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Ken TANAKA *

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I Introduction (The Right to Smoke and the Rights of Nonsmokers)

Smokers assert that they have the right to smoke; however, the right to smoke certainly does not imply the right to smoke as much as one pleases. Moreover, in the opinion dated September 16, 1970 (Minshu, Vol. 24, No. 10, p. 1410), the Grand Bench of Japan's Supreme Court also stated that "even if the right to smoke is included in the fundamental human rights protected by Article 13 of the Constitution, it does not mean that such rights must be protected at all times and places." That is, the right to smoke has limitations. At certain times and in certain places, this right is not protected. As natural human rights, the right to smoke is intrinsically limited to the extent to which it does not harm the survival or health of others. However, if the right to smoke exists, it should cease once it causes problems (including health damage) for those around the smoker.

On the other hand, the rights of nonsmokers can be understood as the right to not be forced to inhale secondhand smoke (passive exposure to tobacco smoke, passive smoke) and the right to breathe clean air, free from the pollution of tobacco smoke. A substantial number of people believe that the rights demanded by nonsmokers interfere with the smokers right to smoke or that these rights of nonsmokers will eventually lead to an absolute prohibition of smoking. However, such opinions are a result of a major misunderstanding. In the following statements, I present three rights actually demanded by nonsmokers.

First, nonsmokers only demand restrictions on smoking in public places. The right nonsmokers assert is, essentially, nothing more than the provision of private areas for

* Professor, Faculty of Law, Kansai University.

smoking, keeping public areas smoke free. They are merely asking for restriction on smoking in public places.

Second, the demands of nonsmokers do not interfere with smokers' right to smoke in any way. As stated previously, similar to natural rights, the right to smoke should be intrinsically limited to the extent to which it does not harm the survival or health of others. On the one hand, the right demanded by nonsmokers could be summarized as "I don't mind if you smoke freely in places where it will not harm the survival or health of others, but please do not pollute the air breathed by nonsmokers." In other words, they want nothing more than actualization of the intrinsic limitations on the right to smoke¹⁾.

Third, nonsmokers are not demanding a total prohibition on smoking. Obviously, as previously stated, the right demanded by nonsmokers necessitates a prohibition on smoking in public spaces; however, such a demand would not prohibit smoking in private spaces. Practically, it is nothing more than a plea for the institutionalization of existing spatial restrictions on smoking.

This study provides a legal theory (legal commentary and legislative theory) on the legal problems involved in tobacco regulations in Japan (problems involving the relationship between rights and duties) based on the right to smoke and the rights of nonsmokers as described above, while considering and analyzing governmental regulations.

From a government regulation perspective, cigarettes are not regulated by the Food Sanitation Act, despite being a consumer good that is consumed orally (i.e., through the mouth). Although cigarettes cause numerous diseases and their discontinuation after prolonged and/or continuous consumption is extremely difficult, they are not even regulated by the Narcotics and Psychotropic Control Act. Further, nicotine, a major component of cigarettes, due to its toxicity is identified as a poisonous substance by the Poisonous and Deleterious Substances Control Act (Article 2.1, Attachment 1); however, the tobacco plant itself is not considered as a poisonous substance.

Currently, the different laws regulating cigarettes in Japan include the Act on Prohibition of Smoking by Minors (enacted in 1900), the Tobacco Business Act (enacted in 1984) (originally, this law promoted cigarettes more than it regulated them), the Tobacco Tax Act (enacted in 1984), and the Industrial Safety and Health Act (enacted in 1992, amended in 2014). More recently, the Health Promotion Act (enacted in 2002) and other laws have been enacted, and the WHO Framework Convention on Tobacco Control (adopted in 2003, effective since 2005) was also adopted globally. Furthermore, many local governments now have various ordinances prohibiting smoking in the streets (since 2002; subsequently enacted in each region). Ordinances preventing secondhand smoke

1) 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.

(passive exposure to tobacco smoke, passive smoke) were enacted in Kanagawa and Hyogo Prefectures (adopted in 2009 and 2012). In light of this, Japan's situation seems to have changed remarkably since the past decade. Yet, when compared with other countries, particularly developed ones, Japan remains a veritable smoker's paradise²⁾.

However, measured by the WHO Framework Convention on Tobacco Control, Japan requires even stronger government regulations on cigarettes. In the current Japanese society, the government and its citizenry are in agreement. The government can be perceived as the entity entrusted with balancing the complex interests of the public. Similar to environmental rights and the right to know, tobacco regulation is also a problem of balancing interests. Governmental regulations based on administrative law have played a significant role in balancing such interests. The prevention of damage and disputes and the improvement of society can be listed as reasons for the existence of administrative law³⁾; however, governmental regulation based on administrative law must also be used to build a better society by preventing damage and disputes caused by smoking.

The question to be addressed is "based on the WHO Framework Convention on Tobacco Control, what administrative law measures should be taken to regulate tobacco in Japan?" Thus, what follows is a presentation of the legal challenges facing Japan in the realm of tobacco regulation.

While exploring the possible means of tobacco regulation, 1) the enhancement of secondhand smoke prevention measures to protect the health of nonsmokers is inevitable from the viewpoint of protection health and preventing damage to non-smokers; however, 2) due to the currently pronounced levels of smoking by minors, preventive measures are required for their protection. Further, 3) as many smokers themselves desire to quit, but are unable to do so, smoking reduction measures are needed to protect the health of current smokers. In addition to concrete tobacco measures that can be taken considering Japan's current legal system, I believe that dramatic reforms will also be necessary to address the legal challenges facing Japan in the realm of tobacco regulation.

This study first explains the direction of concrete tobacco regulation measures from the three perspectives mentioned above: (II) secondhand smoke prevention measures, (III)

2) For an American perspective on tobacco regulation in Japan, see Mark A. Levin, 1997, "Smoke around the rising sun: An American Look at Tobacco Regulation in Japan," *Stanford Law & Policy Review*, vol.8, pp. 99-106, Eric A. Feldman, 2004, "The Limits of Tolerance: Cigarette, Politics, and Society in Japan," Eric A. Feldman and Ronald Bayer eds., *UNFILTERED: Conflicts over Tobacco Policy and Public Health*, Harvard University Press, pp. 38-67.

3) 1) Prevention and straightforward resolution of disputes and damage; 2) control of disorder and the improvement of society; and 3) the direct provision or the securing of the provision of the services needed for daily life can be considered as three reasons for the existence of administrative law. For more on the reasons for the existence of administrative law, see Yasutaka Abe, 1997, *The Administrative Law System [New Edition] (Gyosei no Ho Shisutemu (Shinpan))*, Yuhikaku, p. 2.ff, Yasutaka Abe, 2008, *Interpreting Administrative Law (Gyoseiho Kaishakugaku)*, Yuhikaku, p. 2.ff.

measures to prevent smoking by minors, and (IV) smoking reduction measures, while presenting the direction of tobacco regulation regarding the consideration of concrete legal issues. Thereafter, (V) dramatic reform of tobacco regulation will be examined.

II Secondhand Smoke Prevention Measures

Smoking creates environmental tobacco smoke⁴⁾, which can cause diseases in nonsmokers through the inhalation of secondhand smoke⁵⁾. Accordingly, secondhand smoke prevention measures must be enhanced to prevent harm to and protect the health of nonsmokers. However, secondhand smoke prevention measures involve diametrically opposed interests of smokers and nonsmokers. Therefore, a solution supported by the authority of a governmental regulation is required⁶⁾.

Places where secondhand smoke becomes problematic include workplaces, public spaces, streets, and homes. In Part II, secondhand smoke measures will be considered with a focus on three areas—tobacco regulation in the workplace (1–2), tobacco regulation in public spaces (3–7), and tobacco regulation in the streets (8–9).

1. The need for smoke-free workplaces

Since train stations, airports, airplanes, hospitals, and other public places have become smoke free or have separate designated smoking areas, the evident remaining problem area is the workplace. Article 71.2 of the Industrial Safety and Health Act reads “To improve the standards of safety and cleanliness in the workplace...employers must strive to establish continued and systematic measures to create a comfortable work environment.” Regarding the measures to create a comfortable work environment, employers have the sole responsibility of making their “best efforts.”

At the 186th ordinary session of the Diet on March 13, 2014, The Ministry of Health, Labor and Welfare submitted a bill to amend a portion of the Industrial Safety and Health Act, which was passed on June 19 of the same year. Article 68.2 of the revised act

4) The smoke inhaled by smokers when smoking is referred to as “mainstream smoke.” Once it is exhaled it is referred to as “exhaled smoke.” The smoke that drifts from the lit portion of the cigarette is referred to as “sidestream smoke.” Indoors, the combination of exhaled and sidestream smoke is referred to as environmental tobacco smoke (ETS). For more on ETS, see *Smoking and Health, Report of the Committee on Smoking and Health Problems [New Edition] ((Shinpan) Kitsuen to Kenko, Kitsuen to Kenko Mondai ni kansuru Kentokai Hokokusho)*, 2002, Hokendojinsha, p. 175.ff.

5) The research demonstrating how secondhand smoke causes various serious diseases is too numerous to list here, but, as an official report, the 2006 U.S. Surgeon General Report (SGR) concludes that secondhand smoking of environmental tobacco smoke is unsafe at any level. See *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General, 2014* on the U.S. Surgeon General’s website, available at <http://www.surgeongeneral.gov/library/reports/tobaccosmoke/index.html> (last visited April 14, 2014).

