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ON THE FUNDAMENTAL CLAUSES OF THE HUMAN RIGHTS IN THE CONSTITUTION OF JAPAN

Isao NAKAYAMA*

I

The legal significance of the fundamental clauses of the human rights

As to provisions of the human rights, the Constitution of Japan provides the principal administration of government and the people's attitude towards the enjoying of the human rights prior to such individual rights as rights of individual freedoms, social rights and rights to participate in government. Art. 11 of the Constitution of Japan provides: "The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights." Art. 12 provides: "The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare." Art. 13 provides: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." The ideas underlying these three articles are, in short, that all the fundamental human rights guaranteed to the people, such as

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their right to life, liberty, and the pursuit of happiness, should be respected most as eternal and inviolate rights in legislation and in other governmental affairs, and that these rights should not be permitted to be abused but should rather be actively exercised to benefit the public welfare or the happiness of the social community life. These articles may safely be said to be the fundamental clauses of the human rights in such a sense that they make a direct description of the significance of the state and the ideal way of government based on individualism and thought of natural rights.

In this paper, I would like to reaffirm the significance of the above-mentioned fundamental clauses of the human rights as constitutional norm and examine the practical values of the clauses as complements to individual human rights clauses of Art. 14 and its subsequent articles.

In Japan, as far as the contents of the human rights are concerned, no theories have recognized so much practical utility in the fundamental clauses of the human rights, since they stipulate the human rights in too abstract and general terms. On the one hand, the measures or attitude which the state ought to take in order to guarantee the fundamental human rights are supposed to be based on individual human rights clauses of Art. 14 and its subsequent articles. On the other hand, the fundamental clauses of the human rights are often treated in almost the same way as the preamble of the Constitution of Japan — as declarative provisions which explain the reason why the fundamental human rights should be respected by showing that the human rights have such properties as inviolability, inalienability and eternity — the best they can do. I would like to present some representative interpretations of the fundamental clauses of the human rights. One of them is as follows. “This article is a noteworthy one, which makes a general declaration of the nature of the human rights and which should be contained in the preamble of the Constitution in a sense. Even if the article may not be able to produce any explicitly legal effect by itself, not only does it enunciate the principles on which the fundamental rights guaranteed to the people by the new Constitution of

Japan are based and give the one guideline along which the other articles of the Constitution should be interpreted, but also clarifies the fundamental attitude on which the whole Constitution depends. ...the article forms the first of the provisions which provide the people's rights, and, conjointly with Art. 97, makes a terse declaration of the basic natures which the fundamental human rights have — universality, inviolability, eternity and peculiarity." In referring to the contents of the human rights, "it is safe to say that the rights of the freedoms and rights guaranteed in Chapter III which can be interpreted as peculiar to man or the people belong to the fundamental human rights."¹⁾ Another interpretation is as follows. "The article provides the principal idea that the fundamental human rights are inviolable and eternal rights. And the article, conjointly with its subsequent Art. 12, Art. 13 and Art. 97, provides the principle on which the fundamental human rights should be guaranteed," while the concrete contents of the fundamental human rights are "the rights of the rights provided in the individual human rights clauses which derive logically inevitably from human nature and which have a pre-national and pre-constitutional character."²⁾ There are very few judicial precedents which deal directly with the legal character of the fundamental clauses of the human rights or which agree with one another in their opinions, but, for example, some decisions of the case in which it was disputed whether the freedom of gambling is included in the freedoms guaranteed in Art. 13 from the minority opinion, which is the same as these theories.³⁾

It is needless to say that we should recognize the full significance of the fundamental clauses of the human rights as principles on which individual human rights clauses should be interpreted and applied. The funda-

1) Association of Jurisprudence (Hogaku Kyokai), "Commentary of the Constitution of Japan", Yuhikaku, 1952, pp321. 325.

2) T. Miyazawa "Commentary of the Constitution of Japan", Nihonhyoronshinsha, 1955, p.192. same "The Constitution, vol. 2, A complete collection of Jurisprudence No. 4," Yuhikaku, 1960, p. 197.

3) Judgment of Supreme Court, Nov. 22, 1950, A Collection of Criminal Supreme Court Cases, pp. 2380 ff.

mental clauses of the human rights drawn up in those days of civil revolutions, such as Art. 1 of the Constitution of Virginia and Art. 1 and Art. 2 of the French Declaration of the Rights of Man, are said to have had an intention of declaring the individual, and especially his freedom, to be the most valuable, unlike old values of the feudal times, in that they are eternal and inviolate, and the fundamental clauses of the human rights drawn up after World War II can also be said to have a declarative intention of reaffirming the eternity and inviolability of human rights with all the greater earnestness as a result of our experiences of fascists' infringements of human rights and the horrors of war. In this sense; Art. 99 and others of the Constitution of Japan have a very marked characteristic as a declaration.

