

特集：たばこ規制枠組み条約に基づいたたばこ対策の推進

<総説>

FCTC第13条たばこ製品の広告，販売促進，スポンサー活動

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Article 13 of the World Health Organization Framework Convention on Tobacco Control: Tobacco advertising, promotion, and sponsorship

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抄録

たばこ規制枠組み条約 (FCTC) 第13条「たばこ製品の広告，販売促進，スポンサー活動」に基づき，わが国の現状，関連法規，たばこ規制にあたっての課題（(1) たばこ広告の範囲，(2) 表現の自由との関係，(3) テレビ広告の自主規制，(4) 未成年者喫煙禁止法の適用，(5) スポンサー活動・CSR活動規制），今後の対策に向けた課題について検討し，以下の結論を得た。

1. たばこ事業法に基づく広告指針，業界団体による広告の自主規準において，対象に企業広告，喫煙マナー広告，未成年者喫煙防止広告が含まれていない。まず，これらが未成年者の喫煙行動に及ぼす影響に関するエビデンスを明確にすることが必要である。2. 未成年者喫煙禁止・防止の観点から，企業広告，喫煙マナー広告，未成年者喫煙防止広告，スポンサー活動，CSR活動のそれぞれについて，適切な規制のための個別具体的な検討を進めていくべきである。3. テレビでの日本たばこ産業の企業CMとその放映には，未成年者喫煙防止の観点から問題が多く，自主規制を求めていく必要がある。4. 少なくとも子どもも対象のスポンサー活動，CSR活動については，未成年者喫煙防止の観点から，何らかの規制の導入を検討すべきである。

キーワード：たばこ広告，販売促進，スポンサー活動，未成年者の喫煙予防

Abstract

Article 13 of the World Health Organization Framework Convention on Tobacco Control promotes the legal ban of tobacco advertising, promotion, and sponsorship. This paper discusses the current situation related to laws regulating tobacco advertising, promotion, and sponsorship in Japan.

Tobacco advertising, promotion, and sponsorship are regulated by the Ministry of Finance guidelines and by standards outlined by the Tobacco Institute of Japan, an association of tobacco manufacturers and retailers. The guidelines and standards only regulate advertising, promotion, and sponsorship on tobacco products, and exclude corporate advertising/sponsorship, corporate social responsibility (CSR) activities, the medium for smoking advertising, and smoking prevention for minors. To effectively regulate virtual advertising, more research is required to examine its impact on smoking by minors. For example,

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commercials sponsored by Japan Tobacco (JT) are broadcasted every evening in Japan and many minors have access to them. The themes in these commercials depict universal values, such as family and social ties as well as hard work and rest, and not smoking or its health hazards. Along with sponsorship/CSR activities, these commercials contribute to improve the image and social acceptance of JT, and thus, should be regulated as product advertising.

Although the Law for Prohibiting Minors from Smoking itself cannot regulate tobacco advertising, the law can increase public awareness regarding the importance of reducing the impact of tobacco advertising on minors.

keywords: tobacco advertising, promotion, sponsorship, smoking prevention

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I. はじめに

たばこ規制枠組み条約 (Framework Convention on Tobacco Control: FCTC) 第13条 たばこ製品の広告, 販売促進, スポンサー活動 (Tobacco advertising, promotion and sponsorship) の内容は, 以下の通りである.

- ・ 広告, 販売促進, スポンサー活動の包括的禁止がたばこ製品の消費を減少させる
- ・ 締約国は, 自国の憲法またはその原則に従い, あらゆるたばこの広告, 販売促進, スポンサー活動を禁止する.
- ・ 自国の憲法またはその原則のために, あらゆるたばこの広告, 販売促進, スポンサー活動を禁止できない締約国は, これらに制限を課する.

一方で, 日本たばこ産業株式会社 (以下, JT) のアンニュアルレポート2014年度 [1] によると, 当該年度に会社全体で212億58百万円の広告宣伝費と1299億98百万円の販売促進費が費やされている.

本稿では, 第13条に書かれている政策について, わが国の現状, 国内の関連法規, たばこ規制にあたっての法的課題, 今後の対策に向けた課題について検討を行い, たばこ製品の広告, 販売促進, スポンサー活動の規制のためにはどのような検討が必要かを検討する.

II. 研究方法

文献, 法令, 自主規制およびウェブサイト等からの情報に基づき, 検討した. 特にたばこ規制にあたっての法的課題については, (1) たばこ広告の範囲, (2) 表現の自由との関係, (3) テレビ広告の自主規制, (4) 未成年者喫煙禁止法の活用, (5) スポンサー活動及びCorporate Social Responsibility (CSR) 活動規制を中心に論述した.

III. 結果と考察

1. わが国のたばこ広告規制の現状について

わが国のたばこ広告については, 財務省所管のたばこ事業法 [2] に, 広告に関する勧告等として以下のように

定められている.

(広告に関する勧告等)

第40条 製造たばこに係る広告を行う者は, 未成年者の喫煙防止及び製造たばこの消費と健康との関係に配慮するとともに, その広告が過度にわたることがないように努めなければならない.

2 財務大臣は, 前項の規定の趣旨に照らして必要があると認める場合には, あらかじめ, 財政制度等審議会の意見を聴いて, 製造たばこに係る広告を行う者に対し, 当該広告を行う際の指針を示すことができる.

3 財務大臣は, 前項の規定により示された指針に従わずに製造たばこに係る広告を行つた者に対し, 必要な勧告をすることができる.

4 財務大臣は, 前項の規定による勧告をした場合において, 製造たばこの広告を行つた者が, 正当な理由がなく, その勧告に従わなかつたときは, その旨を公表することができる.

この第40条2項に基づき, 平成元年10月12日に「製造たばこに係る広告を行う際の指針」(平成元年大蔵省告示176号)が策定されたが, その後, FCTC第13条に対応するため, 同指針は, 平成16年3月に改定された [3].

全体的指針にも示されているように, 本指針は, 「たばこ広告を過度にわたらないように行うことを目的」に, たばこ広告を行う際に留意すべき点, あるいは個人が自己責任において喫煙を選択するか否かを判断するための環境整備に資する点を示したもので, FCTC第13条第2項「締約国は, 自国の憲法またはその原則に従い, あらゆるたばこの広告, 販売促進, スポンサー活動を禁止する」に対応したのではなく, 第3項の「自国の憲法またはその原則のために, あらゆるたばこの広告, 販売促進, スポンサー活動を禁止できない締約国は, これらに制限を課する」に対応したものと位置づけられる.

また, 本指針はあくまで指針で, 配慮や注意喚起, 情報提供が主体であり, 罰則等も伴わない. また, 「公共性の高い場所」, 「主として成人を対象とした」等の曖昧な表現も用いられており, 指針実施の範囲が恣意的にな

る可能性も高い。加えて、「企業活動の広告並びに喫煙マナー及び未成年者喫煙防止等を提唱する広告については、この指針の対象に含まれない」とされており、企業広告を是認したものとなっている。

広告・販売促進等については、前述の最初の「製造たばこに係る広告を行う際の指針」策定に合わせて平成元年に財団法人日本たばこ協会が「製造たばこに係る広告、販売促進活動及び包装に関する自主規準」を策定した(平成19年改定) [4]。

本自主規準の特徴として、①たばこの製品の広告が対象で、製品広告以外の企業広告、喫煙マナー向上広告、未成年者喫煙防止広告には適用されないこと、②未成年者に対する規制が徹底していないこと(例えば、(a)成人の読者が読者全体の75%以上であること、(b)未成年者の読者数が未成年者総数の10%未満であること、の合理的根拠があれば、当該雑誌にたばこの製品広告を掲載できるなど)、③スポンサーシップの規制の適用範囲について、やはり未成年者に対する配慮が徹底していないこと(例えば、観客の75%以上が成人であることや未成年者に特に訴求するものでないことなど)があげられる。また、CSR活動については記述がない。

特に未成年については、たばこ産業側は子ども将棋大会のスポンサー(直接の主催は冷凍食品子会社のテーブルマーク)やスポーツ教室、植林活動、大学奨学金など未成年が対象あるいは関与する様々な活動を自主規制外で行っているのが実態である。

以上のように、わが国では、広告、販売促進、スポンサー活動の規制については、業界側による自主規制という形で行われており、国としては、FCTC第13条の期限である2010年2月27日までにこれらの包括的禁止を実施できておらず、現在も同様の状況が続いている。WHOのWHO Report on the Global Tobacco Epidemic, 2015 [5]において、日本は、広告、販売促進、スポンサー活動の禁止において、4段階のうち最低の評価を得ている。

2. 国内の関連法規

(1) たばこ事業法と同第40条第2項の規定に基づく、製造たばこに係る広告を行う際の指針については、前述の通りである。

(2) 未成年者喫煙禁止法[6]

(明治33年3月7日法律第33号)

最終改正：平成13年12月12日法律第152号

第1条 満二十年ニ至ラサル者ハ煙草ヲ喫スルコトヲ得ス

第2条 前条ニ違反シタル者アルトキハ行政ノ処分ヲ以テ喫煙ノ為ニ所持スル煙草及器具ヲ没収ス

第3条 未成年者ニ対シテ親権ヲ行フ者情ヲ知りテ其ノ喫煙ヲ制止セザルトキハ科料ニ処ス

2 親権ヲ行フ者ニ代リテ未成年者ヲ監督スル者亦前項ニ依リテ処断ス

第4条 煙草ハ器具ヲ販売スル者ハ満二十年ニ至ラ

ザル者ノ喫煙ノ防止ニ資スル為年齢ノ確認其ノ他ノ必要ナル措置ヲ講ズルモノトス

第5条 満二十年ニ至ラサル者ニ其ノ自用ニ供スルモノナルコトヲ知りテ煙草ハ器具ヲ販売シタル者ハ五十万円以下ノ罰金ニ処ス

第6条 法人ノ代表者又ハ法人若ハ人ノ代理人、使用人其ノ他ノ従業者ガ其ノ法人又ハ人ノ業務ニ関シ前条ノ違反行為ヲ為シタルトキハ行為者ヲ罰スルノ外其ノ法人又ハ人ニ対シ同条ノ刑ヲ科ス

(3) 日本国憲法第21条(表現の自由) [7]