6) See Yasutaka Abe, 1980. “The Rights of Smokers and Nonsmokers, Regulation of Tobacco Smoking [Vol. 2] (Kitsuenken, Kenenken, Tabako no Kisei (Ge)), *Jurist*, No. 725, p. 109.ff.

entitled “The Prevention of Secondhand Smoke” reads, “Employers shall strive to establish measures, appropriate to the circumstances of said employer and said workplace, to prevent secondhand smoke inhalation by workers (i.e., the inhalation of another person’s cigarette smoke indoors or in the surrounding environment. The same meaning shall apply in Article 71.1). It is the employers’ responsibility to make efforts (take appropriate measures) to prevent secondhand smoke inhalation. A bill in 2011 (which was never submitted before the Diet) would have presented a duty to either keep all workplaces and factories smoke free or establish designated smoking areas; however, in 2014, the amended law merely requires to make efforts, requiring “employers...[to] strive to establish measures, appropriate to the circumstances of the employers concerned.”

However, we should consider the following five arguments: 1) there are only a limited number of ways for non-smokers to avoid the effects of secondhand smoking caused by smoking in the workplace, and those effects are significant; 2) prohibition of smoking in the workplace has the high potential to increase productivity and profit margins; 3) prohibition of smoking in the workplace can be expected to lower smoking rates in general; 4) the WHO Framework Convention on Tobacco Control increases indoor workplace secondhand smoke prevention; and 5) leaving the resolution of workplace smoking problems to the concerned parties will only complicate the process further. Given such arguments, the language in Article 68.2 of the Industrial Safety and Health Act, which now only requires employers to “establish appropriate measures” under the duty of making efforts, should be amended, as soon as possible, to that which requires the duty of either completely prohibiting smoking in all workplaces and factories or limiting smoking in such workplaces and factories to designated smoking areas; the wordings “appropriate to the circumstances of the employers concerned and the workplaces concerned” should be deleted. For information on the types of designated smoking areas capable of preventing secondhand smoke (what types of designated smoking areas are legally sufficient), see (5.) further below.

2. A Review of Measures Establishing a Smoking Corner

The Industrial Safety and Health Act was amended in 1992 with new additions to Chapter 7.2 “measures for creating a comfortable workplace environment” (Articles 71.2–71.4). Based on the text of Article 71.3 of the same law, a “Policy for Measures That Employers Should Establish in order to Create Comfortable Workplace Environments” was formulated in 1992. Furthermore, despite the formulation in 1996 of *Guidelines for Workplace Smoking Countermeasures* (hereafter “Former Guidelines”) based on the same policy, the Former Guidelines were revisited in 2003 following the execution of the Health Promotion Act, and “New Guidelines” were established. Furthermore, a directive was issued in 2005, entitled “Regarding the Promotion of Countermeasures Based on the *Guidelines for Workplace Smoking Countermeasures.*”

As an appropriate smoking countermeasure, an employer may either completely

prohibit smoking anywhere in the workplace at any time (complete ban on smoking) or the employer may allow smoking in designated smoking rooms or smoking corners, provided they meet certain prerequisites, and may prohibit smoking everywhere else to limit employee exposure to secondhand smoke (passive exposure to tobacco smoke, passive smoke) (separation of smoking areas). The New Guidelines envision separation of smoking areas as the primary workplace smoking countermeasure. The New Guidelines read “Wherever possible, employers should opt to construct a separate smoking room. Failing the construction of a separate smoking room, a smoking corner should be set up.” In some cases, it is sufficient to merely set up smoking corners.

However, the measure described with the wordings, “failing the construction of a separate smoking room, a smoking corner should be set up,” would not completely preclude worker exposure to secondhand smoke (passive exposure to tobacco smoke, passive smoke). Particularly, cigarette smoke could escape the smoking corner and be inhaled by someone else. Therefore, one could hardly claim that separation of smoking areas is a sufficiently thorough countermeasure, as it certainly does not prevent worker exposure to secondhand smoke (passive exposure to tobacco smoke, passive smoke). To begin with, even among spatial smoking restrictions (separation of smoking areas), the smoking area as a solution is premised on the tolerance of nonsmokers; that is, it rests on the sacrifices of nonsmokers.

Based on the aforementioned arguments, the following language from the New Guidelines should be deleted—“Wherever possible, employers shall construct a separate smoking room. Failing the construction of a separate smoking room, a smoking corner should be set up.” At least, when employers fail to construct a separate smoking room, the measure of setting up a smoking corner should not be authorized.

Furthermore, there is a demand to revise not only the New Guidelines but also the law (Industrial Safety and Health Act). To prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke) by workers, Article 68.2 of the current Industrial Safety and Health Act, which only requires employers to “establish appropriate measures,” and only imposes a duty of effort, should be revised as soon as possible to impose a duty to either completely ban smoking in all workplaces and factories (total smoking ban) or to ban it everywhere except for within designated smoking rooms (separation of smoking areas).

3. Imposing a Duty to Completely Ban Smoking in Public Spaces

In Japan, Article 25 of the Health Promotion Act merely imposes a duty of effort on the managers of “facilities used by numerous people,” to establish secondhand smoke (passive exposure to tobacco smoke, passive smoke) prevention measures. Such public facilities covered by this statute include “schools, gymnasiums, hospitals, theaters, viewing areas, meeting places, expositions, department stores, offices, government buildings, eating and drinking establishments,” as well as “railway stations, bus terminals, airport terminals,

passenger ship terminals, financial institutions, art museums, museums, welfare facilities, stores, hotels, inns and overnight lodging facilities, outdoor sports facilities, gaming areas, and amusement facilities.”

However, as the right to smoke is intrinsically limited to the extent to which it does not harm the health or survival of others, even restrictions on smoking in places where smoking would harm the health or survival of others (nonsmokers), i.e., public spaces (public places or living spaces shared by smokers and nonsmokers), should not exceed the tolerance limits of nonsmokers⁷⁾. Furthermore, at the facilities used by numerous people, especially eating and drinking establishments, the appropriate measures for preventing secondhand smoking (passive exposure to tobacco smoke, passive smoke) is not well established. Therefore, Article 25 of the current Health Promotion Act, which only imposes upon managers of facilities used by numerous people a duty of effort to establish measures to prevent secondhand smoking, should rather be revised to making the establishment of such facilities “a duty.” Incidentally, during the process of formulating the Health Promotion Act in the 2002 Diet, the then Minister of Health, Labor and Welfare made affirmative statements about making the establishment of measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke) a duty⁸⁾.

Even if the revisions to Article 25 of the Health Promotion Act had imposed a duty on managers of facilities used by numerous people to establish measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke), a manager could still fulfill such a duty so long as said manager established some kind of secondhand smoke (passive exposure to tobacco smoke, passive smoke) prevention measure. Managers would not be required to enforce complete smoking bans in their facilities. However, as indicated in *Regarding Secondhand Smoking Countermeasures*, formulated February 25, 2010, complete smoking bans are considered to be extremely effective secondhand smoking (passive exposure to tobacco smoke, passive smoke) countermeasures. Accordingly, the primary secondhand smoking (passive exposure to tobacco smoke, passive smoke) prevention measure for facilities used by numerous people should be, as a general rule, a complete ban on smoking. On the other hand, according to *Regarding Secondhand Smoking Countermeasures*, if due to extreme difficulties complete smoking bans are arduous for facility managers, they are required to set up designated smoking areas for a certain time, but are required to aim for the complete smoking ban in the future. If this is done, the secondhand smoke (passive exposure to tobacco smoke, passive smoke) prevention measures of Article 25 of the Health Promotion Act would then

7) See Abe, *supra* note 6, p. 111.ff, Ken Tanaka, 2004, “Trends in Cigarette Litigation and Future Legal Challenges (Tabako Soshō no Doko to Kōgō no Hōseitēki Kadai), *Annual Review of Economics, Faculty of Economics, Nagasaki University*, Vol. 20, p. 67.ff

8) See Minutes of the Health Labor and Welfare Committee Meeting of the Lower House at the 154th Diet, No.13 (May 17, 2002), p. 14. (Remarks by Health, Labor and Welfare Minister Chikara Sakaguchi).

have to be interpreted as, in principle, a complete smoking ban. Alternatively, Article 25 of the Health Promotion Act should be amended to clearly impose a complete smoking ban on secondhand smoke (passive exposure to tobacco smoke, passive smoke) countermeasures on managers of facilities used by numerous people.

4. Imposing a Duty of Complete Smoking Bans within Facilities of Healthcare, Education, and Public Transportation

Article 25 of the Health Promotion Act only imposes upon managers of facilities used by numerous people a duty of effort to establish measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke). None of its language imposes a duty of complete smoking bans within public places such as healthcare facilities, educational facilities, and public transportation facilities. Formulated in 2010, *Regarding Secondhand Smoking Countermeasures* considers “the complete smoking ban to be an extremely effective secondhand smoking (passive exposure to tobacco smoke, passive smoke) countermeasure. Accordingly, the primary aim of secondhand smoking (passive exposure to tobacco smoke, passive smoke) countermeasures should be, as a general rule, complete smoking bans in public spaces used by numerous people. At least, such complete smoking bans should be considered desirable in government offices and in healthcare facilities.” Although *Regarding Secondhand Smoking Countermeasures* mentions healthcare facilities, it does not impose a duty of complete smoking bans therein, and it does not even regulate educational or transportation facilities.

However, the legal system should be changed to impose a duty of, as a general rule, complete smoking bans (i.e., designated smoking rooms would not be accepted) within the premises of facilities, which are highly public in nature, that is, government, healthcare, educational, and transportation facilities. Incidentally, Kanagawa Prefectural Code Article 2.3 (a) establishes Category 1 Facilities, which it defines as “facilities which particularly need to be clear of the harmful effects of secondhand smoke (passive exposure to tobacco smoke, passive smoke).” For example, these are schools, hospitals, retail stores, and government offices (see Attachment 1). It is a duty to maintain these as non-smoking facilities (Article 9.1). Further, even for parks, considering that numerous minors also frequent these “public places” used by smokers and nonsmokers alike (the Code of Tokyo’s Chiyoda Ward defines “public places” as “roads, parks, and plazas within the ward.” Article 2.7), a mechanism for banning smoking within the premises of such public places is needed as a general rule. Moreover, the public park ordinance in Iwade City, Wakayama Prefecture, bans smoking in all of the city’s public parks (Article 5).

