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FREEDOM OF ECONOMIC ACTIVITIES AND THE RIGHT TO PROPERTY

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I

INTRODUCTION

This article examines the basis and scope of the 1947 Constitution's guarantee of freedom of economic activities. That freedom encompasses an individual's right to choose his occupation and residence and to own or hold property. The article begins by identifying two possible theoretical foundations of the freedom of economic activities. It then discusses the specific constitutional provisions which protect that freedom. Finally, the article examines the constitutional validity of statutory attempts to restrict the freedom of economic activities.

II

THE SITUATION OF ECONOMIC FREEDOM IN THE CONSTITUTIONAL SYSTEM

A. The Situation of Economic Freedom within Human Rights

Within Japanese constitutional theory, freedom of economic activities is classified as one of the rights to freedom, such as freedom of mental activities and freedom from bondage, as distinguished from social rights, such as the right to a decent life, the right to receive an education, the right to work, and the fundamental rights of workers as they emerged in the welfare state in this century.[1] In this context, freedom of economic activities is the individual's right to reject interference by the state. On the other hand, an influential

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1. For the various social rights, see 1947 Const. arts. 25-28. For a commentary distinguishing the social rights and rights to freedom, see M. NAKAMURA, SHAKAIKEN NO KAISHYAKU 2 (1983).

theory combines freedom of economic activities with the social rights of Articles 25 through 28 into a new concept of "fundamental social rights," distinct from the fundamental rights of individuals.[2] This theory emphasizes the social character of citizens' obligations rather than the individual's right to freedom of economic activities.

B. What Kinds of Human Rights Inhere in Freedom of Economic Activities?

Articles 22 and 29 of the 1947 Constitution guarantee freedom of economic activities. Article 22 provides freedom to change a residence and freedom to choose an occupation.[3] Article 29 provides for the right to property.[4]

Freedom to choose an occupation is a component of economic freedom. Furthermore, it is argued that occupational freedom has an aspect of human dignity, or the right to personhood. The Supreme Court of Japan has held that occupational freedom is closely connected to the value of individual personhood.[5] The Court[6] and a dominant theory[7] acknowledge that the freedom to choose an occupation also includes the freedom to conduct business.

A popular point of view classifies freedom to change one's residence as part of the freedom of economic activities because both freedoms are provided for in the same Article of the 1947 Constitution. Further, modern capitalist society has developed on the premise that guaranteeing free movement of individuals frees the working class.[8] On the other hand, some theories insist that residential freedom is related to the right to be free from any form of bondage[9] or to the right to freedom of mental activities,[10] since there is a difference in nature between the freedom to change one's residence and the freedom to choose an occupation. These theories suggest that residential freedom might be composed of several rights such as freedom

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2. N. UKAI, SHINBAN KENPO 79-80 (1968). Professor Naoki Kobayashi distinguishes "rights to freedom" and "social-economical rights," and the freedom of economic activities is classified as one of the social-economical rights. This classification is adequate to understand the character and history of the right to freedom of economic activity. N. KOBAYASHI, KENPŌ KOHGI 273 (1980).

3. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare. Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

1947 CONST. art. 22.

4. The right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon just compensation therefore.

Id. art. 29.

5. Umehara v. Japan (The Pharmacy Case), 29 Minshū 572 (Sup. Ct., G.B., Apr. 30, 1975).

6. 26 Keishū 586 (Sup. Ct., G.B., Nov. 22, 1972).

7. *See, e.g.*, N. KOBAYASHI, *supra* note 2, at 512; 2 T. MIYAZAWA, KENPŌ 391 (1972).

8. *See, e.g.*, M. ITOH, KENPŌH 337 (1982); I. SATOH, NIHONKOKU KENPŌ GAISETU 213 (3d ed. 1985).

9. T. KAKUDOH, KENPŌH 239 (1982).

10. K. SATOH, KENPŌH 375 (1981).

from bondage, freedom of expression, and freedom as a basis of self-fulfillment.[11] Case law treats residential freedom differently from occupational freedom.

