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## The Landscape of Japanese Tobacco Policy: Law, Smoking and Social Change

### I. INTRODUCTION

Japanese landscape painters use three perspectives—*hei-en* evokes the feeling of standing on the top of a mountain and gazing at other peaks; *shin-en* emphasizes the side of a scene that is hidden from view; and *ko-en* refers to the view from a valley up toward the heights. With these three points-of-view, painters working in the *sansui* (literally, hills and water) tradition are able to portray Japan's rich physical environment.

The same perspectives help shed light on the current landscape of tobacco policy and smoking in Japan. Each of this paper's sections is based on one of the *sansui* approaches. First, observing other mountains from the top of one, the *hei-en* perspective, suggests the importance of understanding Japanese tobacco policy in its historical and comparative contexts. It illustrates Japan's long history of tobacco cultivation and regulation, as well as continuities in the regime of tobacco control. Taken together, *hei-en's* historical and comparative aspects emphasize the similarity of Japanese legal, political, and social practices with those of other nations.

The *shin-en* perspective on that part of the mountain hidden from view illuminates the political economy of tobacco in Japan. Like the roots and branches that keep a hill from eroding, tobacco farmers, government bureaucrats, politicians, and big business constitute the not easily visible, interconnected elements of tobacco's political economy. More specifically, the key institutions include the Ministry of Finance (MoF), the majority owner of Japan Tobacco Inc. (JT); the Liberal Democratic Party (LDP), which dominates domestic politics; the tobacco grower's union; and tobacco retailers. Unified, they con-

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trol the growth, manufacture, and sale of tobacco and work to maintain a smoke-friendly environment. Foreign interests also play a role. Since 1985, when the U.S. pressured Japan to open its market to foreign tobacco products, non-Japanese cigarettes have become increasingly popular, and now account for 25% of the domestic market.<sup>1</sup>

Looking up from the valley to the high peaks of the surrounding hills, *ko-en*, brings to light the perspective of anti-tobacco activists. They gaze from below at an array of powerful institutions that have vested interests in maintaining the tobacco status quo. Anti-tobacco forces seek both individual compensation and social change. They assert a legal framework—the *rights* of smokers to compensation, the *rights* of non-smokers to a smoke-free environment—and seek remedies from the courts. So far their claims have failed. Instead of a litigated or legislated response to the demands of the anti-tobacco community, an extra-legal framework of ‘manners’ or ‘etiquette’ has developed. Smokers are asked to be considerate of non-smokers, and to not smoke when it will bother others.

No one outlook, nor any combination, is able to fully depict so complex an issue as tobacco control. Utilizing the *sansui* perspectives as an analytical tool, however, one common sociolegal feature emerges: forms of formal legal ordering have occupied only a minor place on the landscape of Japanese tobacco policy. Few tobacco control laws have been enacted, and those that exist are rarely enforced. Regulations are largely self-imposed and informal. Litigation has not resulted in any legally required compensation or policy change. Legislation has focused almost exclusively on the business operations of Japan’s largely state-owned tobacco industry, not on public health concerns. In short, formal law has not been used to reduce tobacco-related morbidity and mortality in Japan.

The irrelevance of law to Japanese tobacco control policy is in sharp contrast to international anti-smoking efforts, where legal intervention through legislation and litigation is assumed to be the most effective way to shape smoking behavior. One need only look at the U.S. debate over the Food and Drug Administration’s regulatory reach, the efforts of both the World Health Organization and the European Union to develop multilateral, legal restrictions on tobacco advertising and sponsorship, and the use of litigation internationally to attack the tobacco industry, to appreciate the degree to which legal change is assumed to cause change in smoking behavior. Yet this em-

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1. The role of big tobacco in Japan is not unusual. Tobacco-related interests everywhere have a powerful influence on national tobacco policy. Thus, while the *shin-en* perspective highlights the political economy of tobacco in Japan, it does not suggest that the Japanese system is unique. Power, money, political influence, votes, all common ingredients of policy and politics in industrialized democracies (and other systems), dominate the contemporary landscape of Japanese tobacco.

phasis on the primacy of legal change may be misplaced. As Zimring has noted:

Students of the social impact of legislation tend to focus on changes in law as a cause of changes in behavior. Yet it may also be important to study the extent to which changes in social behavior create a climate in which legal changes can take place.<sup>2</sup>

The Japanese case is interesting not only because it relegates law to a bit player but because certain tobacco-related changes have occurred in Japan despite law's absence. Smoking rates have fallen dramatically over the past 30 years; advertising is restricted; areas where smoking is prohibited or limited are rapidly increasing. Japan is far from vilifying tobacco or treating smokers as pariahs, as one finds, for example, in California. But Japanese public health officials, scientists, and educators, among others, in an effort to limit the harm of tobacco while accepting that some people want to smoke, have gradually developed informal, extra-legal ways to reduce tobacco's impact. Without question those efforts are incomplete; Japan has the highest percentage of male smokers in the industrialized world, and lung cancer rates are rising. Yet Japan's tobacco control landscape, because it exemplifies a style of tobacco regulation at odds with the law-bound approach favored internationally, merits a closer look.

## II. *HEI-EN*: THE HISTORICAL AND COMPARATIVE VIEW

The Portuguese brought tobacco to Japan in the late sixteenth century.<sup>3</sup> Legal restrictions on smoking quickly followed. Some regulations were aimed at fire prevention and minimizing the impact of tobacco cultivation on rice farming.<sup>4</sup> Others sought to eliminate all tobacco cultivation. In 1616 the Shogunate issued an edict that called for imprisoning tobacco cultivators and sellers, as well as levying fines on their village and on the local governor. Three years later, all tobacco pipes were confiscated.<sup>5</sup> Despite such attempts to control tobacco, its cultivation and use flourished.

In the late 19<sup>th</sup> century, after 200 years of rule by the Tokugawa shogunate, Japan embarked on a rapid course of modernization, the Meiji Restoration of 1868. It had important consequences for tobacco farmers, retailers, and users. During the several decades following the Restoration, the basic outlines of Japan's tobacco policy emerged.

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2. Zimring, "Comparing Cigarette Policy and Illicit Drug and Alcohol Control," 95-109, in Robert L. Rabin & Stephen D. Sugarman, (eds.), *Smoking Policy: Law, Politics, and Culture* 99 (1993).

3. A concise history of tobacco in Japan is "Longevity Herb' or 'Fools' Plant': A Brief History of Japanese Tobacco," *The East* XI(2) February 1975, 22-29.

4. Japan Tobacco Foundation, *Tobacco & Salt Museum* 24-25 (1988).

5. *Id.* at 23.

To profit from tobacco's popularity as a consumer good, the government levied a uniform tobacco tax. Entrepreneurs began producing cigarettes. Finance officials placed the government in control of tobacco leaf cultivation through the Leaf Tobacco Monopoly Law of 1898. The 1904 Tobacco Monopoly Law made the manufacture of tobacco products a government-run activity.<sup>6</sup> From the first years of the twentieth century, therefore, the Japanese State had taken control of the cultivation, manufacture, and sale of tobacco products.

There are two reasons why the government sought control of tobacco. One was narrowly financial. Finance officials could better ensure the collection of tobacco-related taxes if they were able to monitor how much tobacco was harvested, how many cigarettes were produced, and the value of all tobacco products that were sold. There was ample precedent for the State's fiscal attraction to tobacco. Almost 200 years earlier, in 1725, the Shogun lifted restrictions on tobacco cultivation as a way of solving a financial crisis.<sup>7</sup> Similarly, at the start of the 20<sup>th</sup> century, tax revenues were important in a general sense, but they also had a more targeted focus. Japan was engaged in an expensive (and ultimately victorious) war with Russia.<sup>8</sup>

In addition, the American Tobacco Company (ATC) was making significant inroads into Japan. Tobacco cultivation and cigarette production were flourishing in the U.S., and American companies were seeking overseas markets.<sup>9</sup> By entering a joint venture with Murai Brothers, the most successful tobacco company in Japan, ATC was poised to become a major player in Japan's growing tobacco industry. The Japanese government apparently believed that the best way to maintain a domestic tobacco industry was to create a government monopoly and shut the door on foreign competition.<sup>10</sup>

The state monopoly controlled all aspects of tobacco. Japanese tobacco farmers were told exactly how much land they could cultivate and how many plants they could grow. Cigarette factories throughout the country were owned and operated by the government. Retailers, licensed by MoF, sold their products at a fixed price. From the formation of the tobacco monopoly in 1904, until privatization in 1985, MoF maintained a total and uninterrupted grip on tobacco in Japan. Pat-

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6. For a detailed official history of the tobacco monopoly, see *Tabako Senbaishi*, [A History of the Tobacco Monopoly], Nihon Tabako Sangyô K.K. Shashi Hensan-shitsu, 6th ed., 1991, volumes 1-6.

7. *Supra* n. 3 at 24.

