

# POSTWAR LAW ON CIVIL LIBERTIES IN JAPAN

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## INTRODUCTION

Legally protected freedom of expression is perhaps the most demanding test for determining the presence and relative health of constitutional democracy in a nation-state. In this article I will attempt to convey in summary fashion what has happened to freedom of expression under law in Japan since 1945. To begin with a conclusion, generally speaking freedom of expression is vigorously exercised and protected by law in Japan; problems of improper restraint arise more commonly from societal than from governmental sources. As in other functional democracies, law and society combine to promote, protect and restrict individual rights. A striking degree of group orientation characterizes Japanese society, and many strengths and weaknesses in the status of individual rights are manifested in contexts defined by a group's sense of its rights to restrict its members or to aggressively assert its perceived rights in competition with other groups or the government.<sup>1</sup> In legal and political circles, a minority composed of the very conservative and the rightist nationalists maintains that the law has gone too far in allowing freedom of expression; but this runs counter to a strong consensus of support.<sup>2</sup> The late Prime Minister Masayoshi Ohira neatly summed up the sociolegal status of freedom when he said, "Japan is a free country, but not an open society." In law and principle, free speech is considered indispensable; in in-group and inter-group behavior loyal conformity is sometimes more highly valued.

Rather than focus on the intricate tensions of freedom in Jap-

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1. Beer, *Group Rights and Individual Rights in Japan*, 21 *ASIAN SURV.* 437 (1981).

2. Beer, *Constitutional Revolution in Japanese Law, Society and Politics*, 16 *MOD. ASIAN STUD.* 33 (1982) [hereinafter cited as BEER].

anese society and politics, I would invite your attention first to the early postwar legal history of freedom in Japan, which constitutes the great divide between eras of restraint and freedom, and then to a few aspects of the government's official record of encouraging and restricting freedom by law and judicial decision.

It should be helpful to keep in mind that freedom of expression did not become an essential and powerfully legitimized element of Japanese constitutional law and legal theory until after World War II. The intermittent quest for the dream of freedom and democracy did not lead to the establishment of Japanese constitutional democracy. Diverse and sometimes vigorous intellectual and political movements of more or less democratic intent coexisted at times with somewhat authoritarian preferences in society and government, but none resulted in a popular and politically effective movement for a legal right to peaceful expression. In fact, no mass resentment appears to have inspired a spontaneous or organized *national* rejection of any regime at any time in Japanese history.

Much of Japan's history from 1868 until 1945, and arguably until the mid-1950s, might be characterized as an extended period of national emergency, broken by interludes of martial law and warfare, and eased at some junctures by manifestations of democratic spirit and official tolerance. Protection and promotion of free speech seem never to have been a high priority of pre-1945 government, and repression was at times official policy,<sup>3</sup> yet human rights thought came to be reckoned with from the early years of the Meiji period (1868-1912).<sup>4</sup> Notions of political freedom and human rights (*jinken*) first became part of Japanese discourse on government in the mid-nineteenth century;<sup>5</sup> but other elements of Western constitutional thought then current in Europe—such as state absolutism, monarchy, code legalism and parliamentarianism—mixed with traditions regarding the emperor and government, form the foundations for revolutionary changes in Japan's constitutional policies between 1868 and 1945. For centuries the emperor had been a neglected symbol of nationalism with only a peripheral place in government and politics. The Meiji leaders remade the emperor into the charismatic center of sovereignty for a modern constitutional state towards whom

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3. LAWRENCE W. BEER, *FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, SOCIETY AND POLITICS* (1984) [hereinafter cited as LAWRENCE W. BEER]. Chapter 2 sketches the law on liberty in modern history.

4. Noda, *Comparative Jurisprudence in Japan: Its Past and Present, Part I*, 8 *LAW IN JAPAN* 1 (1975) [hereinafter cited as Noda]; Takeshi Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, 8 *LAW IN JAPAN*, at 39.

5. Noda, *supra* note 4; *AUTHORITY AND THE INDIVIDUAL IN JAPAN* (J. Koschmann ed. 1978).

expression of doubt or criticism was tantamount to blasphemy. Such reverence was not a traditional attitude but the result of a modern redefinition by a group of leaders.

The general level of sustained commitment to protection of freedom among establishment politicians, publishers, intellectuals and organizations of both left and right extreme does not seem to have been high. In this they seem to have accurately reflected the acceptance of traditional attitudes by the overwhelming majority of Japanese, particularly as Japan moved into the twentieth century and the emperor-centered ideology took ever firmer hold on the popular mind. In this sense, the wishes of the majority were honored and thereby democracy itself, in one of democracy's meanings.

### THE OCCUPATION AND FREEDOM

The present constitution of Japan went into effect in 1947 during the Allied Occupation (1945-1952), guaranteeing to each citizen for the first time in Japanese history the justiciable right to express himself or herself without improper interference. Chapter 3, Articles 10 to 40 of the Constitution establishes a broad range of individual rights.<sup>6</sup> The key constitutional provision on free expression is Article 21:

Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. . .  
No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

In addition, Article 16 establishes the right of peaceful petition, and Article 28 grants workers the rights to organize and to act and bargain collectively.

