

LITIGATION AND MORAL CONSCIOUSNESS
IN JAPAN
AN INTERPRETIVE ANALYSIS OF
FOUR JAPANESE POLLUTION SUITS*

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In the two years from June 20, 1971, to March 10, 1973, Japanese courts decided four pollution injury suits colloquially known in Japan as the "big four."¹ This litigation and the social and political movements that accompanied it are of great interest from several perspectives, including the doctrinal development of Japanese tort law. This article, however, will focus not on the legal or political impact of the litigation, but on the way in which cultural and social factors influenced its course. I attempt to illuminate thereby a side of the Japanese legal system that is ordinarily hidden from view, i.e., the interface of modern Japanese society and the formal legal system.²

In doing so, I compare the Japanese experience with "Weberian" and "American" models of litigation.³ The former is based

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1. These cases are commonly known as the Toyama *Itai Itai* Case (Toyama District Court, decided June 30, 1971; appeal decided by the Kanazawa Branch of the Nagoya High Court, August 9, 1972) henceforth *Toyama*; the Niigata Minamata Disease Case (Niigata District Court, Sept. 29, 1971) henceforth *Niigata*; the Yokkaichi Case (Tsu District Court, Yokkaichi Branch, July 24, 1972) henceforth *Yokkaichi*; and the Kumamoto Minamata Disease Case (Kumamoto District Court, March 10, 1973) henceforth *Minamata*. All but *Yokkaichi*, an air pollution case, concerned the pollution of natural water systems by chemical effluence from the defendant companies. The *Toyama* case concerned poisoning by cadmium; the other two involved mercury poisoning.
2. At this point, I would like to state what I am not attempting in this article. This is, as the title indicates, an interpretive essay. It is not and could not be a quantitative analysis of Japanese attitudes towards law and litigation. The material available to me is too limited to permit such an analysis, and the atypical nature of the cases themselves limits the generality of any conclusions drawn from them. Social scientists may find my discussion unsatisfying for these reasons, but it can provide, I believe, insight into the social setting of Japanese law.
3. The models are not intended as yardsticks by which to gauge the performance of the Japanese legal system. Neither is the Weberian model presented as an ideal against which legal systems can be measured, nor is the American model meant as representing an advanced stage toward which Japan will or should evolve. The models are essentially intellectual constructs introduced for heuristic convenience.

on Weber's typology of legal systems and specifically on his concept of formal rationality in law. The latter emerges from the reality of American litigation and stresses the instrumental use of law to accomplish economic or social goals. Neither model is intended as a full presentation of the subject on which it is based but rather as a reference point to highlight the distinctive features of the Japanese situation as revealed in these cases. Nonetheless, a certain degree of explication of the models is necessary to fulfill that role.

Stated in its simplest form, Weberian formal rationality envisions a society governed by abstract legal principles universally applied by legal professionals using law finding techniques which are peculiar to the legal system and independent of any external principles.⁴ The legal principles themselves must be arrived at through specialized modes of legal thought proceeding from established rules or principles and must be uniformly applied to all cases. In such a society, there must be a clear differentiation of law from other sources of normative learning, and law must eventually supersede all other claims on men's loyalties. Laws will be obeyed largely because they are rationally enacted and applied and are so perceived by the public.⁵ Individuals will be willing to submit to the legal process because they believe in the desirability of formal procedures guaranteeing that universal rules will be followed in all cases.⁶

4. Weber characterized a society with a formally rational legal system as exhibiting "legal domination," meaning that legitimate authority would be derived from law rather than tradition (traditional domination) or the leadership of an extraordinary individual (charismatic domination). Legal domination would exist only when the following conditions prevailed:

- (1) There are established norms of general application; (2) there exists a belief that the body of law is a consistent system of abstract rules, and that administration of law consists in the application of these rules to particular cases and is limited to these rules; (3) the "superior" is himself subjected to an impersonal order; (4) obedience is to the law as such and not to some other form of social ordering; and (5) obedience is owed only within rationally delimited spheres (jurisdiction). (Trubek, 1972:733)

For the development of the model, I have relied on Bendix, 1962; Rheinstein, 1954; and Trubek, 1972; as well as Weber, 1947, 1954.

5. Weber stressed the role of coercion and the expectation of coercion in the maintenance of legal domination, but equally important in Weber's view was "the belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedure". See Weber, 1947:131; Bendix, 1962:390; and Trubek, 1972:726.
6. The Weberian model is appropriate for a discussion of Japanese law not only because of its familiarity to Western readers but also because of its historical connection to Japanese jurisprudence. The school of legal thought that Weber most admired was the "legal science" of the German Pandectists (Trubek, 1972:730) which animated the German Civil Code. The German Code in turn formed the basis of the Japanese Civil Code adopted in the 1890's. German "legal

The American model, although simplified for the purposes of this paper, is based on what I perceive to be the practice of American law.⁷ It emphasizes the procedural tactics and economic or psychological resources of the adversaries and typically results in a settlement determined largely by factors extrinsic to the formal legal system. When the volume of similar cases is great, an informal system may arise that has its own rules and procedures but which retains only an indirect and sometimes contradictory relationship with the formal law. Such an informal system appears to dominate automobile injury litigation (Ross, 1970:232) and dealer/manufacturer disputes within the automobile industry (Macaulay, 1966:202). In this model the American litigant, while he may believe in the justice of his position, views litigation as remote from personal conceptions of morality or justice and as a technical struggle between lawyers with which the parties should have as little personal involvement as possible. The expectation of parties and lawyers is not that the legal system will apply neutral rules to given fact situations. On the contrary, litigation is viewed cynically as a struggle dependent on the relative competence of counsel and the existence of exploitable leverage in negotiations.⁸ Obviously there is also a lot of American litigation in which the parties and lawyers are personally involved in the outcome, but in general the detachment of the American model can be profitably contrasted with the personal and moral involvement of both lawyers and litigants in these Japanese suits.

These "big four" pollution suits are peculiarly useful vehicles for inquiry into the social setting of Japanese law because they brought segments of society that would normally have little to do with the formal legal system into direct contact with it for

science" dominated Japanese legal scholarship before World War II and is still a substantial intellectual force in contemporary Japan (Rabinowitz, 1968: Ch. I).

7. I have drawn on my own experience in American litigation as well as the works of Ross (1970), Tinnin (1973), and Macaulay (1966). There are numerous exceptions to the general rule of non-involvement. Lawyers and litigants in civil rights or public interest litigation are often personally involved in the outcome. The model is not meant, therefore, as a thorough presentation of American practice, but rather as a simplified construct to which the Japanese situation can be compared.
8. The facts which may be determinative of a given case may be of limited or no relevance in terms of the formal rules of law. The parties, therefore, structure their negotiating strategy around the particular economic or psychological leverage points available in a given factual situation rather than trying to apply the substantive law as the basis for a negotiated settlement. (Macaulay, 1966; Tinnin, 1973; Ross, 1970). My own experience, for example, has shown that the prospect of adverse publicity will often convince a business involved in a consumer dispute to settle a case that it might win if it went to trial.

the first time. Because of the indiscriminate nature of pollution damage, the victims represent a wide variety of social groups. Although the plaintiffs in these cases were all either poor fishermen or farmers, the range of victims was much wider and included the urban middle and working classes; and in the context of this inquiry, the attitudes of those who chose not to sue become as significant as those of the eventful plaintiffs themselves. Another interesting aspect is the involvement of the defendant companies and their executives. They were of course not unfamiliar with the legal process, but these cases drew them into litigation on a personal as well as an institutional level. An analysis of their behavior, their attempts to avert litigation and their reaction to the eventual results, should provide an indirect but significant clue to the attitudes of the government and business bureaucrats who constitute the top layer of Japanese society.

An analysis of the attitudes of the parties and those victims who did not become parties can give us an insight into the social consciousness of much of Japanese society, but it would be incomplete without a discussion of the attitudes of the legal professionals themselves. The judiciary has been understandably reticent about its role in these cases. The judges immediately involved have stated that their written opinions are the sum of their comments on the cases; other judges have been reluctant to discuss the cases in any context other than of the development of legal theory. So, as in the case of the businessmen, their views will have to be inferred from their institutional reactions. As for the lawyers, however, there is no shortage of first hand comment, at least on the part of the plaintiffs' lawyers.

Although there are limits to its representativeness (e.g., the size of the sample, the intensity of the harm suffered) this material presents a foundation for some tentative generalizations. I will attempt to show by the statements and actions of those involved that they perceived the litigation as a moral rather than a legal struggle in a manner distinctive from both the Weberian and American models. Instead of the formal rationality on which Japan's legal system is theoretically based or the instrumentalism of the United States, the Japanese in these cases seem to have adapted the mechanism and techniques of litigation to distinctively Japanese purposes and in distinctively Japanese ways. The nature of the adaption and its implications for the future of the Japanese legal system will be the focus of the article.⁹

Two of the four cases are particularly informative and provide the bulk of the factual material for later analysis. Those cases are the *Yokkaichi* case and the *Minamata* case. Certain facets of the other two cases, the *Niigata* case and the *Toyama* case, will be discussed whenever they present a better example or a notable exception to the general rule. Since it is the attitudinal setting of the suits that is of immediate interest, materials pertaining to the development of legal theory or to alternative modes of pollution control are introduced only when they bear on the attitudes of the participants. Whenever possible I have relied on the statements of the participants themselves in order to allow the reader an opportunity to analyze them independently of my own conclusions.

The factual background and chronology of the cases will be presented first. Next will come a discussion of the attitudes of each group of participants: victims, lawyers, judges, and defendants. In the final section I will draw some conclusions about the social character of these suits and put forward some surmises about the future development of Japanese law.

THE CASES

A. Background and Chronology¹⁰

The history of Japanese pollution parallels that of her industrial growth. Beginning in the Meiji Period and continuing up to World War II, repeated incidents of pollution damage occurred in isolated areas surrounding factories or mines, with several incidents causing severe social and economic dislocation. The legal system played only a minor role in these incidents, usually limited to the prosecution and defense of criminal charges. Politically and socially based "people's movements" (*jūmin undō*—literally, "residents' movement") on the other hand, had some success in forcing the government to adopt limited antipollution measures. Progress in this direction, however, was halted as the growth of militarism and the outbreak of war severely limited all forms of social criticism (Jun, 1972: 284).

As the Japanese economy recovered from the war, renewed concern about pollution naturally followed. Damage to fisheries in several parts of Japan was significant enough to stimulate the drafting of legislation imposing restrictions on industrial waste disposal as early as the late 1940's, but it was never passed

10. The bulk of the factual material regarding the course of the litigation and the movements that accompanied them was drawn from the following sources: Tsuchimoto, 1972; Smith, 1974; Ono, 1972; *Juristo*, 1972a; *Juristo*, 1972b; Jun, 1972; and Thurston, 1975.