It is, however, not reasonable to limit the significance of the fundamental clauses of the human rights to the respect above mentioned. Since the fundamental clauses of the human rights are the ones of the human rights of the Constitution, they naturally have not the same legal significance as the preamble, but they have their own significance and utility in the abstract way of expression in which they are provided. Therefore, we should interpret that the fundamental clauses of the human rights themselves restrict legislative power, executive power and judicial power as an independent basis on which individual rights are based. In Japan, as I have already noted, there have been unexpectedly few studies which examine the legal significance of the fundamental clauses of the human rights from the viewpoint of this legal interpretation, but in West Germany and other countries which have the same clauses in the Constitutions there have been a fairly lively discussion about the theme going on with the result that the tendency toward the affirmation of the practical significance of the fundamental clauses of the human rights holds sway.

Various interpretations have been put on the two paragraphs of the Basic Law of the Federal Republic of Germany. One is Para. 1 Art. 1 of the Basic Law: "The dignity of man (*Die Würde des Menschen*) shall be

inviolable. To respect and protect it shall be the duty of all state authority.” The other is Para. 1 Art. 2 of the Basic Law: “Everyone shall have the right to be free development of his personality (die freie Entfaltung seiner Persönlichkeit), insofar as he does not infringe the rights of others or offend against the constitutional order or the moral code.” At first there was a tendency that no other significance was recognized in these paragraphs than as a basic idea on which individual human rights clauses should be interpreted and applied. However, since H. C. Nipperdey interpreted for the first time that the paragraphs restrict legislative power, executive power and judicial power as fundamental provisions which have their own protective legal benefit, this interpretation has been dominant now.⁴⁾ Before Nipperdey, F. Klein argued that the Basic Law of the Federal Republic of Germany stipulated general personal right which was tacitly admitted in the times of the Constitution of Weimar Republic, and, from this point of view, interpreted that “the dignity of man” in Para. 1 Art. 1 of the Basic Law and “free development of his personality” in Para. 1 Art. 2 express the static and dynamic existence of the right of liberty (das allgemeine Freiheitsrecht) respectively. He called this right the material principal human right (das materielle Hauptgrundrecht); the right provided in the concrete provisions of human rights of Art. 3 and its subsequent articles, the individual human rights (die Einzelgrundrechte); and the provision of general procedure as to the guarantee of the human rights in Para. 4 Art. 14 which is the last of the provisions of the human rights, the formal principal human right (das formelle Hauptgrundrecht), and grasped the system of the guarantee of the human rights in the aspects of the material principal right, the individual human rights and the formal principal

4) H. C. Nipperdey “Die Würde des Menschen in Neumann-Nipperdey-Scheuner, Die Grundrechte Bd. 2”, 1968. s. lff. Maunz-Dürig “Die Grundgesetz Kommentar”, 1958, s. lff. S. Taguchi “On the general clauses of the guarantee of human rights in the Bonn Basic Law” A memorial collection of treatises on law of the 100 th anniversary of the foundation of keio University. same “On the Dignity of Man in the Fundamental Law of West Germany” Hogaku Kenkyu vol. 33, 1960, pp. 167 ff. same “On the Right to the Free Development of Personality in the Bonn Basic Law” Hogaku Kenkyu vol. 36, 1963, pp. lff.

right.⁵⁾ This interpretation of Klein's had an influence on Nipperdey, but later Klein gave up the interpretation. Klein denied the existence of the material principal human right and returned to the popular theory: the two paragraphs of the Basis Law declare an idea on which the guarantee of the human rights should be interpreted. The reason for his return is that he felt the fear lest the material principal human right should be abused, on account of its vague conception, as a foundation for trifling vulgar suits.⁶⁾ Nipperdey explains the general meaning of the principal provisions of the human rights as follows.⁷⁾