8. Kaori Honjo & Ichiro Kawachi, "Effects of Market Liberalization on Smoking in Japan," 9 *Tobacco Control*, 193-200, 193 (2000).

9. Richard Kluger, *Ashes to Ashes: America's Hundred-Year War, the Public Health, and the Unabashed Triumph of Philip Morris* (1997).

10. See, for example, Executory Order and Reasons for a Tobacco Manufacturing Monopoly (*Tabako seizô sembai seido riyû oyobi shikô junjo*), quoted in *Tabako Sembai-shi* *supra* n. 6, at 7, translated and discussed in Mark Levin's detailed article about Japanese tobacco regulation, "Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan," 8 *Stan. J. L. and Pol.* 99-123 (1997).

terms of patronage, inter-ministry relations, and regulatory structures established during those eighty years endure in the 21<sup>st</sup> century (see Section III).

Both geographical and institutional continuities characterize the history of tobacco in Japan. Geographically, tobacco continues to be cultivated in almost every Japanese prefecture outside of Hokkaido. Although the most hospitable climates are the warm areas on the southern island of Kyushu, tobacco also grows throughout the northern regions of Tohoku. Retailers are spread throughout the country as well, making tobacco a national rather than simply a regional industry.

More significant are the institutional continuities. Tobacco continues to be controlled by the Ministry of Finance, which owns two-thirds of the stock of Japan Tobacco Inc. (JT), a 'private' company (see Section III) that dominates the Japanese tobacco market. As in the past, tobacco farmers are still told how much land they can cultivate and how many tobacco plants they can grow; and MoF is obligated to purchase everything they harvest. Foreign corporations are prohibited from manufacturing cigarettes in Japan, and retailers must receive a license from the government before they can sell tobacco products either over-the-counter or through vending machines. Tax revenues from tobacco are still an important source of cash for both the central and local governments.

These continuities are important to understanding contemporary tobacco policy in Japan, but they are not unique. Even a cursory analysis reveals a number of commonalities between the tobacco situation in Japan and elsewhere. Government control of tobacco through the creation of a monopoly, for example, has existed in Austria, Spain, Portugal, France, Italy, and Germany. The Chinese government controls the biggest tobacco market in the world, and other Asian governments also own (or have owned) their domestic tobacco industries.<sup>11</sup> Monopolization of tobacco is the rule rather than the exception; why such monopolies do not exist everywhere may be the more complex question.<sup>12</sup>

In addition, although tobacco-related revenues in Japan are important, they are not extraordinary when compared to other nations. With over \$35 billion worth of cigarettes sold in Japan in 1999, and 60% of the price of cigarettes going to tax, the central and local gov-

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11. See, for example, Prabhat Jha & Frank J. Chaloupka, (eds.), *Tobacco Control Policies in Developing Countries* (2001).

12. Other nations that now have (or once had) tobacco monopolies include Ethiopia, Iceland, Jordan, Syria, and Zambia, among others. See Comments of Japan Tobacco Inc., in "Investigation of Japan's Practice with Respect to the Manufacture, Importation and Sale of Tobacco Products," Chairman, Section 301 Committee, Office of the United States Trade Representative, Docket No. 301-50, p.30-35, on file with author.

ernment earned over \$20 billion from tobacco sales in 2000.<sup>13</sup> That represents approximately 2% of total government tax-related revenue, a steady decline from a peak of 18%.<sup>14</sup> In many other nations, tobacco tax revenues are more impressive. A scholar of German law and politics has recently written "tobacco tax constitutes one of the most important sources of income for the federal budget," and the French government obtains 3% of its total tax revenues from tobacco.<sup>15</sup> Although taxes from tobacco products are now an extremely small percentage of total tax revenues in the U.S., in 1960 they represented 2.53% of total federal and state revenue.<sup>16</sup> China dwarfs all of these, with a hefty 10% of its total tax revenue coming from tobacco.<sup>17</sup> Nonetheless, there has been a great deal of hyperbole about the unusual financial importance of tobacco in Japan. A recent article in *The New York Times*, for example, declared that in Japan "cigarettes are the largest source of government revenue," apparently the author overlooked the importance of income tax and sales tax.<sup>18</sup> Still, tobacco-related revenues are a welcome source of cash for many governments, and Japan is not an exception.<sup>19</sup>

In fact, comparing tobacco-related institutions and practices in Japan to those elsewhere indicates that while Japan is distinctive in a number of ways it is not a significant outlier. A higher proportion of adult men in Japan smoke—53.5% in 2000—than in any other industrialized nation.<sup>20</sup> In the U.S. just 25.7% of men smoke; in Germany, 40%, and in Denmark, 42%. But smoking among adult women is less

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13. According to Japan Tobacco Inc., *1999 Annual Report*, for the year ending March 31, 1999, 336.6 billion cigarettes were consumed in Japan in 1999, which equals 16.83 billion packs. At an average price of 250 yen/pack, 4.2 trillion yen were spent on cigarettes. At a rate of 120 yen/USD, this equals approximately \$35 billion dollars.

14. Albrecht Rothacher, *Japan's Agro-Food Sector: The Politics and Economics of Excess Protection* 87 (1989). This downward trend is not unusual. See Virginia Beridge ("Militants, Manufacturers and Governments; Post War Smoking Policy in the UK," 2001, draft paper on file with author), who indicates that tobacco represented 16% of the UK government's tax revenue in 1950, but only 3.6% in 1996.

15. Gunter Frankenberg, "Between Paternalism and Voluntarism: Tobacco Consumption and Tobacco Control in Germany," 31, (2001), draft paper on file with author; Tobacco Manufacturers' Association, *European Tobacco Industry-Facts & Figures 1999*, [www.the-tma.org.uk/statistics/eu\\_facts\\_figures\\_99.htm](http://www.the-tma.org.uk/statistics/eu_facts_figures_99.htm) (last visited February 1, 2002) (according to this document, tobacco taxes constituted 2.6% of total tax revenue in Germany).

16. Comments of Japan Tobacco Inc., in *supra* n. 12, at p.27, Table B-7, on file with author.

17. Global Agriculture Information Network, United States Department of Agriculture, "Peoples Republic of China, Tobacco and Products, Tobacco Update 2000," GAIN Report #CH0044, 1.

18. Stephanie Strom, "Can Koizumi Untangle Japan and Tobacco?" *The New York Times*, June 13, 2001.

19. *Id.*

20. JT News Release, October 26, 2000.

common in Japan than elsewhere, 13.7% in 2000<sup>21</sup>, compared to 21.5% in the US,<sup>22</sup> 25% in France,<sup>23</sup> and 37% in Denmark.<sup>24</sup> The proportion of adult smokers in Japan, approximately one-third, is therefore similar to that of many other nations.<sup>25</sup> Likewise, some scholars have pointed to the large number of vending machines in Japan as evidence that it is an unusually tobacco-welcoming society.<sup>26</sup> Per capita, there are six times more cigarette vending machines in Japan than in the U.S., but only half as many as in Germany, more evidence that Japan is a “normal” tobacco nation.<sup>27</sup>

In sum, the lesson of the *hei-en* perspective, looking back historically and around comparatively, is the striking degree of continuity between the past and present of tobacco in Japan, and the similarity of the tobacco system in Japan and in other nations.<sup>28</sup> Tobacco control policy in Japan does not simply mean reducing smoking prevalence. Rather, the State has a variety of interests in tobacco—as a matter of trade, domestic employment, agricultural policy, and tax revenue, to name but a few. Controlling tobacco, not controlling smoking, is the goal; how the State and other parties work together to maintain this control requires examination of the political economy of tobacco in Japan, the closely interlocked set of parties who benefit from the way tobacco growth, manufacture, and sale are currently configured.

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21. Japanese statistics are for women 20 years and over; there is no reliable data on younger women, although anecdotally there appears to be an increasing number of young women who smoke. It seems that the rate of smoking among women was once much higher in Japan, as reflected in the Edo Period proverb, “Women who do not smoke and monks who abstain from fish and flesh are very rare.” *Supra* n. 3, at 26.

22. “Cigarette Smoking Among Adults—United States, 1999,” *Morbidity and Mortality Weekly Report* 50(40) October 12, 2001, 869-73.

23. Centre de Documentation et d’Information sur le Tabac, [www.cdit.fr](http://www.cdit.fr).

24. The Danish statistics include people 15 years and over.

25. From a public health perspective, too many cigarettes are consumed in Japan—per capita cigarette consumption in Japan is the highest in the industrialized world. In 1999, 336.6 billion cigarettes were smoked in Japan (Japan Tobacco Inc., *1999 Annual Report*, for the year ending March 31, 1999).

26. Levin, “Japan: Streets Unsafe as Machines Prey on Children,” 9 *Tobacco Control* 132-33 (2000).

27. In 1999, there were 220,000 vending machines in the US for a population of over 270 million, or approximately 1 machine per 1200 people. See “Vending Times Census of the Industry 2000,” at [www.vendingtimes.com/census.htm](http://www.vendingtimes.com/census.htm) (last visited February 1, 2002). There are 625,000 vending machines in Japan, and a population of approximately 126 million, or 1 machine for every 200 people. In Germany, with a population of 82 million, there are 800,000 vending machines, approximately 1 per 100 people.