5. Complete Smoking Bans in Eating and Drinking Establishments

(With occasional permits for designated smoking rooms, provided they meet rigorous requirements.)

In most developed countries, smoking is banned in public spaces (facilities), and eating

and drinking establishments are included within that definition of public spaces (facilities). By comparison, in Japan, although eating and drinking facilities are enumerated within Article 25 of the Health Promotion Act, their proprietors are only under a duty of effort to establish secondhand smoking (passive exposure to tobacco smoke, passive smoke) prevention measures.

Essentially, although many eating and drinking establishments in Japan have separate smoking areas, at most restaurants and cafes these separate smoking areas are, in effect, nothing more than the designation of some seats as smoking seats and some as nonsmoking seats. Yet, merely designating some seats as smoking seats and other as nonsmoking seats cannot block or interrupt tobacco smoke, and therefore cannot prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke). However, examining the present situation, little regard is shown for nonsmokers in separate smoking seating areas who must deal with the secondhand smoke (passive exposure to tobacco smoke, passive smoke) of others. The end result is that secondhand smoke (passive exposure to tobacco smoke, passive smoke) prevention does not occur, and the separate smoking areas solution is quite convenient for smokers who use the phrase “separate smoking seating.”

However, in addition to the Environmental Standards Relating to Atmospheric Pollution based on the Environment Basic Act (Article 16), the Order for the Enforcement of the “Act on Maintenance of Sanitation in Buildings” (Building Administration Law) (Article 2), and the Ordinance on Health Standards in the Office (Article 5) based on the Industrial Safety and Health Act establish standards for indoor environments. In particular, the standards for installing air conditioning equipment set the permissible concentration of airborne dust to be no greater than 0.15 milligrams per cubic meter, carbon monoxide rate at no greater than 10 parts per million, and carbon dioxide rate at no greater than 1,000 per million. By contrast, the air trapped inside of eating and drinking establishments merely dividing their areas into smoking and nonsmoking seats, exceeds these permissible concentrations and is polluted.

Accordingly, Article 25 of the current Health Promotion Act, which only imposes upon managers of facilities used by numerous people (including eating and drinking establishments) a duty of effort to perform measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke), should certainly be amended to impose upon managers of facilities used by numerous people a duty to establish measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke). In addition, there are demands to clarify the very meaning of the term “separate smoking areas,” as found in various laws and ordinances. Moreover, merely designating some seats as smoking and others as nonsmoking should not count as “separate smoking areas,” and it should also be clarified that such designation is not considered as “appropriate measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke).”

The next issue to consider would then be whether eating and drinking establishments

could be allowed to just ensure that the smoke from the smoking seats does not escape to the nonsmoking seats. When considering this problem, it is necessary to examine it from the perspective of protecting from secondhand smoke (passive exposure to tobacco smoke, passive smoke) not only users (consumers) but also workers. Furthermore, when opening and closing the entrance to the smoking area, tobacco smoke can still drift in, questioning the effectiveness of such a system to prevent secondhand smoking. One could reasonably expect that the indoor air will become polluted to a level that exceeds the previously mentioned environmental standards.

Therefore, when considered from the standpoint of protecting both users and workers from secondhand smoking (passive exposure to tobacco smoke, passive smoke) (even if construction of designated smoking rooms which protect nonsmokers from the harms of secondhand smoking (passive exposure to tobacco smoke, passive smoke) was permitted), I believe the only choice is to make all indoor facilities completely nonsmoking a general rule. Implementing a complete smoking ban in indoor facilities would be consistent with the guidelines endorsed at the 2nd meeting of the signatories of the WHO Framework Convention on Tobacco Control.

Next, it is necessary to consider just what types of designated smoking rooms prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke) (how should a designated smoking room be constructed for exceptional cases where they are permitted). Approaching this problem from the viewpoint of protecting both users (consumers) and workers from secondhand smoking (passive exposure to tobacco smoke, passive smoke), even if construction of designated smoking rooms is allowed on an exceptional basis in eating and drinking establishments, such as ordinary restaurants and cafes, this should be limited to satisfying rigorous standards enabling the prevention of secondhand smoking (passive exposure to tobacco smoke, passive smoke) by users and workers. At least, 1) from the perspective of protecting workers from secondhand smoking (passive exposure to tobacco smoke, passive smoke), the designated smoking seats should not be so-called “smoking sections” where one may eat, smoke, and drink. Rather, they should be designated smoking spaces used only for smoking. 2) Since a single door to the designated smoking room would allow tobacco smoke to escape when people enter and exit, at least two doors should be built to separate the smoking room from the rest of the premises. Further, these two doors should be placed as far apart from one another as practicable. 3) In cases where a designated smoking room cannot be constructed, as per the law, a complete indoor smoking ban should be implemented.

6. Secondhand Smoking (passive exposure to tobacco smoke, passive smoke)

Countermeasure Regulations for Smaller Eating and Drinking Establishments

The Health Promotion Act (and the Industrial Safety and Health Act) is a law which only imposes a duty of effort to establish secondhand smoking (passive exposure to tobacco smoke, passive smoke) countermeasures. However, in the future, if a duty were to

be imposed upon business owners to either ban smoking or install designated smoking rooms (separate smoking area measures), smaller eating and drinking establishments would be unable to construct designated smoking rooms due to structural and financial restraints. The end results would be a complete smoking ban without exception or discontinuation of business. The question would be whether this violates the equality principle.

In Japan, however, these problems are part of an issue regarding exceptions for small business owners. The Kanagawa Prefectural Code does not impose a duty on all public facilities to take antismoking measures, but only exempts certain Category 2 Facilities, such as small eating and drinking establishments of 100 square meters or less. However, Kanagawa's Prefectural Code, which imposes a duty on large eating and drinking establishments located within the Prefecture to take measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke), but exempts small businesses from the same duty, is not considered as a fair legal treatment. It would be appropriate from the viewpoint of fairness if all facilities were regulated by the code, with no exceptions.

If all public facilities, including small eating and drinking establishments, were regulated by the aforementioned law, we need to consider whether it would be better to completely disallow the installation of designated smoking rooms. Ideally, it would probably be appropriate from the viewpoint of fairness if designation of smoking rooms was completely disallowed for a complete smoking ban in indoor facilities. However, examination of eating and drinking establishments in developed countries shows that construction of designated smoking rooms indoors is not allowed and patrons are free to enjoy themselves without worrying about tobacco smoke. On the other hand, a large number of such establishments permit smoking on outdoor balcony areas and porches. They have ashtrays located at their entrances and exits, and many eating and drinking establishments have smoking areas near these entrances and exits. As a result, there is great damage from secondhand smoking (passive exposure to tobacco smoke, passive smoke). Therefore, it seems that permitting the installation of designated smoking rooms (of course there will be secondhand smoking (passive exposure to tobacco smoke, passive smoke) prevention measures such as two doors) would be a more effective means of preventing secondhand smoking (passive exposure to tobacco smoke, passive smoke). Smokers will visit eating and drinking establishments with designated smoking rooms; however, while comparing eating and drinking establishments with complete smoking bans and those with designated smoking rooms, further consideration will probably be needed concerning the constitutional issue of whether the principle of fairness is violated by denying the possibility of smokers visiting the former. However, one cannot assert that the possibility of smokers visiting eating and drinking establishments with complete smoking bans is denied. This is not because one can eat and drink while smoking even in establishments with designated smoking rooms, but because even the establishments with

complete smoking bans will probably provide a smoking space in an appropriate outdoor place (however, these would not be permitted near the entrances and exits). Therefore, I think that even allowing designated smoking areas does not breach the principle of equality. However, if this were a breach of the principle of equality, then they can only have a complete smoking ban in all indoor facilities, with no exceptions, as presented by the Federal Constitutional Court of Germany.

Furthermore, the Director of the Office of Lifestyle-Related Disease Countermeasures in the Health Bureau of the Ministry of Health, Labor and Welfare issued an administrative circular on July 30, 2010 concerning the use of smoking areas located near facility entrances and exits that required work on performing necessary measures, such as locating the designated smoking areas as far as possible from the entrances and exits of facilities. However, the law should impose a duty to distance smoking areas from facility entrances and exits.

7. Imposing Secondhand Smoke (passive exposure to tobacco smoke, passive smoke) Prevention Measure Duties through Laws, Not Ordinances

Comprehensive regulations to prevent the damages of secondhand smoke (passive exposure to tobacco smoke, passive smoke) have not yet been enacted on the national level. Article 25 of the Health Promotion Act is only a regulation obliging effort and cannot be considered a comprehensive regulation. Presently, only Kanagawa and Hyogo Prefectures have ordinances imposing duties on business owners above a certain size to establish measures to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke).

However, ordinary eating and drinking establishments are “indoor facilities used by numerous people,” and they are used by numerous minors. Accordingly, it is possible that ordinary eating and drinking establishments could be considered as public places and circumstances should not differ by region. Nevertheless, this suggests that the problem should be addressed by laws rather than prefectural ordinances. Furthermore, from the perspective of fairness, it would be fairer if there were no differences among responses on a prefectural level.