The provision about the personal value was already found in Article 100 of the Constitution of Bayern in 1946 (Art. 100 "The dignity of personality shall be respected in legislation, administration and judiciary" (Die Würde der menschlichen Persönlichkeit ist in Gesetzgebung, Verwaltung und Rechtspflege zu achten)). The leading cases at the Bayern Constitutional Court construed that the article was a substantial provision of rights which guaranteed the personality itself which was more original than the positive law and restricted the state power.⁸⁾ This provision exerted influence on the constitutions of the other provinces and at the same time it was inherited in Art. 1 of the Herrenchiemsee draft which became the basis of the Constitution of West Germany afterwards,⁹⁾ so that it is natural to consider that Clause 1 Art. 1 of the Constitution should also have the purport such as above said. There is no doubt that this should not be a mere declaration like some preamble, but that it should suggest the fundamental human rights, that is, the public rights, and moreover that it should be applied in the contents of the private rights, judging from the place (der Standort) of the provision, which is placed at the head of the text of the Constitution, and from its text (der Wortlaut)

5) F. Klein "Tragweite der Generalklausel in Art. 19 Abs. 4 des Bonner Grundgesetzes" 1950, s. 85ff.

6) Mangoldt-Klein "Das Bonner Grundgesetz Kommentar" 1955, s. 161ff.

7) Nipperdey, a. a. O., s. 1ff.

8) Nipperdey, a. a. O., s. 2

9) Herrenchiemsee-Entwurf, Art 1: (1) Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen. (2) Die Würde der menschlichen Persönlichkeit ist unantastbar. Die öffentliche Gewalt ist in allen ihren Erscheinungsformen verpflichtet, die Menschenwürde zu achten und zu schützen.

and its contents (der Sinn). The provision that the dignity of man is inviolate and all of the state powers have the duty of respecting and protecting man's dignity, denotes that every nation has a right to man's dignity and is guaranteed the personal right (das Persönlichkeitsrecht) in the positive law. Against the interpretation like this, the counter view may arise that, even if man's dignity is provided in the beginning of the text of the Constitution, the content of the human rights is provided in the individual human rights clauses in other words, Clause 1 Art. 1 says that "on that account (darum)" that is, on account of man's dignity and in order to respect it and protect it, the inviolate and not-transferable human rights shall be recognized, and judging from Clause 3 providing that "The following basic rights (die nachfolgenden Grundrechte) shall be binding as directly valid law on legislation, administration and judiciary.", the content of man's dignity is the prescribed individual human rights. But it is not necessary for us to stick to this kind of formalism. Apart from the view point that the content of the basic human rights shall not be restricted only to what is provided in the individual human rights, Clause 1 Art. 1 is the very origin (letzte Wurzel und Quell) from which all of the individual human rights come, and is, moreover, the provision of the substantial and essential fundamental rights in itself --- that is to say, this provision guarantees the intrinsic value (der Eigenwert) of man, independency (die Eigenständigkeit), essence (die Wesenheit), and nature (die Natur des Mänschen), which are the vitals for law and order as a whole, as well as the individual and particular volitional actions. In this sense, this clause is a higher norm (die Norm des höheren Ranges). It is the norm which excels the positive law (die übergesetzliche Norm). It is the provision of the elementary and fundamental rights (das elementare Grundrecht). We can not uphold such an interpretation that as long as man's dignity shall not be expressly stipulated in the text of the individual human rights, it can not be protected as the human rights. "Man's dignity" in Clause 1 Art. 1 is by a static grasp (in seinem statischen Dasein) of the human existence as a

whole and "the free development of personality" in Clause 1 Art. 2 is by a dynamic grasp of it (in seiner Dynamik des Einzelnen). In this sense, above mentioned, Clause 1 Art. 1 is the provision of the fundamental and peculiar benefit protected by the law against the provision of the individual human rights, and it also strictly shows the final significance and purpose of law and order as a whole. Moreover as well as the latter paragraph of the same Clause, Clause 3, and Clause 4 Art. 19, it legally binds the rights of legislation, administration and judiciary and it is valid as the ground for taking an action against the violation of the human rights.

Nipperdey interprets like above mentioned and recognizes that the provision of the basic human rights is significant because it is the provision of the benefit protected by the law and of the substantial rights. The provision of the Constitution of Japan and that of West Germany are, though they are different each other in the expressions in the texts, one and the same in the basic idea, and it is not too much to say that the fundamental part of the Nipperdey's view is fully applied to the provision of our Constitution: for both of the Constitutions originate in the same source in the history of struggles for human rights since the revolution of independence and the civil revolution, and naturally the expressions of the texts are alike each other. It can be said that the content of "the fundamental human rights" in Art. 11 of the Constitution of Japan is the same as the content of "man's dignity" in Clause 1 Art. 1 of the Constitution of West Germany. It is the expression that they recognized to guarantee the life itself worthy of a human being and human nature as the right. The expression "Their right to life, liberty, and the pursuit for happiness" in Art. 13 is also interpreted as the generalization of the contents of the fundamental human rights.