9. For four appraisals of the future of Japanese law, see Rabinowitz, 1968; Stevens, 1971; Kawashima, 1967; and Henderson, 1968.

because of industry and government preoccupation with the more pressing problem of industrial growth (Jun, 1972: 284). It was not until the discovery in 1956 of mercury poisoning, later called "Minamata disease," in the area of Minamata City in Kyushu that the public had even a hint of the possible implications of industrial pollution. Subsequently in 1960 and 1961 the cause of both the high incidence of lung disease in the Yokkaichi industrial area and of the "Itai! Itai!" ("Ouch! Ouch!") disease in Toyama Prefecture were traced to industrial pollution. In 1965, a second case of Minamata disease was discovered in Niigata Prefecture. The litigation that grew out of these four incidents came to be known as the "big four pollution cases."

It was not until 1968, however, that the first suit, that of the Itai Itai victims, was filed in Toyama District Court and not until June of 1969 that some of the original victims from the Minamata area of Kumamoto Prefecture finally brought suit. Part of the delay in filing is attributable to doubt as to the causation of the disease. But that accounts for only a very small portion of the delay, as a brief chronicle of the thirteen years from the discovery to litigation in the Minamata case demonstrates. When the Minamata disease first began to appear in the early 1950's, individuals thought it was contagious, and the families of most victims tried to prevent knowledge of the existence of the "weird disease" from spreading for fear of social ostracism. By November, 1956, however, a special research team from the School of Medicine of Kumamoto National University concluded that the disease was caused by eating chemically contaminated fish from Minamata Bay. Suspicion immediately centered on the discharge of heavy metal waste material by the Minamata plant of Chisso Corporation, but it was not until July, 1959, that the research team announced that the direct cause was organic mercury discharged from the local Chisso plant. As a result, merchants refused to sell fish from Minamata Bay. These findings were largely corroborated by other scientific groups throughout the 1960's and finally in 1968 the government itself concurred in finding Chisso at fault. In terms of legal causation, however, adequate research confirming the linkage had been completed much earlier, perhaps as early as 1957.

The neighboring fishing associations had demanded compensation from Chisso for damage to their fisheries throughout the 1950's, but Chisso had consistently refused to negotiate with them. In August of 1959, however, a protest demonstration by the Minamata Fisheries Cooperative got out of control and young

fishermen broke into the Chisso plant and caused substantial damage. This outbreak of violence presented the government and Chisso with a situation which could no longer be ignored, and the latter agreed for the first time to talk with the fishermen. The subsequent negotiations, which were mediated by the mayor and the prefectural government, ended after a month in an agreement by Chisso to pay a small amount of compensation. These developments in turn stimulated the first demands on Chisso by the Mutual Aid Society for Minamata Disease Patients. By the end of 1959, negotiations had resulted in the signing of agreements in which the victims waived all future rights against Chisso in return for payment of solatia, the highest of which was \$833 for the family of a diseased patient.

From that point onwards, although there were periods of relative quiescence, the victims' reaction to the disease gradually changed from self-pity and shame into intense anger, which eventually found expression in a "people's movement" directed against Chisso Corporation. As the early 1960's saw more medical research corroborate the Kumamoto team's indictment of Chisso, the movement gradually grew to national scope with groups all over Japan lending moral and financial support. The successive discovery of lethal pollution in Yokkaichi, Toyama, and finally Niigata further strengthened and broadened the base of the campaign. As the movement grew in intensity and power, and as Chisso's responsibility became more and more obvious, the solatium amounts were raised, although the company maintained that causation was unclear and denied all legal liability.

The mounting pressure against the company became overwhelming after the Ministry of Health and Welfare finally announced in September, 1968, what all of Japan had been certain of for almost a decade, i.e., that Chisso was the cause of the Minamata disease. Immediately, demands for additional compensation for the disease victims were made, but the Mutual Aid Society in Kumamoto split over what course of action to take to realize those demands. One group of 138 patients from thirty families decided to sue. Others, known to the trial groups as the "leave it to the others" or "pro-entrustment" group, again turned to mediation and entrusted the matter to negotiation by a committee established by the Ministry of Health and Welfare. The remaining victims, many of whom were newly discovered and less severely ill, formed the "direct negotiations" faction, which spurned mediation and insisted on direct and personal confrontation with company officials. The pro-entrustment group made an agreement with Chisso in May, 1970, which obligated

Chisso to pay a maximum lump sum of \$5,515, a maximum annuity of \$155 and a medical allowance to each living victim, and a maximum sum of \$11,110 to the family of each deceased victim. The agreement was the product of the mediation of Judge Chikusa Tatsuo of the Tokyo High Court. Although he had been appointed by the national government as a mediator, his role was more that of an arbitrator. Apparently, he used judicial criteria for tort damages and then informed the company and the victims of the resulting amounts. By the time these calculations were being made, there was no question but that the company would agree to pay whatever the government through its representative suggested, and the victims, pressured by their neighbors for an early settlement, also had little choice.

In contrast to the passive attitude of the pro-entrustment group, the direct negotiations group led by victim Kawamoto Teruo staged an active campaign of direct confrontation consisting of psychologically brutal "negotiating" sessions between the victims and the top executives of Chisso, whose personal presence and contrition appeared to be the victims' objectives in the confrontation. The third group, the pro-litigation group, remained distinct but received support from the direct negotiations group. The attitude of the pro-entrustment patients to both of the other groups was hostile.

The judgment for the plaintiffs was delivered by Judge Saito Jiro of the Kumamoto District Court on March 20, 1973, and provided for total damages of well over three million dollars (yen 937 million) to be divided among the 138 plaintiffs. Single awards ranged up to \$60,000, depending on the severity of harm, with families of a deceased victim receiving the top figure. The lump sum payment for a wrongful death, therefore, was about five times that awarded by the government mediator.

The judgment, instead of signaling the end of the ordeal for Chisso and the victims, merely marked the beginning of another round of negotiations. Immediately after the decision, talks began anew with not only the direct negotiations group but also the victorious plaintiffs and the pro-entrustment group participating. The plaintiffs were dissatisfied because their awards did not provide for annuities and medical expenses, and the pro-entrustment group presumably felt betrayed by the much smaller mediation award. Chisso consented to their participation in the negotiations despite having no further legal liability to either the plaintiffs or the pro-entrustment group members. This time the various groups were able to cooperate and sent a single negotiating team to Tokyo where Chisso's headquarters

are located. An agreement was finally reached on July 9, 1973, with the joint mediation of Miki Takeo, then Director General of the Environmental Agency and later Prime Minister of Japan, and Baba Noboru, a Socialist Dietman from Kumamoto Prefecture. Under the agreement all designated victims would receive the same lump sum payment as the plaintiffs received pursuant to the court judgment. The company also agreed to pay all victims lifetime annuities of \$800, \$1,200, or \$2,400, depending on the severity of harm, and to establish a one million dollar trust fund whose interest is to go for medical and miscellaneous expenses. The firm also repeated its apology to the victims and society. In return the victims promised to cease all protest campaigns against the company.

The representatives of Chisso hailed the agreement, but they were not yet out of the woods. The fishermen of the Minamata Bay area remained to be compensated. Negotiations between Chisso and fishery cooperatives representing 7,300 fishermen had begun in June but broke down in August with the rejection of Chisso's offer of \$4 million (1,200 million yen) in compensation. The fishermen's response was a blockade of the port through which Chisso's Minamata plant receives its raw materials. The blockage, accomplished by stringing their boats together, forced the plant to close for almost a month. Finally governmental mediation resulted in the lifting of the blockade on August 29 and the signing of a compensation agreement on November 21. The agreement obligated Chisso to pay a total of \$7.6 million (yen 2,280 million) in three installments.

When compared to the other three pollution suits, the *Minamata* case is distinctive primarily for the duration and strength of the citizens' movement that accompanied it and for the economic domination of the affected region by the defendant. The actual litigation was preceded for several years by an intensive citizen's campaign against Chisso led by both victims and non-victim residents. By the time the lawyers appeared on the scene, the movement, spearheaded by the Citizens' Council for Countering the Minamata Disease formed by Assemblywoman Hiyoshi Fumiko and poetess Ishimure Michiko, was well under way. In the other three cases, the litigation played a more central role in the formation of the movement. In these cases the lawyers themselves played leading roles in the extra-judicial activity, as well as directing the course of the litigation itself. Without the lawyers' activity, the movements might never have gathered the resources to maintain litigation of this scope and

complexity, and the lawyers have consequently been referred to by some as the "real" plaintiffs in those cases.

This distinction, however, should not obscure the basic similarities in the cases. One fundamental similarity is the perceived relationship between the litigation and the movement. Despite the lawyers' prominence as organizers of the supporting movement in the *Toyama*, *Niigata*, and *Yokkaichi* cases, the litigation itself was still considered less important than the movement by all concerned. The legal action was designed to support the general anti-pollution movement, not the reverse. A second similarity is the general pattern followed in all of the cases. Each can be divided into three stages: first, the prelitigation stage during which an anti-pollution citizens' movement is initiated either by lawyers or politically active laymen; second, the period of litigation itself during which the original organizers build a team of lawyers to whom some of the burden of theoretical and factual preparation can be delegated and during which the publicity surrounding each trial session is exploited to build up the strength of the extra-judicial movement; and finally, the post judgment negotiations stage when victims who had not participated originally in the litigation join the plaintiffs in forcing the company to come to satisfactory compensation terms. Usually, the first stage is accompanied by attempts at mediation by local government officials, frequently sparked by incidents of violence directed against the company.

The suits are also similar in terms of the background of the participants. In all four cases the core of the team of plaintiffs' lawyers was made up of leftist or "progressive" lawyers who were at least indirectly affiliated with either the Japanese Socialist Party (J.S.P.) or the Japanese Communist party (J.C.P.). The plaintiffs, on the other hand, were uniformly drawn from the most socially and politically conservative group in Japan, small-scale fishermen and farmers. This was inevitable for the *Niigata* and *Toyama* cases since the victims there were limited to those who lived along a rural river system. In the *Minamata* and *Yokkaichi* cases, however, the affected area was urban as well as rural. In the *Yokkaichi* situation the area is almost entirely urban and industrial, yet the plaintiffs all came from Isotsu, a small fishing village on the periphery. The defendants in all four cases were leading industrial firms.