第21条 集会、結社及び言論、出版その他一切の表現の自由は、これを保障する。

2 検閲は、これをしてはならない。通信の秘密は、これを侵してはならない。

3. たばこ広告規制にあたっての法的課題

(1) たばこ広告の範囲

前述の財団法人日本たばこ協会の「製造たばこに係る広告、販売促進活動及び包装に関する自主規準」では、自主規制の対象となるのは「たばこの製品広告」であり、それ以外の企業広告、喫煙マナー広告、未成年者喫煙防止広告は、自主規制の対象外となっており、何の規制もされていない。

JTのウェブサイト [8]によれば、映像を用いた企業広告は、「ひとのときを、想う」という全体テーマのもと、夫婦や親子などの人と人とのつながりを扱ったもの、働くことと休憩することの意義を扱ったものなど、会社の業務内容やたばこ・喫煙に触れずに、抽象的かつ普遍的な価値観をヒューマンスティックに扱う内容になっている。また、JTの取り組み紹介広告もあり、店舗における分煙支援や喫煙マナーに関する内容となっている。さらにラジオ広告もあり、人を応援することの価値を訴える内容となっている。

喫煙マナー広告については、村田 [9]は、JTの「大人たばこ養成講座」を分析し、(1)本広告で示されるマナーが喫煙者の視点で必ずしも受動喫煙の問題を十分に考慮していないこと、(2)喫煙自体を推奨する表現が多く見られること、(3)ジェンダーに関わる表現が多く、特に男性の喫煙が男性性の誇示と女性に対するセクシュアルハラスメント的意識と関連づけて肯定されていること、の3つの特徴が見られ、全体として、「マナー広告」というよりも喫煙者を養成する「たばこ宣伝」としての側面が強いことを明らかにしている。

たばこ製品広告が未成年者の喫煙を促進するというエビデンスは集積されているが(神田ら [10])、企業広告、喫煙マナー広告、未成年者喫煙防止広告が未成年者の喫煙行動へ及ぼす影響に関する研究はほとんどない。これら企業広告、喫煙マナー広告、未成年者喫煙防止広告をたばこ広告に含めるためには、未成年者への影響など、製品広告に準じた研究が必要であろう。

(2) 表現の自由との関係について

米国では、以前からたばこ広告を規制することが、憲法に定めた表現の自由に反するのではないかと議論がある。

わが国ではたばこ広告規制に関してそのような議論は少ないが、表現の自由は、憲法にも関係する問題であり、一旦検討の対象になった場合、様々な解釈や議論がなされる可能性があり、決着するとしても多大な時間を要することが予想される。また、わが国の現状で、たばこ広告を法律で規制することに対してどこまで国民のコンセンサスが得られるかは不明である。したがって、直ちに法的規制を求めるよりも、未成年者への影響を前面に出して、自主規制の強化を求めるような方向が現実的ではないかとも考えられる。

ただ一方で、一般的な表現の自由とたばこ会社の表現の自由（営利的表現の自由）は異なるとの意見もある。特に、前述のように、喫煙マナー広告は、喫煙を推奨する側面が強いかとも考えられるので、この観点からより適正な表現をするよう申し入れを行うことも考えられる。さらに健康増進や禁煙推進の立場からは、喫煙を前提とするマナー広告は公共的メッセージとしては矛盾するものとも考えられ、自主規制の対象とするよう求めていくことも可能ではないかとも考えられる。

今後は、たばこ製品広告、企業広告、喫煙マナー広告、未成年者喫煙防止広告それぞれについて、規制のあり方を個別に詳細に論じていくのが望ましいのではないかと考えられる。

(3) テレビ広告の自主規制について

業界の自主規制によって、たばこの製品広告はテレビでは放映されなくなったが、それ以外の企業広告、喫煙マナー広告、飲料・食品広告については、時間を問わずJTのテレビCMが放映されている。特にJTが提供している番組では集中的に流されている。JTのウェブサイト [8] によれば、現在の提供番組の時間帯は、曜日によって異なるが、21時から0時15分の間（3時間15分）である。

平成25年のベネッセ教育総合研究所第2回放課後の生活時間調査 [11] によると、

- ①小学生の就寝時刻：22時より前35.0%，22時頃+22時30分頃45.8%，23時頃+23時30分頃14.3%，それ以降約3%
- ②中学生の就寝時刻：22時より前4.2%，22時頃+22時30分頃24.9%，23時頃+23時30分頃40.2%，0時頃+0時30分頃22.5%，1時頃+1時30分頃4.6%，それ以降約2%
- ③高校生の就寝時刻：22時より前1.4%，22時頃+22時30分頃8.0%，23時頃+23時30分頃32.5%，0時頃+0時30分頃38.7%，1時頃+1時30分頃13.7%，それ以降約4%であり、小学生の多くが22時以降、中学生の多くが23時以降、高校生の多くが0時以降に就寝している。逆に言えばそれまでは起きていたわけで、もしテレビのJT提供番組を観ているとしたら、JTのテレ

ビCMも視聴する可能性が高い。日中はもちろんであるが、特にこれらの夜の時間帯のJTのテレビCMは自主規制の対象とするのが未成年者保護の観点からも適当と考えられる。

また、これらの企業CMには、乳幼児を含む未成年者を写しているものが多い。たばこを製造販売している企業のCMに未成年者が多数出ているのは、社会通念上の問題があるように思われる。

アルコールのテレビCMにおいて、サントリーは、製品広告ではあるが、表現についての自主規制として、「h. 子供や未成年者を宣伝の主たる表現に使用すること」を行わないことを明言している [12]。

今後、たばこ関連の企業CMについても、未成年を含むことについて、内容の自主規制を求めていくことは必要であろう。

さらに、夜間のJT提供番組には、「報道ステーション」、「NEWS23」といった報道番組が含まれている。一般にマスメディアにおいてはスポンサー企業の意向に反した報道が少ないことが指摘されている。田中 [13] は、たばこ会社がテレビ番組のスポンサー企業になることで「正確な（真実の）情報提供」がなされないことにつながるのであれば、やはり何らかの規制を強化する必要があると述べている。少なくとも喫煙のように世論の賛否が分かれる事案を扱う番組については、利害関係にある企業が番組提供を行うことを制限することが公正な放送のあり方としても望ましいものと考えられる。

(4) 未成年者喫煙禁止法の適用について

「煙草又ハ器具ヲ販売スル者ハ満二十年ニ 到ラザル者ノ喫煙ノ防止ニ資スルタメ年齢ノ確認ノ他ノ必要ナル措置ヲ講ズルモノトス」における「年齢の確認」という文言は「必要な措置」の例示でしかない。「必要な措置」の中に広告への曝露の制限等の内容を盛り込むことができるのが焦点となるが、現実には難しいのではないかと考えられる。

しかしながら、本法があることによって、健康面や倫理面だけではなく、法的に未成年者の喫煙は許されないという社会的合意が成り立っているのは、たばこ広告の規制にとっても重要な意味があると考えられる。

(5) スポンサー活動・CSR活動規制について

前述の「製造たばこに係る広告、販売促進活動及び包装に関する自主規準」によれば、「2. 定義 (5) スポンサーシップとは、第三者が企画・実施するイベント、チーム又は活動において、銘柄の販売促進を目的として参加又は貢献するものをいう。」とされており、個別銘柄の販売促進を目的としないスポンサー活動は自主規制の範疇から外れる。

JTが行っている、子ども向けの「将棋日本シリーズ子ども大会」は、2012年度からJT主催から子会社の冷凍食品会社「テーブルマーク」主催 [14] に変わっている。大人向けの「将棋日本シリーズ JTプロ公式戦」が、現在もJT主催のままであることを考えると、JT側も、JT

の名前を子ども向けのイベントに直接付けることを避けたと考えられ、子どもに対するスポンサー活動に対する一種の「後ろめたさ」の表れととることもできよう。このようなスポンサー活動が企業広告的な広義の宣伝活動にあたることは明らかであり、未成年者喫煙防止の観点からは、少なくとも子ども対象のスポンサー活動については、自主規制の対象とすることを検討すべきであると考えられる。また、その場合、規制されるべき「企業」には関連会社まで含めるのが適切ではないかと考えられる。

以上の結果より、今後の対策に向けた課題についてまとめると以下の通りとなる。

- 1) わが国はFCTC第13条の期限である2010年2月27日までにあらゆるたばこの広告、販売促進、スポンサー活動の包括的禁止を実施できていない状況にある。
- 2) 「たばこ事業法第40条第2項の規定に基づく、製造たばこに係る広告を行う際の指針」に基づいて、自主規制が行われているが、これは、FCTC第13条第三項の「自国の憲法またはその原則のために、あらゆるたばこの広告、販売促進、スポンサー活動を禁止できない締約国は、これらに制限を課する」に対応したものと位置づけられる。
- 3) 本指針はあくまで指針であって、配慮や注意喚起、情報提供が主体であり、罰則等も伴わない。また、「公共性の高い場所」、「主として成人を対象とした」等の曖昧な表現も多い。さらに、企業広告、喫煙マナー広告、未成年者喫煙防止広告は対象に含まれていない。
- 4) 指針を具体化した、財団法人日本たばこ協会の「製造たばこに係る広告、販売促進活動及び包装に関する自主規準」においても、たばこの製品広告以外の企業広告、喫煙マナー広告、未成年者喫煙防止広告は、自主規制の対象外となっており、何の規制もされていない。
- 5) 現在はたばこ広告に含まれていない企業広告、喫煙マナー広告、未成年者喫煙防止広告をたばこ広告の範囲に含めるよう求めるためには、これらが未成年者の喫煙行動に及ぼす影響に関するエビデンスをさらに明確にすることが役立つものと考えられる。
- 6) たばこ会社の営利的表現の自由についてさらに考察を深めるとともに、適切な規制のあり方について、企業広告、喫煙マナー広告、未成年者喫煙防止広告、スポンサー活動、CSR活動のそれぞれについて、個別具体的な検討を行っていくことが必要である。
- 7) テレビにおける企業広告、喫煙マナー広告については、特にJT提供番組が多い21時から0時15分の間に多く放映されているが、調査によるとこの時間帯も多くの小学生、中学生、高校生は起きており、この時間帯のテレビCMを自主規制の対象とするよう求めていくことも可能ではないか。
- 8) テレビの企業CMには、乳幼児を含む未成年者を写しているものが多い。たばこを製造販売している企業のCMに未成年者が多数出ているのは、社会通念上の