As we have seen so far, judging from the interpretation of the texts, it can be said that the provision of the basic human rights is the provision with positive grounds for the public rights. The human existence as a whole which should be differently considered from the individual human

rights can be regarded as the object of the benefit protected by the law.

But when we have a look at the purport of enacting the provision of the basic human rights and if it is clear that the general expression itself in the text is used with the intention of indicating the following individual human rights, it is doubtful to interpret like above mentioned. In this respect, too, however, there is no positive ground for judging the above interpretation wrong.

As we know, the provisions of the human rights have been generally produced through history. It is certain that both constitutions of the states of America at the time of the revolutionary war or the civil war and the Declaration of the Rights of Man in France were firmly linked with the practical claims of the citizens or the frontiers against the regal authority. The early declarations of the rights of man were the fruits which the citizens acquired from the monarchs who stucked to the feudal authority through the struggles for their liberation against their oppression, and the content of the human rights meant "freedom from the nation" and the freedom, as G. Jellinek said, had its concrete content of "first of all the denial of the oppressions so far".¹⁰⁾ First of all, the claims of the rising citizens who were going to break the feudal chains such as regal authority or religious authority and wanted to live by free commercial dealings were deeply reflected in case of providing freedom of property right---which was the core of the provisions---and freedom of religion, freedom of expression, personal liberty, equal right and so forth. In the United States of America it was also natural that the immigrants who resisted against England, their home country, should claim maintenance of the various rights guaranteed for the people of their home country and abolishment of any discrimination towards them, and therefore freedom which was insisted there seemed to have concrete contents related to the various freedoms such as freedom of religion, personal liberty, freedom of expression and freedom of dealings, trial by jury and no taxation without assert, the rights

10) G. Jellinek "System der subjektiven öffentlichen Rechte" 1905, s. 95.

in common law, the Constitution of England, which increased step by step through Magna Charta, Petition of Right, Bill of Rights and so forth.¹¹⁾ The thinkers of the Enlightenment like Locke and Rousseau or those who engaged in drafting the Declaration of Rights of Man thought that the human rights could be reasonably deduced from human nature. But it can be said that the content of the human rights in practice was firmly connected to the practical and concrete claims which were to a great extent the reflection of the political or social circumstances in those days. The same relation between these practical claims and the content of the human rights can be found in the constitutions followed and also in the constitutions after the first and the second world wars. As we know, the practical claims born from the experiences such as the antagonism of the workers to the employers, poverty, horror of the fascists, the ravages of war were reflected in the provision of the human rights in every country based on the idea of the welfare state. Under the reflex like this the rights of liberty were recognized again and then the social rights such as the fundamental rights of workers, the right to maintain wholesome and cultured living and so on were added to these rights. Therefore, when it comes to the guarantee of the fundamental human rights, there is no doubt that, first of all, the guarantee of the human rights which were realized in the provisions of the individual human rights was taken into consideration as a necessary condition to protect man's dignity. In the provision of the basic human rights it was declared with the intention that these human rights already mentioned above were eternal and inviolate.

However, is it right to think that the general texts about the fundamental human rights, respect for the individual, the rights to life, liberty and the pursuit for happiness, were written with the intention of expressing the total sum of the individual human rights, and that the individual human rights were provided to restrict the politics of the nation only to these

11) H. Taneya "The Previous History of the Declarations of Human Rights in U. S. A" A memorial collection of treatises on law of the 10th anniversary of the foundation of Okayama University, the first volume, same "The Natural Law and the Positive Law in American Declarations of Human Rights" Hokei-gakkaizasshi vol. 39. 40.