Generally, the right to property is classified as part of the freedom of economic activities. According to most scholars, Article 29 of the 1947 Constitution contains aspects of both the guarantee of a private individual's right to own property and the broader institutional guarantee of property ownership.

C. The Nature of Economic Freedom

The human rights provisions of the 1947 Constitution, especially Articles 12 and 13, which provide the general principles, assume civil liberties to be limited by the public welfare. The protection of freedoms contained in Articles 22 and 29 is also limited by the public welfare. Most opinions say that the public welfare limits the freedom of economic activities more than it limits civil liberties, such as freedom of mental activities or freedom from bondage, because Articles 22 and 29 expressly stipulate the public welfare restriction on economic activities.

The Japanese judiciary uses the two-tiered test developed in the United States to review the constitutionality of statutes. Applying the strict scrutiny test, the court presumes that statutes that regulate freedom of expression or freedom of mental activities are unconstitutional. The court seems to apply the rational relation test, which involves a lower standard of scrutiny, to statutes restricting freedom of economic activities in order to allow the legislature discretion in this area.

The Supreme Court of Japan accepted the two-tiered test for the first time on November 22, 1972, in a case involving the licensing of a retail business.[12] In the Pharmaceutical Business Act case of April 30, 1975,[13] the Court more clearly applied the two-tiered test and said:

> One's occupation inevitably has a close relation to social and economic policy. Thus, freedom to choose an occupation may be regulated to a greater extent than freedom of mental activities. For this reason Article 22, section 1, emphasizes the sentence "to the extent that it does not interfere with the public welfare."

The Court judged occupational freedom to be a type of freedom of economic activity and recognized that occupations greatly influence society. It concluded that freedom to choose an occupation should be subject to broader restrictions than freedom of mental activities, and that Article 22, section 1, should be interpreted accordingly.

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11. M. ITOH, *supra* note 8, at 338-40.
12. 26 Keishū 586.
13. 29 Minshū 572.

III

FREEDOM OF OCCUPATION

A. Early Decisions

In the early period after the 1947 Constitution went into effect, the Supreme Court applied the "public welfare" test to decide the constitutionality of statutes restricting the freedom to choose an occupation.

1. *Occupation Stability Act.* Among the early Supreme Court decisions, one of the leading cases that allowed limitations on the freedom to choose an occupation was the Grand Bench decision of June 21, 1950,[14] holding constitutional the challenged provision of the Occupation Stability Act (Shokugyō Antei Hō). This decision judged the purpose of the Act as "giving each person a certain occupation suitable for one's ability and planning a stable employment," and concluded that the purpose was reasonable. But legal scholars have criticized the Court's inadequate review of whether such a strict limitation was proper. In other words, in judging the constitutionality of statutes that limit the freedom to choose an occupation, the Court, it is argued, should first review the purpose of the limitation and, second, determine whether the means of limitation are proper. These scholars argue, however, that in its early decisions the Court did not adequately recognize the need to decide whether the means of the limitation itself were proper or improper, even if the limitation's purpose was reasonable.[15]

2. *Antique Dealing Act.* The Supreme Court Grand Bench decision of March 18, 1953,[16] addressed the constitutionality of the Antique Dealing Act (Kobutu Eigyō Hō), which prohibited antique dealing without a license. The Court held that the statute was constitutional since Article 22 of the 1947 Constitution allows "public welfare" limitations on the freedom to choose an occupation. As a general rule, the Court noted that "if the Antique Dealing Act adopts the licensing system and if punishing non-licensed businesses is necessary to maintain public welfare, the limitation is constitutional." The Court then decided that the licensing system in antique dealing is "necessary to maintain the public welfare, to protect victims, to prevent crimes, to aid in the arrest of criminals, and to [preserve] national . . . well-being." This decision adopted the "necessary restriction" standard and operates as the leading case upholding statutes limiting the freedom to choose an occupation.[17] Other Supreme Court Grand Bench decisions that adopt the "necessary restriction" test are as follows: the decision upholding the constitutionality of the Drug Control Act (Mayaku Torishimari Hō), which prohibits the delivery, receipt, and keeping of drugs;[18] the decision upholding

