

# **CULTURE, COMMERCE, AND THE CONSTITUTION: LEGAL AND EXTRA- LEGAL RESTRAINTS ON FREEDOM OF EXPRESSION IN THE JAPANESE PUBLISHING INDUSTRY**

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## **I. OVERVIEW**

Culminating a quarter-century of research on freedom of expression in Japan, Lawrence Beer recently wrote:

Each constitutional democracy is a partially open, partially closed, coherent whole, operating according to a sometimes subliminal consensus about what should be done for survival, success, and adherence to national values. Each constitutional culture nurtures, protects, regulates, and represses freedom of expression in ways often determined more by its own rules and customs than by law, government institutions, or abstract ideal. Freedom lives or dies in the interplay between public and private sectors.<sup>1</sup>

Beer's statement implies that analysis of legal formalities alone will not result in an accurate picture of the significant forces at work in a constitutional society's attempt to delimit publishing freedoms. One must look to both "public" factors, i.e. laws, their enforcement and judicial interpretation, and "private" factors, i.e. social, economic, and cultural practices, in order to assess the boundaries of acceptable expression.

It is not uncommon to encounter enthusiastic appraisals such as "Japan possesses one of the most emancipated press sys-

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1. Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution, in JAPANESE CONSTITUTIONAL LAW* 221, 245 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

tems in the world"<sup>2</sup> and "Japan is a paradise for the press."<sup>3</sup> Critics, however, note that the "Japanese media [are] notorious for [their] willingness to defer to governmental authority,"<sup>4</sup> and that "rampant self-censorship by the Japanese media is stifling political debate and creating international distrust of Japan."<sup>5</sup> One comparative scholar thoughtfully tried to resolve the situation by summarizing that "it is important to note that the Japanese press, while free and critical, observes an unwritten code of Japanese cultural tradition concerning what can and what cannot be said in public."<sup>6</sup> As scholar of Japanese social change Frank Upham has pointed out concerning publishers' reactions to certain social activists, "[r]ather than taking the chance that something they publish may be considered discriminatory, publishers prefer to avoid the entire issue."<sup>7</sup> A review of relevant materials thus quickly impresses the researcher that Japan's publishing industry is formally quite unrestrained, while informally it operates within a context of considerable tension.

Few would doubt the assertion that the Japanese, as a whole, are extremely literate, hungry for information, and able to purchase more or less whatever published materials they seek. "Japan has been a highly literate society for centuries and today is clearly one of the most media-saturated countries in the world. Publishing in general is a multibillion-dollar industry."<sup>8</sup> At the same time, memories of a not-so-distant past linger to the extent that "anything resembling censorship inevitably evokes cries that a revival of the police state of World War II is underway."<sup>9</sup> For both sociohistorical as well as legal reasons, then, restraints on publishing freedom carry the potential for intense public concern.

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2. Kinji Kawamura, *Mass Media in Japan*, in *THE JAPANESE PRESS AND INFORMATION SYSTEM* 1, 1 (Marjane Aalam & Philippe Regnier eds., 1989).

3. Masao Horibe, *Press Law in Japan*, in *PRESS LAW IN MODERN DEMOCRACIES* 315, 334 (Pnina Lahav ed., 1985).

4. Kazutami Yamazaki, *Press Freedom Japan-Style: Bow and Scrape*, *NIKKEI WKLY.*, Apr. 4, 1992, at 7.

5. *Asian News: Asian Officials Dupe Foreign Scribes, Dutch Author Says*, Kyodo News Service, Japan Economic Newswire, Apr. 23, 1991, available in LEXIS, Asia and Pacific Rim Library, JEN File.

6. Pnina Lahav, *Introduction to PRESS LAW IN MODERN DEMOCRACIES* 1, 4 (Pnina Lahav ed., 1985).

7. FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 114 (1987). Upham was referring to press avoidance of matters related to the historically oppressed Burakumin sub-population in Japan, discussed in greater detail *infra* Part IV. B.

8. Steven R. Weisman, *Japan's Weeklies: A School for Scandal With Curriculum Including Politics*, *N.Y. TIMES*, Aug. 17, 1989, at A14.

9. John Burgess, *In Japan, The Inside Snoop: Photo Magazines Traffic in Sex and Carnage*, *WASH. POST*, Dec. 8, 1986, at D1.

