WELFARE RIGHTS

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I

INTRODUCTION

Under the Constitution of Japan, social rights, as well as civil liberties, constitute important parts of the guarantee of “fundamental human rights.” Specifically, social rights consist of the right to a decent life provided for in Article 25 of the Constitution, the right to receive education provided for in Article 26, the right to work provided for in Article 27, and the basic legal rights of labor provided for in Article 28. The term “social rights” comes from the term soziales Grundrecht used in German public law. By contrast, in American public law, although the term “social rights” appears occasionally, it is not generally used. In Japan, the term “welfare rights” is considered to mean the right to a decent life, which is one of the social rights. I would like to discuss the development of the right to a decent life in Japan before and after World War II.

II

THE POVERTY LAW SYSTEM UNDER THE MEIJI CONSTITUTION

The basic characteristics of the poverty law system before the war reflected the basic structure of the Meiji Constitution. Under the Meiji Constitution, there was no room for the concept of a constitutionally guaranteed right to a decent life. This result was natural given the time of establishment of the Meiji Constitution, which was promulgated in 1889, and given the fact that the Meiji Constitution was modeled on the Prussian Constitution of 1850. In addition, it has been said that the guarantee of fundamental human rights under the Meiji Constitution was almost meaningless because the civil liberties of the people, who were mere tools of the emperor under the Meiji Constitution, were few and were subject to any restriction imposed by legislation. The protection of citizens’ civil liberties was thus legally insufficient; therefore, it was quite natural that a right to receive welfare benefits on the part of the poor, whose social status was much lower than that of ordinary citizens, was not accepted as a legal right.

The Poverty Law of 1874 (Jyutsukyu-Kisoku),1 the first legislation concerning aid to the poor, did not change past practice. The poverty the Jyutsukyu-Kisoku intended to cover was only that based on individual factors,

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1. This poverty law was recorded by 166 Dajyōkan Nisshi (1874) and was removed in 1932.
such as laziness; social factors were not at all taken into account. The law reflected the dominant idea that the poor in need of aid were not highly valued as human beings. Therefore, the groups to be aided were severely restricted to such people as the physically disabled and the seriously ill over seventy years of age. Even then, the amount of money supplied to such people was quite small. There was no room for the concept that aiding the poor was the obligation of society or the state; aid was instead regarded as a mere favor.

As a result, the state espoused the dominant view that aiding the poor was to be done primarily by family members, friends, or neighbors, and that the state should engage in such activity only when support by such people was entirely impossible. This view is demonstrated by the preamble to the Jyutsukyu-Kisoku, which stated that aid should be accomplished by the “kindly feelings of the people” and by the fact that, although the Jyutsukyu-Kisoku provided that the financial burden necessary for such aid should be borne by the national treasury, the amount paid from the national treasury was reduced greatly toward the later stages of the Taisho Era (1912-1925).2

It is further worth noting that the absolute power of the state, based on the emperor system, contributed to the situation described above. The emperor controlled the three branches of government by means of his sovereignty, which was religiously ordained by order of the gods. Because the emperor was regarded as sacred and inviolable, his power was regarded as absolute. Therefore, the people, as subjects, were obliged entirely to obey the emperor, and the guarantee of the people’s rights and freedoms was merely his favor, which was only recognized within the framework of the emperor’s sovereignty. As a result, the poor had no right to be aided and any grant by the imperial state to the poor was a favor. This premodern character of the system for aiding the poor facilitated the imperial nation’s execution of its foremost national policy priority: enhancing the wealth and military strength of the country.

As time passed, the Jyutsukyu-Kisoku became insufficient for meeting the demands of the times, and the government implemented the Poverty Law (Kyugo-ho) in 1932. The Kyugo-ho, which was based on the premise that aiding the poor was the obligation of the state, implemented improvements, including allocating half of the funds for poverty aid from the national treasury, expanding the kinds of aid available, and refining the content of the

2. T. Sakayori, Shakaihoshū 119-20 (1974) states the following:
On account of the financial retrenchment policy to control the inflation occurring after the Russo-Japanese War, the poverty law was amended in May 1908, through an official notice by the Japanese Government to the effect that the expenses should be borne primarily by city, town and village governments. The prefectural treasuries were to bear the expense to the extent that the financial resources of the local governments prove insufficient, and the national treasury would bear any additional expense which the prefectural treasuries could not accommodate. As a result, the expenditure of the national treasury was greatly reduced and according to data for 1921, relief expenditures borne by the national treasury amounted to ¥42,822, which was less than 10% of the total relief expenditures of ¥443,395.
aid. However, the poor were still not recognized as having a legal right to be aided; the class eligible for the aid remained limited to those who were incapable of working, and the people who received the aid had no right to vote and no right to hold office. In effect, the law was still premodern in its nature and content.\(^3\)