But before the Constitution itself came some oft-forgotten but seminal legal changes during the Occupation which began the postwar revolution of freedom. The terms of surrender in the Potsdam Declaration (July 26, 1945) were formally accepted by Japan on August 14, 1945, the surrender instruments were signed on September 2, 1945, and Japan entered its first prolonged period of international peace in modern history. Millions of military personnel and overseas Japanese colonials were repatriated. Food, employment, shelter, family reunions and basic health were the preoccupations of most Japanese at the time, not freedom, constitutionalism or law. And the Allied Powers' initial concerns were not so much freedom as Japan's military occupation, security, and establishment of the Occupation's administrative apparatus. Had

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6. KENPŌ (Constitution of Japan), *reprinted in English translation in*, H. ITOH & L.W. BEER, *THE CONSTITUTIONAL CASE LAW OF JAPAN* 256 (1978) [hereinafter cited as ITOH & BEER].

Russia been the principal occupying power in all or part of Japan, it seems probable that Japan, as an efficient communist state, would not have enacted legislation guaranteeing the freedoms that are provided in its present constitution.

Yet legal freedom came quickly after the Occupation forces arrived in Japan in late August and September, 1945. On August 29, 1945, General Douglas MacArthur, Supreme Commander for the Allied Powers (SCAP) received the United States Initial Post-Surrender Policy (hereafter Policy) for Japan from President Harry Truman. The Policy stipulated that Japan was to be ruled by SCAP directives (referred to as "SCAPIN") but, unlike the German and Korean Occupations,<sup>7</sup> by Japanese, not Occupation, government bureaus and laws. Directives were translated into Japanese law by means of ordinances; in the early Occupation period Diet participation would have been impracticable. Technically, the SCAP-Japanese governmental system then set up was subject to the thirteen-nation Far Eastern Commission and to the four-nation Allied Council in Tokyo. SCAP constituted the ultimate authority in Japan from the date of its surrender until the San Francisco Peace Treaty came into effect on April 28, 1952. The six years and eight months of the Occupation, on balance, may have been the most critical time in Japanese history for freedom of expression, and of this period, the short months from September, 1945 through March 6, 1946 were constitutionally seminal.

Paragraph 10 of the Potsdam Declaration called for the removal of obstacles to democracy and liberty as follows:<sup>8</sup>

The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental rights shall be established.

The initial Policy called for guarantees of freedom of speech, association, religion, assembly and press, as well as demilitarization and encouragement of liberal democracy.<sup>9</sup> This Policy was the basis for the series of "freedom orders" (*jiyū no shirei*) issued early in the fall of 1945. The freedom orders of SCAP gave un-

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7. 1 SUPREME COMMAND ALLIED POWERS (SCAP), THE POLITICAL RE-ORIENTATION OF JAPAN 192 (1949) [hereinafter cited as SCAP]. Regarding the contrasts between the Allied Occupations of Japan and Europe, see THEODORE McNELLY, POLITICS AND GOVERNMENT IN JAPAN 23 (1972). See also, KAZUO KAWAI, JAPAN'S AMERICAN INTERLUDE (1960), and TOSHIO NISHI, UNCONDITIONAL DEMOCRACY (1982).

8. 2 SCAP, *supra* note 7, at 413 app. A.

9. *Id.* at 423.

precedented pre-constitutional and "supra-constitutional"<sup>10</sup> legitimacy to freedom of expression, and might be reckoned among Japan's most precious constitutional documents even though issued by foreign conquerors. Since all major constitutional documents in Japanese history until the present Constitution of Japan (1947) had been handed down by dominant elites, the nonparticipation of a representative body in the formulation of these edicts was not a wrenching departure from past practice and was probably the only means by which a democratic revolution could have been started. In addition, in Japanese public opinion, the Japanese leadership and the military had been radically discredited by utter defeat in a most costly war.

The Potsdam Declaration said the people were to be free to determine their form of government, but that was impossible in the catastrophic social and political circumstances prevailing at war's end. A majoritarian inception is not that common, and is much less crucial to a constitutional democracy than subsequent clear support for the system, legitimized commitment to protection of freedom of expression, and other individual rights, and legal provision of election mechanisms for peaceful leadership succession. Subsequently, the vast majority of citizens responded with overwhelming support for the new regime of freedom. As an occupied state, Japan's governmental organs were all subject under international law to the legal authority of SCAP. To provide a domestic legal basis for promptly transforming SCAP directives into Japanese law, Imperial Ordinance No.542 "Concerning Orders to be Issued in Consequence of Acceptance of the Potsdam Declaration" was issued on September 20, 1945.<sup>11</sup> Because of this connection, later ordinances, which numbered about 520 in all, came to be known as the "Potsdam Orders" (*pot-sudamu meirei*).<sup>12</sup>

To understand Japanese perceptions of the politico-legal context of the early Occupation, one should bear in mind that rather than laws, the key elements in the prewar system of controlling expression were a combination of ordinances and administrative

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10. For a judicial discussion of "supra-constitutional" legitimacy during the Occupation, see ITOH & BEER, *supra* note 6, at 29.

11. This ordinance was abolished by Law 81 of April 28, 1952, and was replaced by the Subversive Activities Prevention Law, Roppo Zensho (compendium of the six Japanese codes), Law No. 240 of July 21, 1952.