問題があると考えられ、この点について自主規制を求めていくことが可能ではないか。

- 9) 夜間のJT提供番組には、社会的影響力のある報道番組が含まれている。少なくとも喫煙のように世論の賛否が分かれる事案を扱う番組については、利害関係にある企業が番組提供を行うことを制限することが公正な放送のあり方としても望ましいものと考えられる。
- 10) 未成年者喫煙禁止法から広告への曝露の制限を導くのは難しい。ただ、同法の存在により、未成年者の喫煙は許されないという社会的合意が成り立っているのは、たばこ広告の規制にとって重要な意味がある。包括的なたばこ規制法がない現在、唯一法的根拠がある未成年者の喫煙禁止を前面に出して広告規制を求めていくことが有効な戦略の一つではないかと考えられる。
- 11) スポンサー活動、CSR活動が、企業名を公にして実施されている以上、企業広告的な広義の宣伝活動にあたることは明らかであり、未成年者喫煙防止の観点からは、少なくとも子ども対象のスポンサー活動、CSR活動については、何らかの規制を導入することを検討すべきであると考えられる。

IV. 結論

たばこ規制枠組み条約（FCTC）第13条「たばこ製品の広告、販売促進、スポンサー活動」に基づき、わが国の現状、関連法規、たばこ規制にあたっての課題（(1) たばこ広告の範囲、(2) 表現の自由との関係、(3) テレビ広告の自主規制、(4) 未成年者喫煙禁止法の適用、(5) スポンサー活動・CSR活動規制）、今後の対策に向けた課題について検討し、以下の結論を得た。

たばこ事業法に基づく広告指針、業界団体による広告の自主規準において、対象に企業広告、喫煙マナー広告、未成年者喫煙防止広告が含まれていない。まず、これらが未成年者の喫煙行動に及ぼす影響に関するエビデンスを明確にすることが必要である。

未成年者喫煙禁止・防止の観点から、企業広告、喫煙マナー広告、未成年者喫煙防止広告、スポンサー活動、CSR活動のそれぞれについて、規制のための個別具体的な検討を進めていくべきである。

テレビでのたばこ産業の企業CMとその放映には、未成年者喫煙防止の観点から問題が多く、自主規制を求めていく必要がある。

少なくとも子ども対象のスポンサー活動、CSR活動については、未成年者喫煙防止の観点から、何らかの規制の導入を検討すべきである。

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研究（研究代表者：中村正和）」の分担研究に基づいている。中村正和氏はじめ研究分担者，研究協力者の皆様に深謝します。

また，本稿において，COI（利益相反）はない。

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タバコ規制と法制度

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タバコ規制の法制度と本稿の射程

日本において、現在、タバコに対して何らかの規制をしている法律としては、「未成年者喫煙禁止法」(1900年策定)、「たばこ事業法」(1984年)(もっとも、同法は、規制というよりはタバコを推進している面が強い悪の元凶である)、「たばこ税法」(1984年)、「労働安全衛生法」(1972年制定、1992年、2014年改正)などがあげられ、最近では、「健康増進法」(2002年)も策定されたほか、世界レベルの「たばこ規制枠組条約(以下、FCTC)」(2003年採択、2005年効力発生)も採択された。また、現在、多くの自治体で、いわゆる「路上喫煙禁止条例」(2002年以降、各地で策定)が策定されるようになったほか、神奈川県や兵庫県では、「受動喫煙防止条例」(2009年、2012年)が策定されている。このように見てみると、日本も一昔前と比べると状況はかなり変化したが、FCTCの趣旨を踏まえれば、日本においては、タバコに対する「行政的規制」のさらなる強化は必要不可欠である。

本稿では、「喫煙の自由」と「非喫煙者の権利」の内容を踏まえたうえで、「日本において、どのような行政的規制をすべきか」という視点から、タバコ規制をめぐる現行の法制度を踏ま

えつつ、「タバコ規制をめぐる今後の法制的課題」を提示することとしたい。

なお、本稿は、タバコ規制について考察するものであるが、より具体的に言えば、①タバコ規制に関する「法律問題」(権利義務に関する問題)について、②「法律論」(既存の法制度の趣旨・意味を探求する「解釈論」と、新しい法制度を設計する「立法論」)を展開するものであり、③どのような規制目的を掲げ、当該規制目的を実現する手段として、どのような行政的規制をすべきか、といった「行政的規制」(行政手法)について考察するものである。

「喫煙の自由」と「非喫煙者の権利」

喫煙者は「喫煙者にも『喫煙の自由』がある」と主張するが、喫煙の自由といっても、それは決して吸いたい放題にしてよいということの意味するものではない。この点につき、最高裁昭和45年9月16日大法廷判決(民集24巻10号1410頁)も、「喫煙の自由は、憲法13条の保障する基本的人権の一に含まれるとしても、あらゆる時、所において保障されなければならないものではない」としている。すなわち、喫煙の自由にも限界があり、あらゆる時・場所において保障されるわけではない。喫煙の自由は、人権の本質上、「他人の生命や健康を

害するものではない」ことを内在的制約としている。喫煙の自由といっても、周囲に迷惑をかけてまで(しかも、「迷惑」にとどまらず、「健康被害」まで生じさせておいて)喫煙するような権利などないはずである。

一方、非喫煙者が、「権利」として要求しているのは、「受動喫煙させられない権利」とか「タバコの煙によって汚染されない清浄な空気を吸う権利」などと呼ばれるものであるが、このような非喫煙者が要求している「権利」に対しては、「喫煙の自由に干渉しているのではないか」「全面的な禁煙を押し付けているのではないか」といった意見が少なくない。しかし、このような意見は大いなる「誤解」である。

第1に、非喫煙者は、「公共的な場所における喫煙の制限」を要求しているにすぎない。非喫煙者の要求は、単に「私的空間は『喫煙自由』であるが、公共的空間では『禁煙』にしてくれ」と要求するにとどまるものである。

第2に、非喫煙者の要求は、喫煙者の「喫煙の自由」に何ら干渉するものではない。前述のように、喫煙の自由は、人権の本質上、「他人の生命や健康を害するものではない」ことを内在的制約としているはずである。一方、非喫煙者が要求する権利は、「他人の生命や健康を害することがないような場所では自由に喫煙してもらっても構わない」が、「非喫煙者の吸う空気までは汚さないでくれ」と要求しているにとどまるものであり、要するに、喫煙の自由の内在的制約を顕在化させているにすぎない。

第3に、非喫煙者の要求は、喫煙者に対して「全面的な禁煙」を押し付けているわけでもない。確かに、非喫煙者が要求している権利は、「公共的な空間」では禁煙を要求するものであるが、「私的空間」では何ら禁煙を要求するものではなく、いわば「喫煙の場所的制限を制度化すること」を訴えているにすぎない。

受動喫煙防止施策

喫煙は、「環境タバコ煙」を生み出し、受動喫煙によって非喫煙者の罹病の原因にもなる。そのため、「非喫煙者の被害を防止し、健康を保護する」という視点から、「受動喫煙防止施策」を充実させる必要がある。

1. 職場における全面禁煙の義務づけ

2014年の法改正で新設された労働安全衛生法68条の2は、「事業者は、労働者の受動喫煙…を防止するため、当該事業者及び事業場の実情に応じ適切な措置を講ずるよう努めるものとする」と定めている。しかし、事業者に対して「適切な措置」を講ずる「努力義務」を課しているにとどまっている現行の労働安全衛生法68条の2を改正し、すべての事業所と工場に、「全面禁煙」か、喫煙室以外での喫煙を禁止する「空間分煙」を義務づけるべきであろうし、「当該事業者及び事業場の実情に応じ」という文言も削除すべきであろう。

2. 公共スペースにおける全面禁煙の義務づけ

健康増進法25条は、「学校、体育館、病院、劇場、観覧場、集会場、展示場、百貨店、事務所、官公庁施設、飲食店その他の多数の者が利用する施設を管理する者は、これらを利用する者について、受動喫煙(中略)を防止するために必要な措置を講ずるように努めなければならない」として、多数の者が利用する施設の管理者に対して「受動喫煙防止施策」を講ずる「努力義務」を課している。しかし、喫煙の自由は、「他人の生命や健康を害するものではない」ことを内在的制約としており、他人(非喫煙者)の生命や健康を害するような場所である「公共スペース」での喫煙を制限されたとしても、それは受忍限度の範囲内と考えるべきである¹⁾。そこで、健康増進法25条を改正し、多数の者が利用する施設の管理者に対して、受動喫煙防止施策を講ずることを「義

務」づけるべきであろう。また、健康増進法 25 条の「受動喫煙防止施策」の中身は「全面禁煙が原則である」と解釈すべきである。とりわけ、官公庁施設、医療機関、教育機関といった「公共性の高い公共スペース」においては、「敷地内全面禁煙」(「喫煙室の設置」も認めない)を義務づける法システムにすべきである。

3. 飲食店における原則全面禁煙(厳格な基準を満たす喫煙室の設置の例外的許容)

レストランや喫茶店などの「飲食店」は、健康増進法 25 条で列挙されているものの、受動喫煙防止施策を講ずる「努力義務」が課せられるにとどまっている。実際、多くの飲食店で導入されている「分煙」は、単に禁煙席と喫煙席を分けて設けるというものである。しかし、単に禁煙席と喫煙席を分けるだけでは「分煙」とはいえず、「適切な受動喫煙防止措置」を講じているともいえない。また、「利用者の受動喫煙防止」を重視することはもちろん、「労働者の受動喫煙防止」という視点も重視するのであれば、原則としては、「屋内の施設すべてを禁煙」とするしかないと考えられる。例外的に「喫煙室」の設置を認めるとしても、利用者(消費者)と労働者の受動喫煙を防止することができるという「厳格な基準」を満たしたものの(例、二重扉)に限定されるべきである。

4. 条例ではなく法律による受動喫煙防止措置の義務づけ

現在、神奈川県と兵庫県において、「条例」で一定規模以上の事業者に対して、受動喫煙防止措置を講ずる義務を課しているものの、受動喫煙による被害を防止するために包括的な規制をする全国レベルの「法律」はいまだ策定されていない(健康増進法 25 条は、「努力義務規定」であり、包括的な「規制」をするものとはいえない)という状況である。しかし、受動喫煙による被害を防止して包括的な規制をするため、「条例」ではなく「法律」で対応すべきであろう。具体的には、「健康増進法 25 条の改正」および「労働安全衛生