rights? The relationship between the practical and concrete claims mentioned above and the provisions of the human rights would not necessarily be the positive ground to affirm this viewpoint. In any country and in any time the real power to let the authority enact the provisions of the human rights ought to have been the very will and desire to ask for the recovery of humanity and man's dignity itself by many people whose humanity was oppressed and trampled down at the time; and this will and desire became the nucleus of the provisions of the basic human rights, and at the same time it can be said that the provisions of the individual human rights were those based upon the experiences as a necessary condition to realize and guarantee them. As Prof. Shinichi Takayanagi said, the fundamental thing which caused to give birth to the provisions of the human rights is "the will and desire and the effort of man to free himself" and "without them freedom can not be generated of its own accord. These will and desire do exist in the first place. And when the effort to realize this will and desire is made in the particular historical society, they are restricted by the social structures concerned"¹²⁾ and then realized into the provisions of human rights. The general expressions in the provisions of the basic human rights can be regarded as the simplest and clearest expression of, in the Professor's phrase, "the will and desire to free a human being". Judging from the fact that in the constitutions of the states of America and the Declaration of Human rights of Man in France which were influenced by the idea of natural rights, they used the general expressions such as the rights to life, liberty, property, and the pursuit for happiness as the inherent rights untouchable to the state, and that moreover, it was not in the preamble, but in one of the articles that the human rights were provided, we feel that the will and desire to recover and guarantee the intrinsic and basic freedom of a human being are hidden under this provision. Even if the people who enacted the provisions were

12) S. Takayanagi "Fundamental Human Rights in Modern States" *Fundamental Human Rights* vol. 1, The Publishing Institute of Tokyo University.

bearing the particular and concrete freedoms in mind for the time being, this would not mean that there was no will nor desire for basic freedom. When we just take a look at the struggles to acquire the human rights since the time of Magna Charta in England, the American Revolution, the French Revolution and the diffusion of the provisions of the human rights into the constitutions of every country and the repletion of the social rights through the two world wars, the practical and concrete claims in each stage of the history constituted the apparent contents of the human rights reflecting the political and social circumstances at the time. But through those struggles and the fruits of the recovery and the guarantee of the human rights, the human race has been conscious of the man's dignity itself more and more which has underlain since the revolution by citizens broke out. It is right to say that to put the man's dignity itself in the center of the benefit protected by the law is the idea to guarantee the human rights which is already recognized world-widely today as well as in the Declaration of Human Rights (Article 1). The Constitution of Japan should be regarded to be based upon the same idea. By the way, in the House of Peers of the ninetieth Imperial Diet the government answered about the meaning of the fundamental human rights provided in Article 11 that its content was the man's dignity and then that it was naturally varied and that the provisions of the individual human rights were the examples necessary for protecting those rights.¹³⁾ As we have seen, even from the purport of enactment, the provisions of the basic human rights are understood not as mere declaratory ones, but as the provisions based upon the public rights including the special benefit protected by the law.

13) edit. by S. Shimizu "A Document of the Discussion on the Constitution of Japan in the Imperial Diet, vol. 2" Yuhikaku 1962, pp. 245ff.

II

Filling up the vacancies in the individual human rights clauses

The general human rights clauses in the Constitution, as stated in the previous chapter, are not for the declaration but for the fixation of the ultimate object of the national policy to secure both the human life as it should be and the general liberty as benefit guaranteed as the human right. It is worth considering what attitude and measure the state should take in order to achieve this object. The individual human rights clauses give some solutions to such a question, which are by no means satisfactory. That is partly because it is technically impossible to cover in a Constitution all the definite policies or measures necessary for the security of fundamental human rights and partly because the individual human rights clauses are destined to have so-called historical restrictions imposed on by the government and the society in which these clauses were enacted. Only the conception of the dignity of humanity, can give a solution to this kind of question:

With the passing of time the gap between the individual human rights clauses and the present policies necessary for the security of human rights seems to wider and this gap presents considerable problems for us to think over as stated later. So consequently the individual human rights clauses should be regarded as the examples showing definite policies necessary for the security of human rights, while the general human rights clauses should have the practical value in dealing with all the items beyond the limit of the former and play the supplementary functions for the former.

I state briefly the way the supplementary functions work.

These can be divided into two kinds. One is the filling up with regard to the benefits guaranteed as the human rights the other is the filling up in the way of security of benefits guaranteed as the human rights.

(I) The filling up with regard to the benefits guaranteed as the human.

rights.

As is mentioned already the Art. II and 12 of the Constitution prescribe that the life worthy of human being and general liberty itself should be regarded as benefit guaranteed as the human rights. But it does not follow that there exists some decisive measure to secure such benefit. It is after all ensured in the form of synthetic security of human behaviours and human lives. Man's life is nothing but a pursuing activity of his desires or needs. Therefore the security of a life worthy of human being should be preceded by that of these desires or needs. When his various kinds of desires or needs are satisfied in a well-balanced manner, he may be said to be enjoying freedom of his life.