12. KENSHIN KOMATSU, *NIHONKOKU KENPŌ NO TENKAI* 97-101 (Yushindō, 1966) [hereinafter cited as K. KOMATSU. Imperial ordinances as a form of law ceased to exist when the 1947 Constitution came into effect; the name "Cabinet Order" (*Seirei*) was used thereafter insofar as Diet enactments did not cover the requirements of SCAP directives. Law concerning the validity of the Provisions of Orders in force at the time of the coming into force of the constitution of Japan, etc., Law 72 of April 18, 1947, reprinted in, KENSHIN KOMATSU, *id.*

decisions, voluntary cooperation with authorities on the part of many citizens and the press, and surveillance by special police. Thus, during and after the Occupation, many politicians, editors, journalists, and scholars saw in the Occupation directives restrictive continuities with prewar repression although at the same time they acknowledged the unprecedented expansion of freedom.

SCAPIN 16 of September 10, 1945,<sup>13</sup> a memorandum on *Civil Liberties*, and subsequent clarifications, first manifested the natural tension between a commitment to freedom and the constraints of Occupation that was to exist in the years ahead.<sup>14</sup> To quote in part:

The Supreme Commander for the Allied Powers has decreed that there shall be an absolute minimum of restrictions upon freedom of speech. . . . Subjects which cannot be discussed include. . . False or destructive criticism of the Allied Powers, and rumors. . . . The Supreme Commander will Suspend any publication or radio station which publishes information that fails to adhere to the truth or disturbs public tranquility.

For freedom of expression, the two most important documents in early postwar Japan, along with the 1947 Constitution, may be SCAPIN 66 of September 27 and SCAPIN 93 of October 4, 1945. Related to their issuance and symbolic of the sudden shift in legal direction was the Japanese government's attempt, in protection of imperial honor and *kokutai* (the emperor-centered national essence) ideology, to ban Tokyo newspapers (the *Asahi Shinbun*, *Mainichi Shinbun*, and *Yomiuri Shinbun*) carrying photographs of Emperor Hirohito with General MacArthur. The pictures were taken during the Emperor's visit to MacArthur's office on September 27. SCAPIN 66, a memorandum on *Further Steps toward Freedom of Press and Speech*,<sup>15</sup> was the swift response. SCAPIN 66 forbade all but "such restrictions [on the mass media] as are specifically approved by the Supreme Commander," stopped the exercise of Japanese government power to restrict press freedom, and ordered that steps be taken to repeal those parts of twelve laws that were inconsistent with the order and related SCAP directives.

However, Home Minister Yamazaki then told Japanese writers they should continue to maintain the spirit of the repressive Peace Preservation Law.<sup>16</sup> By SCAPIN 93, a memorandum on *Removal of Restrictions on Political, Civil and Religious Liberties*,<sup>17</sup> the Japanese government was ordered to release political prison-

13. 1 SCAP, *supra* note 7, at 460 app. B: 2A.

14. 2 TAKASUKE KOBAYASHI, *Kenpō Kōza*, 164-170.

15. 1 SCAP, *supra* note 7, at 462 App. B: 2c.

16. K. KOMATSU, *supra* note 12, at 100-101.

17. 1 SCAP, *supra* note 7, at 463-465 app. B: 2d.

ers and restore their citizen rights; to "abrogate and immediately suspend . . . all laws, decrees, orders, ordinances and regulations" contrary to freedom of expression, "including the unrestricted discussion of the Emperor, the Imperial Institution and the Imperial Japanese Government"; to cease police surveillance activities; to "abolish all organizations and agencies" contrary to liberty, such as the Police Bureau, the Special Higher Police, the Protection and Surveillance Commission, and "all secret police" and locally repressive police organs. With SCAPIN 93 the entire legal structure for repression rather quickly collapsed, as the Japanese government issued a series of compliant ordinances between October 12 and the end of 1945.<sup>18</sup> In the eventful months that followed issuance of SCAPIN 93, a new constitution was drafted which came into effect on May 3, 1947. Laws and institutions implementing the constitutional protection of freedom of expression appeared in quick succession.

In general, the press reveled in the unprecedented freedom they enjoyed, once the scarcity of paper eased, and when not tapped on the shoulder by Occupation censors. The motion picture industry and commercial radio broadcasting were also encouraged and regulated by the Occupation.<sup>19</sup> Newspaper censorship tended to be sporadic and inconsistent, which simultaneously added to freedom and to chilling uncertainty until the censorship system was abolished by stages between July and October, 1948. However, Occupation restraints differed markedly from prewar practices in that freedom of thought and expression were generally encouraged. Newspapers were even chided by SCAP occasionally for being insufficiently critical of government and politics.<sup>20</sup>

There were some dramatic confrontations between SCAP and leftist elements, particularly in the years 1948 to 1950, with the coming of the Cold War, the victory of the Communists in the Chinese Civil War, and the Korean War. For example, in the "Red Purge" of the summer of 1950 hundreds of communist and other left-wing personnel were removed from mass media posi-

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18. For example, Ordinance No. 568 of October 12, 1945 abolished the National Defense and Peace Preservation Law, the Subversive Literature Emergency Control Law, and the Emergency Law for the Control of Speech, Publications, Gatherings, Associations and Other. Imperial Ordinance No. 575 of October 15, 1945 abolished the later Peace Preservation Law and thought control enactments. Related laws were negated by Imperial Ordinance No. 638 and Justice Ministry Ordinance No. 52 of 1945. *Id.*, at p. 194.