Incidentally, when it comes to the laws that provide a complete indoor smoking ban, from the perspective of preventing secondhand smoking (passive exposure to tobacco smoke, passive smoke), there are two possible approaches: 1) amending Article 25 of the Health Promotion Act to make this a duty and 2) amending Article 68.2 of the Industrial Safety and Health Act to make this a duty. Ultimately, both approaches will be necessary, but, based on the global trends, adopting the second approach of amending Article 68.2 of the Industrial Safety and Health Act to impose a duty would be the most pragmatic, effective policy. By “effective,” it is implied that amending Article 68.2 of the Industrial Safety and Health Act to achieve a total indoor smoking ban would probably result in stricter regulation than the amendment of Article 25 of the Health Promotion Act (for

example, considering eating and drinking establishments, merely amending Article 25 of the Health and Promotion Act to impose a duty would allow compliance with the Health Promotion Act by having separate smoking and nonsmoking seating and ensuring that smoke from the latter does not reach the former, but this would still not prevent worker exposure to secondhand smoke (passive exposure to tobacco smoke, passive smoke). From the viewpoint of protecting workers from secondhand smoke (passive exposure to tobacco smoke, passive smoke, the method of separating smoking and non-smoking seats even in the Health Promotion Act is insufficient. Ultimately, both Article 25 of the Health Promotion Act and Article 68.2 of the Industrial Safety and Health Act will require amendment, with both approaches imposing a duty of a complete smoking ban in indoor facilities.

8. Preparing a System for Ensuring the Effectiveness of Street Smoking Regulations

Street smoking regulations should be strengthened. Practically, the right to smoke is intrinsically limited to the extent to which it does not harm the health or survival of others. As a general rule, public places shared by smokers and nonsmokers should be nonsmoking. Based on this, the streets, which are also shared by smokers and nonsmokers, can be considered places (incidentally, under the code of Chiyoda Ward in Tokyo, all roads, parks, and plazas within the ward are defined as “public places.” Article 2.7). Moreover, since they are used by numerous minors, the legal system is needed to make roads and streets nonsmoking in principle. However, presently, the biggest challenge will probably be in how regional public groups establishing street smoking ban ordinances secure effectiveness.

From the perspective of securing effectiveness, the issue is how to respond to those smoking in areas where smoking in the street is banned. Examining ordinances across the nation, there are four general patterns: 1) ordinances stipulating penalties (many places, including Chiyoda Ward of Tokyo, have ordinances with penalties of JPY 1,000 to 2,000), 2) having ordinances stipulating announcements through instructions and warnings (Tokyo’s Chuo Ward Code, Articles such as 9.2 and 10), 3) ordinances stipulating instructions and warnings (Tokyo’s Chuo Ward Code, such as Article 9), and 4) ordinances that impose only a duty of effort to ban smoking in the street (Tokyo’s Taito Ward Code, such as Article 5). In patterns 2, 3, and 4, serious concerns about whether effectiveness can be obtained remain. First, as seen in pattern 1, the levying of penalties should be stipulated in an ordinance.

However, even if the levying of penalties were stipulated in ordinances, the next problem is one of administrative resources (such as staff and budget), for example, many regional public organizations do not have the necessary resources to assess penalties. On the other hand, the Chiyoda Ward ordinance provides a maximum penalty of JPY 20,000 for littering in areas where smoking is banned in the street. Since violations are easily recognized, the uniform JPY 2,000 fee is actually assessed frequently. In the Chiyoda

Ward, the following five points can be indicated as reasons for relative smooth functioning: 1) comprehensive awareness activities are undertaken, 2) there are penalties and not punitive fines, 3) there is an organization to assess the penalties, 4) the penalty is a minor amount of JPY 2,000, and 5) the penalties are levied uniformly regardless of violator intent. However, unlike the Chiyoda Ward, there are extremely few regional public organizations that can bear the personnel and material costs.

A particular future issue for regional public organizations is to prepare the organization to assess the penalties as per the point a mentioned above. A large issue will be securing administrative resources (such as personnel and budget) toward this end. When I conducted interviews, regional public organizations were asked why ordinances did not stipulate levying of penalties. The first reason highlighted was the inability to secure administrative resources (such as personnel and budget)

On the other hand, even provided local governments could secure such administrative resources (such as personnel and budget), they are not effective against willful violators. For example, the Chiyoda Ward ordinance only allows for criminal fines (or criminal arrest of flagrant offenders), when the living environment is noticeably damaged and the violator does not follow orders to cease (Article 15 and 25). Accordingly, options for dealing with willful violators, such as criminal punishments and penalties, should also be introduced in cooperation with police and detectives⁹⁾.

9. Regulating Street Smoking through Laws

At present, smoking in the streets is not regulated at the national level. For example, the Health Promotion Act requires secondhand smoke (passive exposure to tobacco smoke, passive smoke) prevention for facilities used by numerous people, but does not address street secondhand smoke (passive exposure to tobacco smoke, passive smoke) in any way. Local governments are leading the way in regulating street smoking, but street smoking regulations and responses are not uniform across local governments.

Objectively, regular streets are used by numerous people, and, since many of those people are minors, they should be considered as “public places.” Further, circumstances should not differ by region. However, this suggests that this is a problem which should be addressed by laws rather than ordinances.

However, when determining which regions, behaviors, and categories are to be regulated by the regulations, human and budgetary administrative resources, and the possibility of feasibility studies needs to be considered. In particular, if the problem were addressed with laws, fewer local governments would have trouble securing the necessary

9) See Shinya Fukamachi, 2010, “Street Smoking Prevention and Anti-Litter Ordinance and Penalty Theory (Rojo Kitsuen Jorei, Poisute Jorei to Keibatsuron)”, *Rikyo Hogaku*, Vol. 79, p. 74,ff and, regarding the legal nature and applicability of penalties, see Yoshinobu Kitamura, 2008, *Ensuring the Effectiveness of Administrative Law (Gyosei Ho no Jikkosei Kakuho)*, Yuhikaku, p. 33.ff.

personnel and budgetary administrative resources. Eventually, obtaining effectiveness would be difficult. Accordingly, even if the consensus around prohibiting street smoking were to be provided by law, would it be logical to leave the actual response to local government ordinances with no provisions for strict penalties in the law?

III Measures to Prevent Smoking by Minors

Since tobacco smoking is particularly harmful to the health of youths who are still growing, effective measures to prevent smoking by minors are needed.

Tobacco has the peculiar quality of being addictive—it becomes extremely difficult to quit once used continuously for a certain period. Most smokers begin smoking as minors, and the most common reasons given for why people start smoking are curiosity and no particular reason at all¹⁰. In other words, most minors do not consider the dangers of addiction (or they underestimate them), and are overly optimistic about their chances of becoming addicted. It is easy for them to acquire cigarettes and, after using them repeatedly, find themselves to be addicted and unable to quit. This is due to the lack of providing appropriate (accurate) information on the addictive properties of cigarettes.

Accordingly, measures to prevent smoking by minors should consider the peculiar addictive nature of tobacco cigarettes, and the importance of providing appropriate (accurate) information regarding such addictive nature.

The following ten items are measures for the prevention of smoking by minors as introduced above.

1. Complete Ban on Cigarette Vending Machines

Since the nationwide implementation of age verifying cigarette vending machines (taspo) on July 1, 2008, The Nationwide Association of Tobacco Retailers decided to unlock their outdoor cigarette vending machines during late night hours. However, as minors are capable of borrowing the adult age identification card (taspo) to make a purchase, introduction of these cards simply furthers the circumvention of the law through the lending of these adult age identification cards to minors. Moreover, setting up such vending machines in shops defeats the purpose of the law requiring that they be set up in areas where the machine and the purchaser can be easily identified (Article 20.3 of the Order for the Enforcement of Article 23 of the Tobacco Business Act). In addition, these tobacco vending machines are cleverly designed to entice buyers, being frequently redesigned and lighting up at night to pique the curiosity of minors. These machines, frequently containing advertising slogans, actually serve as endorsers of the tobacco industry.

10) See Hiroshi Kawane, 2004, “Nonsmoking Education (Kin'en Kyoiku)”, *The Journal of the Japanese Respiratory Society*, No. 42, p. 601.ff.

Accordingly, more effective measures are required. Practically, new tobacco vending machines should be completely banned. Criminal fines for violation should also be enabled. Existing machines should also be ordered removed after a certain period. However, since they were legal until now, subsidies for removal should be considered as public in nature¹¹⁾. Furthermore, the WHO Framework Convention on Tobacco Control can be read as moving toward the complete removal of cigarette vending machines (Article 16) as a tobacco policy, and also acknowledges the role they play in advertisement and attracting new consumers as still another reason for their removal¹²⁾. Therefore, amendment of the Tobacco Business Act is essential. The Tobacco Business Act does not completely ban cigarette vending machines. Seemingly, the purpose of the law is not to prevent the harmful health effects of tobacco use, since it is part of a different set of laws than the Act on Prohibition of Smoking by Minors. However, if it is to be reconciled with the Act on Prohibition of Smoking by Minors, the Tobacco Business Act should also completely ban cigarette vending machines.

2. Imposing a Rigorous Duty to Verify Age

Corresponding with the introduction of the radio-frequency identification (RFID) age verifying vending machines (taspo), over-the-counter cigarette sales at convenience stores have increased, yet no rigorous age verification occurs at convenience stores.

Newly revised in 2001, Article 4 of the Act on Prohibition of Smoking by Minors contains rules regarding “Age Verification Function including Other Necessary Measures.” According to these rules, “age verification” is merely an example of “necessary measures” included in “necessary measures”¹³⁾. The text of these “necessary measures” is problematic, but, according to the drafters of Article 4, the use of ID cards and drivers licenses to verify age is not required. Furthermore, putting a sticker that reads “Minors should please refrain from using tobacco products,” on the vending machines and shops is considered to be among the “required measures”¹⁴⁾. Accordingly, it is incorrect to expect that Article 4 of the Act on Prohibition of Smoking by Minors will facilitate “age verification.”