法 68 条の 2 の改正」とともに必要である。

5. 路上喫煙規制の強化

喫煙の自由といっても「他人の生命や健康を害しない限り」という内在的制約があり、喫煙者と非喫煙者とが共有する場所である「公共の場所」では原則として禁煙とすべきであることを踏まえれば、喫煙者も非喫煙者も利用する路上はいわば「公共の場所」(ちなみに、千代田区の条例では、「区内の道路、公園、広場」などを「公共の場所」と捉えている。2 条 7 号)といえ、かつ、多くの未成年者も利用する場所であることを踏まえれば、路上については「原則禁煙」という仕組みにする必要がある。実効性をどのように確保するのかが最大の課題であるが、少なくとも、条例で「過料徴収」を明記すべきであろう。また、悪質な者に対しては、刑事罰である罰金規定も導入すべきである²⁾。

未成年者喫煙防止施策

喫煙者のほとんどは「未成年」のときからタバコを吸っている。そこで、実効性のある未成年者喫煙防止施策が求められる。

1. タバコ自販機の全面禁止

タバコ自販機の設置場所については、たばこ事業法 23 条 3 号に基づく同法施行規則 20 条 3 号で規定があるが、従来は、未成年者がタバコ自販機で自由にタバコを購入できるという状態であった。その後、2008 年 7 月 1 日から「成人識別タバコ自動販売機」(taspo)の全国稼働が実現したが、大人が未成年者に taspo カードを貸すなどの脱法行為を助長している。そこで、より実効性のある対策が求められる。具体的には、タバコ自販機の新設は全面禁止とすべきである。既設の自販機についても、猶予期間をおいたうえで撤去を命じるべきであろう³⁾。

2. 厳格な「年齢確認」の義務づけ

未成年者喫煙禁止法 4 条は「年齢確認其ノ

他ノ必要ナル措置」と規定しているため、「年齢ノ確認」が義務づけられているわけではない⁹⁾。実効性のある年齢確認を実施させるために、未成年者喫煙禁止法4条は、「年齢ノ確認其ノ他必要ナル措置」あるいは、並列関係であるとはっきりとわかるように「年齢ノ確認及ビ其ノ他必要ナル措置」と改正すべきである⁹⁾。

3. マナー啓発のCMも含めた「タバコ会社によるCM」の禁止

たばこ事業法40条2項の規定に基づいて策定された「製造たばこに係る広告を行う際の指針」では、「喫煙を促進しないような、企業活動の広告並びに喫煙マナー及び未成年者喫煙防止等を提唱する広告については、この指針の対象に含まれない」（同指針四）として、いわゆるマナー啓発の広告は許されるという立場に立っている。しかし、タバコ会社によるマナー啓発のCMは、営業の自由に対する合理的な制限と考えて、全面的に禁止すべきである。

4. タバコ税の大幅値上げ

日本では、タバコに対して、①国たばこ税（たばこ税法11条）、②道府県たばこ税（地方税法74条の5）、③市町村たばこ税（同法468条）、④たばこ特別税（一般会計における債務の承継等に伴い必要な財源の確保に係る特別措置に関する法律）、⑤消費税（消費税法）、といった税が課せられ、タバコの価格に占める租税の割合は消費税を含めて64.4%である⁶⁾。しかし、先進国のタバコの税負担率の平均は8割であるほか、喫煙によるコストはタバコの税収を大幅に上回っていることを考慮すると、現在のタバコの価格は安すぎると考えられる⁷⁾。そのため、タバコ税を大幅に値上げし、タバコの価格も大幅に値上げすることが望まれる。

喫煙者減少施策

喫煙者は、嗜癖に陥る危険を軽視し、喫煙を

繰り返すうちに禁煙できなくなっている。そこで、以上の傾向も踏まえた施策が求められる。

1. 「タバコの有害表示」に対する規制強化

たばこ事業法39条は「注意表示」という文言になっているが、「有害表示」という文言にすべきである。たばこ事業法施行規則36条に基づく別表第一で規定されている「あなたにとって」といった文言は削除すべきであるし、タバコの嗜癖（依存性）に関する文言をもっとタバコのパッケージに表示させる必要がある。

2. 「タバコの商品名」に対する規制

たばこ事業法40条2項の規定に基づく「製造たばこに係る広告を行う際の指針」において、「low tar」「light」「ultra light」「mild」といった表示の文言は、消費者に誤解を生じさせないような文言である限りにおいて認められている。しかし、FCTCの趣旨を踏まえるのであれば、「メビウス・ライト」「メビウス・スーパーライト」という名称はFCTC違反であると思われるし、「セブンスター」「ピース」「ホープ」といった名称についても、「消費者に誤解を生じさせるおそれのある文言」かどうかについて検討する必要がある。

3. 禁煙支援施策

2006年4月から、一定の条件の下で禁煙治療が健康保険の適用とされたが、将来的には、禁煙外来以外でも保険を適用できるようにするほか、「禁煙外来を受けるにあたっての患者条件」も緩和して、もっと軽度の患者に対しても保険適用を認めるほか、保険が適用される治療の回数を増やしてもよいように思われる。

タバコ規制をめぐる抜本的な改革

タバコ規制をめぐる現行の法システムを所与のものとする「具体的なタバコ施策」のほかに、長期的な視点に立った「抜本的な改革」も必要である。

第1に、たばこ事業法を廃止したうえで、包括的な「タバコ取締法」を策定すべきである。たばこ事業法は、たとえ国民の健康を害することになったとしても、とにかく「たばこ産業を発展」させ、「財政収入を確保」し「国民経済を発展」することを目的としている法律である。国民の生命や健康を尊重して公衆衛生の向上・増進を図る政策を実現するためには、たばこ事業法を廃止する必要がある。そのうえで、新たに包括的な「タバコ取締法」を策定すべきである。タバコ事業に関する権限を財務省から厚生労働省へ移管することも必要であろう。

第2に、包括的な「受動喫煙防止法」を策定することも望まれよう。「健康増進法25条」と「労働安全衛生法68条の2」が改正され、路上喫煙を規制する法律の策定が実現すれば、ある程度、実質的に喫煙場所を制限することが可能となろう。しかし、それぞれの法律の規制対象は限定されることが予想され、非喫煙者が日常生活を送るうえで「受動喫煙」を避けることができないことが予想される。そこで、将来的には、「受動喫煙防止」という観点から、喫煙場所を包括的に制限する法律や条例を制定することが望まれよう。

第3に、「喫煙の自由」を否定するとともに、タバコを全面的に販売禁止とすることも望まれよう。「喫煙の自由」というためには、喫煙するか否かの決定は「自由意思」に基づく必要がある。しかし、現実には喫煙の開始とその継続には、「タバコの依存性」とともに「タバコ会社によるさまざまな働きかけ」が作用しており、喫煙者の「自由意思」に基づいているとはいえない⁸⁾。とりわけ、タバコをやめたくてもやめられない喫煙者に対して、「喫煙の自由」などというべきではない。また、タバコは、喫煙者から「愛、お金、自由、時間」などを奪う一方で、(喫煙者はもちろん、非喫煙者も含め

た)社会全体に対して「ストレス、争い、葛藤、不安」(喫煙者が「タバコはストレスの解消になる」と感じている「ストレス」は、実は「ニコチン切れによるストレス」であって、「ストレスの原因はタバコ」である)などをもたらしている。このような「百害あって一利なし」の消費財については、将来的には「全面的に販売禁止」するという方向で考えるべきであろう。

附記：本稿は、2014年8月に刊行された、田中謙『タバコ規制をめぐる法と政策』(日本評論社、2014年)の一部をまとめたものである。

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注・文献

- 1)阿部泰隆：喫煙権☆嫌煙権☆タバコの規制(下)。ジュリスト725号、1980、p111以下
- 2)深町晋也：路上喫煙条例・ポイ捨て禁止条例と刑罰論。立教法学79号、2010、p74以下
- 3)阿部泰隆：やわらか頭の法戦略一統・政策法学講座。第一法規、2006、p231
- 4)というのも、「Aその他B」となっていれば、AとBは並列関係にあり、例示関係ではないが、「Aその他のB」とあるときは、AはBの例示であり、Bに含まれるからである。「年齢ノ確認」は「必要ナル措置」の例示にすぎず、「必要ナル措置」の中に含まれるからである。
- 5)前掲書3)、阿部、p220以下
- 6)例えば、メビウスは、2015年7月1日現在、1箱20本入で430円であるが、その税額は276.73円〔内訳：国たばこ税106.04円(24.7%)、地方たばこ税122.44円(28.5%)、たばこ特別税16.40円(3.8%)、消費税31.85円(7.4%)〕である。
- 7)Cnossen S. et al: Taxation of Tobacco. In: Cnossen S (ed): Theory and Practice of Excise Taxation. Oxford University Press, 2005, pp 33-46. このほか、荒井一博：喫煙と禁煙の健康経済学。中央公論新社、2012、p116以下も参照。
- 8)Slade J: Marketing Policies. In: Rabin RL, et al (eds): Regulating Tobacco. Oxford University Press, 2001, pp 78-83

The Limitations of the Freedom to Smoke and the Rights of Non-Smokers

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I. Introduction

Traditionally, the act of smoking cigarettes in Japan has been considered an individual's right. Since smoking is exercising one's right, societal attitudes have regarded smoking as something that should be tolerated as much as possible by non-smokers. In other words, Japan was (and may still be) a society wherein non-smokers, to some degree, were asked to "put up with" smoking. However, the second-hand effects of smoking—for example the smell of cigarettes permeating one's clothing and hair, irritating one's eyes, or the litter of discarded cigarette butts—have come to be understood as problems of smoking etiquette. Therefore, Japan has become a society where smokers could smoke in any place at any time.

However, should the act of smoking cigarettes be acknowledged regardless of a

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nuisance to others nearby? Alternatively, are non-smokers demanding an “outright ban on smoking” against smokers? Moreover, can a society in which only non-smokers are forced to “put up with” smoking be a fair society?

In this study, I review discussions on the “freedom to smoke” (Section II) and the “rights of non-smokers” (Section III), neither of which has been accurately understood. Thereafter, I identify the legal issue of how the interrelationship of these rights should be understood (Section IV).

