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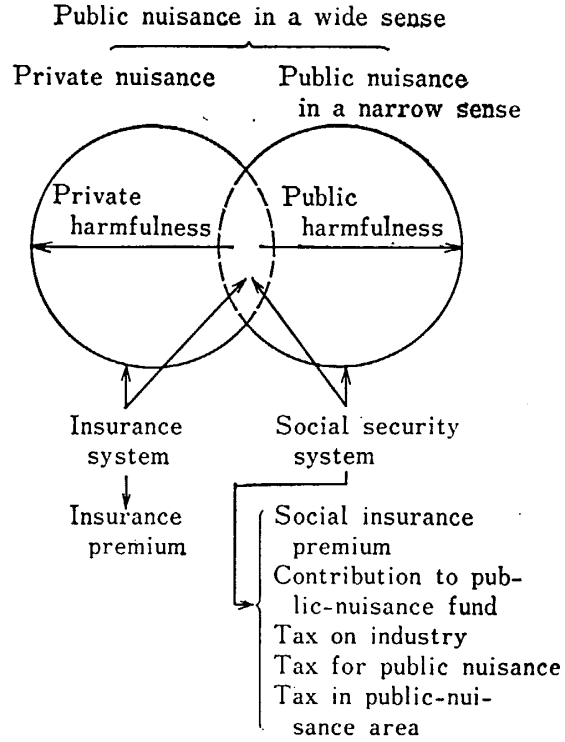
PUBLIC NUISANCE AND INSURANCE

by

Noriaki Niwata

I. Contact of the Public Nuisance Problem with Insurance

The so-called public nuisance in the sense of "injuries inflicted on the general public" represents a phenomenon which, while resulting from human activities, exerts harmful effects on general residents or a whole local community, the effects involving not only those on human physical and mental conditions but also those on animals and plants as well as material wealth. The matter is emergence of harms relevant to health and environments of mankind such as spoiled atmosphere over a substantially broad area, water quality deterioration, noises, vibration, ground subsidence other than by boring, bad smell and so on, all being generated by business or other work of mankind. It should not simply be concluded that these harms ought to be officially dealt with and imply no responsibility on the side of enterprises. In other words, in considering and inquiring into this problem what must be kept in mind is that in the present age of capitalism the subject persons making the origin of harm should follow the principle of autonomy on self-responsibility.



The reasons for frequent occurrence of public nuisance cases lie firstly in the structural level-up of industries and the urbanization advanced through the recent remarkable growth of economy, secondly in the neglect of reasonable planning in town construction and land utilization in this narrow country, and thirdly in addition in the lag in the development of devices for prevention and elimination of public harms. And the reasons why at the present stage of matter this capitalist country and private enterprises have embarked in the research of prevention and countermeasures can be found in the fact that firstly public nuisances have come to disturb not only living of residents but also production activities, secondly reproduction of manpower necessary for private capital has begun to be obstructed, and lastly, and what is decisive, social opinions and movements have risen requiring necessary measures. Characteristically public nuisances come more heavily on workers than entrepreneurs, on the lower classes than the upper classes, and on the so-called downtowns than the uptowns.

The risks newly born or enlarged by high-pace economic growth and technological innovation may be classified as follows.

- A. Risks to operative workers
 - a. By labor accident
 - b. Occupational disease
- B. Risks to the general public—public nuisance.

By classification from another angle:

- A. Risks relevant to regular work—public nuisance
- B. Risks relevant to abnormal case (accident).

Among non-natural conditions harmful to human environments, what are regular and constant come under the so-called public nuisance. Most of these are industrial injuries, although sometimes other conditions such as home excrements take a part. So human beings themselves are producing conditions injurious to their environments of living. As against such public nuisances, natural disasters by unexpected causes are right to be called accidents, which in principle are not included into public nuisances. Problems of precautionous regulation and post-facto disposal are raised as for public nuisances.

As the economic losses due to public nuisance the following are conceivable.