19. MASAMI ITÔ, *NIHONKOKU KENPÔ* 15-19 (Yûhikaku, 1978).

20. Interviews by Beer of Don Brown, Civil Information and Education, SCAP, interviews in Tokyo (1970 and 1979).

tions under the Organization Control Ordinance of 1949.<sup>21</sup> Full freedom of the press in Japan began at the end of the Occupation on April 28, 1952. Two other legal developments of the Occupation period continued to cause controversy decades later. These were the changes in labor law in 1948, which have restricted public employee freedom ever since, and the enactment of local public safety ordinances as the principal means of regulating the freedoms to assemble and to demonstrate.

The Americans had hoped unionism similar to that in the United States would develop; but prewar leftist unionism in Japan, as well as government-sponsored worker associations, had been deeply ideological and continued to be so into the postwar era. Marxist influence swept through the movement among public and private enterprise employees, and SCAP reacted with restrictions. On July 22, 1948<sup>22</sup> General MacArthur sent Prime Minister Ashida a letter calling for an end to public employee strikes, until then permitted by postwar law. This action led to a 1948 revision of the National Public Employees Law and related laws which removed the right to strike and to this day severely restricts rights of expression of all categories of public employees. Also in 1948 SCAP promoted the passage by local prefectural and city assemblies of "public safety ordinances" (*Kōan Jōrei*) to regulate processions, demonstrations and outdoor gatherings by instituting a notification or permit system. These public safety ordinances remain in 1984 the key legal enactments affecting freedom of assembly.

However, after 1952 freedom of academic and religious activity, and freedom of association and assembly generally flourished in Japan as never before. Frequent demonstrations have become characteristic of democratic politics in Japan. But the Occupation period drove home to many Japanese the point that although the Constitution of Japan was in effect, for whatever reason good or bad, powerful government authorities *outside* the purview of the Constitution could and did use law as a basis for restraints on freedom. It is only from the spring of 1952 that the Japanese have experienced democracy as an independent people.

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21. The text of the ordinance in question and a related 1961 Supreme Court decision are in ITOH & BEER, *supra* note 6, at 22-26.

22. For early Supreme Court decisions on labor cases arising during the Occupation, see, JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN 123, 282, and 285 (1964).

## INSTITUTIONALIZING CONSTITUTIONAL RIGHTS: THE CIVIL LIBERTIES COMMISSIONER SYSTEM

How has freedom fared since 1952? Relatively few Japanese question the legitimacy of freedom of expression as a part of the living law. Few loci in the laws are in unambiguous conflict with Article 21 protections of free speech, and there is a very low threshold of elite and organizational tolerance for encroachments on expression rights. In post-independence history, a great many important judicial decisions affecting freedom of expression have been handed down, but other institutions promoting freedom also deserve attention. For example, the schools effectively indoctrinate students with democratic ideology. Many private organizations of townspeople, workers, and students vigorously exercise their rights in movements concerned with environmental pollution, foreign policy issues, and quality education, and have thereby made freedom something easily taken for granted, a good test of institutionalization.<sup>23</sup>

A distinctive institution representing official sponsorship and encouragement of freedom is the Civil Liberties Commissioner system established by a 1949 law. This system eases for the ordinary citizen the expression of grievances and the assertion of individual rights.<sup>24</sup> Lay Civil Liberties Commissioners (*jinken yogo iin*) handle hundreds of thousands of disputes each year without resort to the courts. Serious cases are referred to the appropriate authorities. Duties and achievements of the Commissioners can be summed up as popularization of human rights, human rights education, and conciliatory settlement of disputes.

The office of Civil Liberties Commissioner is prestigious, but not elitist. The roughly 12,000 commissioners serve without pay for renewable three-year terms; they have no police powers or prosecutorial authority. They are very carefully selected on a non-political basis from among respected local citizens by a rigorous process.<sup>25</sup>

When a vacancy occurs in a city, for example, each of a dozen or more local organizations (e.g., each of five political parties, women's organizations, labor unions, the education committee, and volunteer organizations) submits one name to the local government. The mayor, deputy mayor, and the local social welfare committee then make a joint recommendation to the local

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23. For an overview, see BEER, *supra* note 2.

24. For a more detailed treatment, see Beer and Weeramantry, *Human Rights in Japan: Some Protections and Problems*, 1 UNIVERSAL HUM. RTS. 3, at 1 (July-Sept., 1979). This journal is now entitled *Human Rights Quarterly*.

25. *Id.*, at 6-13.

elected assembly. The recommendation endorsed by the assembly is sent to the governor of the prefecture or metropolis, who in turn forwards it with his approval to the Ministry of Justice. The nomination then goes to the Japan Federation of Bar Associations (*Nihon bengoshi rengōkai*) and to the head of the National Federation of Civil Liberties Commissioners, both of which conduct independent inquiries about the candidate and report back to the Justice Minister. The Minister formalizes the appointment in accordance with the recommendations received. Besides enjoying the respect of the local people, a candidate must reflect human rights principles in his/her own life — for example, he/she must not be known for discriminatory attitudes or anarchism — and must not have a criminal record or known association with crime.