28. This does not of course mean tobacco-related policy and practice in Japan and elsewhere are identical. But the differences are in degree, not in kind. Japan lies squarely on the spectrum of industrialized democracies vis a vis smoking and tobacco. For an excellent analysis of the key dimensions of tobacco policy in the U.S., see Robert L. Rabin & Stephen D. Sugarman, (eds.), *Regulating Tobacco* (2001). In that volume, Kagan & Nelson, in “The Politics of Tobacco Regulation in the United States,” argue that U.S. tobacco policy is distinctive when compared to that of other industrialized nations.

### III. SHIN-EN: THE POLITICAL ECONOMY OF TOBACCO

In contrast to the historical and comparative perspectives of *hei-en*, *shin-en* focuses on the actors and institutions that are responsible for and benefit from the business of tobacco in Japan. The elements that make up the political economy of tobacco, “the side of the mountain hidden from view,” are indispensable to tobacco’s smooth operation but are often invisible or opaque. Tobacco is a subset of agricultural politics, which has, “[a]mongst a number of uncompetitive and low-productivity sectors in the Japanese economy. . . stood out at once as the most highly protected and the most politically powerful.”<sup>29</sup> What is the source of tobacco’s power in Japan? What explains the ties that bind tobacco farmers, politicians, bureaucrats, and executives? There are four key elements.

First are the tobacco-related businesses—growers, manufacturers, and sellers. Each of these groups has its own lobby to influence tobacco policy. Growers are the most important and successful. Over the past decades, their number has steadily declined. In 1965, over 300,000 households were engaged in growing tobacco.<sup>30</sup> By 1985, that number had decreased to 78,653, and in 2000 there were only 22,864.<sup>31</sup> This decline in the number of farmers, however, has had little impact on their political power. They speak through the National Political League of Tobacco Cultivators (*zenkoku tabako kousakusha seiji renmei*), dedicated to negotiating as high a price as possible for the leaf tobacco that will be sold to JT. In 1970 MoF agreed to pay 612 yen/kilo for leaf tobacco; by 1984, the price had increased to 1729 yen.<sup>32</sup> And by 2000, it was 2200 yen/kilo.<sup>33</sup> The Japanese government, during its 1985 trade dispute with the U.S. over tobacco importation, argued that the high price is “necessitated by compelling agricultural policy considerations.”

Tobacco growing is critical to the livelihood of the nearly 100,000 tobacco farmers who cultivate areas generally unsuitable for other crops. Because of the limited availability of land, tobacco is generally produced on a small scale. As a result Japanese tobacco leaf is two to ten times more expensive than world prices for similar types and grades. To miti-

29. Aurelia George Mulgan, *The Politics of Agriculture in Japan* 1 (2000).

30. Comments of Japan Tobacco Inc., *supra* n. 12, at 38, on file with author. Similarly, the amount of land devoted to tobacco cultivation has been shrinking, from over 85,000 hectares in 1965, to 47,801 in 1985 and 23,991 in 2000. Because of more efficient farming techniques, however, there has been a much smaller proportional drop in production. Data provided by Zenkoku Tabako Kousaku Kumiai (Tobacco Growers Association), Tokyo, Japan.

31. *Id.*

32. Comments of Japan Tobacco Inc., *supra* n. 12, at 39.

33. JT grades tobacco into different qualities, depending upon its color, moisture, size, and smell. In 2000, for example, Grade A was priced at 2200yen/kilo; B was 1680; C was 1300, etc.

gate the adverse effect on the livelihood of tobacco farmers brought about by Japan's recent drastic reforms, JT is required by law to purchase all domestically produced leaf.<sup>34</sup>

As long as the government pays growers a high price for their crop, guarantees the purchase of all they grow, and ensures that manufacturers and sellers do not face significant competition, it enjoys the support of all three groups.

The Liberal Democratic Party, the conservative party that has held almost uninterrupted power for the past fifty years, protects the interests of tobacco growers, manufacturers, and sellers. In the national election of June 2000, the National Political League of Tobacco Cultivators endorsed 51 candidates, including former Ministers of Finance and Health, senior power brokers and young turks.<sup>35</sup> Every one of them was a member of the LDP. Rural voters in Japan are over-represented in the electorate, so the value of a farm vote can be worth more than three times an urban vote.<sup>36</sup> The LDP has retained power through its strong voting base in the countryside, where it can get fewer votes than in urban settings but still elect more representatives. LDP politicians, therefore, strongly support tobacco interests, as they do agriculture generally.

The powerful bonds between politicians and tobacco farmers can only be maintained if the elected representatives "deliver the goods" to their constituency, and for that they are dependent upon the bureaucracy. Although one might assume that the most important tobacco-related agency in the government would be the Ministry of Health, Labor, and Welfare (MHLW), in fact the MHLW has the weakest of connections to tobacco. It engages in a small amount of public health education and smoking prevention/cessation activity, but its paltry budget for tobacco control—less than \$500,000 in 2000—severely curtails its actions. Instead, the Ministry of Finance dominates the government presence in tobacco policy.

The Tobacco Enterprise Law, enacted under the leadership of the LDP in 1984 to ostensibly end the tobacco monopoly, requires MoF to purchase all domestically grown tobacco, and MoF pays Japanese farmers roughly two to three times the going international rate for their leaf.<sup>37</sup> No matter that the quality of Japanese tobacco is poor; a

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34. Comments of Japan Tobacco Inc., *supra* n. 12, at 4, on file with author.

35. "Tabako Kosaku no Shin no Rikaisha o Kosakusha no Chikara Tousei Saseyou" (Let's Use the Strength of Tobacco Cultivators to Elect Those Who Understand the Truth about Tobacco Cultivation), *Tabako Sangyo* (Tobacco Industry), June 5, 2000, 4.

36. Richard H. Moore, *Japanese Agriculture: Patterns of Rural Development* 163 (1990).

37. Tobacco Enterprise Law, #68, August 10, 1984, enforced from 1 April 1985 (abolishing the Tobacco Monopoly Law (#111 of 1949) and Tobacco Products Fixed Price Law (#122 of 1965)).

large quantity of leaf tobacco is imported from the U.S. and blended with domestic plants to ensure a pleasing product.<sup>38</sup>

MoF oversees many other aspects of tobacco policy. By law, anyone desiring to sell tobacco over-the-counter or through a vending machine must obtain a license, and MoF decides who will be licensed. MoF also has the power to decide the tobacco tax rate, the retail price of cigarettes, the restrictions that should be imposed on tobacco advertising, and almost every other important aspects of tobacco policy. One of MoF's interests in tobacco is surely financial, since tobacco tax revenues are significant. Turf is another crucial interest. For MoF, controlling tobacco is an important and influential political resource. As the most powerful government agency and the one responsible for the budget, MoF needs leverage over other ministries and good relations with the LDP (not difficult because the Minister of Finance is a political appointee). So MoF is willing to pay exorbitant prices for domestic tobacco leaf because it placates tobacco farmers, which in turn pleases the LDP.

Another major factor is Japan Tobacco Inc., formed in 1984 when the tobacco monopoly was abolished. JT is Japan's only tobacco company, and is broadly diversified. It owns a vending machine company, medical and pharmaceutical ventures, as well as a variety of other businesses.<sup>39</sup> In 1999, JT paid \$8 billion for the international tobacco operations of RJR Nabisco, and in the process acquired the worldwide (except US) ownership of brands like Camel, Winston and Salem.<sup>40</sup> But JT is not an autonomous corporate unit. Until 1994, 100% of its stock was owned by MoF, which still owns 67%, a stake that cannot decrease without an amendment to the Tobacco Enterprise Law.<sup>41</sup> Almost every important JT executive is an *amakudari* from MoF. When senior MoF officials reach retirement age they "descend from heaven" (literally, *amakudari*) and obtain a well-compensated position in the semi-private tobacco sector. It is difficult to find any serious point of friction between MoF and JT.

In short, a group of powerful interests defines and controls tobacco policy in Japan. It is so effective that it ensures the satisfaction of all the key players. Tobacco farmers, cigarette makers, retailers, politicians, MoF officials, and JT are basically content, or at least not so disgruntled that they feel a need to disturb the status quo.

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38. See Rothacher, *supra* n. 14, at 88; Confidential interview with officials from Japan Tobacco Inc., summer 2000.

39. Murray, "Kill or Cure—Confused Messages from Japan Tobacco," *The Lancet* 364, January 00, 1999, 1456.

40. It has now created an international division, headquartered in Switzerland, called Japan Tobacco International.

41. It is possible that the government will reduce its share of JT stock in 2002. "MoF Proposes Cut in Government Japan Tobacco Stake to 50%," *Wall Street Journal Interactive Edition*, December 7, 2001.