- (1) Direct losses
 - 1. Increase in production and distribution costs
 - 2. Damage on the groundwork of production
 - 3. Rise in the cost of living
 - 4. Damage on the environments of living
- (2) Indirect losses
 - 1. Investment in and working expenses of preventive installations
 - 2. Swell of administrative machines and expenditures for public prevention and countermeasures
 - 3. Increase in expenditures for research of prevention

Industrial public nuisances are being born day after day in accompany with

the development of techniques of production. However, it is not correct to consider this phenomenon unavoidable to economic growth, even to healthy growth. Rather we should say in this context that the extraordinary and astonishing growth of Japan's enterprises has been achieved by leaving the social evil of public nuisances untouched. By analyzing the characteristic features of public nuisances we can point out the following.

1. They are borne by human activities, hence man-origin disasters.
2. The origin, degree and matter of a public nuisance are unascertainable. Patterns of injuries are difficult to formulate.
3. They are not direct infringement on man and thing but indirect one through various media or carriers.
4. It is not always clear who are the offender and the sufferer, both partners alike.
5. As regards the matters, although such property damages as impairs of structures or farm crops are involved, the principal ones are what interfere or threaten health and comfortable living of people. The interests exposed to infringement are those of living, which are more reasonably regarded as personal (or human) rather than as physical.
6. The offender and the sufferer, or both, are numerous and not easy to specify.
7. Most cases relate to the so-called industrial nuisance caused by activities of enterprises, big as well as small, and the sufferer is general populace, mass of individual citizens. The partners are of a large number and spread over a wide area.
8. The matters are featured with scientific and technological characters.
9. The degrees of injuries are varied, from very insignificant to serious.
10. The acts of infringement in public nuisances are continuous.
11. The acts of infringement are based on warranted business activities, and so illegality is difficult to prove.
12. There are differences of classes or strata between the offender and the sufferer, the latter being the economic weak generally.
13. The patterns of emergence of injuries are not uniform and the origins are very varietiful, and hence the causal relations between business activity and injury are hard to prove.
14. Probability of emergence of public nuisances based on the law of large numbers is not yet established.
15. When the phenomenon of a public nuisance leads to injuries there is a transformation of quantity to quality, that is, injuries occur as the result of accumulation of numerous, abundant and continuous causes by the moment of a certain time-point or degree.
16. In most cases enterprises are opposed to recognize any causal relations and hence law suits tend to be prolonged and passionate.
17. It is a social request that in principle public nuisances should be coped

with by prevention first of all.

It is generally considered that measures of relief by private laws can be fruitful only in limited cases and to a limited extent. The reasons are as follows. Firstly as to such nuisances as of large-scale infringement and extensive injury, relief by private laws, especially by reason of illegality, is not suitable, and inclusive and uniform administrative laws would be more helpful. Secondly the less ascertainable are the offender and the causal relation, the smaller is the room of work of private-law relief, and hence more efforts of guarding against environmental deterioration by official regulation and of finding out their causes should be made by the administrative authorities as well as research organs. Furthermore, the effects of relief by private laws are smaller where the infringement is concerned with physical and mental health, comfortable living or other unrecoverable worth difficult to put monetary evaluation.

By the way, among public nuisances a distinction is possible between those with strong public-harmfulness which need public-law control (that is, of a narrow sense) and those with strong private-harmfulness which can be dealt with by private-law relief to an appreciable extent. To speak in concrete, those for which the offender is less ascertainable come under the public nuisance of public-harmfulness, while those for which this is possible under the public nuisance of private-harmfulness. The said private-harmfulness means that individual relief by private laws is relatively easy to obtain, and application for compensation or court injunction is available. Contrastively the public-harmfulness implies that judicial disputes against the offender is impossible since this is numerous indefinite persons, and hence public-law control only is to be relied upon. If a case of intense private-harmfulness is too clearly defined as public, there would be a fear that liabilities of particular enterprises generating injuries might be left untouched and dissolved into those of the general public, responsibilities of state and local administrative bodies be over-stressed, economic burdens to be charged on enterprises be transferred to general populace through taxes and the like, and preventive measures be neglected. As regards such private-harmfulness cases, however, those that may generate wide-spread disasters must be treated similarly with public-nuisance cases.

To consider the possible system of public-nuisance insurance, it is supposed to be a type of liability insurance, which will gradually shift from voluntary to compulsory. And it will be possible to manage on an idea very akin to the Compulsory Automobile Liability Insurance of Japan. That is to say, enterprises, beginning from those most likely to cause public nuisances, take this insurance in order to prepare for indemnity payment in the event of occurrence. Thus the insurance undertakes expenditure which individual enterprises might be unable to bear. Partial contribution of premium by state or local administrative bodies and furthermore reinsurance by these are conceivable. From the standpoint of the insurer (insurance companies), however, a difficulty may lie in the calculation of premium and, more fundamentally, an aspect unfamiliar to insurance is in-

involved because it presupposes damages of continuous emergence by regular activities of business instead of those of unexpected occurrence.

