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CONSTITUTIONAL REVIEW OF THE PROTECTION AND REGULATION OF BUSINESS FREEDOM IN JAPAN

by

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I. Introduction

Cases concerning freedom of business are difficult to deal with from a judicial point of view, as they are often outside the framework of the judiciary. At least, that has been the view of the Japanese Supreme Court.

The Japanese Supreme Court, in its constitutional review based on Article 81 of the Constitution[1], has held to a "self-restrained position" in dealing with such cases, and has respected the policies of the National Diet and the Cabinet. It has often deemed constitutional the measures taken by the legislators and the administration that restricted this freedom.

Chapter 3 of the Constitution, entitled "Rights and Duties of the People", in Article 22, Clause 1, affirms the freedom to choose one's occupation. This is interpreted as also protecting the freedom of business. According to the text,

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1 The Japanese Constitution enacted in 1946 laid down for the first time in Japan the Democracy, the Sovereignty and the Fundamental Rights of the People. The Constitution has literally remained unchanged since then, a fact that makes revision of the Constitution a politically sensitive matter. The Japanese system of constitutional review is considered to be the same as that in the United States. However, the Japanese system is based on an article within the Constitution, whereas the United States system was created by a famous Federal Supreme Court case: Marbury v. Madison (5 U. S.〔1 Cranch〕137, 2 L. Ed. 60〔1803〕). A doctrine stressing this difference maintains that adoption of another system is possible in Japan, without necessarily changing the Constitution. That system would be the creation of a special Court for constitutional review such as the one in Germany. In fact, a case that the Japanese Supreme Court rendered on October 8th 1952 (Civil Case Book, No. 6-9, p. 782), can be read as opening this possibility. Article 81 of the Japanese Constitution states as follows: The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

however, this freedom is assured only "to the extent that it does not interfere with the public welfare", and the notion of "public welfare" hereby permits certain regulations.

II. Social Policy Regulation (Positive Regulation) and Police Safety Regulation (Negative Regulation)

In the early days following enactment of the Constitution in 1946, the notion of "public welfare" was interpreted by the Japanese Supreme Court as a notion admitting broad and inclusive regulation of the freedom of business[2]. For example, in a judgment rendered on June 21, 1950, the public employment law was considered constitutional. This prohibited private employment agencies, on the grounds that such an enterprise was against the "public welfare"[3]. The notion of "public welfare" was frequently employed even to justify legislative or administrative restrictions on the freedom of expression, yet the Court had never defined the term. The use of this notion, in fact, helped the "self-restrained position" of the Supreme Court in judging as constitutional the measures taken by legislators and the administration[4].

It was on April 30, 1975 that the Supreme Court ruled for the first time that a pharmaceutical law regulating the freedom of business was against the Constitution. According to the law, establishing a pharmacy was subject to a restriction requiring it

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[2] The term "public welfare" appears in four articles of the Constitution: Articles 12 and 13, Paragraph 1 of Article 22 and Paragraph 2 of Article 29. The last two are the only articles concerning economic freedom.

Article 12: The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of rights and shall always refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Article 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Article 22: 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.

2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Article 29: The right to own or to hold property is inviolable.

2) Property rights shall be defined by law, in conformity with the public welfare.

3) Private property may be taken for public use upon just compensation therefor.

In fact, the term had been abused by the government and even by the legislators, before and during the war, under the precedent Constitution enacted in 1889, to justify broad and inclusive regulations of rights.

[3] Criminal Case Book, No. 4-6, p. 1049.

[4] The Japanese Supreme Court is often evaluated as taking a "self-restrained position" in its judgments, leaving a rather broad range of discretion to the legislators and to the administration.

to be located a certain minimum distance from other existing pharmacies[5]. This judgment is one of the five rare cases in which the Supreme Court judged certain provisions of laws to be unconstitutional in themselves[6].

1. Criteria based on objectives of the regulations — Positive and negative regulations —

In the above judgment, the Supreme Court adopted two standards for judging the constitutionality of the pharmaceutical law. The first is the "double standard", which originated in the United States Supreme Court[7], which distinguishes mental freedom from economic freedom, according predominance to the former, and therefore applying relatively narrow criteria in judging the constitutionality and the rationality of its restriction, while the constitutionality and rationality of the restriction on economic freedom is judged under less restrictive criteria.

The second standard adopted by the judgment classifies restrictions on economic freedom according to their objectives. A restriction imposed to achieve a certain social policy is called a "positive regulation" whereas a restriction imposed on economic freedom for the purpose of safeguarding the public safety and health is called a "negative regulation". To judge the constitutionality of a positive regulation, the Court applies the "standard of rationality", known as a relatively lenient principle, where the Court judges that the law violates the Constitution only when the unlawfulness is clear. In contrast, a negative regulation requires a relatively narrow standard, and the Court utilizes the "standard of restrictive rationality".

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5 Civil Case Book, No. 29-4, p. 572.