The Civil Liberties Commissioner is basically a volunteer, not a regular employee of the Justice Ministry. Only out-of-pocket expenses (phone, travel, training sessions) are reimbursed. The local and national administrative work is handled by approximately 200 full-time Ministry employees in the Civil Liberties Bureau in Tokyo and in the local Civil Liberties Divisions of Legal Affairs Bureaus. Commissioners must participate in periodic training sessions and must belong to the local Consultative Assembly of Civil Liberties Commissioners (*Jinken yogo iin kyōgikai*). In 1977, 313 such local associations of commissioners were working in liaison with the Civil Liberties Divisions of 294 district and branch Legal Affairs Bureaus of the Justice Ministry. In between the Civil Liberties Bureau at the top and the commissioners at the local level are fifty Prefectural Federations of Civil Liberties Commissioners (four in the island unit of Hokkaidō) which coordinate with the Legal Affairs Bureaus in the following major cities: Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takamatsu. Key functions of the assemblies are liaison and coordination, exchange of information, research and publication, and preparation of advice and opinion for concerned agencies.

Civil Liberties Commissioners come from a broad cross-section of society. Their occupations according to 1978 figures, in descending order of frequency, include agriculture, forestry and fisheries (29.9%); housewives and retired people (19.3%); religious leaders (10.3%); shopkeepers (7.4%); company executives (6.7%); officers of organizations (3.8%); attorneys (3.4%); white collar workers (3%); civil servants (2.6%); teachers (2.3%). Each town is expected to have at least three commissioners, and large cities may have up to 100; Tokyo is an exception with 360. In 1977, commissioners dealt with some 307,000 cases. The number of people bringing them their problems roughly doubled between 1970 and 1980. The Civil Liberties Commissioner is someone from near to

home. He or she is not a distant or threatening authority figure, but one who understands well the local scene and works in a flexible quiet way, wherever and whenever needed, to solve concrete problems.

Overlapping somewhat in function with these commissioners are the approximately 5,000 elderly laypeople (average age 61) who, as Local Administrative Counselors (*gyōsei sōdan iin*) handle about 125,000 complaints from citizens against civil servants each year. These or analogous creative uses of laypeople in dispute-settlement situations do not remove the need for judges but provide low-cost and effective resources to supplement those of overloaded courts, a system that other countries might find useful.

### THE COURTS AND FREEDOM

The courts took on their sweeping powers of judicial review only with the establishment of the 1947 Constitution.<sup>26</sup> Although the Supreme Court is the court of last resort and administers the entire judicial system, its holdings are only binding on lower courts in the individual case appealed. Precedent is generally honored, but a doctrine of *stare decisis* is rejected. With few exceptions, the small judiciary (c.1,500 for a population of around 119 million) is composed of career judges. The lower courts have been more vigorous in the defense of free speech than the fifteen-member Supreme Court, which includes a few distinguished scholars and lawyers along with career judges and prosecutors. By the lights of most Japanese constitutional lawyers, the highest tribunal has been too cautious at times on freedom-related issues. A few questions decided by the bench since 1947 give some sense of where strengths and weaknesses lay.

In general, freedom of the mass media has been well protected by the judiciary. For example, the Supreme Court in 1980 upheld a Sapporo court decision which first recognized a newsman's privilege to maintain the confidentiality of his sources in some cases.<sup>27</sup> Hideshige Shimada, a reporter for the *Hokkaido*

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26. Article 76. The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

2. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

3. All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

KENPŌ (constitution) art. 76 (Japan), *reprinted in*, ITOH & BEER, *supra* note 6, at 265-66.

Also of importance is Article 81. "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." *Id.*

27. Sasaki v. Shimada, 930 Hanrei Jihō, 44 (Sapporo District Court, May 30, 1979); 937 Hanrei Jihō 16 (Sapporo high court, August 31, 1979); 956 Hanrei Jihō 32

*Newspaper*, had refused under cross-examination to reveal his sources for a June, 1977 article alleging parental complaints against a nurse for child abuse at a nursery. Masako Sasaki, the nurse, brought a civil suit against Shimada and the newspaper for erroneous defamatory reporting, asking damages, and, in keeping with legal custom, a published apology. The court ruled that under Article 281 of the Code of Civil Procedure, a newsman as witness may refuse to divulge information on sources as "occupational secrets" (*shokugyō no himitsu*), unless it one-sidedly closes off the pursuit of evidence to the detriment of a fair trial. In this instance, the judge held it not to be the case and maintained that divulgence of sources would impair Shimada's future capacity to gather and freely report news in pursuit of his profession.