It may possibly be argued that such enterprises as are unable to bear the burdens of injuries they produce by themselves fully, or even to dissipate them through insurance, should not be allowed existence since they are giving harms to the society larger than contributions. On the other hand, extreme high income-earners may protect themselves by taking life or health or accident insurance beyond the public-nuisance insurance.

II. *Status of Public Nuisances as an Economic Problem*

(1) *Economic growth—welfare—public nuisance problem* There may be a mountain of theorists who discuss the problem of public nuisance within the bounds of its own, that is, how vicious and inhuman they are. This fact itself may serve to demonstrate how unallowable public nuisances are, to which any discussion, however sharp, does not suffice. Yet this is an approach generally shown by scholars much oriented to mass-communication media or theorists of active movement type. As several years have already passed since the first appearance of the problem, fuller deployment of academic and theoretical studies, if plain and roundabout, should be expected. And it is right to be wanted that the insurance theory sets forth scientific principles to cope with the matter, one of the biggest problem of today's Japan, and to advance corresponding activities.

Often the discussions are presented in the form of "Whether economic growth or public nuisance" as if an alternative relation lay. This is theoretically objectionable. We have examples of public nuisance not attendant to economic growth, while growth accompanied by little nuisance is doubtless expectable. If the selection were merely between economic growth and public nuisance, the conclusion would be that future is not promising to mankind, notably to the Japanese. The exact expression here must be "Extraordinary high-pace growth is susceptible to serious public nuisance" or "Generally speaking under high-pace growth public nuisances are apt to arise." Similarly we are opposed to the form of "Welfare or public nuisance" from a theoretical standpoint. Economic growth is indispensable to the advance of welfare, especially in Japan with over-population, narrow land, and poor natural resources. The case of Sweden, New Zealand or so with sparse population and appropriately rich resources cannot serve as example. For those countries that need high-pace growth public nuisances seem even a destiny. Hence the true argument should be "Promotion of welfare requires high-pace economic growth in which, however, utmost efforts must be made to avoid public nuisances, confining them to the bounds allowable to the sustenance of human bodies and living.

(2) *Emergence of public nuisances and countermeasures* In fact high-pace economic growth has produced public nuisances and it must not be overlooked that in Japan they have far surpassed allowable bounds and economic growth, which

should point to nation's welfare, is now working to destroy it. Nevertheless cautious inquiry must be made on the combination of two nexuses, that is, on one hand economic growth has brought about public nuisances while on the other it provides economic foundations for countermeasures. Putting aside the process up to emergence, public nuisances, once generated, cannot be overcome unless by allocating to them the fruits of economic growth, insofar as economic aspect is concerned.

Usually we call public nuisances as social loss and deal it as social costs, in other words, discuss the problem in relation with the theory of social costs. The social costs mentioned here include—not to speak of human injuries—destruction of environments, diminishing, extirpation and exhaustion of resources, soil erosion, consumption of fertility, random lumbering of forests, earlier obsolescence of machinery and equipment as well as antiquated skills and unemployment due to technological innovation, operation curtailment and quality deterioration by monopoly, shorter lives of products, forced adoption of new types, lag of production facility expansion, duplication in retail routes, advertising and related efforts of sales increase, swell of transport costs and so forth. In short, even what are called public nuisances have close relations with the reality and trend of the modern economic system, and must be understood from a synthetic viewpoint. So even such phrases as "Poverty is the largest public nuisance" or "Unemployment is the most fearful one" may have significance as an illustration of the situation.