The filling up function with regard to benefit guaranteed as the human rights plays the part of satisfying the desires and needs which the individual human rights clauses fail to guarantee, by the invocation of general human rights clauses. It should be noticed however, that the kinds and the ways a man's desires and needs present themselves are infinitely numerous and that unless the invocation of general human rights clauses were strictly made, every minute behaviour disconnected with the essence of human life is likely to be treated as the constitutional problems, with the result that the abuse of the rights of action will be brought about. Anxious about the abuse of the rights of action Klein took back his insistence that there exists at all the general liberty. The judicial precedent for the suit asking for the freedom of gambling, which I mentioned already, subscribes this kind of anxiety. In order to avoid the abuse of the rights of action, the desires or needs I refer to should be restricted to those needs whose frustration would make a person's existence difficult if not impossible.¹⁾ Therefore these fundamental desires or needs must be defined concretely for us to enable the proper application of the general human rights clauses. The study of the fundamental desires or needs which prompt men to take

1) W. J. Winlade "Human Needs and Human Right" edit. by E. H. Pollack Human Right 1971 p. 29.

actions has been done together with the study of human nature since the long time ago both in the field of social science and natural science. But its content and its kind have not been defined yet. In 1970 E. J. Lampe published his study on the relation between the fundamental desires or needs and the human rights clauses in the constitution of each country and on the model of human rights to be based on the fundamental desires or needs.²⁾ Moreover he mentioned in his study the catalogues of the well-known fundamental desires or needs detected mainly by the psychological methods. These catalogues amount to 16 in all and each of them differs not a little from one another. Now that there is no settled theory about these desires or needs, we can not help but compare and study the existing theories to make up a catalogue of desires or needs which have been commonly seen and acknowledged. By the way Lampe made up a following catalogue.

(A) Bedürfnisse vitaler Entfaltung und vitalen Kontakts,

- (1) Selbsterhaltungsbedürfnis,
- (2) Tätigkeitsbedürfnis,
- (3) Bedürfnis nach Erlebnis und Genuß,
- (4) Sicherheitsbedürfnis,
- (5) Liebesbedürfnis,
- (6) Familiäres Bedürfnis,

(B) Bedürfnisse personaler Entfaltung und sozialen Kontakts,

- (1) Freiheits- und Schaffenbedürfnis,
- (2) Erwerbs- und Besitzbedürfnis,
- (3) Geltungs- und Machtbedürfnis,
- (4) Bedürfnis nach einem angenehmen Milieu,
- (5) soziales Bedürfnis,
- (6) Bedürfnis nach Geselligkeit,
- (7) Bedürfnis nach Pflege von Interessen,

2) E. J. Lampe "Rechtsanthropologie" 1970. s. 209 ff.

(C) Bedürfnisse metaphysischer Entfaltung und existenzieller Integration.

- (1) Bedürfnis nach Verwirklichung des Eigenwertes,
- (2) Bedürfnis nach Pflichten,
- (3) Bedürfnis nach ästhetischen und Wahrheitswerten,
- (4) metaphysisches und religiöses Bedürfnis,

Upon this catalogue of the fundamental desires, he has made the following models of human rights clauses.

- 1) Leben, Körper und Seele des Menschen sind unantastbar. Gegen die ihnen drohenden Gefahren darf sich jeder verteidigen.
- 2) Niemand darf ohne rechtfertigender Grund zu einer Handlung, Duldung oder Unterlassung gezwungen werden.
- 3) Wer krank ist, hat Anspruch auf ärztliche Betreuung. Wer in soziale Not gerät, hat Anspruch auf öffentliche Fürsorge, es sei denn gesetzlich zum Unterhalt verpflichtete Personen sorgen für ihn. Wer in seinen Rechten beeinträchtigt ist, hat Anspruch auf Gehör vor einem unabhängigen Gericht, das Frist über seine Klage entscheidet.
- 4) Jeder Mensch hat das Recht, unter Beachtung sowohl der rechtlich anerkannten Grenzen der Sittenordnung als auch der Freiheit der Entscheidung Liebesbeziehungen zu anderen Menschen anzuknüpfen und zu unterhalten.
- 5) Jeder Mensch hat das Recht, eine Ehe zu gründen, sobald er die körperlichen und seelischen Voraussetzungen dafür besitzt und in der Lage ist, die ehelichen Pflichten zu erfüllen. Eltern haben das Recht, für ihre Kinder zu sorgen. Kinder haben das Recht von ihren Eltern versorgt zu werden.
- 6) Jeder hat das Recht, innerhalb der durch das Recht gesetzten Grenzen frei zu sein und frei zu wirken. Dieses Recht umfaßt auch die Freizügigkeit, die Niederlassungsfreiheit, die Meinungsfreiheit und die Freiheit im Gebrauch der Sprache.