III

THE GUARANTEE OF THE RIGHT TO A DECENT LIFE UNDER THE CONSTITUTION OF JAPAN

The Constitution of Japan was promulgated in 1947, as a faithful execution of the 1945 Potsdam Declaration, in which Japan accepted defeat in World War II. The Constitution, the central tenets of which are pacifism and democracy, provided in Article 25 for the right to a decent life. The protection of social rights, including the right to a decent life, has been valued highly because it represents a fundamental qualitative change in the traditional means of protecting human rights and gives substantive protection to civil liberties. In the draft of amendments to the Meiji Constitution first submitted by the Japanese government, there was a sole provision corresponding to current section 2 of Article 25, which stated that “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.” Current section 1, providing that “[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living,” was added later during the discussions of the Constitutional Diet (Kenpou Gikai), upon proposal by the Socialist Party. It is well-known that this provision was based on the wording, “the people shall have the right to maintain the standards of wholesome and cultured living,” in the draft constitution drawn up by the Society for the Study of the Constitution (Kenpou Kenkyukai), a group consisting of seven scholars.\(^4\)

It is also well-known that the first draft of the Constitution was written by the Government section (Minseikyoku) of the General Headquarters, Supreme Commander for the Allied Powers, which was mainly under the control of the United States, and that the American New Dealers contributed to it. Moreover, an examination of this draft of the Constitution clearly illustrates that the experiences of “constitutional revolution” in the United States during the New Deal era were incorporated into the Japanese

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3. M. Hayashi & A. Koga, Gendai Shakhoshôhô Ron 82 (1968); Nihonshakaihîgyô-Daigaku Kyûhinsêido Kenkyûkai, Nihon no Kyûhinsêido (1960); T. Sakayori, supra note 2, at 115.

4. The fact is beyond controversy that the constitutional draft proposed by Kenpou Kenkyukai enunciated some indispensable principles providing a basis for free democratic government in Japan. But there is a difference of opinion over the practical effect of that draft. Some conservative groups, for example, regard Kenpou Kenkyukai’s view as a utopian ideal that had no influence on average people. Some progressive scholars emphasize that, from a historical point of view, Kenpou Kenkyukai’s work was the first attempt to express the will of the Japanese people themselves in making a liberal constitution. See T. Sato, 2 Nihonkoku Kenpô Seiritsu Shi 830-31 (1964); Suzuki, Kenpou Kenkyukai no Kenpou Sōan Kisô, 31 Aichi Daigaku Hôkei Ronshû 214, 216 (1960).
Constitution. That is to say, Article 31 of the Constitution, which guarantees due process of law, stipulates that “no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.” This phrase is a direct descendant of the due process clause of the fifth amendment to the Constitution of the United States. Comparing the two, however, we see that among the objects to be protected by due process of law, “property,” which is included in the United States’ fifth amendment, was excluded from the Constitution of Japan; only “life” and “liberty” were included. The reasons are as follows: Certain statutes enacted in the United States during the New Deal era that restricted property rights by regulating employment agreements and monopolistic pricing were, at first, considered unjust deprivations of property rights, and were declared unconstitutional by the United States Supreme Court. Then, in the latter half of the 1930s, judgments affirming the constitutionality of such statutes were rendered. Japanese constitutional thought accepted restrictions on property rights in support of the public welfare and also recognized the necessity of direct state intervention in social and economic processes. Japan, through Article 31 of the Constitution, accepted the rule that had been established in the United States by way of interpretation of its Constitution by its Supreme Court. Thus, social rights, including the right to a decent life, though formally modeled on the Weimar Constitution, substantially incorporate the fruits of the New Deal in the United States.

Various social legislative bills intended to embody Article 25 were then enacted, one after another, after the promulgation of the 1947 Constitution. Despite this, the view remained underlying the prewar poverty law system, which denied the right of the people to social security, and the people’s consciousness of a right to a decent life did not materialize immediately. As proof of this, the right to claim social security benefits for those in need of aid was not secured under the old Livelihood Protection Act of 1946, and no such right was legally accepted until the enactment of the present Livelihood Protection Act of 1950, which provides a legal means to confirm such a right and legal remedies for infringement of one’s right.