14. 4 Keishū 1049 (Sup. Ct., G.B., June 21, 1950).
15. Okudaira, *Eigyō no Jiyū no Kisei*, in BESSATU JURIST ZOKU HANREI TENBOH 19 (1973).
16. 7 Keishū 577 (Sup. Ct., G.B., Mar. 18, 1953).
17. Ashibe, *Syokugyō no Jiyū no Kisei*, 294 HŌGAKU SEMINAR 54 (1979).
18. 10 Keishū 1746 (Sup. Ct., G.B., Dec. 26, 1956).

the constitutionality of Article 17 of the Dentist Act (Shika ishi Hō) and Article 20 of the Dental Technician Act (Shika gikōshi Hō), which prohibit dental technicians from checking the line of teeth and from practicing orthodontics;[19] the decision upholding the constitutionality of the Massager Act (Anmashi, Harishi, Kyushi, oyobi Jyudōseihukushi Hō), which prohibits certain businesses from providing services that are similar to medical treatment;[20] and the decision upholding the constitutionality of Article 5, item 2 of the Unfair Competition Protection Act, which prohibits all businesses from committing intentional acts of unfair competition.[21]

3. *Zoning.* In the Supreme Court Grand Bench decision of January 26, 1955,[22] the Court reviewed the constitutionality of a public bath zoning law, which required a certain distance between existing and newly planned public bathhouses before the state grants licenses for the new buildings. The purpose of the statute was to allocate public baths adequately. The Court characterized the public bath as "a sanitary accommodation that is a prerequisite in the daily lives of many nationals." The Supreme Court measured the necessity of public baths and concluded that "many nationals would suffer daily inconvenience with few public baths. And with too many public baths in competition, the bath business would become economically unstable. Consequently, the condition of sanitary accommodation would decline, adversely affecting national health and environmental sanitation." The point of the Supreme Court's analysis is that if there is no zoning on public baths, there would be more public baths in competition with one another. Consequently, the condition of sanitary equipment would decline. Many commentaries criticize the Supreme Court for failing to review adequately the legislative facts behind the zoning law and for simply ruling in accordance with legislative history.

B. The Supreme Court Grand Bench decision of November 22, 1972

While the earlier cases uniformly applied the public welfare test, the first case to apply the "purpose" test to decide the constitutionality of a statute was the Grand Bench decision of November 22, 1972.[23] This decision was an important turning point in the development of the constitutional analysis of restrictions on the freedom to choose an occupation. The Court upheld the constitutionality of the Retail Business Adjustment Special Measure Act (Kouri Shogyo Chosei Tokubetu Sochi Ho), Article 3, clause 1. This law zoned retail markets by requiring new markets to be licensed. For the first time, the Supreme Court classified the restrictions based on the purpose of the regulated economic activity.

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19. 13 Keishū 1132 (Sup. Ct., G.B., July 8, 1959).
20. 14 Keishū 33 (Sup. Ct., G.B., Jan. 27, 1960).
21. 14 Keishū 525 (Sup. Ct., G.B., Apr. 6, 1960).
22. Shimizu v. Japan (The Fukuoka Bathhouse Case), 9 Keishū 89 (Sup. Ct., G.B., Jan. 26, 1955).
23. 26 Keishū 586.

Under this new test, the Supreme Court divides occupational restrictions into two categories based on their purposes. The first type of restriction is negative, designed to keep public safety and order; the other is an affirmative restriction aimed at carrying out socioeconomic policy under the ideal of a welfare state. As to the affirmative restriction, the Supreme Court, respecting legislative discretion, adopted what is called the "clarity test." Under the clarity test, the restriction is deemed unconstitutional if the legislative branch abuses its discretion and the restriction is clearly unreasonable. In the case of the Retail Business Adjustment Special Measure Act, the Court recognized that an affirmative restriction protecting small or medium-sized enterprises has a reasonable purpose in protecting retailers from economic collapse caused by excess numbers of retail markets, and is, therefore, constitutional.