However, to prevent the sale of tobacco to minors, “age verification” is an

11) See Yasutaka Abe, 2006, *Creative Legal Strategy: A Course on Law Policy (Yawaraka Atama no Ho Senryaku: Zoku Seisaku Hogaku Koza)*, Daichi Hoki, p. 231.

12) See Katsuhide Ohashi, 2007, “Age Verification in Tanegashima: A Survey on the State of Cigarette Vending Machines (Tanegashima no Seijin Shikibetsu Kino Tsuki? Tabako Jido Hanbaiki no Jittai Chosa)”, *Japanese Journal of Tobacco Control*, Vol. 2, No. 4, p. 44.ff.

13) If it is “A and B,” then A and B have a parallel relationship and not an exemplary relationship. If it is “A including B,” then A is an example of B and is included in B. For example, the phrase “The Prime Minister including other ministers of state” indicates that the Prime Minister is an example of ministers of state.

14) See the Minutes of the Upper House Cabinet Ministerial Committee Meeting at the 153th Japanese Diet, No.8 (December 4, 2001), p. 2. (Remarks by Mr. Tatsuo Sato).

indispensable necessity. It follows that to enforce effective “age verification,” the language in Article 4 of the Act on Prohibition of Smoking by Minors should be amended to “age verification and other necessary measures”¹⁵⁾.

3. Limiting the Places Where Cigarettes can be Purchased

Corresponding with the introduction of the age verifying vending machines (taspo), over-the-counter cigarette sales at convenience stores have been strong. However, convenience stores are also heavily frequented by minors. Furthermore, almost all convenience stores have ashtrays placed at their entrances and one almost always inhales tobacco smoke when entering and exiting a convenience store.

Accordingly, there should be limits on where cigarettes may be purchased. Sale of cigarettes should be restricted only to tobacco shops. At the very least, cigarette sales should be banned in convenience stores heavily frequented by minors. Sellers of tobacco (including convenience store managers) will probably protest that this interferes with their “freedom of establishment,” but disallowing the sale of cigarettes at convenience store frequented by minors is considered a logical restriction in line with the intrinsic limitations on the “freedom of establishment.” Moreover, Japan Tobacco (JT) has a monopoly on cigarette manufacturing (Tobacco Business Act, Article 8). Furthermore, import and sale of cigarettes is also conducted under a “registration” system with the Minister of Finance, (Id. at Article 11), and therefore it cannot be said that regular private sales businesses have the “freedom of establishment.”

Even if convenience stores are permitted to sell cigarettes, stores used by minors should not have smoking areas or ash trays near them. At present, many convenience stores have ashtrays at their entrances and exits, but this should be absolutely forbidden. An administrative directive issued on July 30, 2010 by the Chairman of the Office of Lifestyle-Related Disease Countermeasures in the Health Bureau of the Ministry of Health, Labor and Welfare regarding the treatment of smoking areas located near facility entrances and exits requires “efforts to take necessary measures so that smoking areas are located as far as possible from facility entrances and exits.” However, a duty should be imposed by law to not place smoking areas near facility entrances and exits.

4. Banning and Punishing the Free Distribution of Cigarettes

If a person other than a guardian, supervisor, or sales person, such as an adult or other friend, provides a minor with cigarettes or lends an age verification card (taspo) to a minor, then the question arises whether to punish said person. Article 5 of the Act on Prohibition of Smoking by Minors calls for a criminal fine not exceeding JPY 500,000 to be imposed on those who knowingly sell tobacco products or accessories to those less than 20 years of age. Accordingly, individuals who sell cigarettes for a price to minors are

15) See Abe, *supra* note 11, p. 220.ff.

punished, but those who provide it for free are not.

One should assume that the reasons for this lack of sanctions against those who provide cigarettes to minors for free is probably because such persons are thought to have less criminal intent, but a law that bans providing cigarettes to minors for free should also be established. In practice, the Act on Prohibition of Smoking by Minors should include the following provisions: “no one may provide cigarettes to a minor for free” and “no one may lend an age verification card to a minor.”

Furthermore, as the harmful effects and addictiveness of cigarettes are already clear, provision of cigarettes to minors by adults, whether in exchange for money or for free, should be punishable, in light of the severity of the harm such actions can cause¹⁶⁾.

5. Banning Tobacco Company Commercials including Public Service Announcements

Should tobacco companies be permitted to make their own public service announcements?

The “Policy on Advertising by Tobacco Manufacturers,” enacted in accordance with Article 40.2 of the Tobacco Business Act stipulates that “advertisements which do not promote smoking, and merely advocate smoking manners or the prevention of smoking by minors are not regulated by this policy” (Article 4). Therefore, the so-called “manner awareness” public service announcements are permitted. However, 1) the WHO Framework Convention on Tobacco Control requires the comprehensive prohibition of advertisement, sales promotion, and sponsorship of tobacco. 2) Under the guise of “manners,” these so-called manner awareness commercials are really part of tobacco companies’ branding campaigns. And, 3) the purpose of these manner awareness commercials is to direct attention away from the problems of secondhand smoking (passive exposure to tobacco smoke, passive smoke), sidestream smoke (passive smoke), the harmful and addictive nature of cigarettes, and the other inherent problems with tobacco itself, and instead to recast the problem as one of manners as this is intended to hide the harmful and addictive nature of cigarettes. Based on these three notions, logical limits on the freedom of establishment, public service announcement commercials by tobacco companies should be completely banned. Furthermore, JT has a monopoly on the manufacture of cigarettes (Tobacco Business Act, Article 8) and import and sale of cigarettes is also conducted under a “registration” system with the Minister of Finance (Id. at Article 11). Therefore, it cannot be said that general private sales businesses have freedom of establishment¹⁷⁾.

6. Strengthened Regulation of Cigarette Advertising Content

To prevent smoking by minors, it is necessary to strengthen the regulation of tobacco

16) See Abe, *supra* note 11, p. 228.

17) See Abe, *supra* note 6, p. 114.

advertisements. Tobacco advertising is a problem because it does not provide consumers with accurate information, and does as much as it can to divert attention away from tobacco's harmful and addictive properties, relying instead on merely conveying an image¹⁸). Therefore, tobacco advertising should first address the need for the provision of accurate information to consumers.

According to the WHO Framework Convention on Tobacco Control, the problem is whether tobacco advertising in Japan uses appropriate language to provide consumers with accurate (truthful) information. Although the *Policy on Advertising by Tobacco Manufacturers*, formulated in accordance with Article 40.2 of the Tobacco Business Act, requires the "provision of appropriate information on the relationship between smoking and health, while being cautious of not spreading misinformation regarding the harmful effects of tobacco," "the policy on the provision of accurate information regarding the relationship between tobacco and health" uses vague language such as "for you." Using phrases such as "for you," can give smokers the incorrect impression that the effects of tobacco are different for different people or that they are not really in any danger. This leaves doubts as to whether this truly constitutes the provision of accurate information. Accordingly, the phrase "for you," should be deleted.

In addition, the same policy authorizes the language, "take care to avoid bothering the people around you when smoking." This suggests that one might still smoke when other people are around. The wording should be rephrased to something more clear such as "avoid smoking in places where you are likely to bother others" or "do not bother those around you while smoking."

Furthermore, while the *Policy on Advertising by Tobacco Manufacturers* requires cautionary warnings regarding the relationship between tobacco consumption and health when conducting tobacco advertising, JT asserts that "tobacco is an individual choice," or "smoking is a matter of freedom of choice." The truth, however, is that the starting and continuance of smoking is also affected by the addictive nature of tobacco as well as the various advertising methods employed by tobacco companies. It is not merely a matter of the exercise of free will¹⁹). In summary, language such as "tobacco is an individual choice" or "smoking is a matter of freedom of choice" cannot be considered appropriate for the provision of accurate information to consumers. Regulation is needed to prevent such advertising.

In addition, JT's website states "tobacco is needed to improve mood and eliminate stress." However, the so-called "stress" that tobacco eliminates is no more than the irritability caused by nicotine withdrawal. This language is yet another example of

18) See Hidehito Kiuchi, 1998. "Freedom of Commercial Speech in the U.S. Constitution and Tobacco Advertisement (Gasshukoku Kenpo niokeru Eiriteki Hyogen no Jiyu to Tabako Kokoku)", *Journal of Law and Political Studies (Keio University)*, Vol. 39, pp. 98-103.

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

language which should not qualify as the provision of accurate (truthful) information to consumers.

7. Regulating Smoking in Television and Movies

Television dramas and movies viewed by many citizens, including minors, depict handsome leading men and other characters smoking in their workplaces, on the streets, and in other places with other people around them (e.g., restaurants and cafes) (For example, in the television show *Moju*, broadcast on TBS since April 2014, the main character smokes in the abovementioned places in several scenes.). The background to this is tobacco companies, who are fully aware of the enticing effect such scenes will have on minors, pressurizing television and movie makers to cleverly incorporate such scenes. Tobacco companies are fully aware that by exposing minors to scenes of handsome actors, such as Takuya Kimura, smoking tobacco, they are subliminally sending them the message that smoking equals coolness. Children are the prime advertising targets for tobacco companies.

However, the portrayal of smoking in television drama and movie scenes decreases current smokers' desire to quit smoking and glamorizes/normalizes smoking in the minds of nonsmokers, particularly minors. This can lead them to start smoking²⁰. Accordingly, even if the law does not ban smoking scenes in television dramas outright, we should be working toward moving in that direction. In practice, based on Article 68.2 of the Industrial Safety and Health Act, Article 25 of the Health Promotion Act, and the various ordinances banning street smoking, scenes that depict smoking in workplaces, streets, and other places with people around the smoker (such as restaurants and cafes) should not be shown in television and movies.