The technical capacities and resources of Japan's mass media are quite impressive. However, in some contexts their methods of investigative reporting produce a more chilling effect than State restraints. For example, groups of reporters from ostensibly competing newspapers follow a group consensus on what news provided by a politician or official will be reported; a maverick who would publish more may be ostracized. In another media-related issue area, a right to privacy in the face of intrusions by novelists or the press was established by judicial decision in 1964 under the influence of scholars of U.S. constitutional law such as Masami Ito, now on the Supreme Court. Also of considerable interest are obscenity regulations under 1907 provisions of the Criminal Code (Article 175) and industry self-regulatory systems,<sup>28</sup> and Customs Bureau censorship of imported erotic material under an allegedly unconstitutional 1910 law.<sup>29</sup>

Four other issues have often been before the courts since the 1940s: (1) regulation of demonstrations by local public safety ordinances; (2) the ban on door-to-door election canvassing; (3) severe restraints on freedom of expression of public sector workers; (4) freedom of publishing and Japan's textbook certification system.

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(Sup. Ct., Third Petty Bench, March 6, 1980). The relevant provision in Article 281 is: "A witness may refuse to testify in the following cases: . . . (3) In a case where he is questioned with respect to matters relating to a technical or professional secret." *Minji soshō hō* (Code of Civil Procedure), as translated in, EHS Law Bulletin Series, No. 2300, p. LA 54 (Tokyo, 1963).

28. HIDEO SHIMIZU, *Hō To Masu Komyūnikēshon* (Tokyo, 1970).

29. Articles 21 and 21-2, *Kanzei teiritsu hō* (Customs Standards Law), Law No. 54 of April 11, 1910. See LAWRENCE W. BEER, *supra* note 3, at chapter 9 on privacy and defamation, and chapter 10 on the obscenity question.

## PUBLIC SAFETY ORDINANCES AND THE FREEDOM TO DEMONSTRATE

Freedom of assembly and association may well be the aspects of freedom of expression most critical to the health of Japan's group-oriented democracy. The severe and thorough restraints on associations and demonstrations of prewar Japan gave way in the postwar era to a sudden and lasting proliferation of social, political and economic organizations and to a flood of public "collective activities" (*shūdan kōdō*), as they are officially called. The Constitution<sup>30</sup> guarantees individual rights to peaceful petition (Article 16), assembly and association (Article 21), and in more narrowly focused provisions, the right to have religious (Article 20), academic (Article 23), and worker (Article 28) gatherings and organizations. Political demonstrations have supplied the most dramatic examples of group activity; Local Public Safety Ordinances — established pursuant to Article 94, the local autonomy provision of the Constitution<sup>31</sup> — have been the principal legal mechanism for their regulation since the late 1940s.

Statistically, the peak years for demonstrations seem to have been 1958 to 1960. Massive and successful opposition to a Police Bill which, it was feared, would have strengthened police powers occurred in 1958. In 1960 the largest mass movement in Japanese history marked a national debate on the continuance or revision of the United States-Japan Security Treaty.<sup>32</sup> In 1958, officials recorded 45,368 instances of local public safety ordinance application. Of 43,012 permit requests, only two were denied. Conditions were imposed on activities allowed by 4,224 permits and in 545 of the 2,356 cases in which notification systems were used. These statistics do not include many demonstrations that took place without benefit of permit or notification, as in many early court cases. Until the 1960s many of those accused in court of ordinance violations challenged the constitutionality of public safety ordinances on their face; subsequently, defense attorneys and judges have dealt more with issues of how an ordinance has been applied in a given case.

Some lower courts and the Supreme Court were occasionally at odds from the 1950s through the 1970s regarding public safety ordinance cases. Supreme Court doctrine, most notably in the 1960 Tokyo Ordinance Decision,<sup>33</sup> stressed in somewhat abstract

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30. ITOH & BEER, *supra* note 6, at 258-261, presents Japan's "Bill of Rights."

31. "Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law." *Id.*, at 267.

32. GEORGE R. PACKARD, III, *PROTEST IN TOKYO: THE SECURITY TREATY CRISIS OF 1960* (1966).

33. *Itō v. Japan*, 14 Keishū 1243 (Supreme Court, Grand Bench, July 20, 1960).

terms the dangers of violence to the "public welfare" attendant to public collective activities, but the 1975 Grand Bench decision<sup>34</sup> in the Tokushima Ordinance Case showed a different emphasis. The district court and high court decisions in this case held that the Tokushima Public Safety Ordinance, Article 3, was too vague and abstract in requiring demonstration leaders "to maintain orderly traffic." Manabu Teramae, a union official and leader of an anti-war group, had been arrested in connection with two street demonstrations, one in 1964 against visits to Japan by United States nuclear submarines, and the other in 1968 against the presence in Japan of American B-52 bombers. The Supreme Court admitted that, as legislation, the provision in question is notably lacking in appropriate clarity, "but the question of whether a provision of penal law should be contrary to Article 31 [the Constitution's due process requirement] by reason of ambiguity and vagueness, depends on whether the standard can be so understood as to enable a person of ordinary common sense to judge whether [the provision] applies to an action in a concrete case." The majority felt a person of normal faculties would find, as did the judges, that "intentional" interference with traffic is illegal.