6 The following are the four other cases.

1) The case rendered on April 4th 1973 (Criminal Case Book, No. 27-3, p. 265.), concerning the ex Article 200 of the criminal code stipulating the most serious crime for a homicide of ascendants. It was considered to violate the principle of equality under the law (Article 14 of the Constitution), in that it discriminated from the crime of ordinary homicide;
2) Two cases rendered on April 22nd 1976 (Civil Case Book, No. 30-3, p. 223.) and July 17th 1985 (Civil Case Book, No. 39-5, p. 1100.) concerning the inequality of distribution of seats in the House of Representatives;
3) The case rendered on April 22nd 1987 (Civil Case Book, No. 41-3, p. 408.) concerning the forest law which restricted the property rights of the co-owners.

7 The Japanese courts have taken various criteria and standards from the judgments of the United States Supreme Court. The "double standard" is an example.

The restriction imposed by the pharmaceutical law has been classified as a negative regulation, because the purpose of the legislation is to prevent danger to public life and health. The Law was enacted to prevent over-establishment and over-competition among pharmacies because it might lead to degradation of the quality of medicine, and the Court held that the objective of the Law can well be realized by a less restrictive measure and that it therefore restricts the Constitution[8].

Meanwhile, the Supreme Court rendered a judgment on November 22, 1972, in a case regarding the retail market. The Supreme Court held that the license system for establishing a retail market is not unconstitutional because it is based on the objective of protecting small and medium sized enterprises and therefore can be classified as a positive restriction[9].

2. Ambiguity of the criteria

One of the biggest problems in classifying restrictions on economic freedom according to their objectives is that, as the government's policy became more complex, it has grown increasingly difficult to distinguish whether a certain regulation should be classified as a positive regulation or a negative one. As the Supreme Court itself points out, the objectives of a certain regulation are "various" and "of many kinds", so it is hard to discriminate one from another. For example, among cases regarding the regulation of locations where public baths may be established, the judgment rendered on January 26, 1955, emphasizing its objective for the public health, held that over-competition can be injurious in terms of sanitation[10]. Unlike the situation in 1955, the majority of Japanese people had their own baths at home in 1989, so they no longer needed to go to a public bath. In 1989, the Supreme Court emphasized the positive aspect of public baths, and deemed it more important to stabilize the management of existing public baths, in order to provide them to the minority of

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8 The purpose of the regulation, which is the prevention of degradation of the quality of medicine, is considered as negative. The court therefore rules here on the basis of the "standard of restrictive rationality".

9 Criminal Case Book, No. 26-9, p. 586.

10 Criminal Case Book, No. 9-1, p. 89.

people that cannot afford a bath at home (judgment on January 20, 1989[11], and on March 7, 1989[12]).

In the case of public baths, the emphasis of the objective has shifted from the negative to the positive, but, in fact, most of the policies have both aspects simultaneously. Even in the 1975 pharmaceutical law judgment mentioned above, the Supreme Court pointed out that the regulation on location can indirectly promote the establishment of pharmacies in areas where there are few or no pharmacies.

By using a lenient standard in examining the constitutionality of the positive regulations, the Supreme Court leaves the decision to the discretion of the legislative and administrative organs. The Supreme Court asserts that situations requiring positive regulations are too complex and that they are a highly specialized matter, so it is difficult for the Court to demonstrate that it is not needed. Therefore, the Court can judge that the law is unconstitutional only when the unlawfulness and the deviation of discretion by the legislature are clear. That, in fact, rarely occurs, and in most cases the discretion of the legislators is respected.

On the other hand, in cases involving negative regulations, the Supreme Court affirms that the necessity of the regulation and its rationality can be judged by "sound common sense". Here, the regulation can be considered constitutional only when the legislature can demonstrate its necessity and its rationality.

III. The Effect of Globalization on the Protection and Regulation of Business Freedom

1. The decision of the Constitutional Court of the Federal Republic of Germany concerning pharmaceutical law

A decision in Germany rendered on July 11, 1958[13] is a good example for comparison. In this case, the Federal Constitutional Court held that the pharmaceutical law of the state of Bayern was unconstitutional. The law restricted

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[11] Criminal Case Book, No. 43-1, p. 1.
[12] Hanrei-Jiho (Jurisprudence Review), No. 1308, p. 111.
[13] BverfGE 7, 377, Urteil v. 11.7.1958.

the locations where pharmacies could be established. The Court did not characterize the regulations as positive or negative, but it held that "subjective conditions" and "objective conditions" should be met in judging the constitutionality of a license system that restricts the freedom to choose one's occupation (including the freedom of business). A subjective condition calls upon the people wishing to assume a certain office or to conduct a certain business to judge for themselves whether or not they fulfill the conditions required. The fulfillment of these subjective conditions is examined in the principle of proportionality.

Objective conditions meanwhile must be fulfilled when restrictions are based on "objective necessity". The confirmation of this necessity is examined with narrow criteria, and the Court holds it to be constitutional only when the regulation is necessary to prevent imminent danger to especially important interests of the community.

In this case, the Court has fully verified the necessity of the regulation, and held that there is no danger to the health of the residents if the number of pharmacies increases, and therefore the regulation is unconstitutional.