IV

THE DEVELOPMENT OF THEORIES CONCERNING THE LEGAL NATURE OF THE RIGHT TO A DECENT LIFE

Dr. Wagatsuma, who first clarified the legal nature of the right to a decent life, highly valued the protection of social rights because he believed that they would bring about an “important change in quality” in the nature of the system of fundamental rights. At the same time, however, he denied that the right to a decent life constituted a legal right, saying that it was not a concrete

and judicially enforceable right. After the Japanese Supreme Court adopted this theory in 1948 and established the precedent that Article 25 was purely a "programmatic declaration" (that is, the provision proclaims that it is the duty of the state to set up a policy to enable all people to enjoy minimum standards of wholesome and cultured living but does not vest in individuals any concrete rights), theoretical development and judicial decisions easily followed this view, and examination of the legal nature of the right to a decent life stagnated. The *Asahi* case, brought to the Tokyo District Court in 1957 and decided in favor of the plaintiff in 1960, interrupted this stagnation. With this case, critical examination of the traditional prevailing theory commenced, resulting in both a theory that tried to demonstrate the positive legal effect of Article 25 within the confines of the "programmatic declaration" theory and a theory that tried to demonstrate that, in opposition to the "programmatic declaration" theory, the nature of Article 25 creates a concrete right to a decent life. These theories examine the legal nature of the right to a decent life from many angles and, by such examination, have encouraged various legal advances.

To begin with, many theories agree upon the point that Article 25 has the legal effect of guaranteeing a negative right. Thus, if people use their own efforts to seek more cultured living and an economic standard of living higher than the "minimum standards of wholesome and cultured living," and if the state interferes with such efforts, all the theories recognize that such interference should be deemed unconstitutional and excluded by the courts. In other words, as to the guarantee of a negative right under the Constitution, all the theories recognize the legal nature of the right to a decent life as giving rise to judicially enforceable concrete rights. However, concerning the guarantee of any positive right, that is, that the fundamental nature of the provision of the right to a decent life entitles the people to demand that the state take certain affirmative measures to ensure that the people can lead lives worthy of human beings, the views can be divided into three basic theories.

The first theory strongly asserts that Article 25 merely imposes a purely political and moral obligation upon the legislative branch, rather than creating legal obligations, and that, as the people have no judicially enforceable right against the state based on the state's failure to perform its obligation, the provision is only "programmatic." The basic outline of this theory is as follows: Article 25 does not invest in individuals any concrete right, and a concrete right accrues to certain individuals only after legislation is enacted to implement the objectives prescribed in Article 25; whether such legislation should be enacted is completely a matter of the legislative policy of the state; and such legislation should carry the strongest presumption of

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constitutionality and thus cannot be easily overridden by evidence of competing concerns. This theory is called the "Negative Programmatic Declaration Theory," and it completely denies the existence of judicially enforceable positive rights under the constitutional right to a decent life.  

The second theory criticizes the first theory by arguing that to deny completely the legal effect of the provision for the right to a decent life is to infringe upon the principles of social justice on which social rights are based. This theory further asserts that the provision guarantees both the "legal right" by which the people can demand that the Diet enact laws necessary to maintain "the minimum standards of wholesome and cultured living" and that the state has a "legal obligation" to establish such laws. However, the second theory holds that such rights and such obligations are abstract and do not give rise to a means of enforcement, and that, therefore, even if such rights are infringed or such obligations neglected, the people have no cause of action for bringing suit claiming that such infringement or neglect constitutes a violation of Article 25. This theory holds that the right to a decent life becomes concrete only when it is transformed into an actual claim of right by means of legislative enactment. If such claim of right is then infringed by the state, the people have a cause of action for bringing suit, based on the legislation, for infringement of the right. Indeed, we must admit that this theory has a more positive meaning than the first one, in that it holds that if a law that is an embodiment of Article 25 guarantees a right by which the people can effectively demand affirmative measures, such as the supply of benefits by the state, then the constitutional right to a decent life is embodied by that law and takes on the nature of an actual legal right. This is, however, nothing more than a reflection of the entitlement created by the legislation embodying the right to a decent life, rather than the concrete legal effect of the constitutional right to a decent life. Moreover, under this theory, if no legislation embodies Article 25 or sufficiently ensures the standard of living intended under Article 25, the people have no basis for bringing suits claiming that such omissions or deficiencies are unconstitutional. After all, this theory does not recognize that the provision for the right to a decent life actually obligates the legislative branch to enact laws that suitably embody the content of the right. Consequently, this theory is called the "Positive Programmatic Declaration Theory" or the "Abstract Rights Theory."  