B. The Plaintiffs

We can now turn to the investigation of the attitudes of the individual Japanese who became involved in the suits. Most of

these persons—the lawyers and judges, the local politicians, and the corporate defendants—are members of selective and atypical groups whose values may not be representative of Japanese society as a whole. The victims of pollution and their families, however, may hold a set of values more representative of the general population. We know most about the behavior of those few who chose to become plaintiffs, but the movements that accompanied the litigation provide some opportunity to examine the reactions of others as well, both fellow victims and supporters.

The length of time from the discovery of the source of pollution to the filing of the complaint in these cases might lead one to conclude that the victims retained the strong traditional Japanese reluctance to sue that Professor Takeyoshi Kawashima (1967) has characterized as a "weak legal consciousness." If one were to establish a hierarchy of Japanese preferences for various methods of dispute resolution on the basis of these cases, legal means would have to be placed very near the bottom. But while the victims may have avoided litigation, their attitudes cannot be explained simply either as a submissiveness to authority or reluctance to sue.

As they discuss their initial reactions to the mounting pollution damage, the plaintiffs and fellow victims reveal not only economic insecurity but also their desire to avoid any disruption, to avoid singling themselves out from their peer group in any way. This fear of individual action is coupled with a pervasive fatalism and willingness to endure hardship that severely inhibits any group action as well. But these are best seen from the victims' words themselves, so in the following pages I have presented excerpts from their conversations as they appeared in a symposium discussing the *Yokkaichi* litigation (*Juristo*, 1972a) and a documentary movie about the Minamata disease (Tsuchimoto, 1972).

In the first excerpt, Kama Tokiyoshi, a fisherman from Izumi City at the southernmost part of the area where the Minamata disease patients are concentrated, describes the reaction of other residents when his father was discovered to have the disease.

. . . the general opinion in Izumi City is terrible. Three or four people must have died without being designated [as recognized victims] because of fear of public opinion . . . they died raving mad.

People started saying, "Take the sick to Minamata City to be examined for the disease, because it would hurt Izumi City [to have cases discovered there]. If people found out that a person named Kama in Maida seemed to have the Minamata disease, then Izumi City would be hurt." They said the fish

shops would be forced out of business, the fishermen, too. . . . Some people even said, well, maybe Izumi City should buy him, that is, look after Kama [to keep people from knowing he had the disease]. (Tsuchimoto, 1972: 2-3)

The second excerpt is part of a dialogue involving Kawamoto Teruo, the leader of the direct negotiations group, who is trying to convince a young mother, who we later learn is herself a victim, to press for official recognition of her daughter Takako as a congenital sufferer from the Minamata disease. Without official recognition, the child won't be able to enter the patients' association and receive financial and medical assistance from the government and compensation from Chisso.

Kawamoto: I see, her head was wobbly from the time she was born . . . mmm . . . when did you think Takako might have the Minamata disease?

Mother: (Her expression, like a Noh mask, doesn't change.) Someone who'd been in the hospital said, "It's similar to the Minamata disease." A Minamata disease patient had been in the next bed, and so this person says to me, "Your child's disease really looks similar to it."

Kawamoto: (Holding the application papers in his hand.) At the end of December, if you are told it is not the Minamata disease, what will you do? Will you apply once more?

Mother: (Feebly) Well, to apply after having two investigations already

Kawamoto: (Emphatically) But there are people designated to have the disease who have had three, four examinations—or five in some extreme cases—and they've been designated, so you can't very clearly tell with just one or two examinations. There's no reason to give up just because she hasn't been designated the first time.

This time, really, you see, this time you have to demand that you be told the name of the disease. Unless you do something like that, you'll never get designated for the disease, not with the way they're doing it now . . . or is it something about the neighbors you're worried about?

Mother: (Mumbling) Somehow it seems a bit forward to me. (Tsuchimoto, 1972: 78-79)

Even as late as 1973 when the fear of contagion had disappeared, there were still many unidentified victims who had not come forward to claim compensation.

The reticence and shame implicit in these excerpts is consistent with the general Japanese attitude toward physical or mental deformities or abnormalities. Families often try to hide from public view a handicapped or retarded child, and there is little or no attempt to enable them to participate even minimally in society. Thus, when the symptoms of the "weird disease" appeared, the victims and their families' first response was to conceal their existence. Secondarily, they may have wished help in dealing with the burdens of the disease, but neither a desire

to discover the cause nor anger at those responsible was paramount in their minds.

One result of their shame, of course, was a reluctance to assert legal or moral rights. The victim was more likely to accept his fate as somehow deserved than to blame others. A certain fatalism remains even in those who eventually joined the protest movement, as the next excerpt, the reminiscence of a seventy-five year old patient and member of the protest movement, illustrates:

We came here thinking of spending a year or two here. Going to the mountains to hunt, shoot game. But, you see, I was, well, greedy, I guess. Since the time I came to Kumamoto I liked to eat crabs better than anything, crabs. Those big sea crabs. And when I came here, there were crabs, mullets, all the things I liked. Octopus and sea slugs. And I ate and ate. I wouldn't eat a meal without crabs. So since I ate that much, I guess it was natural that I got the disease. . . . So, looking back over it now, I guess I got this Minamata disease because I was greedy (Suddenly with emotion) Why did I come here, to Minamata, I wonder. Why did I come here? (Tsuchimoto, 1972: 49)

The combination of fatalism and shame in response to an injustice with a strong group consciousness makes more understandable the victims' reluctance to take the initiative. To be different, whether because of a physical deformity like that caused by mercury poisoning or for some other reason, is to be set apart, and in a culture where the group is all important, such separation is extremely threatening, not only to the individual but to the group as well.

These reactions and attitudes were clearly operating in the *Yokkaichi* case where individual reluctance to act alone and peer hostility to any individual initiative combined to delay litigation and limit the number of participants. This reluctance was explained by Kato Mitsukazu, a victim of *Yokkaichi* air pollution, when asked why he decided not to join his friend Noda Yukikazu as a plaintiff:

In Isotsu, as for the residents' way of thinking, everyone wants to do only what the others do. In whatever meeting, it's everyone together, following the group. So in the case of pollution damage, too, everyone must act together. If an anti-pollution suit is started, the whole group has to do it. This consciousness is very strong. Group unity forms very quickly, but it's a different story when it's a question of one of them stepping forward to take some positive action himself. (*Juristo*, 1972a: 140)

In another part of the symposium, Mr. Kato describes how family and neighbors put pressure to withdraw on one victim who had decided to sue and how Mr. Kato tried to encourage him to persevere after he learned that the sulfur oxide count in the air over Isotsu had reached a new high:

Because I knew this [that the SO level would cause great hardship], I told Mr. Fujida that, for the sake of Isotsu, he had to let them say whatever they wanted. At the beginning, they called him a traitor and wanted to ostracise him [*murahachibu*—a traditional form of punishment was to isolate an individual from all social contact]. Even so, I encouraged Mr. Fujida and told him that I would stick with him to the end.

As for who was suffering . . . everyone in Isotsu was, but their way of thinking was "Why should I support some trial so they can make money off it?" The Patients' Association was different, however. They'd face up to that kind of talk—"What are you saying? Who do you think you have to thank for the higher smokestacks? . . . and the soot collectors? . . . for all the equipment the companies have installed? It wasn't until those nine people [there were nine plaintiffs] came along that the companies woke up, that the stacks were raised. Now, was it?"

Back in 1963, you'd wash something, hang it out to dry and it'd be black immediately. You'd wash it again and a third time . . . and yet we still shut up and took it, didn't we? "For the sake of the country, for the sake of industrial expansion . . . there's nothing we can do." No one said anything. Even now you hear "those nine people know there's something in it for themselves"—that kind of thinking still exists. (*Juristo*, 1972a: 129)

The hostility of those who did not sue figured strongly in the eventual plaintiffs' attitudes toward the litigation. As Mr. Noda, the leader of the Yokkaichi plaintiffs, explains, they seemed to view the step as a last-ditch, suicidal sacrifice of themselves for the sake of the community, a community which, as he points out, viewed the sacrifice as selfishness. To try to lessen that hostility, the plaintiffs took great pains to convince the people that it wasn't just a "family affair," i.e., for themselves and their family alone.

In my village people felt, "why should we do any work for you." In general the first problem we had in relation to filing suit was the feeling that "this is our thing but our lives are already past—we should just endure it." But when it looked like the precious land left by our ancestors might be encroached upon and our grandchildren's generation affected, we could no longer endure. "Now, we must sacrifice ourselves!" became our cry. I think this trial was motivated by that attitude.

Well, anyway, even today that kind of mistaken consciousness [that the trial was selfishly motivated] exists. People often ask me why my wife never comes to court, but I'm afraid that if it becomes a "family trial," then that consciousness of it just being a single family against the *combinato* [the defendant companies] will continue. And I think that's wrong. (*Juristo*, 1972a: 132).

The hostility that met Noda and others cannot be explained simply by the group's resentment toward seemingly selfish and assertive individuals. It stemmed as well from the villagers' suspicion of the radical reputation that the anti-pollution movement had acquired and the fear that association with it would close

the door on continued governmental mediation. Before the leftist lawyers and politicians convinced Noda and others to step forward, the Isotsu residents' sole recourse had been a series of appeals for relief to both private and public authority. Such appeals were well within the mainstream of traditional Japanese methods of dispute resolution and undoubtedly extremely attractive psychologically to victims and non-victims alike. The strength of that attraction is perhaps indicated by the behavior of the pro-entrustment group of Minamata victims, who never did forsake that policy even in the face of truly monstrous obfusatory tactics on the part of both the government and the company. It is natural, therefore, that the village reacted strongly against any associations with the left that might offend the government, close the door to continued mediation, and eventually leave the villagers not only psychologically isolated from Japanese society but also bereft of any recourse.

The psychological pressures against association with the left were reinforced by a simple and perhaps well founded suspicion that the left was involved in the anti-pollution movement primarily for political motives and that the litigation was intended more to embarrass the government than to help the victims. That the fishermen of Isotsu felt this way comes through clearly in the following remarks by Noda:

[After describing how Maekawa, a Socialist City Councilman, had organized a supporting association, contacted a group of Socialist labor lawyers, and gone to the local hospital to organize the victims there into a possible group of plaintiffs.] Then, all 24 of those in the Shiohama Hospital got together with our families, about fifty people total, and talked about our disease symptoms and other circumstances. But around that time the Communist and Socialist Parties were making a lot of propaganda without really doing anything for us. Some people said they were just trying to arouse public opinion and then would discard us when they didn't need us any longer. Because of that, a lot of people started to hesitate and started to leave the group in ones and twos, saying their son works at the *combinato*, or their father, things like that.