But left out of this network of interests is public health, the health of citizens who suffer the medical consequences of tobacco's elegant politico-economic system.<sup>42</sup> It is not that the benefits and burdens of the current system were evaluated and a decision reached to sacrifice public health for other values. The tobacco system was in place well before there was much cause for alarm about the health consequences of smoking, and now it suits the interests of too many powerful players to be changed.<sup>43</sup> "Profits not people" (to invert the once-popular bumper sticker) was not the formulation that guided tobacco policy makers. Public health was just not something any powerful tobacco-related interests worried about. And it still isn't.

#### IV. *KO-EN*: ANTI-TOBACCO ACTIVISM, LAW, AND SOCIAL REFORM

Two major studies of the health risks of smoking—the 1962 report of the Royal College of Physicians and the U.S. Surgeon General's 1964 report—established the scientific foundation for the emergence of a movement aimed at reducing smoking prevalence.<sup>44</sup> In the U.S., the Surgeon General's reports had a rapid impact. Congress passed legislation requiring cigarette packet warnings in 1965, and, mandated limits on tobacco advertising in 1969.<sup>45</sup> These laws were aimed at smokers and potential smokers, but American anti-smoking activists, consumer advocates, and public health experts were not satisfied. They were convinced that non-smokers were being harmed by smoke, and by the early 1970s they persuaded some states (Arizona was the first) to ban smoking in public places.<sup>46</sup>

The anti-tobacco movement in Japan was slower to coalesce than in the U.S. Although the Japanese Woman's Christian Temperance Union was active in passing a law in 1900 that prohibited minors from purchasing tobacco, anti-tobacco activism was dormant for most

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42. 'Fiscal health,' the financial burden of caring for people with tobacco-related illnesses, raises a set of epidemiological, economic and ethical issues that are beyond the scope of this paper.

43. Most tobacco experts would agree that the health effects of tobacco were not widely accepted until the report of the Royal College of Physicians in the UK (1962) and the report of the Surgeon General of the United States (1964).

44. U.S. Department of Health, Education, and Welfare, "Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service," Washington: U.S. Department of Health, Education, and Welfare, Public Health Service, 1964, PHS Publication No. 1103.

45. Federal Cigarette Advertising and Labeling Act of 1965, Public Law 89-92; Public Health Cigarette Smoking Act of 1969, Public Law 91-222.

46. Department of Health and Human Services, "Reducing Tobacco Use: A Report of the Surgeon General," Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2000, 47. Evidence establishing a link between ETS and health was, in the early 1970s, extremely thin.

of the century.<sup>47</sup> By the late 1970s, however, inspired by groups advocating for the right to sunlight, taxpayer's rights, and environmental rights, a movement to establish the rights of non-smokers was born.<sup>48</sup> The founders were writers, lawyers, citizen advocates, and others who demanded that Japan's national railway company designate smoke-free cars on the bullet train (*shinkansen*). When lobbying and direct requests for government action were not successful, they filed a lawsuit.<sup>49</sup>

It is useful to place this anti-tobacco litigation in the broader landscape of Japan's tobacco system. In 1980, when the lawsuit was filed, the Japan Tobacco and Salt Public Corporation, located within the Ministry of Finance, controlled a tobacco empire that was entirely monopolized. Japan's "economic miracle" was running full throttle, and MoF bureaucrats (along with those in the Ministry of International Trade and Industry) were being credited with crafting one of the world's most successful economies. Life expectancy in Japan was increasing, infant mortality declining, and the prevalence of tobacco-related diseases like lung cancer and heart disease was much lower in Japan than in the U.S.. The *ko-en* image, looking up from the bottom of a mountain, does not do justice to the formidable task anti-smoking activists faced in combating the entrenched and powerful interests of Japan's tobacco system.

When in February, 1978, The Group to Establish Non-Smokers Rights (*ken en ken kakuritsu o mezasu kai*) met in Tokyo under the banner of *ken-en-ken*, literally "the right to hate smoke," it drafted a manifesto outlining the main features of its anti-tobacco campaign. It called for the elimination or restriction of smoking in hospitals and clinics, trains, workplaces, public facilities, and schools; education about smoking in elementary, junior and senior high schools; and a ban on tobacco advertising. The group avoided attacking individual smokers; its focus was not so much on the harm of smoking itself, but on the danger of second-hand smoke.

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47. Interview with Matsumoto Shigeko and Kawatani Yoshiko, Japan Woman's Temperance Union, June 8, 2000.

48. There are now estimated to be approximately 100 anti-tobacco groups in Japan. The Japan Association Against Tobacco (formerly Japan Action on Smoking and Health) is an umbrella organization of 71 anti-smoking groups with 70,000 members. Other anti-smoking groups include Nihon Kin-en Yuuaikai (Smoking Cessation Friendship Group), the biggest group of its kind in Japan, with 45,000 members; Tabako Mondai Shutoken Kyougikai (Metropolitan Conference on the Tobacco Problem), a support group for the lawsuit against JT and the government; Tabako Mondai Jyuhou Senta (Tobacco Problem Information Center); Tabako Soshu o Sasaeru Kai (Tobacco Litigation Support Group); Bun-en Shakai o Mezasu Kai (Group for the Separation of Smokers and Non-Smokers); the Japan Medical-Dental Association for Tobacco Control, and others.

49. A detailed account of this litigation can be found in Isayama Yoshio, *Ken-en-Ken o Kangaeru* (Thinking About the Right to Hate Smoke) (1983), which is the primary source of what follows.

To lend legal force to the campaign, two attorneys, Akiyama Mikio and Isayama Yoshio, drafted a complaint against Japan National Railways (JNR, then a state monopoly, now privatized as JR), the tobacco monopoly, and the State (both MoF and MHLW). On World Health Day, April 7, 1980, they filed suit in the Tokyo District Court, demanding that half of all cars on JNR bullet trains be smoke-free and requesting compensation for four plaintiffs allegedly harmed by tobacco smoke. They pronounced:

Now is the time for non-smokers to declare the following rights. The right to breathe clean air unpolluted by tobacco smoke. The right to say that tobacco smoke is unpleasant. And the right to appeal to society in order to restrict smoking in public places.<sup>50</sup>

These claims were rooted in a number of legal theories. Against JNR, the attorneys alleged that exposure to second hand smoke violated plaintiffs' "personal rights" (*jinkaku-ken*) such as the pursuit of happiness and the protection of health, freedom, and honor, based on Articles 13 and 25 of the Japanese Constitution.<sup>51</sup> Against the State, they claimed that since the MHLW was responsible for public health, the Ministry of Transportation controlled JNR, and MoF managed the tobacco monopoly, all had a duty under the State Compensation Act to protect non-smokers on trains. Japan's consumer protection laws, according to the lawyers, prohibited the tobacco monopoly from manufacturing harmful products like cigarettes.

The response of the defendants was threefold: smoking is an individual choice; the impact of secondhand smoke is minimal; and Japanese consumer protection laws regulate artificial, not natural substances, so tobacco is beyond their scope. According to the lawyers for JNR,

Even though there is scientific examination and criticism about smoking and passive smoking, in this country's social life smoking is recognized as a luxury good. We understand that some non-smokers have something to say about the condition on the trains, but considering the common ideas of this society, we do not think we are causing intolerable harm to the plaintiffs.<sup>52</sup>

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50. *Supra* n. 49.

51. 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 order governmental affairs." Article 25: "All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health."

52. Isayama, *supra* n. 49, at 110.

The March 27, 1987 judgment of the Tokyo District Court, announced almost seven years after the case was filed, echoed the defendants' arguments. The court found that traveling by train was not the only way to get around Japan, and all trains had some non-smoking cars, so it was easy for people to avoid smoke-filled trains.<sup>53</sup> More significantly, the court declared that Japanese society accepted smoking, and that the impact of passive smoke was within "tolerable limits" (*jyunin gendo nai*). *Jyunin gendo*, or "tolerable limits," serves as a balancing test that sets the value of a particular act against the harm it causes. Japanese courts have used it to decide a variety of environmental cases, like airport noise, in which residents complain about the sound of planes and courts have to decide whether the importance of airport operations justifies the annoyance to local homeowners. Plaintiffs' lawyers strenuously objected to the idea that smoking raised questions of how to balance public benefits with individual health, arguing that there was no public benefit to smoking but a significant individual cost to passive smokers.<sup>54</sup> But the lawyers did not appeal the court's decision, and the reasoning in the opinion has cast a long shadow on subsequent tobacco litigation.