(3) *Characters of public nuisances and costs of prevention* It is pertinent to define public nuisances as social injuries lingering and spreading over a wide area. So a particular injury in a particular area may be rather a private nuisance of public-harmfulness or a public nuisance of private harmfulness. The definition of public nuisance may be derived from two ideas, that is, sufferer-centered and origin-centered. The former tends to orient to relief work and the latter to reinforcement of preventive installations and compulsory indemnity. And in fact prevention of injuries may require a huge expenditure. Remarks against this are unacceptable. Since enterprises are obliged to bear substantial burdens for prevention under restrained business, the constitution of the national economy will surely be inclined to heavy-chemical industries with a high ratio of value added. Here promotion of those industries liable to public nuisance becomes necessary in order to raise money necessary to prevention. Thus the problem in Japan entertains some element of destiny unless revolution of people's consciousness or value sense were realized. What is needed is plan-based reorganization of economy and industry on strong limitation of the rights of ownership.

Big enterprises displaying monopolistic force on the economy are the major origins of public nuisances, while on the other hand only such enterprises could install sufficient devices and develop work for prevention. And they should, it may be argued, accept the burdens for prevention in the sense of return-back of profits to the society since they are utilizing social capital to the highest extent getting larger benefits than the society itself. All in all, however, what should

be done is to raise labor productivity above international levels in order to assimilate the costs of preventive investment that does not produce value added.

III. Can Public Nuisances be the Subject of Insurance?

(1) Classification of public-nuisance costs. When activities of prevention and countermeasures are intensified, cost burdens will increase and profit decrease. And such increases of costs, especially fixed costs, require more money and hence more profits. Unless sufficient deliberations are made on the solution of such dilemma, a possible result will be failure of smaller enterprises and monopolization, and consequently the expenditure of social costs for prevention will cause an increase of another category of social costs. Happiness and welfare are unexpected without solving public nuisances, but this solution alone cannot derive welfare.

The first classification of public-nuisance costs is before-the-fact (=prevention) costs and after-the-fact (=relief and indemnity) costs. Next, beginning from the aspect of risks, if risks are divided into those relevant to regular operation and those to abnormal condition (accident), and if the former are further divisible into those relevant to labor accident or occupational disease and those to the general public, the last-mentioned ones are just the public-nuisance risks, and the costs for overcoming these come under the public-nuisance costs. And to consider the public-nuisance costs dividing into internal and external costs, the former are expenditures for research, prevention and removal, and the latter pertain to charges to enterprises for preventive public works and (if the offender is specified) indemnity or (if unspecified) taxes, contribution money, insurance premium, etc. Lastly a classification is the costs in the production process and those in the consumption process; the former generally result in price raises and the latter in inconvenience of living.

(2) Possibility of public-nuisance insurance. Public nuisances are an inherent phenomenon and a result of the modern capitalism, never unexpected disasters or damages. If true public nuisances lack unexpectedness, then the logical necessity to design insurance is lost, isn't it? The fact is not always so for the reasons below.

① Transformation of quantity to quality in a public nuisance. Since the time-point as well as degree of this transformation are not distinct, herein lies unexpectedness.

② Public nuisances often occur in combination with natural disasters or other happenings. Natural disasters involve unexpectedness, in connection with which that of public nuisance can be spoken.

③ In not a few cases public nuisances emerge in relation with the birth of new industry, technology or product. It is unforeseeable whether these may produce injuries, and hence unexpectedness.

④ The judgement of public nuisance is not yet settled. The criteria fluctuate

according to public opinions, mass-communication media and court judges. This fluctuation is unforeseeable and hence unexpectedness (at least at present, if not in long-range).

⑤ A public nuisance may be caused by the acts of a number of persons. It is unforeseeable which one is decided as the main causer.

⑥ In many cases public nuisances emerge from duplication of many causes. It is hard to foresee which cause is judged as the principal one.

⑦ Public nuisances are generated from a long passage of time and a chain of many causes. It is unforeseeable to what extent the causes are traced back, that is, the materials supplier, producer, distributor, retailer, user or consumer.

The unexpectedness in public nuisance is of various categories. So it is questionable whether insurance can be adapted to it actually, if theoretically possible. And even if possible, it must be a very unique type of insurance. Among others, since public nuisances affect the poor (or low income) classes sale of this insurance, if of a usual type, will not prevail because of shortage of purchasing capability and demand. Insurance in the suffered class to prepare countermeasures by bearing premium is difficult to realize. On the other hand, a public nuisance, once generated, brings about a huge damage, comparable even with natural disasters, which private enterprises might be unable to meet and follow up. And public nuisances are caused by acts of long duration by multiple enterprises and by pile-up of many causes and hence the true responsible person, originater or causer, is hard to single out. Accordingly the insurance may have to be one based on the argument of responsibility as social beings or the legal theory of liability without fault. Furthermore, formalization of injuries may become necessary. To take account of these points, we must say a unique type of insurance will be born.