[In response to the question of why he persevered when the others were getting out.] When the nine of us made the jump, we felt that whatever we did, it would be bad. There'd been all sorts of groups, but they were always run by people in it for their own selfish gain. We had even blocked the discharge pipe with our own hands, and still nothing! We were really afraid of the JCP and JSP organizations. To rely on them was . . . , well, our families were really opposed. But we felt that if they could use us, we could use them; if they could throw us aside, well, we could throw them aside too If we lose, we're just back where we started; if we win, maybe we'll get something out of it. That's the way we were feeling. (*Juristo*, 1972a: 128-9)

Thus, the basic fear of being "forward" was combined with an aversion to being associated with the left; but the situation was such that a few were willing to try anything. A nuance that does not come through well in the translation is that Noda's language (when he described blocking the pipe "with our own hands," a reference to an incident in which a group of fishermen attempted to seal the discharge pipe of one polluting company) recalls the desperation of his earlier reaction to the possibility of losing the land of his ancestors.

This strong group consciousness is of course part of the tradition of rural Japan, as the explicit mention of the practice of *Murahachibu* indicates. It is understandable that the residents of Isotsu would retain these attitudes since Isotsu is a fishing village which remains somewhat independent of the adjacent urban areas. What is interesting, however, is that the population of the industrial areas did not sue. Presumably, their experience in an urban, industrial setting would have greatly weakened the group consciousness that characterizes rural communities in Japan. To a certain extent, of course, this process may be taking place since we cannot say that the working and middle class residents of Yokkaichi did not sue solely because of a reluctance to take the initiative or fear of isolation from their community. They may have decided not to sue because of rational economic calculations, mistrust or contempt for organizing lawyers, or loyalty to the defendant companies for which many worked. It is still surprising, though, that all of the plaintiffs came from Isotsu, especially when the original organizing effort was aimed at the urban population which should have been politically more progressive and socially more individualistic. That none of the more sophisticated residents of the Yokkaichi or Minamata areas chose to sue may be evidence that the urban Japanese has adapted to the anonymity of contemporary city life without losing completely the sense of communal responsibility characteristic of rural Japan. If this surmise is accurate (as it appears to be for Noda, Kato, and the others from Isotsu) it holds great significance for the operation of a legal system based on the model of the individual litigant with his cause of action.¹¹

11. The urban Japanese may have decided not to sue for precisely the reasons that American individuals are hesitant to become plaintiffs, i.e., the deck is stacked against them. The disadvantages that an individual encounters in American litigation, especially when his opponent is an organization familiar with litigation are described by Galanter (1975). The same disadvantages exist for individuals in Japan; legal institutions are expensive and complex, and are not of a convenient size for individuals to use to vindicate their rights or

The development of Japanese law should not be envisioned, however, in terms of an evolution of Japanese society toward congruence with the individualistic premises of its legal system. Although there is some evidence, e.g., a rising rate of traffic accident litigation, that Japanese are becoming more "Western" in their attitudes toward litigation (Stevens, 1971), it is equally possible that the process of litigation, even if used more frequently, will function in a manner antithetical to individualism. In fact that appears to have been the case in these suits. The plaintiffs' decision to sue seems less a pursuit of vindication in the formal rational manner than the expression of a strain in the Japanese consciousness toward group violence and moral indignation. On the spectrum of favored tactics in dispute settlement, submission and mediation may be first, but it seems that violence is not too far behind. Thus, when Chisso Corporation refused to comply with what the Minamata fishermen believed to be just and reasonable demands, they twice took violent action and twice achieved their end. Masami Takesaki describes the attitudes of the fishermen in the 1959 incident as follows:

Anyway, as long as this company exists, we cannot make a living—that was probably the feeling we had at the time. But there were various things: high voltage electricity, gas, etc. [that were dangerous]. Well, luckily we didn't touch those things, but if it weren't for that, we would have crushed that big company! We really wanted to crush it! . . .

We have to use force, or this will never be solved. We have to act, there is no other way. This was our feeling . . . Well, fortunately or not, when the situation got that tense, the company responded for the first time, suddenly changing their attitude by 180°, saying that if we were that serious about it, they would agree to talk to us. (Tsuchimoto, 1972: 7)

Besides the 1959 incident, there were the two 1973 blockades of Minamata Port by different groups of area fishermen, a forcible intrusion into one of the Yokkaichi factories by residents protesting air pollution, and the attempted sealing in Yokkaichi of a discharge pipe whose effluent was destroying marine life. There was also considerable violence in the course of the protest movement, especially in the Minamata case, but what may distinguish the fishermen's action is its instrumental character. Whereas much of the patients' violence against Chisso was the expression of uncontrollable rage and vengeance, the fishermen acted in

pursue remedies for their grievances. If these were the reasons that the more sophisticated urban dwellers chose not to sue, one is led to the conclusion that it may have been the plaintiffs' stronger group consciousness that gave them the organizational power to sue. The irony of course is that it was their group consciousness that occasioned use of the legal system even though that consciousness is diametrically opposed to the individualistic ideology of the law.

pursuit of a specific negotiating point or in order to force the company into initial talks.

Whatever its nature or purpose, Japanese seem to resort to violence more readily than litigation. The violence also seems to be accepted as legitimate by the public. Of the five instances mentioned above, the fishermen or residents were charged with criminal offenses only in the 1959 incident, and in that case they were given suspended sentences. In the pipe blockage case in Yokkaichi, the Governor of the Prefecture came in person to convince the fishermen to accept his mediation, but no police were called nor threats of criminal prosecution made. Similarly, in the Minamata blockade cases authorities allowed the port to be closed for a total of over a month.

The Japanese acceptance of group violence in these circumstances is perplexing given their abhorrence of individual violence. It seems to be the mirror image of the American view, where individual violence is denounced but tolerated but group violence, especially politically tinged, is dealt with immediately and forcibly and is strenuously condemned by politicians of all shades as threatening the rule of law itself.¹² Japanese politicians, even conservative ones, don't seem to react with similar fear and loathing, and one possible explanation is the traditional role that limited, often ritualized violence has played in Japanese politics. Within this tradition, the violence is justified because it only comes after great suffering and sacrifice and after the authorities have been slow to act in alleviating the situation despite pleas from the people. At that point some dramatic act is needed to purge the frustrations of the oppressed and to alert the authorities to the danger. Thus, as Takesaki put it (Tsuchi-

12. The "mirror image" may be explained in part by a greater acceptance of the principles of formal rationality in the United States. Where the preservation of an autonomous order is of major importance, individual violence, which does not threaten the autonomy of the courts, can be tolerated. Political group violence, however, threatens to destroy the fragile independence of the legal system by forcing it into an affirmative role in the maintenance of the political order. On the other hand, in a society that does not accept the values implicit in formal rationality (the universality and generality of rules and their impersonal application) the specter of group violence is less threatening. The potential destruction of an autonomous legal system is not feared because it was never perceived as important. In such a setting the response to political violence focuses on the nature of the violence itself, not on its possible effect on political institutions. If that violence is a spontaneous reaction to an unjust situation, as was the violence associated with these suits, the society's response is likely to be sympathetic. For a provocative discussion of Japanese attitudes towards what is described as "sin-cere" violence and its effect on the rule of law, see Rabinowitz, 1968. For a discussion of the American legal system's response to political violence, see Balbus, 1973, and particularly his "Conclusion" which discusses the importance ascribed by a liberal elite to the preservation of the legitimating role of formal rationality.

moto, 1972:7), as soon as Chisso realized that the fishermen were "that serious," they agreed to negotiate, and the local government intervened to help reach a settlement.

Exactly where the modern institution of litigation fits in this pattern of mediation, violence, and more mediation, is unclear. As implied above, it may be viewed as a partial surrogate for violence and confrontation, as another way to express frustration and desperation and to trigger a response from authorities. As we shall see below, the parties in these suits did not view litigation as a "formally rational" system for dispute settlement, the structure of which was to apply certain neutral rules to their situation and whose purpose was to provide monetary compensation to the aggrieved party. Nor did they possess the cynicism and detachment associated with the "American model" of litigation. Instead, as we shall see, they viewed the litigation as kindred to these sporadic incidents of violence.

As their background would lead one to assume, the plaintiffs and their supporters had no understanding of the nature of litigation. They had pictured the process as an opportunity for personal confrontation with the presidents of the defendant companies through which they would be able finally to achieve moral satisfaction. The formal nature of the court proceedings (especially the advocacy system which enabled the company presidents to avoid appearing in court) altogether frustrated this desire and left the plaintiffs and their supporters disillusioned with the possibilities of the institution. Ono Eiji (1972:13), a journalist who joined one of the supporting associations affiliated with the *Yokkaichi* litigation, describes the reactions of the plaintiffs as they sat through their first trial session:

The oral pleading began. The trial had several surprises in store for those of us who hadn't seen one before. First was this thing called the advocacy system. It started with the physical arrangements of the courtroom. The two groups of lawyers sat opposite each other on either side of the bench. The plaintiffs themselves sat in the gallery in back. As for the defendants' side, no one even showed up—there was just their lawyers lined up looking professional.

The significance the patients attached to this suit—it wasn't just money, just the compensation. It was to make the presidents of the companies that had inflicted this illness on them say just one word, "I'm sorry." The advocacy system pretty completely shattered this hope. At the very instant that the plaintiffs' lawyers were denouncing the defendants' crimes, at the very instant that the patients were making their embittered appeal, "Mr. President" was sitting in his nice, deep office sofa, not in court! Is money an excuse for even this?

There was another problem for the plaintiffs' side. Of course no plaintiff can talk as well as a professional advocate. But it's also a fact that, no matter how talented the lawyer is,

he can't relate 100 percent the feeling of the patients themselves. There's the opportunity to testify directly, but even then, the person himself is just asked questions—remains a "guest." Sometimes complicated expressions flickered across the patients' faces as they sat in the gallery listening to the give and take of the courtroom—"Why must this court thing be so far removed from the common people?"

Of course, the suit had to be won, nonetheless, and the defendant companies defeated even if within the court rules, but as long as it was done in this phony way, there'd be no real victory. As long as the trial remained in this framework, "Mr. President" would be able to hire his lawyers to make his excuses for him; even if he loses, it won't be anything more than money. The guilty conscience, the pain he should feel as a human being, the recrimination, he will escape it all.