II. The Freedom to Smoke

Although what smokers claim for themselves as a “right” has been called the “freedom to smoke,” there are not necessarily many who truly understand what this freedom entails. In Section II, I aim to review once more the definition of the freedom to smoke.

1. The Right to Self-Determination

Today, although underage smoking is prohibited under the terms of the first clause of the Act on Prohibition of Smoking by Minors (Act No. 33 of 1900), smoking by adults is regarded permissible. Regardless of any health impact, whether one chooses smoking or one’s health is seen as an issue of the free choice of the individual (although as I explain below, the terms of this argument are not necessarily tenable¹⁾).

As described above, from the fact that the act of smoking by adults is not prohibited by law, smokers claim that the “freedom to smoke” is a right to which smokers are entitled. Smokers seemingly believe that this freedom to smoke is an individual freedom based on the right to self-determination generally laid out in Article 13 of the Constitution. Hence, I first aim to ascertain the facts regarding the right to self-determination allegedly guaranteed by Article 13 of the Constitution.

While human rights are regarded as essential, innate, and inalienable rights for people to live as human beings, the basis of these rights may be found in the principle of “respect for the individual.” While Article 13 of Japan’s Constitution upholds this principle in the statement that “all of the people shall be respected as individuals,” the sense in which this principle is used here is “respect of the human individual as an independent moral entity.” In other words, from the perspective of such a principle,

1) Although I have mentioned that regardless of any health impact, whether one chooses smoking or one’s health is seen as an issue of the free choice of the individual, in the case of cigarettes, we must also pay attention to the fact that the public is not fully aware of the risks of tobacco, that warnings are inadequate, and that smokers have not been provided with the necessary information for making a free and informed choice. Moreover, nicotine addiction makes it extremely difficult for smokers to give up cigarettes voluntarily. In several surveys, two out of three smokers actually indicate they “want to quit.” However, a powerful addiction to the nicotine in cigarettes makes them unable to give up smoking despite their desire to quit. Moreover, tobacco companies take full advantage of this addictive quality.

“human rights” will be understood as “rights considered to be essential to human existence” (which is to say “rights relating to basic human dignity”) and “rights that are essential to pursuing a life as an independent moral individual²⁾.” Furthermore, after asserting the principle of “respect for the individual,” Article 13 goes on to state that “Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.” This “right to life, liberty, and the pursuit of happiness,” which is termed the “right to the pursuit of happiness,” could readily be said to be a general term for human rights in the above sense³⁾. Therefore, even where not specified in the Constitution, as long as something is “an essential right for human existence,” a claim could be advanced on the basis of a “right to the pursuit of happiness” guaranteed by Article 13 of the Constitution. Hence, one of the key elements of the human right claimed under Article 13 is “the right of individuals to determine their own actions in certain private matters without interference or intervention by the authorities”; in other words, the right of self-determination⁴⁾.

2. Can the Freedom to Smoke be Characterized as a Substantive Right Guaranteed in the Constitution?

Next, I aim to ascertain whether the freedom to smoke should be acknowledged as a right of self-determination under the terms of the right to the pursuit of happiness in Article 13.

First, the question of whether the freedom to smoke corresponds to a basic human right guaranteed by the Constitution has been addressed by the Supreme Court, which has stated that “even if the freedom to smoke is included as a basic human right guaranteed by Article 13 of the Constitution,” so it remains an assumption that the freedom to smoke is guaranteed by the same article⁵⁾ (Supreme Court, Sep. 16, 1970, *Minshū* [Supreme Court Decisions for Civil Actions] Vol. 24, No. 10, p. 1410, *Hanrei jihō* [Law Cases Reports] no. 605, p. 55). In other words, the Supreme Court has used only hypothetical language with

2) See Norihiro Urabe, 2006, *Constitutional Law [2nd. Edition] (Kenpogaku Kyoshitsu)*, Nippon Hyoronsha, p.40ff.

3) See Nobuyoshi Ashibe (Kazuyuki Takahashi revision), 2011, *Constitutional Law [5th. Edition] (Kenpo)*, Iwanamiyoten, pp.40ff., see Urabe, *supra* note 2, p.42ff.

4) See Ashibe, *supra* note 3, p.125ff., see Urabe, *supra* note 2, p.46ff.

5) As for Supreme Court, Sep. 16, 1970, see Hideo Wada, 1979, “Prison and fundamental human rights (Zaikankankei to Kihonteki Jinken)”, *Gyosei Hanrei Hyakusen [1th. Edition]*, p.58ff., Bin Takada, 1993, “Prison and fundamental human right (Zaikankankei to Kihonteki Jinken)”, *Gyosei Hanrei Hyakusen [3rd. Edition]*, p.42ff., Shigeru Shimada, 1999, “Prison and fundamental human rights (Zaikankankei to Kihonteki Jinken)”, *Gyosei Hanrei Hyakusen [4th. Edition]*, p.42ff., Ryutarō Toma, 1994, “Prohibition of smoking in prison (Hikokinsya no Kitsu no Kinshi)”, *Kenpo Hanrei Hyakusen [3rd. Edition]*, p.34ff., Tatsuya Fujii, 2007, “Prohibition of smoking in prison (Hikokinsya no Kitsu no Kinshi)”, *Kenpo Hanrei Hyakusen [3rd. Edition]*, p.36ff.

regard to this question, thereby avoided a clear conclusion.

On the other hand, mainstream legal theory takes the position that Article 13, while lacking express provision, nevertheless provides a basis for the guarantee of the right. However, there is disagreement between “the theory of general freedom” and “the theory of moral interest” in terms of the scope of the guarantee of “what corresponds to basic human rights that are guaranteed by Article 13 of the Constitution.”

The theory of general freedom holds that Article 13, while encompassing individual rights, is substantively concerned with freedom of action as it pertains to all areas of life⁶⁾. This stance is based on the discussion that all human actions are provided for by law, and it has conventionally been derived from the conclusion that all actions interpreted as permissible (e.g., walking, mountaineering, swimming in the sea) are constitutional rights⁷⁾. The theory of moral interests agrees with the theory of general freedom on the point of a right encompassing individual rights. However, it understands the right to be more substantively restricted and interprets it as the “totality of rights substantively concerned with interests essential to the moral existence of the individual⁸⁾.”

Currently, the theory of moral interest occupies a prevailing position, a stance that is basically supported by legal precedent. The basis of this theory may be found in such factors as its consistency with rights that assume the philosophy of natural rights that represent the ideological roots of the actual Constitution, its consistency with the level of importance given to individual rights in Article 15 of the Constitution and succeeding articles, and a concern with the inflation of human rights through the expansion of the scope of human rights⁹⁾.

Even if self-determination is generally seen to be worthy of protection, this is not to say that it immediately follows that the right to self-determination must constitute a constitutional right. If we are to claim that the right to self-determination constitutes a constitutional right and should be interpretively written in the Bill of Rights as a “new human right,” then this would mean that we would have to lay out the specific normative substance of such a right where it does not refer specifically to the protection of the rights

6) See Youji Kakudo, 1977, *Constitutional Law [2nd. Edition] (Kenpo)*, Minervashobo, p.231, Kiminobu Hashimoto, 1988, *Japanese Constitutional Law [2nd. Edition] (Nihonkokukkenpo)*, Yuhikaku, p.268, Masanari Sakamoto, 1999, *Constitutional Theory II (Kenpo Riron)*, Seibundo, p.235ff., Koji Tonami, 1999, *Constitutional Law [3rd. Edition] (Kenpo)*, Gyousei, p.176ff., Koji Tonami, 1996, “The structure of the right to pursue happiness (Kofukutaiyukuen no Kozo)”, *Kohokenhyu*, No.58, pp.17-18.

7) That stated, the theory of general freedom does not suggest that all actions are subject to absolute protection under the Constitution. For example, Kōji Tonami notes the view that, depending on the importance of interest, some actions should be ranked according to the severity of their assessed unconstitutionality. See Tonami, *supra* note 6, pp.177ff.

8) See Koji Sato, 1995, *Constitutional Law [3rd. Edition] (Kenpo)*, Seirinsyoin, pp.448ff., see Ashibe. *supra* note 3, p.118ff.

9) See Hideki Shibutani, 2013, *Japanese Constitutional Law [2nd. Edition] (Kenpo)*, Yuhikaku, p.185.

contained therein¹⁰⁾. One approach that we might consider when discussing this point is that of attempting to expand the area, so to speak, of what we mean by constitutionally protected freedoms. The theory of moral autonomy is one such approach. According to this theory, the substance of the right of self-determination guaranteed by Article 13 of the Constitution of Japan consists of (1) matters relating to the disposition of one’s own life and body, (2) matters relating to the formation and maintenance of a family, (3) matters relating to reproduction, and (4) other matters¹¹⁾. Furthermore, while the “other matters” according to this theory, exemplified by “clothing, appearance, smoking and drinking, mountaineering and sailing, etc.” are problematic, the restriction or prohibition of such actions does not in principle have the power to utterly change the direction of someone’s life¹²⁾. The protection of self-determination in such matters may be left to approaches that question the necessity and rationality of the reasons for restricting freedoms¹³⁾.

While there are other notions that regard the freedom to smoke as a basic right protected by Article 13¹⁴⁾, without clear criteria, courts’ recognition of a right as constitutional also risks the establishment of rights according to the subjective value judgments of courts. Thus, it may be that we should consider only those legal benefits essential for people to lead lives as autonomous moral entities should be enhanced in rights that fall under the right to the pursuit of happiness¹⁵⁾. When we consider the act of smoking, even if smoking were to be prohibited, there would likely be few who would suffer from the obstruction of their “essential rights to exist as human beings” (i.e., “rights relating to basic human dignity”). Seen in the manner described above, we could say that, in the final analysis, the freedom to smoke should not be described as a constitutionally substantive guaranteed right¹⁶⁾.

3. Can Smoking be Characterized as a Matter of the Free Choice of the Individual?

Regarding the health effects of smoking, Japan Tobacco Inc. (JT) argues that “the decision on whether or not to smoke should be made by individual adults based on information about the health impacts and risks of smoking¹⁷⁾.” In addition to considering smoking as an issue of free choice, they assert that cigarettes are a product of taste everywhere. Furthermore, JT, claiming “cigarettes for smokers,” argues that “as adults, we

10) See Yoshiyuki Koizumi, 2007, “Self-Determination and Paternalism (Jikokettei to Paternalism)”, *New Developments of human rights theory (Jinkenron no Shū-Tenkai)*, Iwanami Syoten, p.187, Note(1).