More than a decade after this defeat, plaintiffs' lawyers brought another tobacco-related suit. During that interval, a variety of other tobacco cases came to the Japanese courts, and all were lost. For example,

- In 1991, the Nagoya District Court rejected a case brought by a teacher who demanded that smoking at his school be limited to a designated smoking room.
- The Tokyo District Court refused the request of a researcher at the Tokyo Institute of Hygiene who wanted smokers to smoke only in a confined, well-ventilated smoking room.
- A case brought to the Yamaguchi District Court by a local government official, and later appealed to the Hiroshima High Court and the Supreme Court of Japan in 1998, sought to ban smoking in a local government office and demanded financial compensation.
- A 1996 judgment of the Nagoya High Court, in a case brought against the Japanese State by five office workers in Aichi Prefecture who claimed to be suffering from environmental tobacco smoke, (ETS, i.e., passive smoking), sought a ban on the production and importation of tobacco.
- The Nagoya District Court, in November 1998, heard an ETS-based suit brought by several office workers in Aichi Prefecture

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53. Isayama Yoshio, *Gendai Tabako Sensō* (The Contemporary Tobacco War) (1999), at chapter 3. The full opinion of the court can be found in *Hanrei Times* #630, May 15, 1987, 234-58. In the years after the case was filed, JNR began to designate smoke-free cars.

54. *Id.*

against JT, which demanded a ban on the production and sale of tobacco, and 1 million yen for each of the four plaintiffs.

- A group of teachers brought a case against former Prime Minister (and former Minister of Health and Welfare) Hashimoto Ryutaro, a heavy smoker. They insisted that as a matter of public education he should be prohibited from smoking. In February 1998, Nagoya District Court Judge Inada Tatsuki found that Hashimoto's smoking was not unconstitutional, and in September 1998 Nagoya High Court Judge Teramoto Eiichi upheld the lower court ruling, stating that "smoking is a question of individual preference."<sup>55</sup>

Most of these cases were dismissed on procedural or technical grounds, without the court addressing their substantive claims. When courts did consider the merits, they invariably returned to the "tolerable limits" standard invoked by the Tokyo District Court in 1987. In the 1998 case demanding the end of tobacco manufacturing and sales in Japan, for example, Judge Nakamura Naofumi of the Nagoya District Court concluded:

If there is an ongoing infringement of a person's lifestyle and/or body, or a danger that they will be infringed, and if the infringement is not within tolerable limits, then the personal right is infringed, and the court can order that the infringement be stopped. But in this case, it is hard to see the relation between the deed of the defendants and the harms to plaintiffs.<sup>56</sup>

Similarly, in November 1996 and March 1997, ten plaintiffs from Tochigi, Fukui, Aichi, Osaka, and Yamaguchi Prefectures sued JT in the Nagoya District Court, demanding that domestic tobacco manufacturing be banned. The plaintiffs asserted that their personal rights were violated when JT manufactured, imported, and distributed tobacco knowing that it was toxic. They demanded that JT state clearly that tobacco is addictive and can cause cancer and heart disease, and asked for 1.1 million yen each as compensation for harm, and potential harm, to their health from ETS. On March 15, 1999, Judge Aoyama Kunio dismissed the suit. He wrote:

the impact of the damage from passive smoke, the suffering it causes, is comparatively slight, and the feeling of dislike

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55. The first case against a foreign tobacco manufacturer was brought to the Nagoya courts in March 1998, a claim against Philip Morris on behalf of 20 teachers, public servants, and other anti-smoking activists. The plaintiffs demanded that Philip Morris stop selling its products in Japan (the company had a 13% share of the Japanese market in 1998). In addition, they expressed concern about passive smoking, complained that Philip Morris took advantage of Japan's lax tobacco control laws by substituting the Japanese for the American packet warning, and asserted that the company sold its products despite knowing about tobacco's dangers. Each plaintiff requested 100,000 yen.

56. Nagoya District Court, November 13, 1998, Case #1180, 48.

and unpleasantness toward tobacco and smokers is within the range of tolerable limits.<sup>57</sup>

These cases, and others like them, signal the current reliance of judges on the tolerable limits standard in reaching decisions when plaintiffs allege harms from ETS.

Hoping to avoid a ruling based on tolerable limits, Isayama Yoshio, the attorney who brought the 1980 claim seeking smoke-free train cars, adopted a "direct harm" strategy in May 1998 in a case he filed with the Tokyo District Court. He was joined by several veterans of the public interest bar—Yamaguchi Toshihiro, for example, who worked on the famous Minamata mercury poisoning case, and Tani Naoki, who helped to represent HIV-infected hemophiliacs against the MHLW and five pharmaceutical companies. These lawyers, sixteen in all, represent seven people with lung cancer and other allegedly tobacco-related health problems, and are seeking relief from JT and the State, specifically MoF and MHLW.<sup>58</sup>

Their cause of action casts a wide net. As a tort claim that alleges specific health damages to each plaintiff, the attorneys demand 10 million yen per person, for a total of 70 million yen.<sup>59</sup> In addition to individual remedies, they also insist on a series of policy changes, including:

- 1) a ban on vending machines;
- 2) a ban on tobacco company sponsorship of sporting events and concerts;
- 3) a ban on magazine, newspaper, and TV advertising and radio commercials; and
- 4) new cigarette packet warnings in larger type and with more severe cautions.<sup>60</sup>

Oral arguments started in June 1998, and as of September 2001 the parties had made 18 court appearances.<sup>61</sup> Predictably, JT contests whether smoking caused the plaintiffs' illnesses, and has asked that the suit be dismissed. In its 1999 Annual Report, JT downplayed the potential seriousness of this and other litigation; "the Company be-

57. Nagoya District Court, March 15, 1999, Case #4181, 59.

58. Three have lung cancer, three emphysema, one throat cancer; two plaintiffs have died since the start of the litigation, so there are currently five living plaintiffs.

59. Interviews with Isayama Yoshio and Yamaguchi Toshihiro, who say that their case presents a tort claim, and is also based on Articles 13 and 25 of the Constitution and on the Tobacco Enterprise Law.

60. Plaintiffs propose the following warnings: "tobacco (cigarettes) causes cancer," "smoking might kill you," "tobacco causes heart attacks and heart disease," "smoking by pregnant women may result in fetal injury," "tobacco is very addictive," "smoking cessation reduces serious damage to your health," and "your smoke harms the health of others around you."

61. Japanese trials are scheduled intermittently rather than continuously. Each time the tobacco case is before the court, it is allocated a slot of two hours. At the conclusion of the day's proceedings the next trial date—generally 6-8 weeks in the future—is established.

lieves that the ultimate outcome [of the litigation] will not have a material adverse effect on the Company's financial condition or results of operations."<sup>62</sup> If history is any guide, JT's assessment may well be correct. The case will be in the courts for years, and is unlikely to become a major legal breakthrough for the anti-tobacco movement. Resting on a shaky doctrinal foundation, without precedent, and aimed at some of Japan's most powerful institutions, an affirmative court decision would be a huge surprise.

Moreover, there are a number of other barriers to the effectiveness of anti-tobacco litigation in Japan: causality, equity, unity, and ideology. Causality presents two problems. First, Japanese courts have not (at least so far) been influenced by data linking ETS and various health problems, including lung cancer.<sup>63</sup> In 1998, for example, Nagoya District Court Judge Nakamura wrote "the relation between lung cancer and passive smoking is extremely weak."<sup>64</sup> Similarly, Judge Aoyama points out that both tap water and grilled fish can cause cancer, and cites a 1998 WHO report as evidence that the link between ETS and lung cancer is not statistically significant.<sup>65</sup> No matter that his assertion directly contradicts a March 1998 press release of the WHO, titled "Passive Smoking Does Cause Lung Cancer, Do Not Let Them Fool You."<sup>66</sup>

In addition, another aspect of causality, the relation between smoking and medical ailments like cancer and heart disease, is not clearly accepted by the courts. This is not as unusual as it might appear; one is hard pressed to find a decision by an American court that clearly asserts a causal relationship between smoking and lung cancer (which in part explains the creative legal strategies deployed in the U.S. over the past several years). Consequently, plaintiffs' lawyers in cases like Isayama's current Tokyo litigation find themselves arguing about the nuances of medical treatises with large teams of elite JT and government lawyers, who are content to delay and ulti-

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62. Japan Tobacco Inc., *supra* n. 13, at 14. Similarly, JT minimizes the importance of its participation in the US Master Settlement Agreement. In its 1999 *Annual Report*, JT writes that it participated in the settlement because if it didn't it could not continue to be profitable in the US. "We see the settlement as reflecting the unique nature of legal, political and cultural issues in the United States." According to the company, three points were confirmed in settlement: settling helps to avoid further expense of continuing litigation; manufacturers denied allegations of unlawful conduct; and the settlement is only effective only in the U.S. p.10.

63. Environmental Protection Agency, "Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders," Washington: Environmental Protection Agency, Office of Research and Development, Office of Air and Radiation, 1992. Publication No.EPA/600/6-90/006F.

64. Nagoya District Court, November 13, 1998, Case #1180, 39.

65. Nagoya District Court, March 15, 1999, Case #4181, 36, 39.

66. Given the limited fact-finding abilities of Japanese courts, it may be that plaintiff's attorneys have failed to provide the judges in these cases with the relevant medical literature.

mately defeat the tobacco suits by engaging in an endless debate about scientific proof and causation.