IV. Various Insurance Categories around Public Nuisance

(1) *Public-nuisance prevention insurance, so-called* Prevention of public nuisance necessitates investment of fixed capital, and this is a scheme to complement credit for raising such money. Naturally its premium rate is low, and this may be posited as a sort of economic-policy insurance.

(2) *Public-nuisance libality insurance* For effecting smooth and sufficient compensation back-up of social opinions and movements is necessary. However, the more intensely such back-up is developed, the more decidedly enterprises will be opposed to the issue, because they dislike to be labeled as a "public-nuisance enterprise" for the sake of social honor and confidence. Accordingly this insurance is likely absorbed into a public-nuisance compensation fund.

(3) *Workmen's Accident Compensation Insurance (Rōsai Hoken, now in force)* This is applied to cases of injuries caused firstly among employees of an enterprise. Hence a fear is involved that the fact of public nuisance is disposed secretly.

(4) *Life insurance and private health insurance* Most sufferers, who are supposed to be generally poor, may be unable to take these sorts of insurance because of high premium as insurance for the weak.

(5) *Private nonlife insurance* The element of public-nuisance insurance may be introduced into, for example, the voluntary automobile insurance or the multiple line. This inevitably leads to high premium rates.

(6) *Public nonlife insurance* This will possibly come on the stage in connection with the agricultural and fishery mutual relief systems. This entails a fear of transforming private nuisances to public ones, and furthermore will result in incessant claims for increase of state's burdens, assistances and compensation, which will be disputed and disposed on the stage of politics.

(7) *Social insurance as social security* This also entails the said fear of transforming a private nuisance to public one. This will invite increases in premiums or taxes for social insurance along with those in the burdens of state and employers, but in the end burdens will be transferred to the general public.

The above-described various types of insurance relevant to public nuisance, especially those related with employers, work to change the burdens to production costs through contribution of premiums, and then transfer to the general public by means of price raise. A fear is that through the repetition of this course social sense to admit public nuisances might be born. So pursuit of penal responsibilities must always be made at the same time.

(8) *Social effects of public-nuisance insurance* To adapt insurance makes a way of manifestation of social costs and accordingly the following effects may be expected. ① Burdens are removed from sufferers, which have been placed on them as an unescapable sacrifice to economic growth. ② Exclusion of voluntariness which has been the base of sufferer relief and damage compensation. ③ Exclusion of beneficence. Relief and compensation have hitherto been undertaken as if these were beneficence of the side of enterprises or injurers. ④ Efforts of prevention will become more active since institutionalization by insurance leads enterprises to full recognition of the presence of public nuisance. ⑤ Increase of effectiveness in prevention. Utilization of insurance renders this possible far above prevention by independent, isolate and incomplete studies and systems by individual enterprises.

(9) *What should be kept in mind about the effects of public-nuisance insurance* If expenditures for public nuisance are furnished through insurance, these will be formally posited within the production process, which will lead to price raises for reasons of cost increase, and in the end to a danger of transferring burdens to people. Next in the case of those enterprises unable to raise prices (generally non-monopolistic ones) oppression to wages must be resulted. And again in high-profit industries there will be decreases in dividends, internal reserves, entertaining expenses as well as research and development expenditures. In particular, equipment investment necessary for business growth will become lagged by decreases in profits. Even so, where improvement of productivity or

economization of costs is possible costs of public nuisance prevention may be assimilated inside the business.

(10) *Plans of relief fund for the sufferer*

① A fund of social security sense. State and local administrative bodies bear most part of expenses, while relevant industrial organizations make some contributions. This plan, however, implies a regression of the idea of liability insurance.

② A fund for advance payment. In principle this makes advance payments for the liability of the causer or offender. It aims to perform relief of the sufferer speedily, daringly and perfectly as far as possible, and then make subrogation claims to the offender. Essentially enterprises bear the burdens in the ultimate.

③ A mutual relief fund. All enterprises of a particular area or industry contribute to this fund, by which liabilities of individual enterprises may be extinguished to the effect of exemption from responsibility. The fund becomes the fiction subject person for civil liabilities. It opens up the road to partial charge of expenses on state and local administrative bodies, going beyond the limits of the principles of insurance.