11) See Sato, *supra* note 8, pp.459-462.

12) See Joseph Raz, 1986, *The Morality of Freedom*, Oxford University Press, pp.373-376.

13) See Koizumi, *supra* note 10, p.186.

14) For example, see Tonami, *supra* note 6, p.186.

15) See Ashibe, *supra* note 3, p.120ff.

16) See Yoichi Higuchi et al., 1984, *Japanese Constitutional Law I (Cyusyaku Nihonkokukkenpo (Jo))*, Seirinsyoin, p.303 (Koji Sato write), and Shibutani, *supra* note 9, p.187ff.

17) See the website of JT, available at <http://www.jti.co.jp/corporate/enterprise/tobacco/responsibilities/responsibility/health/index.html> (last visited October 16, 2015).

have the freedom to judge for ourselves the pros and cons of smoking based on information about the risks of smoking cigarettes and to enjoy them according to our individual preference¹⁸⁾."

These claims that smoking is an "individual preference" and a matter of "free choice" are attempts to justify the freedom to smoke based on the theory of self-determination. Thus, the traditional concept of smoking may be summarized along the lines of "a problem of (preferential) choice based on the exercise of an individual's free will¹⁹⁾."

However, it remains questionable whether claims that attempt to justify the freedom to smoke using the logic of self-determination are justifiable.

First, to justify the freedom to smoke using the logic of self-determination, several conditions will have to be satisfied²⁰⁾. While the decision to smoke needs to be made with full knowledge regarding the various options, the fact that tobacco companies do not disclose the risks of smoking means that this condition cannot be said to be generally satisfied. Second, although the decision to smoke needs to be based on free will, dependency on nicotine contained within cigarettes means that this condition may not be said to be satisfied either. Third, while the decision also requires adequate capacity for judgment, most smokers experience their first cigarette when they are still minors and may not be in possession of adequate critical faculties. Moreover, tobacco companies have taken advantage of nicotine's addictive qualities and introduced clever branding strategies targeting minors who may become life-long consumers. As described here, then, in fact, at the start of smoking behavior and during its continuation, the effects of cigarette dependencies and various outreach strategies on the part of tobacco companies mean that the question of whether to smoke cannot be said to be merely a matter of the free choice of individuals²¹⁾.

4. The Limitations of the Freedom to Smoke

Although smokers claim that "smokers are free to smoke," the mere fact of such freedom does not imply that everyone should be free to smoke as much as they want. Regarding this point, the 1970 Supreme Court Decision mentioned earlier (Supreme Court, September 16, 1970, *Minshū* [Supreme Court Decisions for Civil Actions] Vol. 24, No. 10, p. 1410, *Hanrei jihō* [Law Cases Reports] No. 605, p. 55) also holds that "the

18) See the website of JT, available at <http://www.jti.co.jp/corporate/enterprise/tobacco/responsibilities/recognition/index.html> (last visited October 16, 2015).

19) See Iwao Sato, 2000, "Changes in Tobacco Litigation and the Identity of the Movement (*Tabako Sosho no Henyo to Undo no Identity*)", Takao Tanase ed., 2000, *Sociological Study of Tobacco Litigation (Tabako Sosho no Hoshakaigaku)*, Sekaishisoshu, p.91ff.

20) See Kenichi Sato, 2000, "Antismoking logic and culture of smoking (*Kenen no Ronri to Kituen no Bunka*)", Tanase ed., *supra* note 19, p.200ff.

21) See John Slade, 2001, "Marketing Politics," Robert L. Rabin and Stephen D. Sugarman, eds., *Regulating Tobacco*, Oxford University Press, pp.78-83.

freedom to smoke, while included in basic human rights protected by Article 13 of the Constitution, does not mean that this freedom is guaranteed in all places at all times." In other words, there are limits to the freedom to smoke, meaning that it is not protected in all places at all times.

The above problem is known as the issue of "constraining principles" or "limitations" on human rights. Discussions on this issue have traditionally centered on "formal" or "substantial" grounds that do not regard human rights as absolute. Formal grounds would be a discussion about whether to seek grounds in the Articles of the Constitution, while substantial grounds would be some specific reason for accepting limits. Formal grounds that have traditionally been mentioned in the Constitution are the injunction against "abuse of ... freedoms and rights" and the responsibility for "using them for the public welfare" subsequent to Article 12, the clause "to the extent that it does not interfere with the public welfare" subsequent to Articles 13 and Article 22(2), and "in conformity with the public welfare" in Article 29(2)²²⁾.

What might be the limits that apply to the freedom to smoke?

Modern thought on basic human rights is based on an underlying assumption of the "equality and dignity of all people." Accordingly, recognition of any exercise of human rights in a form that would challenge this assumption would represent an internal contradiction in the very idea of human rights. In other words, the concept of "rights" has the limitation "to the extent that it does not interfere with the equality and dignity of all people." In short, the limitation on human rights is that "one may not infringe on others." To frame this limitation more specifically, we could point out the following examples²³⁾.

First, exercising human rights does not justify infringing on the lives or health of others; this is because life and health are the most basic matters for human beings, and it is certain that they are a major premise of "individual dignity." Second, violating the dignity of others is indefensible. Actions that damage the dignity of other people, even if they do not affect life or health, are still not permissible. Third, one may not interfere with the legitimate exercise of another's human rights. Since human rights are intended to be guaranteed equally to all people, the act of disregarding the rights of another in order to enforce one's own rights is basically unacceptable. In cases where the exercise of a given person's human rights comes into conflict with the human rights of another, this will always call for a process of mutual adjustment²⁴⁾.

22) As for development of public welfare theory, see Nobuyoshi Ashibe, 1994, *Constitutional Law II (Kenpogaku II)*, Yuhikaku, p.186ff., Hideki Shibutani & Masahiro Akasaka, 2013, *Constitutional Law I [5th Edition] (Kenpo I)*, Yuhikaku, p.324ff. (Hideki Shibutani write), and Shibutani, *supra* note 9, p.164ff. As for the specific contents of the public welfare, Masayuki Uehino, 1991, *Logic and System of constitutional interpretation (Kenpo Kaisyaku no Ronri to Taikei)*, Nipponhyoronsha, p.340ff., Masanari Sakamoto, 1993, *Constitutional Theory II (Kenpo Riron II)*, Sibundo, p.167ff., and Shibutani, *supra* note 9, p.169ff.

23) See Urabe, *supra* note 2, p.77ff.

24) That said, the establishment of this mutual adjustment holds true only where there is a possibility of mutual

As suggested from the aforementioned content, regardless of the fact that the substance of the freedom to smoke is that individuals are free to choose to smoke, we must also note that this is premised on smoking, not impairing the lives or health of others. In other words, the freedom to smoke has the inherent limitation, from the perspective of essential human rights, of not impairing the lives or health of others.

However, examining the current situation in Japan, it has been the case in the past (and perhaps remains so today) that smokers continue to smoke their cigarettes when and where they like, without taking any notice of how their behavior is detrimental to the people around them. This situation, rather than the freedom to smoke, should perhaps rather be called the “tyranny of the smokers.”

There are very few who would oppose regulations for industrial air pollution, even among smokers. However, there are more than a few smokers who oppose the regulation of air pollution in places where it might affect the health of others, on the grounds of the freedom to smoke. This is no different than claiming that factories should have the “freedom to operate” in an attempt to justify the emission of polluted gases into the atmosphere²⁵.

Incidentally, there is a surprising number of smokers who are completely nonchalant about smoking cigarettes in typical restaurants and cafés, despite the nearby presence of non-smokers (including children), and except where by-laws prohibit outdoor smoking in specific neighborhood areas, there are more than a few smokers willing to smoke cigarettes on crowded city streets. Many of these smokers who casually smoke cigarettes in such areas claim, “I’m obeying the laws and regulations, and I’m not obliged to listen to anyone who wants to complain. As well as not being prohibited by laws or regulations, smoking is my *right*.” However, are these claims valid? We examine three comments below.

First, the above claim misunderstands the difference between civil law and

exchange between two positions. For instance, where one party stands in a permanently compromised position and the other party is always being propped up by the compromised party; this would lead to a request to constrain the rights of the infringing party, from the perspective that this is not mutual adjustment but “protection of the weak.” A limitation on human rights as portrayed from this perspective should be seen as qualitatively different from a limitation in the sense of mutual adjustment, and it would require political restraints. See Urabe, *supra* note 2, p.80.

In the case of tobacco, while smokers smoke by their own volition, non-smokers are always exposed to tobacco smoke regardless of their personal will. In other words, non-smokers are, so to speak, forced to inhale tobacco smoke. Moreover, non-smokers suffer only unilaterally from second-hand smoke. Non-smokers experience only the inconvenience of tobacco and derive none of the benefits. Furthermore, there is no possibility of a positional interchange between perpetrators (smokers) and victims (non-smokers). For the above reasons, given the structural antagonism between the interests of smokers and non-smokers, a constraint on smokers’ freedom to smoke will be needed from the perspective of protecting the weak rather than a mutual adjustment in the case of cigarettes.

25) See Yasutaka Abe, 1980, “The Rights of Smokers and Nonsmokers, Regulation of Tobacco Smoking, Vol. 1 (Kitsunenken, Kenenken, Tabako no Kisei (Jo))”, *Jurist*, No.724, p.45.

administrative law. In other words, the laws and regulations that make provision to protect the public from second-hand smoke fall under administrative law, which is an area of law that governs the relationship between individuals and the state. However, civil law governs the relationship among individuals. Hence, the above claim, even if it were to have been made against the state, should not be valid in claims against other individuals. Namely, simply because something is not prohibited on the basis of administrative law, this does not render the complaints of others invalid in terms of a problem among individuals in theory. The fact that someone is complying with administrative law does not necessarily mean they can escape civil liability²⁶.

Second, for someone to not want to hear anyone complain, a minimum unspoken assumption should be necessary: “Since it’s not like I’m inconveniencing anyone else.” However, when we listen to the claims made by smokers, they seem to be roughly similar to “I don’t know whether I’m inconveniencing anyone else. Maybe I’m a nuisance for some. But it’s none of my business. Stop your griping!” The statement “Stop your griping!” is tantamount to an offender’s argument with a victim. However, since the victim is the one raising an objection to an “inconvenience” (or, more precisely, a “health hazard”), there should not be any question of anyone’s “right” to smoke enough to “inconvenience” those nearby (or moreover, to place their health at risk) in the first place.