With regard to equity, it is useful to compare the Japanese situation with that in the U.S. Tobacco litigation in the U.S., unsuccessful for decades, at least could be expressed by a nice, simple sound bite; big dishonest companies deceived the public, people got sick and died, and the companies should be made to pay. While this is not exactly how things worked out in the U.S. litigation, shifting wealth from the evil tobacco industry to suffering individuals sounded plausible and appealing.

In Japan, however, the accused is the State itself—MoF, MHLW, and JT (so dominated by MoF that it lacks an independent corporate identity). It may be that in some sense the State is culpable and should be punished for inflicting nicotine dependence and illness on innocent citizens. But for ordinary taxpayers, both nonsmokers and smokers who are not interested in seeking compensation for tobacco-related illnesses, the logic of litigation is fuzzy. Why should any of their tax monies be given to sick, litigious smokers? There is no clear sense in which equity is served by “punishing” the State and requiring that it compensate so-called smoking ‘victims,’ when the money being paid is that of non-smokers and smoking non-sue-ers. This adds to the difficulty of anti-tobacco activists who are seeking to mobilize public support.

Unity creates another difficulty for tobacco litigation. In a very real sense, the anti-tobacco attorneys are a house divided. There are two main centers of activity, one in Tokyo and the other in Nagoya. The Tokyo team, devoted to reducing the impact of tobacco on both public health and individual rights, is well connected to international anti-tobacco groups and single-minded in its focus on reducing the negative consequences of smoking. The Nagoya attorneys, in contrast, use tobacco litigation to attack powerful corporate and state institutions. It was the Nagoya lawyers, for example, who brought the symbolic smoking suit against former Prime Minister Hashimoto.<sup>67</sup>

Despite the overlap in their legal attacks on tobacco, the attorneys in Tokyo and Nagoya do not collaborate. This is not necessarily fatal to tobacco litigation; in the U.S., for example, there was little cooperation between certain of the lawyers pursuing big tobacco. But there would clearly be value added if the two Japanese groups were able to work together, and there may well be deleterious precedental

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67. Hashimoto took aim at the suit during a visit to Singapore, when he said: “In our country, which faces the worst financial crisis of any advanced nation, consumer tax on tobacco is an important source of revenue for the government. My desire is that people smoke to the point which is not harmful to their health, and does not put too much of a burden on medical care.”

consequences to the rapidity with which cases have been filed and lost in Nagoya.

Ideology, or more specifically the social conception of smoking and the smoker, is another obstacle. The age-old question at the root of tobacco consumption is whether smokers are victims or are simply exercising their free will. In cases such as litigation in Japan over HIV-tainted blood in the late 1990s, a turning point was when those infected with HIV through blood succeeded in portraying themselves as victims of some combination of malevolence, greed, and incompetence.<sup>68</sup> For the anti-smoking movement and anti-smoking litigation to blossom in Japan, smokers, particularly sick and dying smokers, need to successfully portray themselves as helpless victims. According to public opinion polls, however, the Japanese people do not think of smokers as victims. In a recent survey, 90% of respondents agreed with the statement that “smokers are responsible for their decision to smoke.”<sup>69</sup> And even tobacco litigators believe it is hard to find plaintiffs for their cases because smokers don’t think of themselves as victims.<sup>70</sup>

Indeed, underlying most tobacco-related legal decisions is a conception of smoking as a matter of personal choice. Starting with the 1987 decision of the Tokyo District Court, judges have consistently described smoking as something individuals decide to do because it suits their “taste” (*shikou*). They have dismissed the idea that smokers are victims of a pharmacological addiction, for example, or corporate seduction, as well as the notion that non-smokers are victims of secondhand smoke.<sup>71</sup> Judge Aoyama Kunio of the Nagoya District Court, for example, writes:

In Japan, for many years, smoking has been a matter of individual taste, and has become popular at many levels of society. . . Smoking is still, as a matter of principle, something done as an individual freedom, and tolerance of smoking has come to be expected.<sup>72</sup>

Similarly, Judge Ineda of the Nagoya District Court opines that “until now, the general point of view toward smoking was that it is a

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68. Feldman, “Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States,” 34 *Law & Soc. Rev.* 651-701 (2000).

69. See Nishida Eiichi, “*Kitsuen o Meguru Kenri Ishiki*” (Rights Consciousness and Smoking), in Tanase Takao, (ed.), *Tabako Byō Soshō no Hōshakugaku: Gendai no Hō to Saiban no Kaidoku ni Mukete* (The Legal Sociology of Litigation over Tobacco-Related Illness: Deciphering the Contemporary Laws and Trials) 273-92 (2000).

70. Confidential interviews with anti-tobacco attorneys in Japan, 2000-2001.

71. Nicotine dependence is classified as a disease in the U.S. in the DSM III, and internationally by the WHO’s International Classification of Diseases (ICD) #10. Yet in 1998, Judge Nakamura cited both of these agencies but still concluded that nicotine dependence is not generally thought of as a disease. His conclusions echo the claims of a MoF Smoking and Health Subcommittee in a 1991 report, which minimizes the seriousness of tobacco dependence and carefully avoids calling it a disease.

72. Nagoya District Court, March 15, 1999, Case #4181, 40.

matter of one's own taste." Judge Teramoto of the Nagoya High Court agrees, stating that "smoking is still considered an issue of one's taste, and many smokers continue with the knowledge that tobacco is harmful to them."<sup>73</sup>

In contrast to the view of smokers as victims of the ills of tobacco, they are sometimes touted as the victims of overzealous anti-tobacco forces. In a recent essay, Sato Kenichi suggests that smokers are the upholders of coveted Japanese traditions.<sup>74</sup> Sato describes how smoking once created a sense of solidarity and mutual understanding between the generations, and gives as an example the communicative function of sharing burning embers to light tobacco pipes. To Sato, tobacco litigation poses a threat to individual identity and culture more generally, and he argues that the triumph of tobacco litigation would result in the worst sort of interaction between law and culture, one in which legal victory would cause a cultural loss.

Ideology has another dimension, embodied in a conflict over rights. Tobacco poses an interesting contrast to issues like organ transplantation and AIDS, in which rights-claims have been asserted, defended, debated, and enforced.<sup>75</sup> In the case of tobacco, the anti-smoking forces have tried mightily to frame both smokers and those exposed to second-hand smoke as victims whose rights have been infringed. But a concerted effort by the tobacco industry and the State has succeeded in depicting smoking as an issue of manners.

Linking smoking to a set of behavioral norms has a long pedigree in Japan. In the late 17<sup>th</sup> century, the Shogun issued a proclamation stipulating that people could smoke indoors but not outside, and a code of smoking manners quickly developed. People were told never to bring their own tobacco when visiting friends:

He is to smoke the tobacco which has been prepared for guests by the host and which has been placed on the tray, regardless of its quality. A guest should not smoke until his host has entered the room. When the host offers tobacco, the guest should at first refuse to accept it, saying, 'After you.' This refusal should be made two or three times in the same way as is customarily observed when sake or tea is offered. Then the host should pick up a *kiseru* [pipe] and remove the guard. After wiping the *kiseru*, the host should then offer it to his guest, saying, 'Please enjoy smoking with this *kiseru*.' If the tobacco is of good quality, the guest is to praise it. After taking a puff or two he is to replace the guard on the *kiseru* and put it in front of him. Upon his departure he is to

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73. Nagoya District Court, February 26, 1998, Case #778, 37; Nagoya High Court, September 30, 1998, Case #199, 52.

74. Sato Kenichi, in Tanase Takao, (ed.).

75. See Eric A. Feldman, *The Ritual of Rights in Japan* (2000).

wipe the pipe clean with a paper handkerchief and return it to the tobacco tray. However, when the host notices the guest cleaning it he is to say, 'please leave it as it is.' Should the host be the guest's supervisor or boss, the guest should have the good manners to refuse the *kiseru* even if it is offered, saying, 'Tamaezu' (I am too humble a person to accept it).<sup>76</sup>

The contemporary meaning of smoking manners can be illustrated with reference to the use of portable telephones. Between 1997 and 2000, what had become the incessant hum of cell phone chatter in public places almost completely disappeared. Particularly inside of local trains, the use of portable phones went from ubiquitous to rare. No financial penalties were imposed on those who continued to use phones, and no explicit ban was enforced. Instead, an automatic announcement on most trains asked people to mind their manners and refrain from using their phones and annoying other passengers. (The announcements also mention that cell phones may harm people with pacemakers, but that is presented as the weaker of the two pleas.) The invocation of manners worked; most passengers now put their phones on 'vibration' mode and avoid talking when they are on the train.