Thus, both the first and the second theories, although different in the process of development of their logic, are in substance "programmatic declaration theories" in that the ultimate result of each theory is to deny that Article 25 creates a judicially enforceable concrete right. Although the distinction between the two theories should now be clear, the fundamental

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logical differences between them are summarized below. First, if any claim of right is created under a law that embodies the right to a decent life, the first theory maintains the "programmatic declaration" view even for such claim of right and denies that a concrete right thereby arises, while the second theory holds that a concrete right does so arise. Second, if any law that embodies the right to a decent life is established, the second theory holds that the right to a decent life under the Constitution is thereby made material and takes on the nature of a concrete legal right, whereas the first theory recognizes no such legal effect.

The third theory asserts that, upon examination of the subject of the right, its content, and the addressee on whom the provision imposes the legal obligation to realize its constitutional values, section 1 of Article 25 of the Constitution has fairly clear content that is enforceable by the courts. This theory states that, given the principle that all actions of administrative agencies must have their basis in legislation, section 1 of Article 25 of the Constitution, even if not as clear and detailed as a legislative enactment that directly binds administrative power, has sufficiently clear content to bind the legislative and judicial branches. The right to a decent life is a concrete right by which the people can demand that the legislative branch enact laws that give suitable embodiment to the content of the right, and if the legislative branch does not so fulfill its obligation and thereby permits infringement of the right to a decent life, the people have the right to obtain a judicial declaration that such legislative omissions and deficiencies are unconstitutional. This theory is therefore called the "Concrete Rights Theory."

Among these three theories, the second theory is held by a majority of the academic world, the third theory is held by a minority, and the first theory is supported by almost no one. However, the judicial precedents, which are centered around the Supreme Court, are deeply inclined toward the first theory, and thus receive strong criticism from the academic world for being anachronistic.

I have mainly advocated the Concrete Rights Theory and have been trying to develop its logic. There is not sufficient space here, however, to address it in detail. Therefore I will discuss just one point in relation to the fundamental nature of the right. This point addresses the special character of the judicial procedure for securing the right to a decent life as a concrete right.

A special constitutional litigation theory, which holds that a court can declare legislative omissions and deficiencies to be unconstitutional, is necessary to overcome the difficulties of the "Programmatic Declaration Theory." I assert that the effect of a judgment of the unconstitutionality of a legislative omission or deficiency need not obligate the Diet to amend existing laws or to create new legislation, but rather can oblige the Diet to express its concrete intention in response to such judgment. The Concrete Rights

Theory might be criticized for being an interpretative theory based on exceptionally strong political intentions. This is because, in my view, if the Diet expresses an intention inconsistent with the judgment, there should be no other expectation than that such a problem ultimately will be resolved through the political process, by the reaction and movement of the people against the pronouncement of the Diet and by the Diet’s response to that movement. It is additionally worth noting that a certain critic argues both the merits and problems of locating authority on this matter in the courts or in the legislature, in light of the desire to realize constitutional values. This critic raises an important issue at the last part of his thesis by writing, “Considering various factors, more detailed examination is necessary concerning whether mainly political or judicial processes should be utilized to realize constitutional values and to make the right to a decent life a substantive right.”

The intent to protect constitutional values through the operation of political processes is clearly revealed in the text of the Constitution itself. The Constitution devotes extraordinary energy to keeping political and administrative processes open and democratic, in accordance with the principle of the popular sovereignty of the people, by making the Diet the highest state power and by giving it the power to control the other two branches of government. On the other hand, in the area of fundamental rights, the Constitution guarantees various civil liberties, which constitute most of the fundamental rights that have specific and concrete content. The rule is that such rights should not be restricted by governmental power, and restriction by legislative or other governmental powers is an exception. And because the Constitution explicitly adopts judicial review of constitutionality, judicial protection of human rights is generally guaranteed. Therefore, in the area of human rights, judicial protection of such rights is the rule.

However, the situation concerning the protection of social rights, including the right to a decent life, is slightly different from that of civil liberties. The right to a decent life is guaranteed in the Constitution, and embodiment of this right is entrusted to the legislative branch by the Constitution. Thus, the legislature assumes primary responsibility for protecting that right, and, therefore, the extent of legislative involvement in the protection of the right to a decent life should be much greater than it is with civil liberties. If one overemphasizes this point concerning the supremacy of the legislature, the theory gives the legislative branch complete discretion and thereby falls into the “Negative Programmatic Declaration Theory,” which completely denies the legal effect of a constitutional right to a decent life. However, even if we recognize the nature of the right as a concrete right, we cannot deny that in order to protect the right to a decent

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life, both judicial protection and political protection are interrelated necessities. Thus, while we should make judicial protection the more basic of the two, it is important to use both protections harmoniously. That is the reason why we must formulate a special procedure for seeking judgments of unconstitutionality for legislative omissions or deficiencies. Therefore, to understand, evaluate, and argue the propriety of the content and effect of a judgment of unconstitutionality from only the legal point of view seems inappropriate given the fundamental nature and structure of the guarantee of the right to a decent life that is to be secured by the judgment.