8. Strengthening Regulation of Sponsorship

Actors smoking tobacco in popular television dramas to make it seem intentional is related to the fact that JT sponsors many television programs. In a survey by Kitasato University, the main characters in the television dramas surveyed were frequently doctors who smoked in several scenes. The popular show, *Kyumei Byoto, 24 Ji* (24-Hour Emergency Room) was also sponsored by JT²¹.

Sponsor companies' power over their sponsored television programs is often tremendous, and one can easily imagine certain performances based on sponsor intent (either express or implied). For example, in television dramas where the main character is a doctor, one can easily conceive that the frequent and subtle incorporation of scenes

20) See Masakazu Kuroyama & Masaaki Aizawa & Sayo Hayashi & Hirokuni Tagaya, 2011, "Research for Smoking-Related Scenes in Television Drama Shows in Japan." *Japanese Journal of Tobacco Control*, Vol. 6, No.2, p. 16.

21) See Kuroyama & Aizawa & Hayashi & Tagaya, *supra* note 20, p. 19.

where the handsome, cool protagonist is smoking is due, in no small part, to the sponsorship of tobacco companies. Even if the concerned television program is not sponsored by a tobacco company, tobacco companies still sponsor numerous other television programs. With tobacco companies investing such tremendous sums of money in the television industry, sponsored television stations, even in their news programs, are reluctant to air content that is critical of the tobacco industry (their sponsors). If this is indeed the case, it would certainly contribute to the failure to provide accurate (truthful) information about tobacco. If the sponsorship of television programs by tobacco companies contributes to the failure to provide accurate (truthful) information, then surely the regulation of sponsorship should be strengthened.

Furthermore, the events, activities, sports teams, and individuals who bear the JT corporate name, apparently have no problem in receiving JT's sponsorship. JT sponsors various sports and cultural activities. However, JT uses its considerable resources to strengthen its ties with the society, establishing an environment where it is difficult to express criticism of tobacco. Based on the previous arguments, tobacco company sponsorship of sports and cultural activities resulting in the display of tobacco company names should be disallowed. At the very least, JT's crown logo should not be displayed. Incidentally, tobacco companies are not allowed to be sponsors in the Olympics or the World Cup²²⁾.

The WHO Framework Convention on Tobacco Control demands that all signatory nations comprehensively prohibit various tobacco advertisements, sales promotions, and sponsorships according to principles in their respective national constitutions (Article 13.2).

9. Substantial Increase in Tobacco Tax

One of the reasons for the high incidence of smoking by minors is the cheap price of cigarettes. Since cigarettes are so cheap that it is easy for minors to purchase them, it creates an environment wherein it is easy for minors to acquire tobacco and lowers hurdles to tobacco acquisition by minors. Therefore, a significant increase in the tobacco tax, which would increase the cost of cigarettes, is desirable.

In particular, a fair price for tobacco, even with a dramatic increase in the tobacco tax, would still be much less than the true cost of smoking. The increase in price would make

22) For information on the WHO call for banning smoking at sports events, see the WHO website, under "Tobacco Free Sports--Play it Clean." Available at <http://www.who.int/mediacentre/background/2002/back2/en/> (last visited February 17, 2014.) For information on the activities of the IOC, see the IOC's website, under "OLYMPIC MARKETING FACT FILE", available at http://www.olympic.org/documents/ioc_marketing/olympic-marketing-fact-file-2012.pdf#search='IOC+sponsor+tobacco' (last visited February 17, 2014.). For information on FIFA's activities, see FIFA's website, under "Global showpieces to be smoke-free events", available at <http://www.fifa.com/aboutfifa/footballdevelopment/medical/news/newsid=2025637/> (last visited February 17, 2014.)

smokers contemplate smoking's true cost. Currently, the price of tobacco is extremely low²³⁾.

Furthermore, comparatively, Japan's tobacco tax rate is too low (hence, the low price of cigarettes). As a percentage of the price of cigarettes, taxes, including Japan's consumption tax, are already 64.4%²⁴⁾, which, at first glance, makes it seem that the tobacco tax is not low at all. However, in other countries, that percentage is, on average, 80%. Since taxes as a percentage of the cost of cigarettes are lower in Japan than they are in most of the world, one may reasonably conclude that Japan's tobacco tax is too low.

The next problem is how much should the price of cigarettes be increased? Masamichi Kawano believes that a fair price for cigarettes should be the price which maximizes the difference between its economic merits and social cost. Within tobacco's social costs, we can include cleaning, medical, and other costs, which are dependent on the volume of tobacco sold. Accordingly, Kawano believes that a fair price for cigarettes would be approximately JPY 1,400 per pack²⁵⁾. At the very least, it should be pointed out that tobacco generates JPY 7 trillion per year in social burden and healthcare costs. Even if tax revenue were subtracted from these costs, we would still be left with approximately JPY 5 trillion. This is a sufficient reason for increasing the tax on cigarettes.

In the recent past, the tobacco tax has been increased in December 1998, July 2003, July 2006, and October 2010. The purpose of increasing the tobacco tax is not only to increase tax revenues but also to realize a tobacco free society by protecting the health of the nation's citizens and prevent smoking by minors.

10. Imposing Complete Smoking Bans on Educational Institutions

Completely banning smoking in educational institutions serves the interest of preventing secondhand smoking (passive exposure to tobacco smoke, passive smoke) by minors as previously mentioned, but it also must be emphasized as an important measure for the prevention of smoking by minors.

The Act on Prohibition of Smoking by Minors prohibits smoking by minors (Article 1) and educators, who are in the position to advise minors about smoking, should refrain from smoking around minors. Furthermore, those employed as teachers have a

23) For information on the true tremendous cost of smoking, see Sijbren Cnossen & Michael Smart, 2005, "Taxation of Tobacco," Sijbren Cnossen ed., *Theory and Practice of Excise Taxation*, Oxford University Press, pp. 33-46, and Kazuhiro Arai, 2012, *The Health Economics of Smoking and Nonsmoking: Human Nature Revealed by Tobacco (Kitsuen to Kinen no Kenko Keizaigaku: Tabako ga Akasu Ningen no Honsho)*, Chuo Koron Shinsha, p. 116.ff.

24) As of April 1, 2014, Japan's most prominent cigarettes (Mevis, etc.) cost JPY 430 for a pack containing 20 cigarettes. JPY 276.73 of that price (breakdown: national tobacco tax JPY106.04 (24.7%), regional tobacco tax JPY 122.44 (28.5%) special tobacco tax JPY 16.4 (3.8%), consumption tax JPY31.85 (7.4%) is comprised of various taxes, accounting for 64.4% of the price (including consumption tax).

25) See Masamichi Kawano, 2008, "On the Optimal Price of Tobacco (Tabako no Tekisei Kakaku nitsuite)," *Japanese Journal of Tobacco Control*, Vol. 3. No. 1, p. 2.

responsibility to safeguard the health of the children, who are their students. They have a responsibility to maintain a living environment for children that is free from the harms of secondhand smoking (passive exposure to tobacco smoke, passive smoke). Hence, to protect children's health, instructors should refrain from smoking in schools or hospitals. Most importantly, smoking in educational institutions contradicts the educators' duty of providing instruction for students. Educators should be prohibited, by law, from smoking anywhere on school premises, and educational institutions themselves should be completely smoke free²⁶⁾.

IV Measures to Reduce the Number of Smokers

The decision to smoke is an individual choice made by the smoker, so some might say that when smokers contract various diseases, they are merely reaping what they sowed. While it is certainly true that smokers are responsible for their actions, nicotine, a component of tobacco, is highly addictive, and 70% of smokers are actively trying, albeit unsuccessfully, to quit. Further, influencing this individual decision are tobacco companies' advertising strategies, developed by those who are fully aware of the addictive and harmful nature of nicotine, intended to facilitate smoking among people. Therefore, one might say that smokers are the victims of the government and the tobacco companies' sales strategies. Accordingly, to protect the health of smokers, measures are needed to reduce the number of smokers. Incidentally, generally smokers emphasize short-term pleasure (in economics, the "time preference rate") and are less likely to avoid future dangers²⁷⁾. Ultimately, smokers underestimate the likelihood that they will become addicted, and, after smoking a certain number of times, find themselves unable to quit. Any measure to reduce the number of smokers should consider the abovementioned argument.

In the following Part IV, the measures suggested in Parts II and III will not be revisited; instead, the following four measures will be considered.

1. Strengthening Warning Label Regulations on Cigarettes (Improving Cigarette Warning Labels)

Although Article 36 of the Tobacco Business Act currently addresses warning labels with "harmfulness label" or "advisory label," Article 39 of the Tobacco Business Act uses the words "advisory label" instead of "harmfulness label." Article 39 of the Tobacco Business Act should also use the words "harmfulness label."

Next, the substantive language defined in Article 36 of the Order for the Enforcement of the current Tobacco Business Act, in effect, requires "harmfulness labels" and/or

26) See Abe, *supra* note 6, p. 114.

27) See Arai, *supra* note 23, p. 43.ff.

“warning labels,” but vague phrases such as “for you” are still being used, which should be removed.

Moreover, the phrase, “try not to bother those around you when smoking,” is permitted, but it would be better if the phrase, “do not bother those around you when smoking,” was used.

Of the eight types of label language required under Article 36 of the Order for the Enforcement of the Tobacco Business Act, there are many that address the harmfulness of tobacco. However, regarding its addictiveness, the language is inadequate. Examples of such inadequate language include, “although different people will have different results, nicotine can cause people to be addicted to smoking,” and “the harmful health effects and addictiveness may be worse among minors.” Yet, one of the reasons minors reach for their first cigarette is that they underestimate their addictiveness. In other words, they assume they will be capable of quitting at any time. Of course, conveying the proper information regarding tobacco’s addictive nature is necessary, but more language regarding tobacco’s addictive nature must be included on the warning labels on cigarette packs themselves.