Third, even where not prohibited by laws or regulations, the act of smoking cigarettes and being a nuisance to others nearby should not be something that can be termed as “correct behavior” (i.e., a right). When claiming a “right,” it should be easy enough to think of the other meaning of the term in English. In other words, the meaning of “right” (translated into Japanese as *kenri*) is “something that is correct,” and those who simply claim their rights, rather than claiming them because they are rights, should be able to appropriately state that “this is right²⁷.” Even though it is not prohibited by laws and regulations, could we say that it is “right” (or “a right”) to smoke cigarettes and so inconvenience (and not just inconvenience but endanger the health of) others nearby?

26) For the difference between civil law and administrative law, cf. Abe Yasutaka, *Gyōsei hō kaishakugaku: Jissūtsuteki hōchi kokka o sōzōsuru henkaku no hō riron I* [The Interpretation of Administrative Law: A Legal Theory of Reform to Create a Substantive Constitutional State, vol. 1] (Yūhikaku, 2008), p.193ff, esp. p.218ff. For example, as examples of evading civil liability while complying with administrative law, noises not subject to noise restriction legislation could be construed as illegal (e.g., karaoke music could be construed as unlawful even in the absence of karaoke regulations), and atmospheric pollution could lead to liability if it results in adverse health effects, even in the absence of regulation under administrative law (cf. the Yokkaichi asthma case, Judgement of July 24, 1972, Tsu District Court [Yokkaichi Branch], 672 Hanrei jūhō 30).

27) See Urabe, *supra* note 2, p.5ff.

III . The Rights of Non-Smokers

It becomes more apparent that smoking in confined and congested spaces, which can be likened to the smoke of industrial pollution, is not only uncomfortable to non-smokers but also endangers their health. Hence, non-smokers have begun to advocate their rights "to breathe clean air not polluted by tobacco smoke" and "not to be subjected to second-hand smoke," specifically demanding that smoking be banned in public spaces. However, perhaps as a result of the label "anti-smoking rights" (*ken'en-ken*), these rights claims by non-smokers have also been met with opposition²⁸. However, that is possibly because the true substance of "non-smokers' rights" has not been sufficiently understood. Therefore, in Section III, I aim to assess (1) the substance of non-smokers' rights, (2) the specific content of the rights claimed by non-smokers, and (3) the basis in positive law for non-smokers' rights in order to finally examine (4) whether there is any sense to rights claims by non-smokers, or whether cigarette smoke is ultimately something that non-smokers should "just have to put up with.

1. The Substance of Non-Smokers' Rights

Conventionally, in terms of what is meant by "non-smokers' rights," these have been associated in legal doctrines with environmental rights, moral rights, and health rights, principally in conjunction with the three principal theories described below. First, in what I shall call Theory A, there is the position that holds non-smokers' rights to involve "the right to breathe good air that is free from pollution" and which understands them "as constituent within environmental rights in the lived environment with which people are in closest and most familiar contact." Second, there is the position that argues that non-smokers' rights are also involved with environmental rights, in so far as the latter can be understood to have "qualities that could also be described as the moral rights established through the relationship with the natural environment" (hereinafter Theory B). Third, there is the position wherein since second-hand smoke impacts health, non-smoker's rights should be understood as separately as "health rights," which are to be differentiated from moral rights (hereinafter Theory C).

However, there have been problems indicated for each of these three theoretical perspectives²⁹. In Theory A, the issue that, in addition to the absence of any accepted precedents for environmental rights, since previous judgments in tobacco litigation have required that there be danger of actual infringement rather than the abstract possibility

28) For example, while the *Aien-ka Tsūshin* [the Smoking Aficionado's Newsletter], the website of the Smoking Culture Research Society, available at <http://aienka.jp/> (last visited October 16, 2015), presents a variety of people who advance their own claims. These claims hardly seem to be made by anyone familiar with the true substance of non-smokers' claims. Most people do not accurately understand what non-smokers are asking for.

29) See Hideyuki Osawa, 1994, "Antismoking Litigation (Kenenken Soshō)", *Jurist*, No. 1037, p.183.

thereof, they seem ill-suited to rights and remedies. However, Theory B, which considers environmental damage to infringe the most basic aspects of moral existence, including individuals' lives and physical safety, is an attempt to consider environmental rights as an issue of moral rights that gradually confer the legal protection of the courts. While Theory B has seen non-smokers' rights become more easily accepted as a subset of moral rights under traditional private law, it has been revealed that there is a problem in that their basis in constitutional theory remains inadequate. In contrast, Theory C has come to understand the issue of non-smokers' rights as a limitation on the freedom to smoke based on the right to health. However, along with this limitation, several other problems have been identified, including the fact that the question of how the substance of a "right to health" differs from the right to health based in Article 25 of the Constitution, which has been the grounds for previous claims.

As described above, while certain problematic points have been indicated with respect to each of these theories, among the three, it is basically Theory C that is seemingly valid on the point of being bold to confer remedies prior to the occurrence of any specific health damages³⁰. However, at present, discussions on the right to health have been relatively few. Since it will likely be more meaningful to identify specifically what non-smokers are demanding as "rights"³¹, rather than whether to think in conjunction with environmental rights, moral rights, or health rights, I next aim to ascertain the specific content of the rights claimed by non-smokers.

2. The Specific Content of Rights Demanded by Non-Smokers

What, specifically, are non-smokers demanding as their "rights"?

The rights that non-smokers are claiming include those that might be called "the right not to be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke." Meanwhile, views that such rights "seem to interfere with the freedom to smoke" and "seem to be insisting on a complete ban on smoking" are not uncommon. However, such views have been extensively misunderstood. Below, I aim to ascertain three points regarding the contents of the rights that non-smokers are specifically demanding.

(1) Simply a Request to Restrict Smoking in Public Spaces

First, non-smokers are demanding nothing more than to restrict smoking in public spaces. The contents of the right that non-smokers claim are no more than simply a demand "not to pollute the air that non-smokers breathe." This demand is simply "to ban

30) See Osawa, *supra* note 29, p.183.,

31) See Ken Tanaka, 2004, "Trends in Cigarette Litigation and Future Legal Challenges (*Tabako Soshō no Doko to Kōgo no Hōseitoku Kadai*)", *Annual Review of Economics, Faculty of Economics, Nagasaki University*, Vol.20, p.63ff

smoking in public spaces, while allowing the freedom to smoke in private spaces." In other words, the right that non-smokers are demanding is nothing more than a request to restrict smoking in public spaces that are in common use, or otherwise lived spaces shared by smokers and non-smokers.

(2) No Interference of any Kind with the Freedom to Smoke

Second, the demands of non-smokers do not interfere in any way with smokers' freedom to smoke. As described earlier, the freedom to smoke should have the inherent limitation, from the perspective of essential human rights, of not impairing the lives or health of others. However, the rights that non-smokers demand are no more than the demand "not to pollute the air that non-smokers breathe," while recognizing that "it is fine to have the freedom to smoke in places where the lives and health of others will not be impaired." That is, no more than a materialization of the inherent limitations of the freedom to smoke³². Accordingly, it will be understood that the right demanded by non-smokers does not interfere in any way with smokers' freedom to smoke.

(3) This does not mean an Insistence on a Complete Anti-Smoking Ban

Third, non-smokers' demands do not constitute an insistence on a complete anti-smoking ban against smokers. Certainly, as described earlier, the rights that non-smokers are demanding do involve a ban on smoking in public spaces, but this is in no way a demand that smoking be banned in private spaces. It is no more than, so to speak, an appeal for the institutionalization of limitations on smoking in certain locations. It will therefore be understood that it is certainly not an insistence on a complete smoking ban.

3. The Basis of Non-Smokers' Rights in Positive Law

The basis of non-smokers' rights in positive law also presents a problem. As described earlier, the rights being demanded by non-smokers include those that might be called "the right not to be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke." However, these rights are certainly not provided for in positive law, and even if this is true, since "the right to breathe" is a natural and inborn human right not needing to be newly provided for in the Constitution or other legislation, we could also say that the absence of such provision is intentional. Similarly, "the right to breathe clean air not polluted by tobacco smoke" is also a natural and inborn human right not needing to be newly established in the Constitution or legislation. While it may be (affirmatively) sought on the basis of the constitutional right to the pursuit of happiness provided in Article 13, it is patently obvious that the violation of these rights would be impermissible even without being prohibited by law³³.

32) See Abe, *supra* note 25, p.45.

33) See Abe, *supra* note 25, p.46ff.

However, rights based in the constitutional right on the pursuit of happiness provided in Article 13 are basically called "rights to freedom" that serve the function of making claims for the exclusion from interference, i.e., inaction (in relation to aspects of the right to freedom), and seek non-interference and inaction from state power over the rights and freedoms of human beings. On the other hand, rights being demanded by non-smokers, such as "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," seek to limit smoking in public places, appealing specifically for the institutionalization of limitations on smoking in certain locations. These demands have a function that makes a claim on state institutions to act (in relation to social rights). Thus, we could follow the discussion on constitutional law that holds that the function of making claims for the exclusion from interference (in relation to aspects of the right to freedom) is based in Article 13 of the Constitution, which makes general legal provisions for human rights, and that the function that makes claims on state institutions to act (in relation to social rights) is based in Article 25 of the Constitution³⁴. Then, the rights being demanded by non-smokers such as "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke" could be said to have their basis in Article 25 rather than in Article 13³⁵.

In the first place, clean air, water, and soil are an absolute prerequisite for human survival. To be unable to breathe air, drink water, or eat food, it would be impossible for humans to survive as animals, let alone as human beings. This is a basic premise of personal dignity and also a fundamental premise of "wholesome and cultured living"³⁶. In that sense, the rights being claimed by non-smokers "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke" could be said to be rights naturally predicated in Articles 13 and 25 of the Constitution.

That said, even if non-smokers do have the rights "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," there remains the very difficult problems of what remedies they might be able to demand as arising directly from these "concrete rights."