2. The judgment of the European Court of Justice and discretionary power of the European Commission — Case C-180/96 concerning the validity of the emergency regulatory measures against BSE —

In 1996, the European Court rendered a judgment concerning bovine spongiform encephalopathy (BSE), or 'mad cow disease'[14]. It declared that the emergency measures taken by the European Commission[15] banning exports from the United Kingdom to other Member States and to third countries of bovine animals and bovine meat or products obtained from it, was not a misuse of its powers. The Court observed that the purpose of the directives[16] from which those powers are derived is to enable the Commission to intervene rapidly in order to prevent the spread of a disease affecting animals or a threat to human health.

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14 Case C-180/96 UK v. Commission [1998] ECR I-2265; Case C-157/96 R v. MAFF, ex p. National Farmer's Union [1998] ECR I-2211.

15 Decision 96/239.

16 Council Directives 89/662 & 90/425.

As regards a possible breach of the principle of proportionality, the Court noted that when the contested decision was adopted there was great uncertainty regarding the risks posed by live animals, bovine meat and derived products. Where there is uncertainty regarding the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent. Consequently, in view of the seriousness of the risk and the urgency of the situation, a temporary export ban cannot be regarded as a manifestly inappropriate measure, and the Commission displayed due caution by imposing a general ban on exports of bovine animals, bovine meat and derived products pending more detailed scientific information.

3. Necessity of applying international norms assuring business freedom

On February 6, 1990, the Japanese Supreme Court held as constitutional modification of the Law Concerning the Market Price Stabilization of Raw Silk, and it imposed regulations on the import of raw silk[17]. The applicants in this case were the manufacturers of neckties made of Nishijin textiles, and they asked for compensation from the State, saying that the protective measures obliged them to buy domestic raw silk, which was twice the price of foreign products, and that the measures were counter to the General Agreement on Tariffs and Trade (GATT) as well as against Article 22 of the Constitution assuring the freedom of business. The Kyoto district court in this case, denied the self-executing character of the Agreement, saying that infringement on the Agreement may bring certain disadvantages based on the Agreement itself, but that it has no other legal force[18]. The Supreme Court held that the regulation is "positive" and that its purpose is to "protect the silkworm raising industry". Adopting the "standard of rationality", it concluded that the unlawfulness of the measure concerned is unclear in this case. The Supreme Court did not decide whether the measure was against the Agreement.

The Uruguay Round held under the GATT led to the creation of the World Trade Organization (WTO) in 1994. After this change, application of the International Agreement gained even greater importance, as it is no longer based on a

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[17] Shomu-Geppo (Justice Monthly Review), No. 36-12, p. 2242.
[18] The judgment on June 29th 1984, Shomu-Geppo, No. 31-2, p. 207.

"provisionary" protocol, but on the agreement itself, and it could deprive the legislative or executive organs of the contracting parties from entering into negotiated arrangements, even on a temporary basis.

About this same time, in 1994, the United States enacted the Uruguay Round Agreements Act providing that U. S. federal law prevails over the Uruguay Round Agreement in the event of a conflict (Section 102 (a)), and that the Uruguay Round Agreements prevail over state law, but only in actions brought by the U. S. government (Section 102 (b) (2)). In addition, under the Act, no person (except the United States) has a cause of action or defense under any Uruguay Round Agreement by virtue of congressional approval thereof, nor may any person challenge a federal, state or local law or action or inaction on the grounds that it is inconsistent with the Uruguay Round Agreement, nor may a private party rely on the results of an action brought by the federal government (Section 102 (c))[19].

Also in Europe, Decision 94/800 declares that "by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts"[20]. This position was confirmed by the recent Case C-149/96 in the European Court[21] , in which it was held that "having regard to their nature and structure, the WTO agreements are not in principle among the rules, in the light of which the Court is to review the legality of measures adopted by Community institutions".

In Japan, the National Diet made no such statement of reservation at the moment of ratification. Therefore, the role of the Supreme Court has become even more important in judging the cases individually in order to safeguard social values based on the Constitution.

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19 *See* Jackson, J. J., "Status of Treaties in Domestic Legal Systems: A Policy Analysis", 86 AJIL 310, 1992; Hill, M., "The Role of National Courts in International Trade Relations", 18 Michigan Journal of International Law 321, 1997.

20 Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

21 Case C-149/96, Portuguese Republic v. Council of the European Union.

IV. Conclusion

As the economic system becomes increasingly complex, the demand for a liberal economy and free trade on one side and the demand for a more substantial policy for social welfare on the other grow more intertwined.

The Japanese Supreme Court, in exercising its role of constitutional review, has so far given a broad range of discretion to other organs, under the pretext that the Court lacks the ability to rule on highly technical and specialized economic matters.

Yet, as the economic system becomes more complex, and as international norms directly affect national law, values written in the Constitution, such as that of social welfare, can only be safeguarded by constitutional review. It is high time, therefore, that the Supreme Court abandon its criteria of positive and negative distinctions in regulations, engage the world of economic norms and fulfill its role as guardian of the rule of law.