C. The Supreme Court Grand Bench Decision of April 30, 1975

In examining the constitutionality of zoning new pharmacies under the Pharmaceutical Business Act (Yakuji Hō), the Supreme Court fundamentally adopted the reasoning of its 1972 decision,[24] classified the act as a negative purpose restriction, and held the Pharmaceutical Business Act unconstitutional by applying "the strict-reasonableness test," rather than the clarity test.

At first, the Supreme Court classified two types of measures: affirmative measures that promote socioeconomic policy and negative measures that protect the public from the harmful effects of free occupational activities. In the case of negative purpose restrictions, the Court required the legislative purpose (i) to be necessary and reasonable and (ii) to impose minimal restrictions on occupational activity. Next, the Supreme Court reviewed the necessity and reasonableness of zoning pharmacies and found that zoning a new pharmacy is a negative purpose measure, designed mainly to protect life and health from danger. The Court denied the necessity and reasonableness of distance restrictions in setting up new pharmacies and indicated that the "danger of supplying defective medicine caused by a sudden increase in competition or instability of business is not recognized as a reasonable decision, and is merely speculative." The Court held that the legislature's argument that business instability leads to a "supply of defective medicine is unreasonable." Thus, this decision refutes the legislature's logic of causation in adopting the distance restriction in its 1963 revision of the Pharmaceutical Business Act.

D. The Relationship between the Public Bathhouse Decision and the Pharmaceutical Business Act Decision

On one hand, the Supreme Court decided that the zoning of public baths is constitutional, and thus affirmed the legislative findings in 1955 that, without zoning, too many public bathhouses would compete with one another

24. 29 Minshū 572.

and the condition of sanitary equipment would decline. On the other hand, in 1975, the Court decided that the zoning of pharmacies is unconstitutional, and thus denied the legislative findings that without zoning in this context, the competition among pharmacies would create instability and consequently defective medicine would be supplied. Therefore, the question arises whether the decision in 1975 substantially overruled the decision of 1955.

There are two lines of commentary on the issue.[25] On the one hand, there are three arguments denying the constitutionality of the public bathhouse restrictions. First, there is no causation between laissez-faire policy and the declining condition of sanitary equipment; rather, free competition increases sanitation standards. Second, administrative acts controlling public health and cancelling public bath permits should be done in response to decreasing sanitation. Third, free competition makes public baths geographically well apportioned.

On the other hand, the argument that the restrictions are constitutional is based on the special public character of public bathhouses. First, the public bath is public insofar as it is a prerequisite of daily life for persons not having a bath in their own house. Second, the bath charge is regulated and kept low by the Price Control Order (Bukka Tōsei Rei). Third, there is no strategic flexibility in the public bath business since the demand is regionally restricted. Fourth, although the cost of constructing baths is high, public bathhouse buildings cannot be converted to serve other industries.

The Supreme Court reaffirmed the decision of 1955 and held that the zoning of public baths is constitutional.[26] This decision mentioned the "public bath as a prerequisite public accommodation in the daily lives of citizens." The Court judged the purposes of zoning to be "maintaining the health of the citizens, protecting public bath managers from giving up or changing businesses because of difficulties, and encouraging a good and stable business for the 'public welfare.' "

The Court also classified zoning on public bathhouses as "an affirmative restriction." Citing the Supreme Court decision of November 22, 1972, the Court mentioned that "if the legislature's act deviates in its discretion and is clearly unreasonable, the act should be unconstitutional." The Court then applied the clarity test as a liberal standard of constitutional review. Since planning to ensure the stability of already existing public baths is an affirmative purpose restriction, the prevailing position among legal scholars is that zoning on public bathhouses is constitutional.[27]

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25. *See, e.g.*, N. ASHIBE, KENPŌH 3, 66-67 (1981); Ashibe, *Shyokugyō no Jiyū no Kisei*, 296 HŌGAKU SEMINAR 30 (1979).

26. 1302 Hanrei Jihō 159 (Sup. Ct., 2d P.B., Jan. 20, 1989).

27. Harada, *Kōsyu Yokujōhō 2 jyo 2 kou, Osakahu Kōsyūyokujōhō Sekoujyōrei no Kakukitei to Kenpoh 2 jyō 1 kou*, 934 JURIST 98 (1989).

