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 tenable[1)]).

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 individual[2]." 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 sense[3]. 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-determination[4].

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 article[5] (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* Noriho Urabe, 2006, *Constitutional Law [2nd. Edition] (Kenpogaku Kyoshitsu)*, Nippon Hyoronsya, p.40ff.

3) *See* Nobuyoshi Ashibe (Kazuyuki Takahashi revision), 2011, *Constitutional Law [5th. Edition] (Kenpo)*, Iwanamisyoten, 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.58.ff., Bin Takada, 1993, "Prison and fundamental human right (Zaikankankei to Kihonteki Jinken)s", *Gyosei Hanrei Hyakusen [3rd. Edition],* p.42.ff., Shigeru Shimada, 1999, "Prison and fundamental human rights (Zaikankankei to Kihonteki Jinken)", *Gyosei Hanrei Hyakusen [4th. Edition],* p.42ff., Ryutaro Toma, 1994, "Prohibition of smoking in prison (Hikokinsya no Kitsuen no Kinshi)", *Kenpo Hanrei Hyakusen [3rd. Edition],* p.34ff., Tatsuya Fujii, 2007, "Prohibition of smoking in prison (Hikokinsya no Kitsuen no Kinshi)", *Kenpo Hanrei Hyakusen [5rd. 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 life[6]. 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 rights[7]. 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 individual[8]."

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 rights[9].

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

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6) *See* Youji Kakudo, 1977, *Constitutional Law [2nd. Edition] (Kenpo)*, Minervashobo, p.231, Kiminobu Hashimoto, 1988, *Japanese Constitutional Law [2nd. Edition] (Nihonkokukenpo)*, 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 (Kofukutuikyuken no Kozo)", *Kohokenkyu*, 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 therein[10]. 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 matters[11]. 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 life[12]. The protection of self-determination in such matters may be left to approaches that question the necessity and rationality of the reasons for restricting freedoms[13].

While there are other notions that regard the freedom to smoke as a basic right protected by Article 13[14], 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 happiness[15]. 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 right[16].

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 smoking[17]." 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 Shin-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 el., 1984, *Japanese Constitutional Law 1 (*Cyusyaku Nihonkoku*Kenpo (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 preference[18].”

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 will[19].”

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 satisfied[20]. 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 individuals[21].

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, *Sociolegal Study of Tobacco Litigation (Tabako Sosho no Hoshakaigaku)*, Sekaishisosha, 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 examples[23].

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 adjustment[24].

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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 Uchino, 1991, *Logic and System of constitutional interpretation (Kenpo Kaisyaku no Ronri to Taikei)*, Nipponhyoronsya, 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 atmosphere[25].

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

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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 (Kitsuenken, 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 liability[26].

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 right[27]." 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?

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26) For the difference between civil law and administrative law, cf. Abe Yasutaka, Gyōseihō kaishakugaku: Jisshitsuteki 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 jihō 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 opposition[28]. 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 perspectives[29]. 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 Sosho)", *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 damages[30]. 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 Sosho no Doko to Kongo no Hoseiteki 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 smoke[32]. 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 law[33].

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 Constitution[34]. 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 13[35].

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."

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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 breath 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 25[37], 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 privileges[38].

Moreover, the World Health Organization's Framework Convention on Tobacco Control (FCTC[39]) 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/treaty/treaty159_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 Pfizer[40], 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

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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 operate[41].

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 smoke[42], 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 majority[43].

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

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

V . Conclusion

At the start of smoking behavior and through its continuation, tobacco dependency 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 question of the free choice of individuals. Smokers do not necessarily smoke cigarettes by their own volition, but they may be the unfortunate captives of nicotine dependency. Tobacco companies like JT make money on the backs of smokers who are addicted to nicotine. Such an image resembles how gangsters get people addicted to injected stimulants, which they then sell at a premium to those who struggle to satisfy their need for stimulants.

In particular, a specific property of tobacco addiction is that once consumption has reached a certain level, it becomes extremely difficult to quit. Moreover, for smokers to exercise their own control and make a choice based on their own free will is considerably difficult.

In light of the preceding information, we could say that rather than the "freedom to smoke[44]," it is more valid to consider that "there is no such thing as the 'freedom' to smoke." Hence, reaching the consensus of rejecting the freedom to smoke may be necessary[45].

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44) *See* Takao Tanase. "U.S. Tobacco Litigation and Tobacco Policy: The Gap between the Right to Smoke and Smoking Prohibition (Beikoku Tabako Sosho no Tenkai to Tabako Seisaku: Kitsuen Jiyu to Kitsuen Kinshi to no Hazama)", Tanase ed., *supra* note 19, p.3ff.

45) Incidentally, although smoking cessation treatment was to be covered by insurance subject to certain conditions from April 2006, this was not out of consideration for mere lifestyle or preference, rather it was an approach to conducting necessary treatment with the understanding of nicotine dependency as a disease. In addition, nine medical professional societies (The Japan Oral Health Society, the Japan Oral Surgery Society, the Japan Public Health Association, the Japanese Respiratory Society, the Japan Society of Obstetrics and Gynecology, the Japanese Circulation Society, the Japan Pediatric Society, the Japan Society of Cardiology, and the Japan Lung Cancer Society) refer to the victims of nicotine addiction due to smoking as "patients" suffering from smoking-related diseases (i.e., dependency and smoking-related symptoms). The above could be an approach that denies the so-called freedom of smoking.

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