Similarly, since the 1970s, MoF and JT have promoted a series of campaigns directed at smokers' manners. These primarily fall under the so-called "smokin' clean" campaign, urging smokers to carry portable ashtrays, to not throw cigarette butts on the ground, and to not cause fires. There is also a more general sense of manners, in line with the second part of the cigarette packet warning—"Let's mind our smoking manners." It emphasizes that smokers need to be considerate of others. The essence of the manners campaign is to remind people that Japan is a small, densely populated nation, where everyone must make an effort to get along. Doing so means that smokers need to take the feelings of non-smokers into account, and that non-smokers should not be overly sensitive to the presence of some smoke. Like cell phones, the weak form of the argument is the medical impact—in this case, the health risk of ETS. The more compelling argument is that it is simply bad behavior to irritate other people.

Anti-smoking activists have sought to counter the emphasis on manners.<sup>77</sup> They insist that smoking kills, that passive smoking endangers third parties, and that Japan's weak regulation of tobacco amounts to a gross disregard of public health and a persistent violation of individual rights. These groups implore their audiences to think about smoking as a matter of legal rights, not merely social

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76. *Supra* n. 3, at 23.

77. In the early days of the manners campaign, however, into the 1980s, they did advocate the distribution of 'manners posters' directed at smokers.

etiquette. Nonetheless, there is little evidence that their position has taken hold. In a disputing life-cycle that starts with naming, moves to blaming, and ends with claiming, a widespread rights-based conception of tobacco-related grievances has yet to be born.<sup>78</sup>

In sum, anti-smoking activists in Japan have tried to use litigation to promote their cause, but the tolerable limits standard has been a formidable legal barrier. The framework of manners has presented an ideological obstacle to the successful invocation of non-smokers' rights. Anti-tobacco lawyers have not been able to pursue a common strategy, and public opinion seems to accept the notion that smokers are willful seekers of pleasure, not victims or dupes. Perhaps most important, judges have been unsympathetic not only to the general assertions of anti-tobacco cases, but to their scientific bases as well. Japan's anti-tobacco activists are visible deep down in the valley, the *ko-en* perspective, with no apparent path to the top.

#### V. SOCIAL CHANGE, LEGAL CHANGE, AND TOBACCO CONTROL IN JAPAN

Looking around, looking behind, and looking up, the three perspectives emphasized by Japanese landscape painting, make it clear that Japan's tobacco system is rooted in long-standing political and economic factors comparable to those of many other nations and relatively impervious (at least so far) to demands for formal change. To the extent that legal forms and norms influence tobacco policy, it is by defining the economic and political playing fields, particularly the general business environment, in which tobacco policy operates. The Tobacco Enterprise Law, for example, spells out the Ministry of Finance's tobacco-related powers; and the Tobacco Grower's Association Law establishes the authority of the union that represents cultivators. There are no similarly concrete laws or regulations aimed at the public health consequences of tobacco consumption.

Some observers who have noted the absence of formal tobacco regulation have described Japan as a "smoker's paradise" where (implicitly in contrast to the enlightened tobacco control efforts of certain Western nations) smokers can puff with impunity.<sup>79</sup> Yet in spite of its law-free approach, a smoke-free or at least smoke-reduced Japan is beginning to emerge. Despite the fact that

- restrictions on tobacco advertising are voluntary;
- vending machines selling cigarettes are proliferating;
- tobacco taxes have not been raised in an effort to reduce consumption;

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78. Felstiner, Abel, & Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .," 15 *Law & Soc. Rev.* 631-54 (1980-81).

79. See, for example, Donald MacIntyre, "No Warning," *Time Asia*, 156(14), October 9, 2000.

- separating smokers from non-smokers and designating smoke-free areas remains almost entirely informal and ad hoc; and
- the most important tobacco control law, which prohibits youth smoking, is honored in the breach,

the tobacco establishment expresses alarm at the prevalence of “tobacco bashing” in Japan, and at least anecdotally smokers are increasingly apologetic when they light up.<sup>80</sup> There are some grounds for this defensive posture. Slowly but steadily, in the absence of formal law, tobacco-related behavior in Japan is changing:

- Over the past 35 years there has been a steady decline in the percentage of males who smoke, from 83.7% in 1966 to 53.5% in 2000. The percentage of women smokers has remained low, approximately 15%.<sup>81</sup>
- Even though courts have ruled against the plaintiffs in all smoking-related litigation, lawsuits appear to be having an impact. During the seven years it took for the case against Japan National Railways to fail, for example, smoke-free cars were established and then proliferated, exactly the result demanded by the losing plaintiffs.
- Since the creation of the first smoke-free environments in and around public transportation, an ever-expanding variety of spaces have been declared smoke-free—private offices, restaurants, public buildings, and others.
- Advertising of tobacco products has decreased, limited by time/place/content restrictions voluntarily adopted by the Tobacco Institute of Japan.

These developments, and local initiatives like banning vending machines from particular towns, illustrate a significant change in the social acceptability of smoking and in actual smoking behavior.

What accounts for these social changes, and to what extent might they be laying the groundwork for a legal regime of tobacco control? Three overlapping explanations suggest at least in part how and why these changes are taking place. First is the emergence of domestic pressure to conform to U.S. norms and standards. Sometimes the source of such pressure is U.S. commercial enterprises. Starbucks has been extraordinarily successful in Japan, for example, and it now has cafés throughout the country. Although there are undoubtedly a number of explanations for its popularity, one thing that differentiates Starbucks from the competition is that it is smoke-free.

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80. Confidential interviews with officials in tobacco-related organizations, 2001.

81. See JT, “Heisei 11 Nen Zenkoku Tabako Kitsuenharitsu Chōsa” (National Survey of Smoking Prevalence, 1999), News Release #19, October 22, 1999. Since people under 20 are legally prohibited from smoking, almost all smoking-related data surveys adults over 20. There is some evidence, however, that smoking among youth aged 15-20, particularly women, has been increasing.

People like the "American" atmosphere of Starbucks, and "no smoking" is part of it. Japanese consumers are keen to emulate the style of American café culture, and they are willing to forgo tobacco when they do so.

The influence of the U.S. also manifests itself in the attention given to scientific reports about the link between tobacco and health from the U.S. Surgeon General, the Environmental Protection Agency, and others. These reports are covered by the Japanese press, read by Japanese scientists and public health officials, and communicated to the public. Individual risk calculations vary, but some people are clearly sensitive to information about the health consequences of smoking and will try to stop rather than endanger their health. Even those who continue may be influenced to believe that smoking is "bad" and that they should try to smoke less. The fact that experts outside Japan are sounding a warning about tobacco highlights the gap between the lack of health-related messages available in Japan and the abundance of such messages in the U.S.<sup>82</sup>

Even more influential than scientific facts is information about tobacco-related litigation and public policy in America. The details of particular American cases and policies are not generally known. Nonetheless, the media have regularly reported that many people are suing tobacco companies in the U.S., that those tobacco companies have agreed to pay huge sums of money as a consequence of litigation, and that smoking is banned in an ever-expanding number of places. With this limited understanding of the U.S. environment, many in Japan can easily (and correctly) conclude that smoking and smokers in the U.S. are rapidly losing ground, at least in comparison to Japan. In short, there is a sense that Japan is out-of-step with the US vis-à-vis tobacco and smoking, and an impulse to (at least superficially) close the gap.<sup>83</sup>

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82. The Japanese government has officially maintained skepticism regarding the health consequences of tobacco consumption. According to a 1988 MoF report, for example, "Epidemiology is simply a tool to elucidate suspicious factors in diseases affecting the general public. Thus, just because a correlation exists, there is no reason to conclude that a risk factor constitutes a direct cause. Establishing causality requires the support of basic medical and clinical research. Besides, epidemiological studies have revealed that the morbidity of some diseases such as Parkinson's disease, ulcerative colitis, and sarcoidosis is lower for smokers than for nonsmokers." It concludes, "based on the consideration described above, the present knowledge summarized in this review is not enough to evaluate the effects of smoking on holistic health." See Kasuga, H., et al, "Smoking and Health: A Review Prepared by the Smoking and Health Subcommittee of the Tobacco Industries Council, A Council Formed by the Minister of Finance of Japan," 26 *The International Journal of the Addictions* 423-40 (1991). This report was based on Okura Daijin (Minister of Finance), "Kitsuen to Kenkou no Mondai ni Kanrensuru Tabakao Jigyō no Ari ho ni tsuite' no Tōshin," (A Report on Smoking and Health and its Relation to the Activities of the Tobacco Enterprise), May 30, 1988.

83. Some American scholars have suggested that changes in elite smoking-related behavior are crucial to changing general smoking-related norms, but there is no indi-

The second factor that helps to explain tobacco-related social change in Japan is lawyers and litigation. Since the 1970s, the early days of anti-tobacco activism in Japan, litigation has been the central strategy through which those who seek a less smoke-filled society have pressed their claims. Affirmative court judgments are of course desirable, but there is more to the cases than simply the hope of winning. Litigation has a variety of functions, as anti-tobacco lawyers are well aware. They bring their cases not only to win, but also to get media attention and thus to inform the public about tobacco conflicts. Publicity is crucial to the ability of anti-tobacco groups to attract new members and broaden their membership base. Litigation also expands the ability of anti-smoking groups to participate in the policy making process. Bringing lawsuits puts anti-tobacco lawyers and their clients into contact with JT, MoF, MHLW, and others. As a consequence, the anti-tobacco groups find themselves engaged in a dialogue about tobacco policy with actors to whom they would otherwise have no access.