V

SURVEY OF CASE LAW CONCERNING THE RIGHT TO A DECENT LIFE

The judgment of the Supreme Court on September 29, 1948, involving violation of the Food Control Act, states:

Paragraph 1 of the same article is a declaration of the responsibility of the nation . . . to manage state affairs so that all of the people can maintain the minimum standards of wholesome and cultural living. That must, in the main, be carried out by the enactment and enforcement of social legislation, but the maintenance and elevation of such a standard of living must be regarded as a function of the state. That is to say, the nation must assume that responsibility broadly toward all the people . . . But the state does not bear such an obligation concretely and materially toward the people as individuals.

This judgment of the Court adopted the “Negative Programmatic Declaration Theory” with regard to the legal nature of the right to a decent life. This case has come to be thought of as the leading case. The main reason why such theory was accepted as the predominant view in academia and the courts was that, due to the defeat in World War II, the nation’s economic productivity was at a very low level, and thus the nation’s economic power was extremely weak. It was believed that it was almost impossible for the government to maintain “the minimum standard of wholesome and cultured living” under this extremely difficult situation. The people’s low consciousness with regard to any right to demand such welfare also must have contributed to such thinking. Furthermore, the introduction and spread in Japan, without due consideration, of the German view of the “Negative Programmatic Declaration Theory,” which was the predominant interpretation in Germany of the right to a decent life under the first section of Article 151 of the Weimar Constitution, may have been one of the factors which lead to the view becoming predominant in Japan.

The Asahi case was a lawsuit for nullification of an administrative decision in which Mr. Asahi alleged that the decision of the director of the local welfare office to alter the level of assistance previously granted to him was in violation of the Livelihood Protection Act. The case, however, does have constitutional significance.

15. 2 Keishū 1235; see also Shokuryō Kanrihō (the Food Control Act), Law No. 40, 1942.
16. 2 Keishu 1235.
17. 21 Minshū 1043.
Mr. Asahi prevailed at the Tokyo District Court on October 19, 1960.\textsuperscript{18} The court held that both the standard of “livelihood protection” set by the Minister and the decision of the local welfare office to apply the standard to Mr. Asahi were in violation of Article 3, and of Article 8, section 2, of the Livelihood Protection Act. Because the provisions of the Act have almost the same content as Article 25 of the Constitution, this holding implicitly assumes the position that administrative decisions based on the Act are subject to judicial review of their constitutionality. Thus, although this holding did not explicitly recognize a constitutionally concrete right to a decent life in Article 25, in substance it implicitly assumed that Article 25 of the Constitution created a judicially enforceable right to a decent life.

Furthermore, the court’s judgment offered frequent criticism of the “Negative Programmatic Declaration Theory.” For example, it first held that the level of a “minimum standard of living” should not be affected by the conditions of the national budget of the time, but that, on the contrary, the minimum standard should lead and govern the budget. This statement made clear that the legal norm of Article 25 of the Constitution should control the making and execution of the budget. Second, the court held that, in theory, the level of a minimum standard of living could be objectively determined for a specific nation at a specific time. This holding supports the theory of an absolute standard for determining the minimum standard of living; such a theory can be the foundation for recognition of the right to a decent life as a legally enforceable right.

Mr. Asahi’s claim was defeated on November 4, 1963, on appeal to the Tokyo High Court,\textsuperscript{19} which adopted the “Negative Programmatic Declaration Theory” of the right to a decent life. First, it adopted the theory of a relative standard for determining the minimum standard of living, as opposed to the theory of an absolute standard adopted by the Tokyo District Court. It is true that both theories share the assumption that historical factors have a certain influence in determining the minimum standard of living; thus the minimum standard of living is to be determined relatively in one sense, although whether it is possible to determine it entirely on an objective basis is in dispute. However, the approach of the Tokyo District Court is completely different from that of the Tokyo High Court in its view that consideration of the nation’s finances is one of the necessary requirements in making the evaluation. The view that determination of the budget is solely a national political matter increases the discretion of the Diet, and thus increases the degree of instability of the minimum standard of living, and substantially contributes to the denial of the view that the right to a decent life under Article 25 of the Constitution gives rise to a judicially enforceable right.