Nobuyoshi Ashibe, a noted constitutional lawyer, says of this decision:

There is almost no mention of a direct relationship between Article 21 and the ordinance itself; emphasis on the violence of collective activities does not appear; and there are passages which can be taken as favorable towards collective *activities* themselves. There is some room for reading in this a qualitative change and a contrast with the 1960 decision (in *Tokyo*). But . . . some aspects are at odds with such an assessment.<sup>35</sup>

In other decisions since then one can find further evidence of greater judicial tolerance of demonstrations, which fits well with prevalent socio-political attitudes.<sup>36</sup>

## FREEDOM OF EXPRESSION FOR PUBLIC EMPLOYEES

In the earlier postwar years most workers gloried in their newly recognized rights to organize and to act collectively, which significantly enhanced their social status, but their preoccupation

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LAWRENCE W. BEER, *supra* note 3, chapter 5. *Keishū* refers to the official Supreme Court Reports of Japan, *Saikōsaibansho Hanreishū: Keiji*.

34. Japan v. Teramae, 29 Keishū 489 (Supreme Court, Grand Bench, September 10, 1975).

35. NOBUYOSHI ASHIBE, KENPŌ II: JINKEN(1) 590 (Tokyo, 1978) [hereinafter cited as ASHIBE] (Beer translation).

36. *E.g.*, Kato et al. v. Japan, 854 Hanrei Jihō, 30 (1977) (Tokyo District Court, June 27, 1977), the so-called "Terao Decision," after the judge.

in those very hard times was the physical survival of their families. Relatively few workers, then or later, seem to have acted in accord with the leftist ideological convictions of their leaders, but then ideology and pragmatism are mingled in Japanese unionism. *Sōhyō* (General Council of Trade Unions of Japan), the largest federation of trade unions, has long been allied with the Japan Socialist Party.<sup>37</sup> Members of public employee unions comprise about 27% of the total union membership in Japan, but account for 71% of *Sōhyō*'s members. Large public sector unions, such as the National Railway Workers Union (*Kokurō*) and the Japan Teachers Union (*Nikkyōso*), have been a principal source of leadership and political activism for the union movement.<sup>38</sup>

Both public and private employee unions have been involved in serious free speech disputes; but the most persistently litigated problem in postwar union history has been the comprehensive restraint on public employee free speech since 1948. Public employees, whether janitors in the tobacco and salt public monopoly corporation or policy makers in the Finance Ministry, may vote and little else. The National Personnel Authority (*Jinjin*) is expected to obviate public workers' need for strikes by protecting their economic interests; it also punishes what it considers to be their improper political activities.<sup>39</sup> Perhaps the courts as guarantors of constitutional rights have been weakest in the area of protecting certain worker rights and freedom of expression of public employees. Particularly since 1973, the Supreme Court, at times reversing lower courts, has rather consistently upheld special restrictions on public employee freedom. In the *Sarufutsu* Case,<sup>40</sup> for example, a postal employee was convicted for putting up six political posters on a public bulletin board during his leisure hours. The issues still debated include (1) proper delineation of restrictions on the rights of teachers, postal workers, telecommunications workers and transportation workers to strike or to engage in political activities, and (2) whether administrative discipline, criminal penalties or no punishment at all should be applied for related legal violations.<sup>41</sup> Administrative discipline is the punishment most often imposed.

### THE BAN ON CANVASSING

Another issue that has been under lively debate in and out of the courts for many years is the unique ban on door-to-door can-

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37. WORKERS AND EMPLOYERS IN JAPAN 241-242 (Kazuo Okochi ed. 1974).

38. *Id.*, at 230-232.

39. ASHIBE, *supra* note 35, at 114-122.

40. *Japan v. Osawa*, 28 Keishū 393 (Supreme Court, Grand Bench, November 6, 1974).

41. LAWRENCE W. BEER, *supra* note 3, at chapter 6.

vassing for votes provided by Article 138 of the Public Offices Election Law.<sup>42</sup> The ban was first made a part of election law in 1925. Three positions have been most commonly taken on the constitutionality of the Article 138 prohibition: (1) that the ban is a reasonable and necessary limitation on freedom of expression to discourage bribery, threats, and other unfair influences on voter decision-making; (2) that Article 138 is not itself unconstitutional but can be invalid in application if not narrowly construed in line with such tests as the "clear and present danger" rule; and (3) that the provision is itself constitutionally repugnant. The second and third views have been adopted by a number of lower court judges and by most constitutional lawyers.<sup>43</sup> The third position would seem most persuasive because canvassing is a core aspect of a democratic campaign, because a total ban appears to be needlessly extreme, and because no empirical evidence sustains the assumption that canvassing is linked in Japan to patterns of greater abuse and bribery than would otherwise occur. This is not to deny that cultures differ importantly in the degree of seriousness accorded the appearance at one's door of another person, whether friend, acquaintance, or stranger, or that such cultural variation may dictate differential law in some issue areas, such as the regulation of election canvassing.