(11) *Measures attendant to the realization of public-nuisance insurance*

In case countermeasures to public nuisances are instituted on the base of capital surpluses or allowances of business, secret disposal of nuisances is apt to be conducted, while internal reserves for the aim of profit hiding will be increased. And if private settlement is employed, cover-up and unjustifiable disposal will be accelerated. Insurance systems are unquestionably desirable in order to prevent these defects. Yet favored treatment should be given to preventive investment on taxes through special depreciation as well as to premiums of insurance. And meanwhile the method of utilizing internal reserves or allowances should be switched to public systems of social character.

V. *Functions and Orientation of Public Nuisance Insurance*

(1) *Functions of public-nuisance insurance* Various types of insurance related will work as a bulwark against the floods of public nuisances. In the ultimate, however, insurance will not suffice to cope with them. Insurance is to serve to postpone a possible overall collapse, while completion and adjustment of social and economic systems should be contemplated. That is to say, justifiable distribution to people of the fruits of high-pace economic growth should be fostered in order to enable them to take voluntary countermeasures, and on the other hand effective utilization of insurance should be promoted. The principal lines will be to endeavor at prevention by way of fulfilling social capital and to contrive sufferer relief by advanced social security, to which various types of insurance will afford flank help. In accompany with the progress of countermeasures by means of socialization relevant insurance may draw more attention than in the past. And it is an urgent task to widen the scope of the property and

concept of insurance.

(2) *Costs related to public nuisance and orientation of insurance* An argument is prevalent that it will cost less in an economic sense to prevent and eliminate than to give indemnities, yet this is not always correct. True the costs would be smaller if all nuisances should disappear by preventive and elimination measures of a single enterprise alone, but actually preventive investment must be conducted by all enterprises of an area or an industry, whose costs would be enormous as a whole. Herein lies the *raison d'être* of insurance for indemnity or compensation. If prevention is always economical than indemnity, there will be no need of insurance. Nevertheless prevention is emphatically set forth against public nuisances because the problem concerns with health and life, namely existence, of many people. The problem may be grasped from two aspects of human and economic, and as for the latter insurance can display effective functions.

Once a public nuisance is officially acknowledged as such, all and every damages that have been ignored as insignificant come into the sum of indemnity and reparation, which would amount to an unexpectedly large one. A phenomenon of accumulation and inflation of numerous small damages arises. Then it would become impossible for a single enterprise to deal with by means of self-insurance or the like, and hence insurance or mutual relief systems become indispensable.

(3) *Enterprise, public nuisance and insurance premium* Hitherto enterprises have been warranted social *raison d'être* by their productive activity itself. Today it must be advocated on account of their bearing social costs. Such enterprises as are unable to bear burdens of social nuisances have no significance and right of existence because their harms surpass contributions to the society. Since insurance premiums are to be paid out of profits and counted into necessary expenses of business, those that cannot afford even such payment should disappear from the economic ground of society. From the standpoint of the general public or the masses, since they suffer from public nuisances almost without exception despite their irresponsiveness, surely they will require solution of the problem of burdens at least. Insurance, which functions in this solution, may be said to situate at the entrance of the actual problem, and what lies in the terminal may be the measures of complete prevention and elimination. Within the system of countermeasures the utmost essentiality will be given to prevention, while the first order of start will be with economic security for injuries by insurance.

The present situation in which public nuisances have come into discussion is that harms quite different from conventional private harms are being generated, and the injuries are unable to deal with and overcome by customary means. And an additional factor is that countermeasures would be established by making good use of the fruits of economic growth which is the origin of public nuisances. Here is observable a turn of people's concept of value accompanying the success, appreciable to some extent, of the policies of growth, which may be taken to mean a shift from growth policy to welfare policy. And here if insurance wishes to

exhibit active plays, what is necessary is to introduce an idea of welfare insurance. If insurance shows no positive attitude on this problem, so big today, or escapes from the scene by taking mere negative measures, or attempts to efface the actual state, not only will it fail to hold a position of main actor in the welfare society to come, but also lose confidence of people and be driven out with stones, say, nationalization of insurance. The situation of today is that it is inevitable to take up the problem sincerely and squarely, letting alone success or failure.