Second, although the Tokyo High Court admitted that the determination of the standard of “livelihood protection” and of benefits pursuant to the standard are \textit{Ermessen der Rechtmäßigkeit}, that is, acts of administrative

\textsuperscript{18} 11 Gyōshū 2921.  
\textsuperscript{19} 14 Gyōshū 53.
discretion that are severely restricted by law, in substance the Court inclined toward *freies Ermessen*, or free discretion, in widening the scope of permissible discretion by emphasizing the specialized technical expertise of the minister.

The decision of the Supreme Court in the *Asahi* case on May 24, 1967, also stated the following, though in dictum, which is very near to the "Negative Programmatic Declaration Theory":

[The] standards which the Minister of Health and Welfare has found to be sufficient to maintain the minimum standard of living . . . should of course be set in accordance with the requirements enumerated in article 8, Paragraph 2 of the Act and should provide for protection which is sufficient to maintain minimum standards of wholesome and cultured living as guaranteed by the Constitution. The concept of minimum standards of wholesome and cultured living is rather abstract and relative. Such standards will be improved as our culture and national economy develop. These standards can be determined only after taking into consideration all these and other variable elements. Therefore, the determination of what "minimum standards of wholesome and cultured living" actually means [under particular circumstances] is within the discretion of the minister of Health and Welfare. His decision does not produce an issue as to the legality of the standards, although such a decision may produce an issue as to the propriety of the standards which may be discussed in terms of the political responsibility of the government in power. Only in cases where such a decision is made in excess of or by abuse of the discretionary power conferred by the law, so as to neglect [totally] the policy and objectives of the Constitution and the Livelihood Protection Act by ignoring the actual conditions of life and establishing extremely low standards, would such a decision be subject to judicial review of its legality. Thus, by adopting the theory of relative standards, the Court permits wide discretion on the part of the Minister of Health and Welfare in the determination of standards. Although the standard set by the Minister is subject to judicial review of its legality if such determination is made in excess of or by abuse of the discretionary power conferred by the Act, such a case is extremely rare. It would not be too much to say that the standard set by the Minister is almost completely excluded from judicial review of its legality. Thus, the Court essentially gives government officials almost completely free discretion.

Since the *Asahi* case, the main issue in lawsuits involving the right to a decent life has shifted to a constitutional challenge of decisions concerning the qualifications for receiving welfare pensions that do not require advance contributions. In the *Makino* case, Mr. Makino won in the Tokyo District Court on July 15, 1968. He claimed that the provision reducing the Aged Welfare Pension benefits of anyone whose spouse was already receiving the same pension was an unconstitutional violation of section 1 of Article 14 of the Constitution, which guarantees equality under the law.

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In the Horiki case, Ms. Horiki claimed that the provision of the Juvenile Allowance Law, which prohibited parallel receipt of benefits under both the Juvenile Allowance and the Pension for the Handicapped, was an unconstitutional violation of Article 14 of the Constitution. Although she won in the Kobe District Court, she lost in her appeal to the Osaka High Court and in her final appeal to the Supreme Court. Finally, in the Miya case, Mr. Miya claimed that the provision prohibiting parallel receipt of benefits under the Aged Welfare Pension and the Ordinary Pension violated Articles 14 and 25 of the Constitution. He lost in the Tokyo District Court and on appeal to the Tokyo High Court.

The social background of these constitutional challenges was the harsh reality that, in spite of the gradual improvement of the national pension system for which advance contributions were not made, the benefits provided under all pension plans were too small and did not function as sufficient benefits for social welfare or social security.

The courts of first instance in the Makino and Horiki cases tried partially to correct the deficiencies of the system of social welfare and social security by utilizing the constitutional guarantee of equality under the law. Immediately after these decisions, amendments to the National Annuity Law and the Juvenile Allowance Law in compliance with the decisions were introduced in order to repeal the provisions that had been in dispute.

Thereafter, however, at about the time of the judgment of the appeals court in Horiki, the social mood in favor of funding welfare lessened, and, in accordance with that change of mood, increasing numbers of judgments were issued that confirmed on the basis of broad legislative discretion the constitutionality of the provisions prohibiting parallel receipt of pensions or other assistance.