- 7) Jeder hat das Recht, durch Arbeit Erwerb zu erzielen und Eigentum an dem Erworbenen zu begründen. Er darf über sein Eigentum nicht im Widerspruch zum allgemeinen Wohl verfügen.
- 8) Ehre, Geheimsphäre und Wohnung des Menschen sind unantastbar.
- 9) Jeder hat Anspruch auf ein Mindestmaß an gesunder und kultivierter Umgebung.
- 10) Jeder darf am sozialen Leben teilnehmen, insbesondere Ämter bekleiden, Parteien und Organisationen gründen und ihnen angehören, wählen und sich wählen lassen.
- 11) Alle haben das Recht, sich zu versammeln. Alle haben das Recht, Vereinigungen zu bilden.
- 12) Jeder hat das Recht, einen Beruf zu wählen und sich für ihn zu bilden. Jeder darf seine außerberuflichen Interessen pflegen.
- 13) Jeder hat das Recht, seine Persönlichkeit in ihrem Eigenwert zu entfalten.
- 14) Jeder darf sich wissenschaftlich und künstlerisch frei betätigen.
- 15) Jeder darf einen Glauben haben und ihn in angemessener Form betätigen.

Einschränkungen: Die Grundrechte 1-15 sind eingeschränkt, soweit das soziale Wohl es erfordert. Sie dürfen nicht in einer Form ausgeübt werden, die der Gerechtigkeit widerspricht.

Now the individual human rights clauses in the Constitution of Japan are abundant in number and excellent in quality and cover most what are called the fundamental desires or needs. They are by no means inferior to the catalogues made up by Lampe but not without some omitted items. For example, the guarantee of sex act and privacy of an individual should justly be found there. It goes without saying that sexual desire is one of man's fundamental desires, however no clause can be seen in the Constitution of Japan as well as of each country of the world to secure these desires in an express statement. Consequently the esteem and protection

of these are to be based on the general human rights clauses. The enjoyment of sexual desires naturally should be restricted by public welfare, but maintaining too strict control over sexual act having so much prejudice against it, is to violate human rights which by no means must be permitted. To take an example, Art. 175 of the criminal code of our country provides that the publishing, selling, and exhibiting of obscene writings constitute crimes. This regulation, however, should be applied only to the conducts to those who will be obviously damaged by these documents or feel much displeased. The rights of privacy are partially guaranteed in the individual human rights clauses. These are for example the right to the secrecy of any means of communication (Para. 2 of Art. 21), the right to secure in the home (Art. 35) and the right to be free from confession (Art. 38). But the rights of privacy, the rights to cover one's private territories from other eyes, are very extensive in range. They all constitute the human rights in Japan's Constitution. In West Germany, the concept of *das allgemeine Persönlichkeitsrecht* has been sanctioned in the theory and the court on the basis of "die Würde des Menschen" in Art. 1 Abs. 1 G. G and "die freie Entfaltung der Persönlichkeit" in Art. 1 Abs. 2 G. G. And the benefit has been guaranteed through the medium of Art. 823 Abs. 1 B. G. B.³⁾

Filling up the vacancies of the fundamental needs or desires in the individual human rights clauses means two functions. One is to really fill up the vacancies of them. The other is to fill up the insufficiency of the guaranteed activity to pursue one's needs or desires though this activity is prescribed in a way in the human rights clauses.

The pursuit of one's needs or desires is seen to take various forms at present. The human rights clauses now guarantee only some special form of them but should guarantee some other form which the pursuit of one's needs or desires will have to take with the change of living conditions.

3) K. Igarashi and S. Matsuda "The guarantee of civil life through the private law in West Germany — The development of the theory on the right to personality —" edit. by M. Ito and M. Kaino, *Studies on Privacy*, Nihonhyoronshinsha pp. 186 ff.

For example the freedom of traveling abroad which is quite common nowadays, should not be included in Para 1 of Art 22 of it,⁴⁾ but the guarantee of it should be given by the general human rights clauses.

(2) Filling up in the way of guaranteeing the benefits guaranteed as the human rights.