IV

PROPERTY RIGHTS

A. The Supreme Court Grand Bench Decision of April 22, 1987

The Supreme Court distinguished between affirmative and negative restrictions in reviewing the constitutionality of statutes restricting freedom to choose an occupation. The Court then applied the clarity test to affirmative restrictions and the "strict reasonableness" test, which reviews the reasonableness of legislative discretion, to negative restrictions. The question arises whether this dichotomy between the affirmative and negative restrictions also applies to property rights cases. Scholars generally assert that the dichotomy applies to property rights as well.[28]

The Supreme Court decision of April 22, 1987,[29] clarified the test for reviewing statutes restricting property rights. This decision, concerning the right to claim division of joint ownership as prescribed by Civil Code (Minpō) Article 256, clause 1, dealt with the constitutionality of the Forest Act (Shinrin Hō),[30] which denied this right to persons owning less than half of a forest. The decision declared the Forest Act, Article 186, to be unconstitutional as a violation of Article 29, clause 2.

The majority opinion, citing the Pharmaceutical Business Act case of 1975, first stated that the purpose of regulating property rights varies from "affirmative restriction[s] on socioeconomic policy such as vindication for public accommodation or protection for [an] economically weak person" to "negative restriction[s] on behalf of security of social life or maintenance of public order." The question of whether the restriction fits the public welfare limitation in Article 29, clause 2, of the 1947 Constitution should be decided by balancing the purpose, necessity, and content of the restriction. The Supreme Court, however, decided that

> [t]he legislature's balancing should be respected. But, where it is clear that the restrictive purpose is not consistent with public welfare, or where, even if the restrictive purpose comports with public welfare, the measures of restriction are unnecessary or unreasonable in accomplishing its purpose, the restrictive statute should be construed as against Article 29, clause 2, of the 1947 Constitution. Thus, the decision of the legislature should be denied only when it exceeds the reasonable use of discretion.[31]

Next, the majority opinion, applying the test to Article 186 of the Forest Act, reviewed the constitutionality of both the Act's purpose and manner. First, the Supreme Court explained that the legislative purposes of Article 186 are "protecting the stability of forest management and consequently promoting the culture and the production capacity of the forest." The court then decided that these legislative purposes were constitutional since it

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28. *See, e.g.*, Y. HIGUCHI, I. SATOH, M. NAKAMURA & N. URABE, CYŪSYAKU NIHONKOKU KENPŌH 679 (1984); I. SATOH, KENPŌ 482 (1983); 1 N. URABE, KENPOHGAKU KYŌSHITU 260-61 (1988).

29. Hiraguchi v. Hiraguchi, 41 Minshū 408 (Sup. Ct., G.B., Apr. 22, 1987).

30. In Japan, community residents in rural areas may own a forest through a form of ownership that Americans might describe as tenancy in common.

31. 41 Minshū 408.

cannot be clearly argued that public welfare is not involved. Next, the Court examined the manner of the restriction from several angles and decided that the legislative decision to deny the right to claim division of joint ownership is beyond the legislature's reasonable discretion in relation to the legislative purpose of Article 186. Since the Court did not find both reasonableness and necessity, it held Article 186 to be unconstitutional.

In addition to the majority opinion of the twelve justices, a minority opinion of three justices clearly adopts the dichotomy between affirmative and negative restrictions. The minority applied the clarity test to the affirmative restriction but reached different results. Justice Ohuchi decided that the restriction was unconstitutional, but Justice Kagawa held it to be constitutional.

Thus, the majority opinion did not necessarily decide that Article 186 was unconstitutional by defining which test would be applied to statutes restricting property rights. Consequently, legal scholars are divided over the interpretation of this case. In his commentaries, Professor Ashibe has identified three groups in this debate.[32]

The first group interprets this Supreme Court decision as applying the strict reasonableness test of the Pharmaceutical Business Act case in 1975. The 1987 decision interprets legislative purpose as maintaining the status quo even if the act has an economic purpose. Thus the Forest Act was not decided under the dichotomy of affirmative and negative restrictions.[33]

The second group says that the Supreme Court did not adopt the dichotomy of affirmative and negative restrictions on property rights.[34] In the case of environmental protection, for example, these commentators recognize the difficulty in deciding whether the restriction has an affirmative or a negative purpose. This group takes a position against applying the dichotomy to freedom to choose an occupation and posits that the constitutionality of statutes restricting freedom to choose an occupation and property rights are decided basically by the reasonableness test. In determining the "reasonableness" of a measure, a court should examine legislative facts.