The *Minamata* patients found the same defect in their litigation, i.e., there was no way to force the personal confrontation they sought. One response was the "one share movement," a plan by which each patient or supporter would buy one share in Chisso Corporation, then attend the 1970 annual meeting of shareholders in Osaka. At the meeting they would have the desired opportunity to vent their rage.¹³ Maybe some of their comments can give us an idea of what their expectations of litigation had been. The first excerpt is from Onoue Tokiyoshi who had received \$5.50 from Chisso as a compensation for the loss of his wife:

. . . I don't have much to say, but, if it's this small a sum, if a company executive is going to be this stingy, maybe the executives should talk about it and decide on one or two to be sacrificed, see? And drink the mercury. Then their eyes would be opened. . . . So we should put water in a big keg, then put some mercury in it, take it up to the stage and say, "At this stockholders' meeting, if some of you important people at the top, some of you from the Chisso Company sacrifice yourselves and become victims, then maybe we'll be ready to reconsider." (Tsuchimoto, 1972: 28)

Hamamoto Fumiyo, who had lost both her parents to the disease looked forward to the meeting:

. . . The Chisso Company is so hateful. When I go to Osaka, I'm going to say to President Egashira [of Chisso], "I'm buying your life with yen 4 million." I'm going to say something to him, I'm really going to go raving mad when I go to the meeting. (Tsuchimoto, 1972: 72)

At the meeting in front of national television she had her chance to confront Egashira face to face, and she made the most of it:

13. The idea for the movement belonged to Goto Takanori, a New Left lawyer from Tokyo and not one of the lawyers working on the litigation itself. The plaintiffs' lawyers were opposed, at least partially because they were Communist party oriented and antagonistic to the New Left, but also because they felt it would be detrimental to the litigation. The movement as it evolved was highly political and perhaps most of the participants were not patients or even from the *Minamata* area. To counteract this distortion, I have excerpted only the comments of the victims themselves.

. . . You're a parent, too! Do you understand? Do you really understand my feelings? [Dead silence fills the auditorium.] What did you say, what did you say to me then [when he visited her home to apologize—probably in 1969 after Chisso publicly repented], have you forgotten how you bowed your head three times? [President: So I went to pray to your deceased . . .] Coming to the Buddhist altar is not enough! . . . [The people around them are silent and unmoving. She clings to the President's lapels.] . . . how much do you think I suffered? The suffering, it's so much, I can't put it into words! You can't buy lives with money! My brother's a cripple! My parents . . . both of them! My brother's a cripple and people laugh! My parents . . . (Tsuchimoto, 1972: 90)

Not only was the courtroom procedure inadequate on this ground but the patients were alienated further by the formal process of proof. Ono (1972:14) contrasts the misery and suffering outside the courtroom (including pollution-induced suicides) with what went on within:

As concerns the way the hearings went, we were made extremely anxious by the "formalism." To take a living phenomenon like pollution, turn it into a series of documents, then discuss those while people are actually suffering and dying seems somehow arrogant or disrespectful. The plaintiffs' side would say, "It's terrible." The defendants' side would say, "It's not terrible." The judge would strike a balance and write his opinion. This is nothing more than bargaining with the plaintiffs' appeal.

Mr. Noda, when asked how the patients felt as the litigation dragged on and on, expressed frustration with what seemed to them an endless and mindless process:

The feeling that it was really slow was very strong. Such a lot of boring formality and verbosity—a trial for something that was so clear, so obvious from the beginning! If you went to the courtroom and watched, well, there'd be scholars lining up and spouting a bunch of meaningless jargon—really stupid stuff! You wanted to say, "Stop! Stop! I can't stand it!" (*Juristo*, 1972: 133-134)

The Japanese are not the only laymen disgusted and confused by the delay, jargon and formality of litigation. Nor is the preference for informal, out of court settlements any less common in the United States (Ross, 1970; Macaulay, 1966). Nor can the distinctively Japanese character of these suits be found in the instrumental use of litigation by the anti-pollution movement since that instrumentalism is similar to the American model. Instead their distinctiveness comes from the attitudes of the participants and the dissonance between their attitudes and both the operation and ideology of the legal system. Although inconclusive, the preceding material points to the participants' strong communal orientation and to adaption of the litigation to their communal ends despite the individualistic premises of the legal system. A contrast can be drawn to the American

model which entails little conflict between the individualistic bias of the law and the attitudes of most litigants. If the American use of litigation as a bargaining tool or economic bludgeon distorts the substantive principles of the formal law, it does not depart from the notion that litigation is inherently self-interested.

C. The Lawyers¹⁴

The frustration and alienation engendered in the victims by the "cold-blooded" formality of the courtroom procedure was compounded by the role the lawyers were forced to play. The plaintiffs had not expected litigation to be so totally devoid of emotion and morality. Similarly they had not expected their lawyers to act as specialists or technicians, but rather to be fellow soldiers in the battle to achieve moral satisfaction. To the plaintiffs, participation in this battle should be total, and there is (ideally) no room for "experts," or "hired guns."

To a large extent, the lawyers shared the plaintiffs' and their supporters' view of the litigation and of the appropriate role of attorneys. Their attitudes came out quite clearly in a discussion among lawyers active in the *Yokkaichi* case concerning the lessons to be learned from the litigation and their role in it. In the discussion a split emerges between two views of the lawyer's function and the general purpose of litigation. One faction, a minority, insisted that the lawyers could not become "soldiers" totally committed to the anti-pollution struggle as a whole. They contended that the technical complexity and wide range of the issues required experts and specialists, who could not give total commitment. The opposing faction criticized these lawyers for being too role oriented, too concerned with winning the litigation, and not sufficiently concerned with the progress of the movement as a whole and with expressing the suffering of the patients in as dramatic and forceful a fashion as possible. Both groups compared the *Yokkaichi* lawyers, who were generally regarded as less political and more technical, with the pattern established by the lawyers in the other three cases, who

rejected their traditional role model as lawyers and sought to overcome their separation from the victims. This discussion and the ideas that inform it present, in concrete form, the conflict between the need for impersonal specialization and the desire for personal involvement in the human aspects of complex but politically and socially controversial litigation. Before we look at the views of the different factions, the ideal type of Japanese anti-pollution lawyer against which both factions were measuring the *Yokkaichi* example must be presented fully.

In the *Toyama* case, three members of the lawyers' group actually moved to the affected area, and when other lawyers from Tokyo, Nagoya, or Osaka gathered there, they always stayed a night at a victim's home or a rural inn. That night, whenever it was feasible, the visiting lawyers would individually get together with two or three people from the area and explain what they were doing and how. Then, on days when there were court sessions, the lawyers would borrow an extra room in the courthouse and join the plaintiffs, other victims, and supporters in a simple lunch supplied by the victims themselves. In this way the lawyers became very close to the plaintiffs and their supporters and became personally involved in the anti-pollution movement in Toyama.

The lawyers in the *Niigata* case acted similarly. Bandō Katsuhiko, the founder of the team of lawyers, moved from Tokyo to Niigata years before the case formally began in order to assemble a body of plaintiffs and to experience as nearly as possible the actual suffering of the victims. During this period he worked solely on this case while his wife supported him. This pattern of full personal commitment to the suit and the victims became known as the "Bandō method" and was followed by Managi Teruo, the leader of the Minamata lawyers.¹⁵

Alongside this view of the lawyer's role was a political and moral view of the purpose of the suits. Just as the plaintiffs were seeking something more than monetary compensation, the lawyers saw the litigation as part of a cause that went well beyond the relief of the particular plaintiffs or even of all the victims in that certain polluted area. While that cause was largely moral and personal for the plaintiffs, for the lawyers it had great political significance as well. For they were almost all leftists and convinced that the problem of pollution could not

14. This section is based on the *Juristo* (1972b) symposium cited above in Note 10, which was a roundtable discussion among the *Yokkaichi* lawyers, and a series of interviews in Kyoto, Japan, with plaintiffs' attorneys in May and June, 1973. In the course of these interviews, I discussed the cases with approximately ten (10) lawyers who had either been part of one of the four lawyer "teams" in these suits or were involved in similar suits. Two interviews with Akio Morishima, Professor at Nagoya University and himself involved in the *Yokkaichi* case, were invaluable not only in filling in factual gaps but also in interpreting what I had been told by other Japanese attorneys.

15. This description has been simplified and idealized. Actually the lawyers, plaintiffs, supporters, etc., in these cases were not always the "happy family" depicted here, but this was the ideal conception that animated the debate among the *Yokkaichi* lawyers.

be solved as long as the responsibility for pollution in the minds of the people was centered on the individual defendant firms. Their efforts, then, unlike the moral outrage of the victims, were directed at the capitalist system as a whole rather than at the individual executives of the defendant company. Bandō expressed their attitude as follows:

Our most fundamental motivation was the clarification of the cause and responsibility [for pollution], i.e., to unravel exactly what the intrinsic nature of the repeated outbreaks of pollution actually was. That was the point from which we proceeded The idea was that the root cause, the essence of pollution was the same as the cause of the problems that the workers were confronting: the labor accidents, the work related diseases, bad working conditions and automation. We came to realize that the core of the effort to eradicate pollution had to be the working class. That realization and the Niigata struggle based on it greatly enhanced the meaning of the final trial session and the judgment itself. (Ushiyama, 1973: 28)

Thus, the "Bandō method" not only meant complete personal commitment on the part of the lawyer but also required a good deal of ideological commitment as well. This political orientation was generally shared by the *Toyama*, *Niigata*, and *Minamata* groups, but the *Yokkaichi* lawyers were known to be somewhat less ideological and more concerned with the progress of the suit itself than with the accompanying people's movement. Although the lawyers who originated the suit came largely from a law firm associated with Socialist labor unions, there was a variety of political views represented among the lawyers and law professors who formed the nucleus of the working group. There was neither a single lawyer who dominated the group as Bandō had in the *Niigata* case, nor a highly developed and politicized mass movement to impart an ideological hue to the litigation itself.

In fact, the relative stagnation of the movement in *Yokkaichi* is one of the major failings of the suit in the minds of several of the lawyers. This is brought out in their discussion. The two factions in this discussion can be roughly represented by two lawyers. The first is Noro Hiroshi, *de facto* leader of the group and politically active. His firm was involved in the case from the beginning and he did much of the initial work. The second is Tomishima Teruo, who was not a member of that firm and considered himself dedicated to the legal protection of human rights rather than to any political ideology. Before this suit, he had had a general civil practice while Noro had specialized in labor related cases. Noro was the first lawyer to be contacted by Maekawa Tatuso, the Socialist City councilman who initially

tried to organize a coherent anti-pollution movement, and was thus involved from the very beginning. Tomishima, although interested earlier, joined only when the original five or six labor lawyers opened their group to non-labor lawyers—about one month before actual filing of the complaint. Tomishima joined partly because he had grown up in the area and was appalled by its rapid deterioration and partly because he saw the case as one involving the protection of civil rights.