It is further worth noting that the decision of the appellate court in Horiki separated section 1 from section 2 of Article 25. As for section 2, the court, having accepted broad legislative discretion, held that legislative determination would be subject to judicial review of its constitutionality only in cases where the determination was obviously made in excess or by abuse of the discretion conferred by the Constitution, such as when a decision of the legislature was clearly arbitrary and constituted a retreat from the level of the national standard of living. The court adopted what is called the "standard of clear violation for judicial review." In contrast, as to section 1 of Article 25, the court held that more strict scrutiny of laws would be needed because

24. Horiki v. Governor of Hyogo Prefecture, 36 Minshū 1235 (Sup. Ct., G.B., July 7, 1982) (rev’g 23 Gyōshū 711 (Kobe Dist. Ct., Sept. 20, 1972) and aff’g 26 Gyōshū 1268 (Osaka H. Ct., Nov. 10, 1975)).
25. Jidō Fuyō Teate Hō (Juvenile Allowance Law), Law No. 238, 1961, art. 4, § 3, no. 3.
26. 23 Gyōshū 711.
27. 26 Gyōshū 1268.
28. 36 Minshū 1235.
section 1 requires utilization of an absolute standard for determining the “minimum standard for wholesome and cultured living.”

The Supreme Court in *Horiki* did not approve these separate interpretations of sections 1 and 2 of Article 25, and instead affirmed the broad discretion of the legislature and applied the “standard of clear violation for judicial review” to all laws covered by Article 25. The doctrine of broad legislative discretion as affirmed by the Court means that legislative decisions are subject to judicial review only in such exceptional cases as where legislation is made in excess or by abuse of the discretion conferred by the Constitution.

Generally then, under the theory of legislative discretion based on the concept of *freies Ermessen*, or free discretion, the objects of legislative decisions basically cannot be cognizable as legal issues nor be subject to judicial review; thus, only very exceptional cases can be subject to judicial review. Therefore, it is fair to say that the Supreme Court, which was willing to speak in terms of “broad legislative discretion,” adopted the interpretation that, as a rule, Article 25 protects no judicially enforceable right.

VI
SIGNIFICANCE OF THE CONSTITUTIONAL GUARANTEE OF SOCIAL RIGHTS

In this section I would like to point out that because of the guarantee in the Constitution of social rights, including the right to a decent life, the protection of the people’s rights and freedoms has been enriched qualitatively and quantitatively. Such guarantees show vast potential to improve the system of protection of human rights in line with changing social circumstances.

First, the constitutional protection of civil liberties has been increasingly reinforced by the inclusion of social rights in the Bill of Rights. Social rights newly create the foundation for the actual exercise of civil liberties, just as the right to a decent life improves, even if at a minimum, the life and subsistence of the people.

Second, the provisions of the Constitution relating to social rights have a peculiar structure that allows such provisions to function simultaneously as guarantees of civil liberties and of social rights. Historically, social rights have been recognized to the extent that they supplement the protection of civil liberties. Thus, the manner of exercise of social rights is inevitably conditioned by civil liberties accompanying such social rights. On the other hand, social rights can enrich the guarantee of civil liberties.

As an example, let me explain this point in connection with the right to work, which is guaranteed under Article 27 of the Constitution. The right to work, as a social right, is generally defined as “the right to demand from the state opportunities to work, if people of desire and ability are not employed
Like other provisions relating to social rights, Article 27 also guarantees a civil liberty, the freedom to work, which includes the freedom to choose among employment opportunities and the right to select among occupations. The positive measure by the government to protect the right to work should respect the freedom to choose occupations by ensuring that there are several kinds of employment available, from physical labor to mental labor, so that unemployed persons can select suitable occupations in consideration of their abilities and qualifications.

People cannot be content, or may even feel agony in some cases, if they must toil in occupations not suitable to their natures, even if their lives are economically secure. It is aptly said that "man cannot live by bread alone." The protection of the right to work can be enriched not just by the mere chance to work, but by the provision of abundant occupational opportunities worthy of human beings, so that people can be freed as much as possible from work not suitable to their natures. I call such a need the "preservation of the cultural aspect of work."

Third, in certain social domains where social rights and civil liberties are closely interconnected, every governmental decision should of necessity be made with the participation of the persons enjoying such civil liberties. For instance, governmental decisions on educational matters, which implicate the social right to receive education and the closely related civil liberty of freedom of education, should require the direct or indirect participation of those in the education profession, especially teachers.

The reason for such participation is that when the "hardware" conditions of education (such as the facilities to be provided or the financing of education) are closely related to the "software" conditions (such as the content or manner of education), then the freedom of education has to govern the hardware conditions and autonomy of education is strongly required. Even if the government should have jurisdiction over the hardware conditions of education, the decisions on such matters should not be wholly entrusted to the government, but should necessarily be made, directly or indirectly, with the participation of those in the education profession. In this way, from the interconnection of the social right and the civil liberty, the right of those in the education profession to participate in educational decisions emerges.