The imposition of the duty to put warning labels on tobacco products raises issues of economic freedom. However, considering the health of smokers and the harmful health effects of secondhand smoking on others, to prevent minors from smoking, such imposition should be constitutionally permissible. Further, as proper decisions cannot be made without having accurate information on which to base them, one could say that smokers were deprived of their actual right to choose by their lack of accurate information²⁸⁾. Additionally, a major reason that consumers are not given accurate information on the harmful and addictive properties of tobacco is that the entire tobacco industry is united in manipulating tobacco information to hide the truth from consumers²⁹⁾.

28) See Yoshio Isayama, 1999, *The Modern Tobacco War (Gendai Tabako Senso)*, Iwanami Shoten, p. 12.ff.

29) See Philip J Hilts, 1996, *Smokescreen: The Truth behind the Tobacco Industry Cover-up*, Addison Wesley Reading. This book is based on the accounts of a whistleblower from inside the tobacco industry and uses secret internal documents. This book reveals that tobacco companies have been aware of the addictiveness of tobacco and the dangers of nicotine for quite some time, and have manipulated nicotine concentrations (by increasing them) to get smokers addicted.

Additionally, see ASH (Action on Smoking and Health), 1998, *Tobacco Explained*, available at http://www.ash.org.uk/files/documents/ASH_599.pdf (last visited April 12, 2014). This book is a compilation of internal document evidence from U.S. and European tobacco companies which was made public during tobacco litigation in the United States by the British NGO, ASH. It was compiled by ASH and can be viewed on their webpage, available at <http://www.ash.org.uk/information/tobacco-industry/tobaccochronology>. The webpage for the World Health Organization (WHO)’s World No Tobacco Day 2001 contains “Tobacco Explained”, available at <http://www.who.int/tobacco/media/en/TobaccoExplained.pdf#search='TobaccoExplainedwho>. It was intended to expose the immoral business strategies of the tobacco industry to the world (last visited April 14, 2014). If you read these internal documents, you will understand that the tobacco industry was clearly aware of the harms of tobacco use. Further, for a robust collection of internal documents from the tobacco industry, visit the University of California, San Francisco (UCSF)’s library website, available at <http://www.library.ucsf.edu/tobacco> (last visited April 14, 2014). Also, see the Journal of the Japan Society for Tobacco

Hence, to provide consumers with accurate information on the harmful and addictive properties of tobacco, it is absolutely necessary that the law impose a duty regarding the language used to label cigarette packs.

2. Regulating Tobacco Product Names

Japan's *Policy on Advertising by Tobacco Manufacturers*, formulated in accordance with Article 40.2 of the Tobacco Business Act, authorizes the use of words such as "low tar," "light," "ultra light," and "mild" on cigarette packs, as long as "to avoid misunderstandings among consumers, such packaging contains clear language to the effect that the cigarettes contained within are not less harmful than other cigarettes." However, descriptive adjectives such as "mild" and "light" provide the false impression to consumers that certain products cause fewer health risks than other products, and therefore such descriptive adjectives should be banned from tobacco product names. Ultimately, names with descriptive adjectives such as "mild" and "light," in the context of product selection, constitutes a failure to provide accurate information.

Therefore, words such as "low tar," "light," "ultra light," "mild," and any other language that are likely to cause misunderstanding among consumers regarding the harmful relationship between cigarettes and health should not be used in tobacco product names.

The WHO Framework Convention on Tobacco Control requires that signatory nations ensure that the packaging and labels on cigarette packs sold within their borders do not promote the sale of tobacco products through the use of means likely to cause misunderstanding regarding the properties, harmful health effects, dangers, and/or emissions of cigarettes (e.g., labels with descriptive adjectives such as "low tar," "light," and "ultra light") (Article 11.1).

On August 8, 2012, the JT Group announced that it was globally renaming its Mild Seven brand to "Mevius." However, the various individual Mevius products still have names such as "Mevius Light," "Mevius Super Light," and "Mevius Extra Light." Further, JT's other cigarette products have names such as "Seven Star," "Peace," and "Hope." However, according to the WHO Framework Convention on Tobacco Control, product names such as "Mevius Light," "Mevius Super Light," and "Mevius Extra Light" can be considered violations of the announcement. It should also be considered whether product names such as "Seven Star," "Peace," and "Hope" constitute "language likely to cause misunderstanding in consumers regarding the relationship between tobacco consumption and health."

Control, 2000, *Judging the Tobacco Industry: Japan's Tobacco War (Tabako Sangyo wo Sabaku, Nihon Tabako Senso)*, Jissensha.

3. Induction through Economic Methods

Smokers also generate various societal costs by smoking. Since smokers create a heavier economic burden on society than nonsmokers, principles of societal fairness are highlighted. Smokers may present the argument that they pay the tobacco tax. However, as the estimated societal and national healthcare costs of tobacco use are approximately JPY 7 trillion per year, these costs are not fully covered by the tobacco tax. Accordingly, it is necessary to introduce economic methods (economic disincentives for smokers and economic incentives for nonsmokers). Possible economic methods include 1) fire insurance, 2) life insurance, 3) automobile insurance, 4) rental and hotel fees, and 5) surcharges for smoking seats at eating and drinking establishments.

4. Nonsmoking Support Measures

Smokers underestimate the danger of becoming addicted and find themselves unable to quit after smoking for a certain period. Once addicted, warning labels and economic incentives do little to help smokers quit. Accordingly, mechanisms are needed to support the efforts of those who are trying to quit smoking (smoking cessation support measures). As a practical matter, this could include funding for smoking cessation treatment by physicians, and private sectors measures such as providing a nonsmoking bonus to nonsmoking workers and allowing workers to use sick leave to visit smoking cessation clinics.

Incidentally, smoking cessation treatment has been covered by health insurance since April 2006, if it meets certain conditions. However, health insurance coverage is limited to outpatient treatments, and, even when receiving such outpatient treatments, patients (former smokers) must pass a four-factor test to be eligible for coverage. These four factors require that patients 1) themselves wish to quit smoking (not family members), 2) test positive for at least five factors in a nicotine dependence test, 3) must score at least a 200 based on the formula of (number of years smoked) x (cigarettes smoked per day), and 4) are capable of consenting to the treatment and treatment-related documents. Only those who satisfy all of these requirements may receive outpatient smoking cessation treatment (Notice from the Director of the Medical Care Division of the Ministry of Health, Labor and Welfare's Insurance Bureau, "Regarding Issues to Consider in Implementation of System for Calculating Reimbursement of Medical Fees")³⁰⁾ (March 5, 2008, *Hoihatsu* No. 0305001). In addition, treatment is only covered for the first five treatments. Any further treatment is not covered (at patient's expense). However, in the future, in addition to enabling health insurance coverage for more than outpatient smoking cessation care, the conditions for receiving outpatient care should be relaxed, more patients should be approved, and the number of covered treatments should be increased. Furthermore, to

30) See the website of the Ministry of Health, Labor and Welfare, available at <http://www.mhlw.go.jp/topics/2008/03/dl/tp0305-1d.pdf> (last visited April 14, 2014).

secure the necessary funding, the tobacco tax must be substantially increased.

V Dramatic Reform of Tobacco Regulation

Parts II through IV dealt with concrete tobacco measures that can be taken given Japan's current legal system. However, the future legal challenges facing Japan in the realm of tobacco regulation must include dramatic reforms in addition to more actual measures. Accordingly, Part V will not be premised on the existing legal system; instead, to explore ideal solutions, the need for more dramatic reforms will be considered.

1. Repeal of the Tobacco Business Act

The Tobacco Business Act has no stated purpose of protecting the health of the nation's citizens. Rather, the statute is intended to develop the tobacco industry, secure funds for the government, and contribute to the national economy, irrespective of any harm to the health of the national citizenry. Lacking such protective purpose, the statute serves as a means for accumulating funds through an aggressive policy of tobacco industry expansion at the expense of national health. However, the purposes of the Tobacco Business Act are irreconcilable with the promotion of the general health and welfare of a nation's citizens. Accordingly, as long as the Tobacco Business Act exists, one cannot expect the country to achieve a policy that will promote the general health and welfare of the nation's citizens. To achieve such a policy, the Tobacco Business Act must first be repealed.

2. Establishment of a Comprehensive Tobacco Control Law

The current Tobacco Business Act should be repealed and a comprehensive Tobacco Control Law enacted in its place. The current Tobacco Business Act actually regulates tobacco in many ways, but usually laws are structured so that 1) they define the law's policy purpose in the first section of the law, and 2) starting with Article 2 of the law in question, they establish means for achieving that policy purpose. If that were the case, the provisions of the current Tobacco Business Act, starting with Article 2, would be to develop the tobacco industry, secure government revenue, and promote the national economy. Therefore, amending the law from the perspective of protecting the health of the nation's citizens would raise several problems. Accordingly, the current Tobacco Business Act should be repealed and replaced with a comprehensive Tobacco Control Law formally devoted to protecting the health of the nation's citizens.

3. Changing Jurisdiction from the Ministry of Finance to the Ministry of Health, Labor and Welfare

Not a single aspect of the Tobacco Business Act regulates the tobacco business in the interest of protecting health. One reason for this is that the government ministry with exclusive jurisdiction over supervision of the tobacco business, the Ministry of Finance,

obtains tax revenue from tobacco.