34) As for a discussion on the provisional basis of environmental rights (in other words, not with reference to "the right to not be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke"), see Ashibe, *supra* note 3, p.262ff., Shibutani, *supra* note 9, p.289ff., Urabe, *supra* note 2, p.241ff., Tadashi Otsuka, 2010, *Environmental Law [3rd. Edition] (Kankyoho)*, p.58ff.

35) However, beyond "the right to not be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke," it may be unreasonable to try to position these "new human rights," within which environmental rights are included, in the Constitution under the umbrella of traditional human rights of moral rights and the right to survival. For this reason, to achieve these new human rights, we could demand that the obligations of national and regional governments should be clearly defined and theorized with reference to the Constitution. As for a discussion on environmental rights, see Kitamura Yoshinobu, 2013, *Environmental Law [3rd. Edition] (Kankyoho)*, Kobund, p.53ff.

36) See Urabe, *supra* note 2, p.241ff.

Regarding the legal character of the right to life provided for in Article 25³⁷⁾, these matters ultimately amount to the issue of the possibility of remedy by the courts. (1) The "Program Rules" theory (which holds that Article 25 of the Constitution does no more than lay out the objectives of political and moral effort) denies any legal effectiveness and renders the courts completely incapable of involvement. (2) The "Objective Legal Norms" theory, which allows legal effectiveness, does recognize restrictions of the activities of the legislature and executive. However, since it allows for significant discretion within these domains, it also makes it difficult for citizens to obtain remedy in practice. (3) The "Abstract Rights" theory, while affirming the subjective legal norms of the right to life, also accepts that the realization of this right is limited by virtue of its impact in the established legislation, which makes it impossible to bring an action in the absence of the enactment of laws that make specific provision for the right to life. (4) The "Concrete Rights" theory, although the substantive rights of Article 25 are not sufficiently clear to constrain the executive, is sufficiently clear to constrain the legislature. In that sense, it makes provision for concrete rights that, in the absence of any specific method for their implementation, are nevertheless able to bring about litigation or sue for anonymous appeal to ascertain unconstitutional violations. While this may be construed as allowing for judicial relief even in the absence of separate laws, the necessary conditions for bringing suit are not clear. In the hypothetical case that a remedy should be presented, the solution to the problem will ultimately be handed back to the legislature, which will not constitute direct relief to those who are in need and seeking rapid relief.

Based on the above, even if non-smokers do have rights "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," in order to be able to exercise these rights in concrete terms and demand effective remedy, separate legislation needs to be clearly enacted (or else, already existing legislation will need to be appropriately amended). While the extension of the logic of the Abstract Rights Theory could mean that the rights of non-smokers would only become "concrete" for the first time through the enactment of legislation that gives them concrete force, it is still possible to use the word "rights" to characterize the content of these privileges³⁸⁾.

Moreover, the World Health Organization's Framework Convention on Tobacco Control (FCTC³⁹⁾) was adopted at the meeting of the WHO held on May 21, 2003. In

37) As for the legal character of the right to life provided for in Article 25, see Shibutani, *supra* note 9, p.276ff., Ashibe, *supra* note 3, p.260ff., Urabe, *supra* note 2, p.227ff.

38) See Ashibe, *supra* note 3, p.260.

39) As for more information about the Framework Convention on Tobacco Control, see the website of the World Health Organization (WHO), available at <http://www.who.int/fctc/en/index.html>, as well as that of the Ministry of Foreign Affairs, available at http://www.mofa.go.jp/mofaj/gaiko/teaty/teaty159_17.html (last visited October 16, 2015). In addition, as for an overview of the Convention and the history of its development, see Kazuhiko Nakamura, 2004, "World Health Organization Framework Convention on Tobacco Control (Tabako no Kisei ni kansuru Sekai Hoken Kikan Wakugumi Joyaku)," *Jurist* No.1274, p.84ff

addition to the fact that Japan became the nineteenth party to join the Convention, which took effect on February 27, 2005, there are regulations relating to "Protection from exposure to tobacco smoke" in the FCTC's Article 8, which imposes a mandate on signatory nations to "adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places" (Article 8[2]). Based on the stipulation in Article 98(2) of Japan's Constitution that "the treaties concluded by Japan and established laws of nations shall be faithfully observed," the rights demanded by non-smokers "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," could have grounds not only in Articles 13 and 25 but also in the FCTC.

4. Is It Unreasonable for Non-Smokers' to insist on Their Rights?

Traditionally, the act of smoking cigarettes in Japan has been considered as a "right" similar to the acts of drinking water or consuming food. In addition to smoking being the exercise of a right, the way that society responded was to expect that cigarette smoke could and should be tolerated by non-smokers as much as possible. In other words, Japan was (and perhaps is) a society in which non-smokers were called on to "put up with" a certain amount of smoking. This is the thought behind the "Maximum Permissible Limit" theory. Hence, Japan has become a society where smokers were able to smoke when and where they liked.

In fact, according to the Comparative Opinion Survey on Second-hand Smoke conducted by Pfizer⁴⁰⁾, Inc on 47 prefectures in 2012, regarding their actions when discomfited by smoking by others, 29.1% of respondents indicated that they "put up with it, despite wanting to ask the other party to stop smoking," whereas 63.4% "left the area"; no more than a mere 3.8% "clearly asked the other party to stop smoking," revealing that more than 90% of people tended to "put up with" smoking behavior, even in the presence of second-hand smoke.

However, is tobacco smoke really something that non-smokers should be expected to put up with, and is it really so unreasonable that they claim rights of their own? While we may feel that the backgrounds of such claims are that tobacco smoking and similar behavior are only minor problems, such a characterization may itself be open to question. In addition, could a society that insists that only non-smokers should have to put up with

and Narutoshi Nagao, 2005, "WHO Framework Convention on Tobacco Control (Tabako no Kisei ni kansuru Sekai Hoken Kikan Wakugumi Joyaku)," *Horei Kaisetsu Shiryo Soran*, No.283, p.59ff.

40) See the website of Pfizer Inc., Q20, available at <http://www.pfizer.co.jp/pfizer/company/press/2012/documents/20120525.pdf> (last visited October 16, 2015).

the behavior of others be said to be a truly fair society?

Initially, tobacco smoke engenders the development of a variety of illnesses caused by second-hand smoke, and the hazards of second-hand smoke are extremely severe, even greater than those posed by active smoking. Indeed, tobacco smoke has majorly impacted the health and lives of non-smokers, and it is certainly not something to be dismissed as a "minor" problem.

Next, to argue that tobacco smoke is something that should be "put up with" even when it damages health and not being able to claim "the right to clean air," would be akin to arguing that the damaging atmospheric pollution emitted by factories is something that should be "put up with" and the non-recognition of "the right to breathe clean air." However, it is usually the case wherein even smokers believe that atmospheric pollution from industrial emissions is not something that should be tolerated. Basing one's opposition to tobacco restrictions in public spaces in order to prevent second-hand smoke on the grounds of the freedom to smoke is akin to justifying rampant pollution by claiming that offending factories should have freedom to operate⁴¹.

Furthermore, having identified the structural opposition between the interests of smokers and non-smokers, although smokers smoke according to their own volition, non-smokers are always exposed to tobacco smoke regardless of their personal will. In other words, non-smokers are, so to speak, forced to inhale tobacco smoke. Moreover, non-smokers suffer only unilaterally from second-hand smoke. In other words, non-smokers experience only the inconvenience (or more accurately, "health hazards") of tobacco and derive none of the benefits.

Furthermore, as described above, the substance of the rights being claimed by non-smokers are the following: (1) no more than simply the demand "to not pollute the air that non-smokers breathe," which is in addition to being no more than a request to restrict smoking in public places, (2) does not interfere in any way with smokers' freedom to smoke, and (3) does not insist on a complete anti-smoking ban targeting smokers.

In light of the above, our contemporary society, wherein over 90% of people are compelled to "put up with" second-hand smoke, can in no way be described as a fair society. Moreover, as described above, on the basis that the right to breathe clean air not polluted by tobacco smoke is a natural inborn human right, non-smokers should be considered to be able to claim their rights "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke."

IV . The Relationship of the Freedom to Smoke to the Rights of Non-Smokers

At the risk of repeating some aspects of my argument, since there generally seems to

41) See Abe, *supra* note 25, p.45.

be exceptional misunderstandings concerning the relationship of the freedom to smoke to the rights of non-smokers, I aim to reiterate the ascertainment of this relationship.

1. The Inherent Limitations of the Freedom to Smoke as materialized in the Rights of Non-Smokers

The rights claimed by non-smokers do not interfere with smokers' freedom to smoke. While this freedom has the inherent limitation, from the perspective of essential human rights, of not impairing the lives or health of others, non-smokers' rights are no more than the manifestation of this inherent limitation. In this way, although we say "freedom to smoke," this freedom should be understood to be constrained by the inherent limitation of not subjecting others to second-hand smoke. Additionally, it can be stated that the right to not be subjected to second-hand smoke and the right to breathe clean air are no more than the manifestation of the inherent limitations of the freedom to smoke.

2. The Right of Non-Smokers Does Not Conflict with the Freedom to Smoke

Non-smokers' rights do not insist on the imposition of a complete smoking ban on smokers; however, they are no more than simply making an appeal for the institutionalization of limitations on smoking in certain locations. Specifically, this is no more than a request "to ban smoking in public spaces, while allowing the freedom to smoke in private spaces." In other words, non-smokers are not interfering in any way with the freedom to smoke. Accordingly, it will be understood that the freedom to smoke and the rights of non-smokers are not necessarily in conflict, and there is room for both to be satisfied. For example, the freedom to smoke does not imply the right to subject others to second-hand smoke and hence is in no way incommensurable with the right to not be subjected to second-hand smoke. While the freedom to smoke has been characterized as a right that is far subordinate to the right to not be subjected to second-hand smoke⁴², we should precisely say that the right to subject others to second-hand smoke is not a part of the freedom to smoke.

3. The Inalienable Right of Non-Smokers to Breathe Clean Air

Even if non-smokers were an absolute minority, as long as one person did not consent, there would be a need to insist on the impermissibility of polluting clean air where almost everyone was in favor of smoking. In other words, it is not the freedom to smoke but the right of those who do not to breathe clean air that is inalienable by the majority⁴³.

42) See Japan Society for Tobacco Control ed., 2007, *Tobacco Control Advocacy (Kinengaku)*, Nanzando, p.18ff.

43) See Abe, *supra* note 25, p.45.