Consider the different ways that the two perceive the purpose of the litigation, and its relationship with the extrajudicial movement and the proper role of the lawyer in pollution litigation. First, Tomishima on the nature of the suit:

There are those who understand the anti-pollution movement as an ideological struggle, but a pollution case can never be an ideological problem. Rather it should be thought of in terms of dealing with a concrete infringement of a person's life and health, i.e., as a strict question of human rights. It is with that assumption, which corresponds to both my personal motivation in becoming a lawyer and the purpose of pollution litigation, that I joined the lawyers' group. (*Juristo*, 1972b: 102)

Tomishima, therefore, made a clear distinction between politics and law and by implication indicated that the lawyer's role should be restricted to the latter. In this particular case, the lawyer's role was to deal with the concrete infringement of civil rights, presumably by injunctive relief and monetary compensation.

Noro, on the other hand, saw the litigation, at least initially, as a way of sparking the development of the anti-pollution movement and of expanding that movement to include the individual victims. This view comes out as Noro answers a question concerning his feelings at the time of the filing of the initial complaint. The question followed a statement by Kitamura Toshia, the head of the Socialist law firm to which Noro belonged, in which Kitamura indicated that the suit was filed in order to shock the government into action on the pollution issue.

In response to that, at the time I also felt that a proper understanding of the meaning and significance of initiating litigation was essential in resolving the problem. Like Mr. Kitamura said, my decision to try litigating this suit also grew out of a feeling of the suit as part of a movement. That movement, however, was still sort of vague, revolving around the actions of the local governments, the unions, or other group activity. It hadn't yet taken the form of individual victims raising their voices in accusation of the companies and government responsible Then [when] the individual patients decided to stand up to the companies one by one and demand that they face up to their responsibilities, this action, well, I think it took the movement one step higher, don't you? (*Juristo*, 1972b: 105)

Since Noro saw the purpose of the litigation in the context of a movement, he judged the lawyers' performance not solely on whether the case was won and the plaintiffs compensated, but also on whether they had fully participated in the non-legal aspects of the movement:

[Explaining why he felt there should have been more contact with the plaintiffs.] After all, this suit wasn't conducted like a pure lawsuit but as one link in the anti-pollution movement, as the leading edge of the movement. If one thinks in this way, i.e., that the litigation itself is part of the people's movement, one has to admit that the work of the lawyers in this suit was a little too isolated. Of course, some would come to Yokkaichi and go to various meetings and get together or attend workers' or citizens' study groups, but it was only a limited number of lawyers in the group . . . Most didn't use the opportunity to become an intimate part of the people's movement. (*Juristo*, 1972b:118)

Noro attributed this lack of involvement with the movement to the fragmented and specialized structure of the lawyer's group. Because of this division of labor and the consequent lack of complete unity and cohesion among the lawyers, they were unable to get in intimate touch with the people's problems:

Thus, as I said, we used the method of giving each person a separate aspect of the case to work on, but in retrospect that was a mistake, as we can see from the insufficient contact with and understanding of the plaintiffs and their fellow inhabitants.

In short, this case was an extremely technical trial from the beginning. Because there was required a high level of non-legal expertise and the lawyers' energy was channelled in that direction, the lawyers themselves couldn't express as their own experience the suffering and experience of the plaintiffs' lives. . . . even though it was essential, they couldn't do it adequately. Because of that, when sometimes the plaintiffs themselves were attacked by the other residents in the area as being mercenary and selfish or they had similar simple problems, the lawyers couldn't get together with them and resolve them. Also, although of course they went to the site of the pollution and engaged in various negotiations, the lawyers did not establish an adequate level of mutual understanding with the inhabitants of areas other than Isotsu. My feeling is that this problem is due to the specialized division of tasks.

Therefore, in the next suit like this, whatever happens, the first rule should be to have the lawyers fully experience and appreciate the life of the plaintiffs and other residents. (*Juristo*, 1972b: 118)

To make that possible, Noro would avoid the detached specialization of the *Yokkaichi* lawyers and make the lawyers' singleness of purpose his first organizational priority.

Many of Noro's concerns echo those of the plaintiffs and other laymen involved in the litigation. Like Ono Eiji, he regretted that the lawyers were unable to express "as their own experience" the plaintiffs' suffering and were prevented by the

formality of litigation from becoming an intimate part of the people's movement. Noro's emphasis, however, appears to be slightly more instrumental in that he is less concerned with the moral than the practical effects of the litigation. The two are complementary but distinct. The practical effect of the lawyers' failure to present adequately the plaintiffs' plight was a lack of understanding and sympathy by the other villagers and residents. Their hostility in turn blunted the movement and lessened the political impact of the litigation.

Tomishima responded:

In the first place, concerning the advisability of the division of the work, Mr. Noro has said that it interfered with the relationship with the plaintiffs and that we should therefore reconsider this point, but I don't see it that way. The division of work and the rough relations with the plaintiffs and other residents are not necessarily linked. Rather, with a lawsuit of this scope and duration the work of many different tasks must be coordinated or the lawsuit can't be maintained. In this type of litigation, after all, a certain degree of the division of labor is inevitable.

Elsewhere you hear that the *Yokkaichi* group lacked a so-called "founding lawyer"—well I'm not sure that Mr. Noro wasn't really one, but anyway this wasn't a lawyers' group where the model was the omniscient and omnipotent general practitioner. Like Mr. Oguri just said, the case has been brought along by the cooperation and consolidation of several lawyers all working on various incidents. I think this itself is very significant. If in all pollution cases from now on it is necessary to gather omniscient and omnipotent lawyers who can devote their whole lives to one suit, well, then that's going to cause some problems itself. In the future, pollution litigation will get harder and harder to maintain. (*Juristo*, 1972b: 119)

Tomishima's point is not that the movement is unimportant or that coordination of the litigation with the movement is undesirable. On the contrary, it is clear from the discussion that he is as firmly committed to the cause of eliminating pollution and of the protection of human rights as Noro and the other lawyers. His point is rather that, in order to win, the lawyers in complicated suits like *Yokkaichi* must accept the limitations of their role imposed by modern legal institutions. The implication of the argument of Bandō and Noro is simply that in Japan this just isn't true, that the best way to deal with the problem of pollution is massive public pressure that will sweep the judges, companies, and the government before it. The role of law is significant and in these cases perhaps it was a necessary element, but the point is that the lawyer's dedication is ultimately to the building of the movement, not to some abstraction like "human rights under law," and his role as a trained professional should not make him stray from that larger purpose.

D. The Judiciary¹⁶

Unlike the plaintiffs and their lawyers, the judges who have been involved in these cases have not explained their motivations publicly. Thus, we must gauge them indirectly, by what others expected of the judges and by what they did.

The four cases form a single entity not only in their social and political characteristics but also in their contribution to Japanese legal doctrine. In the mid and late sixties, when lawyers were first grappling with the theoretical problems involved in proving negligence and causation in a pollution context, few if any believed there was any chance of meeting traditional tort standards on either issue. The cases were undertaken not with a firm hope of victory, but with the sense that even if the plaintiffs lost, the litigation might provoke general interest in the problem of pollution, i.e., they were undertaken as part of the movement.¹⁷ By the time the four decisions had been handed down, however, it had become very difficult to conceive of a pollution case that the plaintiff could not win (Sawai, 1973:13; Awaji, 1973:21). This expansion of tort theory may itself provide a clue to the judges' view of their role and the role of the legal system in the context of a massive social movement.

The basic principle on which Japanese tort law is based is Article 709 of the Civil Code, which reads: "A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom." In pre-war cases the Great Court of Adjudication had interpreted this language quite narrowly, establishing strict standards of proof for both negligence and causation. A defendant was not negligent if he could show that he had taken reasonable measures to prevent or alleviate injury even if he knew or should have known such injury would occur despite such measures. In a pollution case causation required detailed proof of each step in the production, discharge, and transmission of the material as well as the precise nature and causation of the resultant disease (Awaji, 1973: 21). Although post-war decisions had undercut the rigidity of these standards in some areas, including medical malpractice, the plaintiffs' attorneys had to anticipate the possibility

of their continued application in the pollution area. Those fears were not realized because the courts made a clear and conscious effort to relax the standards of proof both as to negligence and to causation.

The relaxation of proof of negligence in these four cases culminated in the *Minamata* case. The actions for which Chisso was ultimately found negligent began in the late 1940's or early 1950's. If one considers the technical sophistication and knowledge of the Japanese chemical industry at that time and especially the lack of sensitivity to the pollution problem, it is difficult to see how the court could find Chisso negligent under the earlier standard, at least toward the earliest group of victims. The difficulty is compounded by the fact that the quality and content of the defendant's waste water violated no statutory limitations or administrative standards. The Court, however, easily found negligence by emphasizing the highly dangerous nature of chemical waste water and holding that the company could have and should have foreseen that danger even before 1953, when the first victim contracted the disease. The *Minamata* defendants, apparently with a view to the three earlier cases, did not even try to rely on the old standard of negligence, but claimed only that they could not have foreseen the specific causal material and that they were, therefore, not negligent. The Court rejected this reasoning, arguing that:

If we were to adopt this way of thinking, it would be only after the environment had been despoiled and the health and lives of the residents put in jeopardy that the dangerous nature of the defendant's activity would be corroborated . . . Since this would amount to using human beings as guinea pigs, it is obviously wrong. (Sawai, 1973: 18)

The Court later qualified this language, which would practically establish a theory of non-fault liability for hazardous enterprises, by pointing out that there was one article written in 1921 that might have alerted the defendant to the possibility of producing organic mercury as a by-product of its chemical processes. Thus, the Court reasoned, the defendant should have foreseen the harm it ultimately caused to the plaintiffs. The reliance on the 1921 article to establish foreseeability, although it does not literally eliminate that element of proof, renders it no longer a practical consideration.

The *Minamata* Court also laid down very stringent guidelines within which the chemical industry had to operate in the future to avoid liability for negligence, including continual analysis of the factory's waste water, extensive environmental surveys before any material can be discharged, and immediate suspension

16. I have drawn on the following law review articles in assessing the doctrinal significance of these cases: Nakai, 1973; Sawai, 1973; Ushiyama, 1973 and 1970; Awaji, 1973; and Hirano, 1973.