The third group views the dichotomy as a more objective analysis and interprets the Forest Act decision as determining constitutionality by balancing.[35] According to this group, the dichotomy is not applied in the property right context.

In any event, understanding the relationships among the decisions of 1972, 1975, and 1987, which indicate the tests to determine the

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32. Ashibe, *Kenpōh Hanrei no Dōkō to "Nijyū no Kijun" no Riron*, in H. WADA, KOKI KINEN RONSYŪ KENPŌGAKU NO TENKAI 274-79 (1988).

33. *Id.* at 277-78; Imamura, *Zaisanken no Hosyō to Shinrinhō*, 186 JURIST 70 (1987).

34. Abe, *Kyoyūrin Bunkatuseigen Ikenhanketu*, 59 HŌRITUJIHŌ 183 (1987); Tonami, *Shokugyō no Jiyū*, in KENPŌH NO KIHON MONDAI 245 (N. Ashibe ed. 1988); Yonezawa, *Shinrinhō Ikenhanketu to Saikōsai*, 83 HŌGAKU KYOSHITU 27 (1987).

35. Satoh, *Shinrinho Kyoyūrin Bunkatuseigen Ikenhanketu to Ikenshinsakijun*, 392 HŌGAKU SEMINAR 17 (1987).

constitutionality of restrictions on the freedom to choose an occupation and on property rights, depends on the development of future cases.

B. Expropriation and Just Compensation

Article 29, clause 3, of the Constitution provides that private property may be taken "for public use" with "just compensation." This provision means that the government may expropriate and restrict private property where there is a public need, and that just compensation should be paid thereafter.

1. *What is "for Public Use"?* "For public use" includes not only public enterprises, such as roads, railroads, and airports, but also those cases in which the expropriation is primarily for the public, although specific individuals may benefit as a result. For example, during the post-World War II farm reform, which was designed to make farmers independent, the Japanese Government purchased farms of landowners and sold them to tenant farmers.[36]

2. *What is "Just Compensation"?* Legal commentaries on what "just compensation" means can be classified into three groups.[37] The first group requires the government to compensate the property owner for all property damage. For example, when the government expropriates land, it must compensate individuals for the market value of the land taken. The second group advocates "probable compensation." This group defines just compensation as probable or reasonable compensation calculated by considering the degree of public need for the restriction on the property right as well as the surrounding social or economic circumstances.[38] Consequently, there will be cases where the amount of compensation given is below the property's market value. The third group defines just compensation depending on the specific situation. In the case of an expropriation of the bourgeoisie's property, such as compensation for landowners in farm reform or compensation for stockholders in nationalizing important industries, probable compensation is required, but in the case of ordinary expropriation, full compensation is required.[39]

The Supreme Court Grand Bench decision of December 23, 1953, held that just compensation, as prescribed by Article 29, clause 3, of the 1947 Constitution, is "the probable amount reasonably calculated by the probable economic value at that time."[40] The Court then decided that the payment offered by the government was constitutional under the theory of probable

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36. 7 Minshū 1523 (Sup. Ct., G.B., Dec. 23, 1953).

37. *See* Y. HIGUCHI, I. SATOH, M. NAKAMURA & N. URABE, *supra* note 28, at 689-90.

38. I. SATOH, *supra* note 8, at 226.

39. *See* S. IMAMURA, SONSHITUHOSYŌSEIDO NO KENKYU 74 (1967).

