there was a high risk of pollution or contamination of surface and groundwater arising from e.g. waste disposal sites.

Local residents have been using the mandamus action since it was adopted in 2004. On July 2, 2011, the Fukuoka High Court ordered the Governor of Fukuoka prefecture to take action against illegal waste traders who were damaging the living environment. On March 7, 2012, such decision became definitive when the Supreme Court rejected the final appeal by the local government.

4 Future Perspectives

In public health cases, especially claims for damage, the civil litigation has been relatively effective in Japan. Recently, State liability lawsuits have been proving to be an effective measure to challenge the non-use of the regulatory power.

State liability litigation concerning health damages by asbestos is expected to

increase, because old asbestos producers do not exist anymore and the current victims could not call them to account.

The mandamus action, a new type of administrative litigation, is expected to demonstrate in the future more effectiveness to control illegal failures by public authorities. However, as for other environmental matters, such as nature protection, there still has been a deficit of judicial review because of the lack of standing for local residents, NGOs and local government.