Fourth, the Article 26 right to receive education can theoretically create the right to require the government to establish educational systems in which "educational neutrality" is realized. Educational neutrality requires that the content of education be decided upon and attained by those in the education profession, independent of religious, political, or administrative authorities or forces. Such a requirement has to be located among civil liberties, for the core of the doctrine is freedom from state interference. Educational neutrality is required by Article 26 of the Constitution and therefore partly

32. Ishii, Rödōken, 1 Rödōhō no Kenkyū 98 (1967).
overlaps the right to receive education as a social right. Thus, we can conceive the right to demand establishment by the state of systems that respect and realize this requirement. The public election of members to the board of education, which was abolished in 1956, can be classified as one of the democratic institutions by which such a requirement is realized and which the government has a legal obligation to establish and maintain.

Fifth, attachment of social rights characteristics to rights traditionally understood as civil liberties has become an important issue. For example, the social right aspect of the freedom of expression is the right to know or to require information disclosure based on the right to know. If the free flow of information is hindered by excessive concealment of information by the government or by the monopoly on information held by information industries, the guarantee of the freedom of expression, such as the right to see or hear what one wants, cannot function effectively. Therefore, the right to know or the right to require information disclosure, insofar as either requires affirmative disclosure of information, can surely play a significant role in correcting such distortions in the marketplace of ideas. This, then, represents the new merit and potential to be accrued by guaranteeing social rights.

However, we must be aware of the risk that, through aspects of social rights, the government can interfere with and thereby undermine civil liberties. The domain of freedom should be maintained and controlled by each individual without aid of the government; a strong consciousness of freedom can be nourished only under such conditions. Accordingly, each addition of social rights characteristics to civil liberties contains the risk of corruption of liberalism. Therefore, the addition of social rights characteristics to the traditional civil liberties should be restricted to cases where it is necessary to correct clear and significant distortions in the functioning of civil liberties, and their addition should be restricted to the minimum extent necessary.

VII
Conclusion

Generally, history shows that the protection of the right to a decent life begins with a protection with respect to economic life. Once it came to be impossible for workers without property and needy people to enjoy freedom or rights under the abuses of capitalism, social rights were developed as a nurturing device to fill the gaps left by civil liberties, both to improve such a situation and to enable the people to enjoy their freedom and rights. Because of this history, the application of the guarantee of the right to a decent life has been restricted mainly to the area of economic life. The protection has been pursued in such a manner that it does not reach the domain of individual freedom.

Additionally, under the social circumstances of past historical periods, the manner of guaranteeing social rights creates the minimum conditions
necessary to lead a life worthy of a human being. For this reason we can say that the theory of the right to a decent life was initially intended to make breakthroughs on poverty. Since then the theory has spawned further theories requiring the provision of the conditions necessary for securing human dignity, but its basic aim has remained as initially intended.

Recently, however, in the process of pursuing economic growth, environmental pollution and every kind of social evil have developed, and these have endangered the subsistence and life worthy of human beings. The self-alienation of people, which necessarily accompanies a highly developed industrial society, is one such example. The characteristic of such alienation, under which human beings are occupied and controlled by that which they have produced, is the forfeiture of humanity. As autonomous judgments or actions are not needed and as people lack opportunities to exercise their creative abilities, they have become passive tools of the organization and function of society.

The constitutional basis for challenging these various threats to the culturally satisfying life, in which a person can maintain a comfortable life and utilize his creativity, and for challenging other cultural poverties, is the right to a decent life; more specifically, the cultural aspect of the right to a decent life is the heart of the right.

If the real material, economic, and social conditions of life can be defined as the objective conditions of human life, the spiritual or cultural conditions of life can be called the subjective conditions of human life. These subjective conditions of life relate to aspects of the quality of life. Thus, matters such as whether the dignity of the people is being secured, whether the people are alienated, and whether their conditions of life are worthy of them are the main subjects for examination. The government should affirmatively take care of the cultural aspects, as well as the economic aspects, of human life. This is the legal effect of social rights. However, the government should take affirmative measures in the area of "hardware" conditions in order to maintain and improve the cultural life of human beings, but should not in the area of "software" conditions. As the basis for these trends, there lies the realization that under today's social circumstances, humanity's basic need for dignity cannot be secured without governmental measures ensuring the fulfillment of basic cultural needs. Thus, theoretical development of these cultural aspects of the right to a decent life seems to be one of the most important tasks in development of the theory concerning the right to a decent life.