40. 7 Minshū 1523. For an English translation of this decision, see J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS 1948-60, at 230 (1964).

compensation. The Supreme Court First Bench decision of October 18, 1973,[41] however, required whole compensation and held that

> since compensation for damage prescribed by the Land Expropriation Act (Tochi Syūyō Hō) seeks to compensate for specific sacrifices of property rights caused by expropriation for a specific public enterprise, whole compensation, that is, [compensation] equivalent to the value of expropriated property, must be given. When compensated with money, the amount of money sufficient to buy substitute land equal in value to the expropriated land must be required.

The Supreme Court decision seems to follow the position of the third group as discussed above: In the case of ordinary expropriation, whole compensation is required, and in the case of infringement of property rights in the course of social reform, such as farm reform, probable compensation is required.[42]

C. Just Compensation and the Right to Standard of Living Compensation

Whole compensation, required in the case of ordinary expropriation of property, includes incidental costs, such as the cost of moving or damage to business, in addition to compensation for the fair market value of the expropriated property. Is this really the meaning of "just compensation," as whole compensation for the infringement of property rights? For example, in the case of the expropriation of farmland to build an international airport, monetary compensation alone is not sufficient, so the question arises whether the compensation given must restore the person affected to the standard of living he or she enjoyed before the expropriation. Sample legislation providing measures to reconstruct the individual lifestyles of those who lost their standard of living by the expropriation are as follows: the Highway Constitution for Developing National Land Act of 1957, Article 9 (Kokudo Kansen Jidoshadō Kensetu Hō), the Specific Measure Acquiring Public Land Act of 1961, Article 47 (Kōkyō Yōchi no Syutokuni Kansuru Tokubetu Sochi Hō), the Urban Planning Act of 1968, Article 74 (Toshi Keikaku Hō), the Biwa Lake General Development Specific Measure Act of 1972, Article 7 (Biwako Sōgōkaihatu Tokubetu Sochi Hō), and the Riverhead Area Specific Measure Act of 173, Article 8 (Suigen Chiiki Taisaku Tokubetu Sochi Hō).

The question is whether these measures for reconstructing standards of living are required by the Constitution or are simply a matter of legislative policy. For example, Article 8 of the Riverhead Area Specific Measure Act provides for reconstructing the lifestyles of those whose standards of living diminish because of the construction of a dam. A lower court decision holds that such measures are not included in the definition of "just compensation" in Article 29, clause 3, of the Constitution and thus are not required by the Constitution.[43] Scholars argue persuasively, however, that compensation for a drop in one's standard of living is a requirement of the 1947 Constitution, as part of the guarantee of the right to a decent life prescribed in Article 25.

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41. 27 Minshū 1210 (Sup. Ct., 1st P.B., Oct. 18, 1973).
42. S. IMAMURA, JINKEN SŌSETU 218 (1980).
43. 966 Hanrei Jihō 22 (1980).

V

CONCLUSION

Until now, the Supreme Court of Japan has decided five cases holding certain laws unconstitutional: the decision of April 30, 1975, which declared the zoning provision in the Pharmaceutical Business Act as against the freedom to choose an occupation; the decision of April 22, 1987, which declared the provision prohibiting a claim to divide a jointly-owned forest as against the guarantee of property rights; the decision of April 4, 1973, which declared that Article 200 of the Criminal Code (Keihō) violated the guarantee of equal protection of law by unconstitutionally imposing heavier penalties for committing patricide as opposed to regular homicide; and the decisions of April 14, 1976, and July 17, 1985, which declared unconstitutional the apportionment provision for representatives in the Election Act (Senkyo Hō).

The fact that two of these five decisions relate to the freedom of economic activity means that the Supreme Court of Japan, while generally exercising judicial restraint, takes a more active role when deciding issues involving the freedom of economic activity. The freedom to choose an occupation of Article 22 and the property rights of Article 29 in the 1947 Constitution are specifically restricted by public welfare. Under a literal interpretation of the Constitution, economic freedom is viewed in an inferior position. Economic freedom, however, seems to be rather heavily guaranteed. In the background of issuing two decisions finding unconstitutional laws relating to the freedom of economic activity (as distinct from other constitutional issues), there is national recognition that the Pharmaceutical Business Act and the Forest Act were unconstitutional because they had no reasonable basis. The Japanese Supreme Court is very cautious in deciding constitutional issues without national consensus.