The Supreme Court has consistently upheld the constitutionality of the canvassing ban. An increasing proportion of lower court decisions has found the prohibition unconstitutional. In 1980 and 1981 the Supreme Court repeatedly affirmed the validity of the ban, but in one case<sup>44</sup> Justice Masami Ito added a significant supplementary opinion. The accused maintained that his visits to thirteen houses in 1974 were made before he had registered as a candidate with the local election commission, that his intent had not been to gather votes but to gain grass-roots information about the city's problems and administration, that therefore he had not violated Article 138, and that, in any case, the Article 138 ban is unconstitutional. While deferring to precedent and recognizing the Diet's discretionary power to make election rules, Justice Ito noted that such rules should promote free and fair elections, and suggested that some arguments used for the canvassing ban, such as the dangers of bribery and disturbance of citizen privacy, may not be persuasive in light of actual experience; canvassing is but one of many campaign methods, and

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42. Yoshiaki Yoshida, *Kobetsu hōmon no kinshi*, JURISUTO, *bessatsu* No. 69, at 272-273 (May, 1980).

43. Hidenori Tomatsu, *Kobetsu hōmon kinshi iken hanketsu no ronten*, JURISUTO, No. 688 at 68 (April 15, 1979).

44. 35 Keishū 568 (Sup. Ct., Third Petty Bench, July 21, 1981); and Japan Times Weekly, June 20, 1981 at 11 on related cases.

broad restrictions on freedom of expression would not be permissible.

### THE IENAGA TEXTBOOK REVIEW CASES

Government certification of pre-collegiate textbooks has been another object of controversy for many years, in part as a reaction to very stringent controls in prewar days. The complicated processes of writing, publishing, local selection, and marketing of such textbooks may contain unintended restrictions on freedom which may be more important than censorship. These problems are further complicated by the sometimes rigid polarization of debate on educational issues along political lines. The textbook certification process takes place within the Ministry of Education. The Ienaga Textbook Review Cases significantly challenged administrative review criteria and processes with respect to textbooks and dramatized the continuing public sensitivity to anything faintly reminiscent of prewar thought control. Professor Saburo Ienaga brought suits against the Ministry in 1965 and 1967 for requiring him to make changes in the manuscript of his revised high school text on the history of Japan. In a 1975 Tokyo high court decision,<sup>45</sup> the Ministry was taken to task for violating its own certification standards and arbitrarily abusing its administrative discretion. However, in its 1982 holding the Supreme Court avoided the larger questions of law, constitution and educational policy. Since the Ministry's guidelines for textbook review had changed during the trial years, the Justices focused instead on the technical issue of whether Ienaga still had standing to sue in the case and remanded the question to the Tokyo high court for resolution.<sup>46</sup>

Ienaga and his supporters objected to the education minister's preference for polite ambiguity in textbook coverage of emperor myths and wartime behavior. Just as the "freedom orders" of SCAPIN 66 and 93 revolved around treatment of the Emperor in the media, so the reaffirmation over time of Japanese democracy seemed to call for continuing demystification of the Emperor and frank discussion in the mass media and textbooks of repressive and unpleasant aspects of Japan's pre-1945 history at home and abroad. Vigorous protests by China, Korea and other countries in the summer of 1982 over what they saw as official Japanese tampering with the textbook treatment of that earlier time again made

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45. *Japan v. Ienaga*, 800 Hanrei Jihō, 19 (Tokyo high court, December 19, 1975). For a detailed description of the textbook certification and selection systems, see Beer, *Education, Politics and Freedom of Expression in Japan: the Ienaga Textbook Review Cases*, 8 *LAW IN JAPAN* 67 (1975).

46. *Japan v. Ienaga*, 1040 Hanrei Jihō, 3 (Sup. Ct., First Petty Bench, April 8, 1982).

it clear that the status of freedom in Japan's law and politics can seriously affect Japan's relation with its neighbors.<sup>47</sup> The Ministry of Education had called for a textbook content which downplayed Japanese atrocities in China and which implied that Korea's independence movement in 1919 was no more than a series of riots. By autumn of 1982, the Ministry of Education, nudged by the Ministry of Foreign Affairs and by unfavorable comments from friendly countries, revised its policy in the direction of a more sensitive treatment of these and other historic matters.

### FREEDOM OF SPEECH AND THE "NO WAR CLAUSE"

In the unique Japanese understanding of constitutionalism, the status of freedom of speech and press is intimately linked with memories of unquestioning devotion to the emperor and harsh militarism. Prewar militarism meant repression at home and disastrous aggression abroad in the name of the emperor. Today, constitutional repression of military and imperial power is thought essential to the maintenance of democracy and Japan's remarkably pacifist foreign relations. Many of Japan's elite are acutely sensitive to the degree to which the current government is willing to continue honoring Article 9, "the no war clause" in Japan's treasured "Peace Constitution." It is not clear in 1984 whether pressures from the United States for substantial rearmament constitute a noteworthy danger for freedom of expression in Japan, but it would be a mistake to assume the two questions are unrelated.<sup>48</sup>

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47. Concerning the international controversy over Japan's textbooks, *see*, Asahi Shinbun, July 10, 1981 and July through September, 1982. In English *see*, for the same period, The Japan Times, China Daily News, Korea Herald, People's Korea, and The Asia Record, September through December, 1982.

48. Lawrence W. Beer, *Some Reflections on Japan and America's National Interest*, 46 VIT. SPEECHES DAY 443 (May 1, 1980). On Japan's defense policy, *see*, *The Defense of Japan: "Should the Rising Sun Rise Again?"*, 13 DEFENSE MONITOR (1984).