17. Interviews with Professor Akio Morishima in New Haven, Connecticut, and Cambridge, Massachusetts, March, 1974. Professor Morishima acted as a legal consultant for the *Yokkaichi* lawyers' group. His major field of concentration at the present time is legal sociology with a special interest in these particular suits.

of operations whenever there is doubt as to the safety of plants, animals, or people. In fact, the Court indicated that Chisso should have suspended operations and begun a thorough investigation of the cause of the Minamata disease at the time of the 1959 dispute with the area fishermen.

In the causation area the first major contribution of the cases was the acceptance by the courts of proof of etiology by statistical epidemiological evidence and the consequent rejection of the defendant's contention that etiology had to be proved by pathological evidence, i.e., by experimental rather than statistical criteria. In the *Toyama* case and impliedly in the *Yokkaichi* case as well, the Court emphasized the practical difficulties the plaintiffs would face if the more stringent standard of causation were employed. In the *Toyama* case, the defendant had not countered plaintiff's epidemiological evidence at the first instance, perhaps relying on the Court to apply the traditional standard, but on appeal the defendants contended that the plaintiffs must show the precise mechanism by which cadmium produced the disease, e.g., in cases of oral intake, the exact rate of absorption, amount of accumulation in bone tissue, etc., that produced the exact symptoms. The High Court rejected this contention:

In determining causation in pollution cases, since industrially caused air and water pollution is both spatially extensive and temporally of long duration, the indeterminate factors will be practically limitless. In this context, it is reasonable to recognize legal causation when established by epidemiological methods even if it could not be established by clinical or pathological methods alone. (Sawai, 1973: 15)

The Court went on to indicate that clinical and pathological proof would be available to the defense for rebuttal, but, as long as such proof is not determinative, epidemiological proof was sufficient. The decision set the pattern for the *Yokkaichi* case as well where proof of etiology by the old standard would have been particularly difficult because the *Yokkaichi* lung disease was a non-specific asthma that one might contract in the absence of pollution, rather than a set of peculiar symptoms specific to a certain chemical like cadmium or mercury.

Because of the research on the etiology of the Minamata disease done by Kumamoto University, the defendants did not have much room to maneuver on this point in either the *Niigata* or *Minamata* cases. Instead the key causation issue in the former case was the discharge of the causal material by the defendant and its transmission to the victims. Again, the Court was very aware of the difficulty the plaintiffs would encounter if the traditional doctrine were not adapted to the special problems of

pollution litigation, and it gave a concrete explanation of the judicial measures necessary to alleviate such difficulties. The typical pollution case, the Court noted, presented the following problems of causation: (1) the distinctive quality of the disease and the material that causes it; (2) the transmission of the material to the victim (the path of pollution); and (3) the discharge of the causal material by the defendant (the mechanism of production and discharge). To prove (1) the cooperation of many experts in different fields is needed; also, without a substantial number of victims, causation is often impossible to prove by epidemiology. Regarding (2) the Court noted that it is difficult to ascertain the path of pollution solely from the chemical substance itself, since natural and artificial factors continually affect the material. Industrial secrecy, making it unlikely that any outsider can know precisely the amount and chemical nature of the discharge from the defendant's plant, adds to the difficulty of determining the path of pollution. Regarding (3) the Court observed that without access to the internal operation of the plant itself, no outsider can know what substances are being produced or used within and whether or how they are discharged. In contrast to the plaintiff's difficulty, these points could be easily proved or disproved by the defendant's technicians. The Court, reasoning from these premises, concluded that:

. . . to require proof of causation that would satisfy the criteria of natural science in cases of chemical pollution would be unreasonable from the point of view of equity, the essence of the tort system. Instead in regard to points 1 and 2, when accumulated circumstantial evidence is sufficient to explain them and is not contradicted by the principles of the relevant fields of natural science, they will be considered legally proved. Further, as to point 3, when the above degree of evidence is attained and the source of pollution is traced to the "doorstep" of the defendant's plant, unless the defendant can show that its plant could not be the source of pollution, it will be factually presumed to be and all requirements of legal causation will be satisfied. (Sawai, 1973: 16)

Although there is some disagreement among Japanese scholars as to the degree of theoretical innovation in these four cases, there is no question that each judge was quite conscious of the difficulties that the traditional theories would present to the plaintiffs and were determined to shape standards of proof that would minimize those difficulties to the greatest extent possible.

The easing of the plaintiff's burden was progressive, beginning with the acceptance of the epidemiological evidence by the *Toyama* District Court in June, 1971, proceeding through the *Niigata* decision's establishment of a strict duty of care for the

chemical industry and the Court's "doorstep" doctrine, the *Yokkaichi* Court's refinement of the use of epidemiology and its widening of the concept of joint liability (unlike the others, this case had multiple defendants), and culminating in the *Minamata* decision which practically established no-fault liability for industrial pollution. This doctrinal progression is significant because, with the exception of the *Toyama* case, all the decisions were at the District Court level. From a practical as well as a theoretical viewpoint, therefore, the various judges were not bound by the previous cases' reasoning (although there were considerations of comity), and each had in turn to consider the wisdom of breaking with the precedents of the Great Court of Adjudication (1875-1947).¹⁸ From the academic material discussing the cases and from informal interviews with individuals involved in the litigation, however, I gather that by the time of the *Yokkaichi* decision, there was little question but that the plaintiffs would prevail and that there was no doubt at all as to the outcome of the *Minamata* case. This was true despite the fact that these two cases probably presented the thorniest problems of legal theory in the causation and negligence areas respectively. That some of those involved believe that the Supreme Court would have reversed these decisions had they been appealed gives the nature of the judges' reasoning even more significance.

How much of the impetus for the decisions was supplied by a purposive analysis of Article 709 and the principle of equity that, according to the *Toyama* Court, underlies it? How much was supplied by the tremendous social pressure generated by the anti-pollution movements? It would seem unlikely that the courts could remain totally immune from this pressure. In the face of the relative inaction of the national government, its well known close association with the defendant businesses, and the great disparity in wealth and social power between the plaintiffs and defendants, it is easy to imagine the judges viewing themselves as the last chance for the vindication of substantive justice. Discussions with judges involved in this type of litigation¹⁹ indicate that they are, perhaps more than their American counterparts, acutely aware of the dilemma in which this kind of reason-

ing will place them. On the one hand, they feel strongly that justice requires a decision for the plaintiffs. On the other hand, they realize that a decision for the plaintiffs will be interpreted at least in part as succumbing to public pressure and that such an interpretation threatens to erode the independence of the judiciary on which they believe democracy depends. Perhaps to protect that independence many judges and scholars maintain that these decisions represent no departure from pre-war precedent and traditional doctrine.

The plaintiffs conceived of the lawsuits as part of a titanic moral struggle in which they were the contemporary equivalent of the sacrificial village leader of peasant rebellions.²⁰ The lawyers generally saw themselves as "soldiers" in the same struggle, to which they owed the total commitment of a human being and not the partial commitment of a lawyer. In this context, it is improbable that the judges would accept completely a role of

18. To avoid exaggerating the importance of breaking with pre-war precedents, it is necessary to note that the role of precedent in Japan is similar to that in civil law jurisdictions and considerably less important than in common law jurisdictions (Henderson, 1968:451).

19. I presented an early version of this paper at a meeting in May, 1973, of the Goethe Institute of Kyoto, Japan, which was attended by several District Court judges who were involved directly or indirectly in similar litigation. During the question period and afterward, I had the opportunity to discuss this question with them.

20. The social movements associated with these suits have been compared to Tokugawa *hyakushō ikki* (peasant rebellions). Kano (1973) analyzes the *ikki* as exhibiting four major characteristics that are also present in the social background of these cases. First, both the *ikki* and this litigation represented a desperate struggle by local people in defense of their basic right to live. The Tokugawa peasants were reacting against the merciless imposition of taxes and corvée that threatened their very existence. Certainly the threat in these cases was no less great. Secondly, both movements were basically non-ideological. Some Western scholars have tried to interpret the Tokugawa *ikki* as partially revolutionary and anti-feudal. But they produced no ideology of peasant rebellion such as that of Thomas Münzer of the German Peasants' War or Hung Hsiu-ch'uan of the Taiping Rebellion. They were struggles for changes in government policy rather than attempts to overthrow the entire system. Similarly we can see that, although the lawyers may have been ideologically motivated, the general thrust of these cases was not ideologically directed. On the contrary, the victims and supporters were extremely reluctant to become associated in any way with leftist ideology, and the domination of the lawyers' group by Communist and Socialist lawyers was a cause of underlying tension in all four cases. The third common characteristic is moralism, a conviction on the part of the actors that they are morally correct in opposing merciless oppression whether it be that of the feudal lords or the corporate/government bureaucracy. Once that sense of moral superiority has been established, they no longer feel bound by any sense of duty to community and feel justified in defying both the law and ordinary social convention. This certainty of moral rectitude explains why the daughter of a humble fisherman like Hamamoto Fumiyo has little compunction in physically and psychologically confronting the president of a large corporation like Chisso, a person of such social status that she would normally be hesitant to even address him directly. The fourth and last similarity is the general tactical pattern of peaceful appeals and mediation followed by direct action and, in the contemporary instance, an eventual resort to litigation. Many of the Tokugawa *ikki* began with the presentation by the village chief of a petition directly to the feudal lord or the shogun, protesting the unbearable tax burden. Such a direct appeal even when preceded by appeals to lower fief officials was usually harshly punished. This tradition may explain to a great extent the feeling of sacrifice and desperation of people like Noda when they finally decided to sue. English sources on Tokugawa peasant rebellions in general include Smith, 1959, and Borton, 1938.

merely applying neutral, pre-determined rules to a given set of facts. On the contrary, the nature of the cases and the plight of many of the plaintiffs were such that few judges could remain unaffected. What is of interest, then, is not whether morality or notions of substantive justice influenced the judges in these cases, but rather whether they did so in a manner distinctly Japanese.

E. The Defendants

The last group to be examined is the defendants. Here we have not even secondary materials from which to gauge the participants' attitudes. Instead, we must rely totally on an interpretation of their observable reactions to the cases. Fortunately, those acts and omissions are often of a striking character.

The initial reaction of the defendants to demands by pollution victims was to entrust the matter to the corporate legal department. In its first contacts with the plaintiffs in the *Minamata* case in 1959, Chisso required all compensated victims to sign solatium contracts, in effect releases, intended to insulate the company by legal means from further demands. The contracts provided that in return for payment of a small sum, the plaintiffs and their families would relinquish all future claims against the company. They stipulated that the causation of the disease was at that time unclear even though Chisso's own experiments indicated otherwise. Furthermore, Article Five read, "even if it becomes clear in the future that the Minamata disease is caused by industrial wastes from A (the company), B (the patient) will not demand any further compensation from A" (Nakai, 1973: 33). If the converse were found to be true, however, the company was relieved of all further duties under the contract. In negotiating these grossly one-sided contracts, Chisso emphasized the difficulty the victims would have in legally proving causation, relying not only on the victims' lack of sophistication but also on the fact that the government had not yet publicly recognized Chisso as the source of pollution. From these contracts and the way they were negotiated, it appears that the companies were conscious of the possibility of litigation from the beginning and took rational, legalistic steps to forestall that litigation. In doing so, they took advantage of their legal sophistication and their adversaries' lack thereof in a manner quite common in other industrial societies.