As a supplementary function of the fundamental human right clauses, above mentioned there is a case that it supplements the omissions found in fundamental desires or in the forms of their manifestations. And besides this, there is another case that it supplements the individual human rights clauses in the forms for securing one of the fundamental desires. Both positive and negative securities are necessary as the forms of personal security for each fundamental desires.⁵⁾ Because desires are fundamentally in the nature of being pursued and sufficed by the intention of a person concerned, there, in the first place, comes the necessity of its security, that is to say the security of freedom to pursue his desires without any disturbances from other will powers. (Negative security) On the contrary, in case he cannot suffice or it becomes impossible for him to lead a man if not sufficed, or in cases he may think it necessary in order to suffice his desires more amply or rationally, a state needs to play a positive role (Positive security), intending that it, instead of him, suffices, as far as possible, the desires concerned, (for example, security of minimum standard of life through the Livelihood Protection Law) or it provides facilities to the pursuits of desires (furtherance to researches in pursuit of learning, establishment of cultural institutions, public education system etc).

In the individual fundamental clauses, as is well known, desires are divided into right of individual freedom (freedom from a state) or into social rights etc. and in express statement at least, its forms of security is one-sided. As mentioned above, however, even in case of the desires

4) It is comparatively popular in the theory that such freedom is guaranteed by article 22 clause 1 or 2 (Miyazawa, *The Constitution* p. 376, *Association of Jurisprudence* *ibid.* p. 454 etc.)

5) I. Nakayama "The guarantee of the fundamental human right" *Handai Hogaku* vol. 80.

secured as right of individual freedom, for example, the mental desires found in freedom of expression, or in freedom of learning etc. there is no hope for their perfect pursuit or sufficiency nowadays without positive support of the state because of their expanded scope of activity. Or it is needless to say that even in case of a desire secured as social right, for example, right to life, there comes the necessity of security of freedom meaning that it protects a man's life as an benefit guaranteed by law from the disturbances by other will powers (For example control of public contamination). As is known through this example, both positive and negative considerations are necessary for security of fundamental desires. Furthermore the security of individual freedoms or general liberty no longer becomes realistic if following the classical interpretation that it is limited to the security of being free from the state. This has often been pointed in connection with the problem of die *Drittwirkung der Grundrechte*.⁶⁾ As for the problem of *Drittwirkung*, however, the question has been moved from "Ob" to "Wie". "Wie means the extent of the effect of human rights clauses, in connection with private self government."⁷⁾ Theoretically, the theory of indirect effect through the medium of general articles such as Civil Law (Art. 90) is more powerful, and the extent of the effect can be determined, in harmony with private self government, by both the strength how much freedom is disturbed and the social seriousness whether the state take part. But the basis of such theory lies ultimately in the fundamental human rights clauses.

Besides what should be added so far as ensure the security of freedom from state, is that even when in respect of the expression of the clause the security is limited in its application to a particular state action, the effect of the clause should be extended with in the range of necessity and possibility, once there comes a problem of the disturbance in the mentioned

6) N. Ashibe "The guarantee of the human rights between private individuals" *Fundamental Human Rights* vol. 1.

7) W. Leisner "Grundrechte und Privatrecht" 1960, s. 352.

freedom by the other state actions. An example is the problem coming from the relation between the Article 31 plus those on and after the Article 33 of the Constitution and administrative procedure. Doubtlessly those provisions should relate directly to criminal procedure. But it goes without saying that in the administrative procedure these clauses are respected because it gives coercion to personal liberty of a man and property, or intervenes in his privacy and in his freedom of expression. These lawful benefits must be directly combined with fundamental desires, and accordingly be respected and protected in conducting national policies in general. Therefore it should be and is proper to understand that the mentioned articles of Constitution should in principle be applied to the administrative procedure as well, and after that, their application may be limited within the range of urgent necessity for the attainment of the administrative objects.⁸⁾

As mentioned above, as far as the lawful benefit in general clauses means individual dignity, general liberty: these clauses must filling up the vacancies in the individual human rights clauses in various ways. Progress of various sciences has deepened the understanding of humanity and the political and social changes have brought about different aspects of disturbances. And a gap comes to be felt between the individual human rights clauses and what is really asked, in points of concrete treatments and ways of national policy necessary for securing fundamental human right. As the same time the fundamental human right clauses as the basis of *das materielle Hauptgrundrecht* increase practical usefulness in the form that they supplement what is omitted in fundamental desires or in their expressive forms.

8) S. Takayanagi "The administrative procedure and the guarantee of the human rights" Lectures on the Constitution vol. 2, Yuhikaku 1963.