Yet, the tobacco problem is a health problem and supervision of the tobacco industry should be conducted by the Ministry of Health Labor and Welfare, not the Ministry of Finance. Accordingly, jurisdiction over tobacco supervision should be transferred from the Ministry of Finance to the Ministry of Health, Labor and Welfare. If such a transfer is difficult to implement, at the very least, the Ministry of Health, Labor and Welfare should have joint jurisdiction with the Ministry of Finance. Hence, at least, the legal system should be restructured to give the Ministry of Health, Labor and Welfare substantive authority over tobacco control by, at the very least, giving the Ministry of Health, Labor and Welfare joint jurisdiction over tobacco supervision and the previously proposed Tobacco Control Law.

4. Restrictions on Shares of JT Held by the National Government

One of the reasons for Japan's slow progress on tobacco issues is that the national government owns half of the shares of JT. However, the party previously in power, the Democratic Party of Japan, when compared with the Liberal Democratic Party, had fewer ties to the Ministry of Finance and JT, and it was expected that they would implement reforms to ban smoking. Then, the Liberal Democratic Party regained power, but the national government should not own shares of JT³¹⁾.

5. Enacting a Comprehensive Secondhand Smoke (passive exposure to tobacco smoke, passive smoke) Prevention Law

(A Law Restricting Smoking Areas)

As previously discussed, if Article 25 of the Health Promotion Act and Article 68.2 of the Industrial Safety and Health Act could be amended to institute a complete ban on indoor smoking, one could expect a significant drop in indoor smoking and concomitant increase in the prevention of secondhand smoking (passive exposure to tobacco smoke, passive smoke). Even if it were to be amended, the laws would still not affect outdoor smoking. However, currently, the prospects for amending the Articles and regulating outdoor street smoking are equally bleak.

If the previously mentioned amendments to Article 25 of the Health Promotion Act and Article 68.2 of the Industrial Safety and Health Act, together with regulations of street smoking, were to be enacted, it would result in actual restrictions on areas where smoking is permitted. However, the various laws would still have limited scope. I predict that even if these laws were to be enacted, nonsmokers would still be unable to avoid secondhand smoke (passive exposure to tobacco smoke, passive smoke) in their daily lives.

31) See Satoshi Kitamura, 2009, "Towards Preventing Secondhand Smoking: In Order to Not Lag Behind the Rest of the World (Judo Kitsuen Boshi ni mukete: Sekai no Choryu ni Okurenai tameni), *Japanese Journal of Tobacco Control*, Vol. 4, No. 5, p. 117.ff.

Accordingly, to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke) in the future, comprehensive laws and ordinances restricting smoking areas are desirable³²⁾.

6. Repudiating the Right to Smoke

Is there an actual right to smoke?

Tobacco companies entice minors into nicotine dependence and use them as profit-generating customers for a prolonged period, devising clever and ingenious branding strategies. In reality, the decisions to start smoking and to continue smoking are affected by the addictive nature of tobacco and by the various influences of the tobacco companies. Smoking is not simply a matter of free personal choice³³⁾. Notably, tobacco is uniquely addictive, making it extremely difficult for people to stop using once consumed regularly for a certain time. Accordingly, it becomes exceedingly difficult for smokers to control themselves and exercise true free will.

Therefore, for smokers who are trying to quit, but cannot, we should not speak of a “right to smoke.” It is better to proceed as though no such right exists and to build a consensus to repudiate the so-called “right to smoke.” Since April 2006, smoking cessation treatment, provided it meets certain conditions, has been covered by health insurance. Such treatment is premised on the belief that does not consider smoking to be a mere lifestyle choice, but a life-threatening disease known as nicotine dependence, which requires medical treatment. In other words, such a belief repudiates the very concept of a right to smoke.

7. Complete Prohibition of the Sale of Tobacco

Smokers do not smoke as an exercise of free will. Their bodies have become pathetically dependent on nicotine. Tobacco companies such as JT profit by making smokers nicotine dependent. This business model is similar to that employed by organized criminal organizations which inject people with methamphetamines to get them addicted and are forced to buy their product at a high price. Accordingly, we should consider the argument that we should outlaw the sale of tobacco completely and create an environment wherein tobacco is not available even if smokers wish to smoke, instead of simply telling smokers to stop smoking³⁴⁾. Eventually, despite the fact that the dangers of tobacco are

32) In Japan also, on November 21, 1978, the Committee of Legislators for Securing Rights for Nonsmokers submitted a bill entitled the “Act Regarding Spatial Restrictions on Smoking.” Further, in March 2010, the Japan Society for Tobacco Control drafted a bill entitled, “Act for Preventing Secondhand Smoking in the Workplace and Other Public Spaces,” and petitioned the ruling administration (including the Prime Minister and Minister of Health, Labor and Welfare) to enact it.

33) See Slade, *supra* note 19, pp. 78-83.

34) See Abe, *supra* note 1, p. 44, Takao Tanase. “U.S. Tobacco Litigation and Tobacco Policy: The Gap between the Right to Smoke and Smoking Prohibition (Beikoku Tabako Soshō no Tenkai to Tabako Seisaku: Kitsuen

visible to all, the simple question remains, why does the national government permit the sale of tobacco? It is difficult to answer this question accurately. Yet, accurate information regarding tobacco is not provided, and even when smokers do appreciate the risks of smoking and try to quit, the vast majority of them fail. Therefore, regardless of concepts like “the right” to smoke, for smokers who appreciate the risks of smoking and yet still cannot quit, we should consider forcefully urging smokers to quit by using government regulation to absolutely prohibit the sale of tobacco³⁵⁾.

However, tobacco is addictive because once consumed for a certain period, it becomes exceedingly difficult to discontinue. It is incorrect to state that smokers are exercising absolute control and their freedom to choose to smoke tobacco. Due to tobacco’s addictive nature and the way it impairs the ability of smokers to make decisions for themselves, we should adopt a paternalistic attitude toward this issue and strive to preserve a bare minimum of societal morals. The possession and sale of tobacco should be strictly regulated under the Narcotics and Psychotropic Control Act similar to methamphetamines and opium.

Personally, I believe that if you really care about others, then you should oppose the sale of poisonous, addictive substances which cause people to suffer. You should want JT to immediately withdraw from the tobacco industry. If the purpose of a business is to provide more of the things people want—love, money, freedom, and time—or to remove the things people do not want—stress, conflict, discord, and anxiety— (or to do both), then there certainly is a right to conduct business³⁶⁾. However, tobacco steals love, money, freedom, and time from smokers (and nonsmokers as well) on the one hand, and burdens society as a whole with stress, conflict, discord, and anxiety (when smokers think they are relieving stress by smoking, they are really just relieving nicotine cravings which are caused by nicotine dependence) on the other. With the aforementioned characteristics, this peculiar consumer good has 100 demerits and zero merits. We should be moving toward outright a prohibition of this consumer product in the future.

8. Reform of the Tobacco Manufacturing, Marketing, and Sales System

The tobacco industry is powerful, and has the support of labor unions, farmers, shippers, related businesses, and smokers. It also conducts lobbying activities. Although the various tobacco companies are mutually competitive, they will be united in their opposition to anti-smoking activities and devise a means of opposing any policy aimed at reducing smoking areas and will continue to market their product.

The tobacco industry, which deliberately created the market for their product, the

Jiyu to Kitsuen Kinshi to no Hazama)”, Takao Tanase ed., 2000, *Sociolegal Study of Tobacco Litigation (Tabako Soshō no Hoshakaigaku)*, Sekaishisoshā, p. 3.ff.

35) See Tanase, *supra* note 34, p. 3.ff.

36) See Chris Guillebeau (Translated by Naoyuki Honda), 2013, *The Hundred Dollar Startup*, Asuka Shinsha, p. 57.ff.

practice and custom of smoking itself, through aggressive sales and marketing, must absolutely be reformed; however, the government which should be regulating such sales and marketing practices (particularly the Ministry of Finance) is itself an interested party in the survival and development of the tobacco industry, making the prospects for effective tobacco regulation unlikely. The legal system governing the manufacture, marketing, and sale of tobacco, which perpetuates the custom of smoking and resultant health damage, must be changed³⁷⁾. As stated previously, it is important to reduce the number of smokers, but to do that, it will be necessary to achieve structural changes in the current manufacturing, marketing, and sales system in which the national government is united with the tobacco industry³⁸⁾.

VI Conclusion

As mentioned previously, the so-called “right to smoke,” as a natural right, is intrinsically limited to the extent to which it does not harm the health or survival of others. Furthermore, based on the WHO Framework Convention on Tobacco Control, measures must be taken to prevent secondhand smoking (passive exposure to tobacco smoke, passive smoke), prevent smoking by minors, and reduce the number of current smokers. I also believe that more dramatic reforms are needed. For the current Japanese society, stronger governmental regulation of tobacco is an absolute necessity. If one truly understands the addictive and harmful nature of tobacco, then one should understand the need and desirability of a fair legal system that can guide our society away from tobacco usage as quickly as possible. The day when that happens cannot come too soon.

(Appendix)

This study is the compilation of the results of research conducted from FY 2008–2011 under scientific research grants from the Japan Society for the Promotion of Science (B) under the research topic “Law and Policy of Tobacco Regulation” (Topic Number 20730007). It also contains the results of research conducted under an FY 2013–2014 Ministry of Health, Labor and Welfare science research grant (Project for General Research on Measures Against Circulatory Conditions, Diabetes and Lifestyle-Related Diseases) research topic “General Research on Countermeasures Based on the WHO Framework Convention on Tobacco Control” (Representative: Dr. Masakazu Nakamura) (Topic Number H25 *Junkanki To (Seishu) Ippan* 010).

37) See Iwao Sato, 2000, “Changes in Tobacco Litigation and the Identity of the Movement (*Tabako Soshō no Henyo to Undo no Identity*), Tanase ed., *supra* note 34, p. 95.ff.

38) See Simon Chapman, 2007, *Public Health Advocacy and Tobacco Control*, Blackwell Publishing, pp. 172-197.

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