If the companies' immediate reaction to the problem of compensation was legal rather than moral and institutional

rather than personal (i.e., the problem was handled by specialized departments rather than by the executives themselves), then sometime during the course of the struggle this attitude became untenable. By the time the judgments were reached, their interaction with the victims had become both personal and moral, and decisions were no longer based solely, if at all, on legal or economic grounds. One striking piece of evidence of this change was the decision not to appeal or even to use the threat of an appeal to reach a reduced settlement. If there was any chance that the Supreme Court would reverse or modify the judgment for the plaintiffs, one could assume that the defendants, absent other considerations, would appeal. One such consideration that immediately comes to mind is pure economic rationality, i.e., the companies assessed the unfavorable publicity and its effect on sales and came to the conclusion that an appeal was not worth that cost. That must certainly have been a factor, but, at least in the case of the Chisso Corporation, it seems unlikely that it was the only factor. Since mid-1973 when the final agreements with the various groups of fishermen were signed, Chisso has been under considerable financial pressure because of the size of its compensation payments and there has been widespread speculation that it would eventually go bankrupt.

An alternative explanation which applies equally to the motivations of all participants rests on the premises that a Japanese has a sense of community and a feeling of individual responsibility to that community that is much stronger than any similar feeling among Westerners. Each member of society has certain duties to society in general and to those who depend on him in particular. These duties are not in any way dependent on, derived from, or even expressed by legal norms, and their content is vague and perhaps not even susceptible to precise expression. Together, however, they form a network of moral limitations on individual action that is extremely difficult to ignore. According to this interpretation of Japanese society, the company executives ran afoul of this moral network when it became clear to the general public the extent and intensity of the harm they had caused and the callous manner in which they dealt with their victims. At that point, to appeal the judgments would have been interpreted as a further attempt to evade what had become an inexorable duty.

This sense of duty and community might also explain why high executives felt constrained to take part personally in negotiations with the victims and to suffer personal humiliation in

doing so. Perhaps a personal account of one such session can give a flavor of the ordeal to which these men consented.²¹ This session was one of several held in Isotsu after the judgment in the *Yokkaichi* case. Its purpose was the compensation of Isotsu residents who were pollution victims but had not been members of the original plaintiff group. The negotiations took place in a small meeting hall and the participants included the more politically active lawyers, led by Mr. Noro, large numbers of leftist students who had been doing political work with the residents, and the victims themselves. The hall had filled long before the representatives of the companies arrived, with the lawyers and victims seated before a long table where the executives were to sit and the students and other activists standing along each wall. The representatives of the six defendant companies arrived accompanied by their lawyers, but the lawyers were immediately told to sit behind their clients and not to engage in the "negotiations." This session lasted five to six hours and consisted mainly of personal and vituperative attacks on the executives both by the victims and by the leftist lawyers. The scene was one of extreme psychological violence very similar in tone and content to the "struggle sessions" engaged in by New Left students at Japanese universities where students will physically capture a professor and demand "self-criticism."²² The professor or, in this case, the businessman, is best advised to say nothing since each comment of his, even if conciliatory, intensifies the crowd's mood of hatred and anger. The result is that the object of these sessions remains, head bowed, stolidly and silently staring at the ground before him, totally stripped, at least in Western eyes, of all self-respect. The question of why the companies would allow and even expect their executives to endure such treatment is obviously one that goes very deeply into the psychology of the Japanese and in that sense can only be tangentially dealt with in this paper. But, to the extent that it leads the Japanese to deal personally with what Western businessmen would consider legal issues to be handled by lawyers, it is central to the questions raised here and can, I believe, be linked to the defendants' decision not to appeal.

That link is found in the nature of the demands that the Japanese social consciousness makes on those who have transgressed the limitations of their position and violated the moral

21. This description is taken from an interview with Professor Akio Morishima of Nagoya University, who was present at the negotiation.

22. I personally witnessed a series of such incidents while a student at Kyoto University during 1972-3.

standards of society. In the case of Japanese industry, those limitations allow a great deal of leeway as is evidenced by the relative passivity of both the immediate victims and society in general in the face of the mindless ecological devastation that preceded these suits by ten to fifteen years. Not even pollution-caused deaths and suicides by themselves were enough to arouse a general reaction or even embolden the individuals concerned to step forward. Apparently only when the "precious land of [their] ancestors" or the contemporary equivalent was threatened, were the companies considered as having transgressed those moral limits. Once that had occurred and was generally recognized, the situation was totally reversed. Just as the victims had previously been largely passive and ignored the possibility of legal action to redress their grievances, the companies were now in a similar position. Just as the victims would have been ignoring their duties to society if they had been too quick to assert their legal rights in a selfish or individualistic way, the companies and their executives were now faced with a situation where their duty was to accept moral blame and ignore any legal avenues that would relieve them financially as a business institution or emotionally as human beings.

The role that law and the legal system played in this social phenomenon was almost entirely instrumental as opposed to normative. This is to say that it was not the companies' legal liability and the promise of monetary compensation that prompted the plaintiffs and their supporters to enter the litigation, nor was it a perceived violation of their legal rights. Rather it was the feeling that a lawsuit would be useful in turning the moral corner, in demonstrating to the society at large that the companies had forfeited their moral prerogatives by not fulfilling their duty to the people dependent on them in various ways. Once that moral corner had been turned, an appeal to the Supreme Court and eventual legal vindication could no longer help the defendants for the simple reason that the law and legal norms had lost their significance. The lawyers' attitudes, with the exception of individuals like Tomishima, seem consistent with this interpretation; they either shared the victims' sense of moral outrage or saw an opportunity to capitalize politically on the outrage as it spread more widely in society. As for the judges, the considerable theoretical innovation, explicitly noted as necessary to the plaintiffs' victory and to the satisfaction of substantive justice, and the fact that in the later cases there was no doubt as to the outcome despite considerable

legal problems in the plaintiffs' proof suggests that they, too, were sensitive to the moral climate and felt more responsible to the moral demands of the society than to the formal demands of the law.

CONCLUSION

Perhaps the most striking characteristic of these four cases is the communal and anti-individualistic attitudes of the participants. Respect for the community was at the heart of most of the decisions made—not only by the victims and their attorneys, but also by the defendants. The victims' fear of isolation and their willingness to accept the ravages of pollution "for the sake of the country" was the counterpart of the defendants' decision not to utilize the law fully to protect their economic and personal interests. Participants on all sides seemed caught in a web of moral obligations that allowed the society as a whole to impose great demands on both individuals and institutions.

In this setting, law was subordinate to those moral mandates and was not seen as a challenge to them. Success in the litigation in and of itself was not seen as a substitute for moral vindication, but rather as a means to crystallize the moral issues in a manner similar to the instrumental use of violence. The litigation was not simply an instrument for publicity, however; it was intended to serve as a forum for the moral confrontation that was so important to the plaintiffs. To the extent that the litigation retained its formal, impersonal character, however, it not only failed to deliver the personal moral satisfaction the plaintiffs were seeking, but also was less effective in generating publicity and thereby increasing the social pressure on the defendants. The need to keep the moral issues in the forefront, therefore, was twofold and led to parallel extra-judicial phenomena such as the "one share movement."

If we accept this interpretation, with its emphasis on the importance of the community and morality, there are certain aspects of the litigation which might be profitably compared to similar American cases. Although the instrumental use of law by movements of moral outrage is common in the United States, I believe that in the American context the litigation plays a more central role in the movement. That is, successful litigation is seen as providing legitimacy equal to and independent of any moral pressure that extra-judicial activities might engender. Consequently, such legitimacy is achieved even when the plaintiffs' moral position is supported by only a small part of the com-

munity. These cases suggest that in Japan, on the other hand, the use of litigation to achieve social or moral consensus would be extremely difficult. It would require an emotional detachment and independence from community values that apparently remains rare in Japan, if the cases discussed here are representative in that regard.

Much more needs to be known about the attitudes of the more sophisticated residents of polluted areas like Minamata and Yokkaichi before we can ascertain whether they rejected litigation for reasons of economic self-interest or for psycho-social reasons similar to those that at first dominated the thinking of the victims who eventually became involved. It may be wrong to assume, therefore, that the strong sense of communal responsibility that characterized those involved in these cases will remain a constant in Japanese life. Charles Stevens (1971:673) has cited the increase in traffic litigation in Tokyo District Court as evidence of an "undeniable tendency . . . toward the development of legal consciousness along Western lines" (although his figures show that litigation in general actually declined between 1967 and 1970). Stevens attributes this rise in litigation in part to wide publicity given to high settlements and money judgments in traffic cases in the 1960's. Publicity of the awards in the "big four" has of course also been widespread and may well encourage other groups and individuals to consider litigation in circumstances where they would not previously have done so. Certainly, recent years have seen a substantial increase in the number of lawsuits in environmental and consumer areas.

The rate of litigation itself, however, says little or nothing about the attitudes that led to the decision to sue. Stevens may be correct that Japanese attitudes will move into closer harmony with the individualistic premises which underlie the legal system, but there is little in the attitudes of those involved in these cases that points in that direction. On the contrary, the material presented above may lead one to the conclusion that what Rabinowitz (1968:58) has termed "the very obvious strong pulls in Japanese society towards submergence into groups" is still dominant in the Japanese personality. Although Rabinowitz (1968:88) concludes that one consequence of such an attitude is that law must "be relatively little used," the existence of a strong group consciousness and a sense of communal responsibility in these cases appears to have facilitated rather than impeded litigation. Stated differently, these Japanese plaintiffs seem to have utilized the legal system to satisfy demands for moral vindication and

community accountability that are in direct conflict with the principles that underlie Japanese formal law.

Perhaps modern legal and economic institutions inevitably mold similar individualistic societies. These suits may even have accelerated that process in Japan, but it seems clear to me that they are not themselves evidence of any such evolution. On the contrary, they indicate that, at least under some circumstances, litigation can be an institution whose uses remain distinctly Japanese and that the solution of social disputes by use of the formal legal process need not necessarily await an individualistic or "Western" legal consciousness.

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