Anti-tobacco litigation has not inspired judges to intervene in the tobacco business, but it does appear to be a factor in bringing about pressure for policy change. The litigation over smoking on the bullet trains, discussed above, is one example of how plaintiffs can "lose" a lawsuit but "win" on the substantive issue. In that case, the court refused to hold that the railway company was required to designate smoke-free train cars, but only after such cars had already been "voluntarily" added. Other tobacco-related litigation has not had as clear a consequence, but some of the judicial decisions are based on reasoning that could easily be used to the plaintiffs' advantage. The tolerable limits standard, for example, is rooted in a subjective determination of whether the burden of a particular act is more or less important than its benefit. Judges have so far found the burden of second hand smoke easily bearable, and have refused to limit tobacco consumption based on claims that it causes harm to non-smokers. In doing so, however, the courts have started to stake out a position that links their assessment of tolerable limits to the willingness of smokers and society more generally to take the needs of non-

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cation that the behavior of Japanese elites is at the forefront of change in Japan. (See Kagan & Skolnick, "Banning Smoking: Compliance Without Enforcement," 69-94, in Robert L. Rabin and Stephen D. Sugarman, (eds.), *Smoking Policy: Law, Politics, and Culture* (1993), and Zimring, *supra* n. 1, at 95-109. In fact, a survey of smokers in Japan indicates that elites are enthusiastic tobacco consumers. Managers are more likely to smoke (51.1%) than office workers (35%); 48.5% of laborers smoke, and only 24.8% of the unemployed are smokers (See Tokyo-to Seisaku Houdou Shitsu (Tokyo Metropolitan Government Policy Information Office), "Kenkou ni Kansuru Seiron Chousa," (Public Opinion Survey of Health), January 2001, p.81. This survey reached only a few thousand people, so its data should be taken only as suggestive, not definitive. The involvement of elites may well be relevant to Japanese tobacco policy, but their individual smoking decisions do not appear to be leading the way toward a smoke-free society.

smokers into account. In his March 1999 opinion, Nagoya District Court Judge Aoyama wrote:

[S]mokers must be considerate of nonsmokers, and should exercise adequate self-control in terms of where and how they smoke. If smokers do this, then the chance of non-smokers being exposed to smoke will disappear. Of course, we can't rely on smokers' manners alone to perfectly protect non-smokers from indirect smoke. Recently, the harm of tobacco has been stressed, and in public institutions, in transportation, and in workplaces, steps have been taken toward general regulations to separate smokers from non-smokers (*bun'en*). So, from now, there is good reason to expect that nonsmokers will be protected from indirect smoke by social regulation.<sup>84</sup>

Judge Aoyama's opinion clearly indicates that smokers, employers, and the government must be aware of the burden of smoke on non-smokers. Formally, this opinion and others like it are defeats for the anti-tobacco lobby. But in practice they play an important role in the gradual transformation of smoking-related social norms and practices in Japan because they make it clear that there are significant limits to when and where smoking is appropriate.

Third is the importance of informality in Japanese law and policy. Tobacco control illustrates how legal informality operates and how it creates the conditions for a formal legal regime.<sup>85</sup> Tobacco advertising, for example, is limited through a voluntary agreement between JT and foreign tobacco companies; if one of the companies decides to ignore the agreement there is no clear avenue of enforcement or sanction.<sup>86</sup> The segregation of smokers and non-smokers in office settings (*bun-en*) is discussed in guidelines issued by the Ministry of Labor, but they neither mandate the creation of smoke-free zones nor penalize companies that fail to accommodate non-smokers.<sup>87</sup> In one of the few areas in which a formal law with sanctions does exist, the prohibition on selling tobacco products to youth, there is no enforcement and, not surprisingly, widespread noncompliance. Perhaps the most important example of informality as a change agent is the emphasis on smoking manners rather than on non-smokers' rights. Focusing on the behavior of smokers and telling them to

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84. *Supra* n. 72, at 51.

85. For an extended discussion of legal informality, see Frank Upham, *Law and Social Change in Postwar Japan* (1987). By informality, I mean simply the use of administrative guidelines, organizational codes, and other devices that are intended to shape behavior but lack the force of law, i.e., have no enforcement mechanism and carry no legal penalties.

86. Tobacco Institute of Japan, "Rules on Advertising and Sales Promotion Activities for Tobacco Products," (1998).

87. Roudoushou (Ministry of Labor), "Shokuba no Kitsuen Taisaku no Gaidorain," (Guidelines for a Policy on Smoking in the Office), February 22, 1996.

be considerate of non-smokers makes clear that bad manners are subject to neither fines nor imprisonment, so good manners are only optional. In each of these areas—advertising, *bun-en*, and manners—informality works; tobacco advertisers limit their advertising, companies create smoke-free zones, and smokers curb their smoking.

Despite the lack of teeth in these and other tobacco-related norms and guidelines, therefore, they are more powerful than one might imagine. Even without clear legal sanctions, these informal mechanisms serve to change both individual and institutional behavior. Of course there are informal but clear ways of punishing the failure to comply. But there is a more subtle and ultimately more satisfying explanation for why these apparently unenforceable guidelines change people's behavior; The articulation of and adherence to particular informal social norms is part of what defines and delineates groups, nations, and cultures. Kagan and Skolnick argue that the U.S. has undergone a fundamental change in the rules of civility that govern smoking, and that this change helps to explain why Americans comply with weak tobacco-related laws.<sup>88</sup> To explain this change they invoke Norbert Elias' analysis of civility norms; that people comply with norms of propriety because they want to be viewed as significant persons and thus seek to be accepted by friends, spouses, and strangers. In the U.S., smoking clearly has emerged as a violation of civility norms:

When smokers are segregated a powerful message is conveyed: their conduct has formally been recognized to be so harmful that it defiles others, with whom the law forbids them to congregate. American smokers. . . have largely come to understand that it is the nonsmokers, not the smokers, who enjoy the moral superiority conferred by civility rules.<sup>89</sup>

In Japan, the civility rules that govern smoking are changing but have not yet changed. Informality is a critical step in that process. Instead of formal laws that are aspirational but may not be effective, at least not alone, informal expectations set out a normative behavioral template for both individuals and institutions. They do not demand change, but they suggest a form of behavior that is socially desirable. They articulate a new set of civility norms, and it is only a matter of time before the norms take hold.

In the U.S., Kagan and Skolnick argue the formalization of non-smoking norms into formal rules has had four consequences. Formal rules governing tobacco consumption 1) communicate to nonsmokers that they have a right to smoke-free air; 2) provide authority to people when they ask others to stop smoking; 3) facilitate enforcement by allowing the aggrieved to ask third parties (like work supervisors)

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88. Kagan & Skolnick, *supra* n. 83, at.

89. *Id.* at 85.

to confront rule-breaking smokers; and 4) shift the moral compass by signaling that it is necessary for smokers to defer to nonsmokers.<sup>90</sup> In Japan, formalizing tobacco control into a concrete legal structure is unlikely to have such significant ramifications because formalization will not occur until new smoking norms are well established. The move toward a formal legal regime in the area of tobacco policy is likely to be symbolic in Japan. It will signal that individuals and institutions will have already altered their smoking-related behavior, and that the changed climate of tobacco consumption can now be officially enunciated. At the same time, formalized tobacco control policies will reinforce newly created social norms about smoking, and ensure that the norms will be strengthened.

The relationship between legal and social change in Japan and the factors that appear to influence smoking-related behavior contrast with the pride of place often given to formal law in other nations, but is not uniquely Japanese. Tom Stoddard, for example, has pointed out that despite New Zealand's progressive gay rights laws, in practice the country remains conservative and unwelcoming toward lesbians and gay men.<sup>91</sup> Gerald Rosenberg argues that landmark court decisions in cases like *Brown v. Board of Education* and *Roe v. Wade* at best have a modest impact on social change.<sup>92</sup> Yet international tobacco control activists continue to expend most of their energy on concrete law making, despite the lack of evidence that it will have the effect desired. To what extent is the de-emphasis on formal law particular to Japan, and/or confined to certain types of issues? In which instances is formal legal change likely to precede social change in Japan? How can one best disentangle the causal relationship between formal legal change and social change? The reciprocal relationship between the formal and informal, the legal and social, between mandates and manners—and what combination of these is most likely to bring about behavior change—is an important piece of unfinished business for scholars and policy makers alike.

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90. *Id.*

91. Stoddard, "Bleeding Heart: Reflections on Using the Law to Make Social Change," 72 *NYU L. Rev.* 967-91 (1997).

92. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (1991).