While still not abundant, scholarly writing on formal legal restraints affecting freedom of expression in Japan's print media is increasingly available in both English and Japanese.<sup>10</sup> Three comparative pieces specifically treating Japanese libel and privacy law have appeared in the past five years in U.S. law journals.<sup>11</sup> The Japanese-language legal affairs journal *Jurisuto* has published lengthy collections of articles by scholars and media analysts specifically discussing trends in defamation and privacy law in 1977, 1981, 1990, and most recently in 1994.<sup>12</sup> Lawrence Beer has continued to provide thorough sociolegal analysis in this area, including particularized treatment of press-related developments.<sup>13</sup> Professor of Law Horibe Masao of Hitotsubashi University, perennial participant in the *Jurisuto* features, has had his succinct but thorough overview of Japanese press law translated into English.<sup>14</sup> Thus it is not difficult to identify the fundamental elements of legal restraints on publishing in Japan. Nonetheless, two areas of inquiry are not addressed, or addressed only marginally, by this scholarship. First, numerous important lawsuits have arisen in the past few years that have yet to be analyzed fully, at least in English, from even the formal-restraint perspective.<sup>15</sup> Second, until very recently, systematic self-restraint by publishers in reaction to organized social activism has not resulted in open and in-depth discussion, despite an industry-wide impact on press treatment of a variety of important topics.<sup>16</sup> The former area concerns legal restraint based on perceived harm to individuals; the latter area concerns extra-legal

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10. This paper treats only those restraints applicable to the commercial publishing industry in Japan, including organizations involved in newspaper, magazine and book production and distribution. For a comprehensive assessment of freedom of expression that also includes other spheres of activity, see generally LAWRENCE WARD BEER, *FREEDOM OF EXPRESSION IN JAPAN* (1984).

11. Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FLA. J. INT'L L. 141 (1990); Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53 (1990); Ellen M. Smith, Note, *Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japanese Libel Laws*, 14 MICH. J. INT'L L. 871 (1993).

12. JURISUTO, Dec. 1, 1977, at 14; JURISUTO, June 15, 1981, at 14; JURISUTO, July 1, 1990, at 14; JURISUTO, Feb. 1, 1994, at 12.

13. See Beer, *supra* note 10, at 281-335. See also Lawrence W. Beer, *Defamation, Privacy, and Freedom of Expression in Japan*, 5 LAW IN JAPAN 192 (1972); Beer, *supra* note 1, at 221-54.

14. Horibe, *supra* note 3, 315-38.

15. Discussion by legal scholars of the Miura cases, for example, has yet to appear in English. See discussion *infra* Part III.C.1.

16. Other than an occasional isolated comment such as Frank Upham's, the author was unable to locate any pre-1993 materials treating this issue. See *supra* note 7 and accompanying text. See discussion *infra* Part IV.B. for discussion of 1993-1994 Japanese mass media treatment of *kotoba-gari* ("word hunting") and *sabetsu yōgo* ("discriminatory terms").

restraint based on perceived harm to groups. Recent and noteworthy developments in both areas require examination.

As for legal actions, Japanese observers have noted with some anxiety an increase in the number of libel suits and media-defendant losses in recent years.<sup>17</sup> English-language analysis, on the other hand, seems to dwell on the generally low level of litigation in Japan<sup>18</sup> and apparent lack of libel chill in the Japanese press.<sup>19</sup> Given that Japan-based professionals are generally in a better position to more quickly assess important events as they occur, there is a clear need to update English-language scholarship with recent cases as well as review Japanese commentators' analysis thereof.

As for extra-legal trends, in 1994 the Japanese press began to raise publicly, in formats widely available to outside observers, the problems and challenges it faces with respect to social pressure groups.<sup>20</sup> English-language discussion of the nature of extra-legal influences, such that it exists, predates this recent public debate in Japan and does not analyze these forces with an eye toward assessing publishing freedoms on the whole.<sup>21</sup> That legal scholars in Japan and elsewhere have generally chosen not to discuss industry self-restraint is hardly surprising given the outcome-based analysis characteristic of most formal legal research. It is difficult enough to analyze actions that may well result in out-of-court settlements,<sup>22</sup> much less lawsuits that never happened or reactions to published content that might not support formal legal action but still result in significant restraints on press freedom.

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17. See, e.g., Symposium, *Saishin no meiyō-puraibashii mondai o bunseki suru* [Analysis of Recent Problems in Reputation and Privacy Law], JURISUTO, Feb. 1, 1994, at 12, 22 [hereinafter Symposium]; Katō Masanobu, *Meiyō-puraibashii shingai no kyūsairon - masukomi-shuppan jirei o chūshin ni* [Discussion of Remedies in Reputation and Invasion of Privacy Actions - Mass Circulation Cases], JURISUTO, Feb. 1, 1994, at 55, 55.

18. See, e.g., Smith, *supra* note 11, at 890 n.126.

19. *Id.* at 891.

20. The Tsutsui controversy of 1993 spurred the public debate. See discussion *infra* Part IV.B.

21. Ellen Smith states that "self-censorship by the Japanese media should not be confused with the chilling effect purportedly caused by libel litigation." Smith, *supra* note 11, at 891. However true her assertion might be from the standpoint of legal doctrine, it is difficult to dispute that from the standpoint of publishers, consistent grievances lodged by the public concerning allegedly harmful content, whether formal or informal, will have an appreciable effect on editors' decisions to allow certain uses of language or presentation of potentially controversial topics.

22. An example of the tendency for Japanese libel suits to settle out of court and thus cast a problematic cloud over analysis as a whole is illustrated by discussion of the Miura cases in Furukawa Toshimi, "*Rosu giwaku*" *jiken hōdō no kyōkun* [Lessons From Press Coverage of the "L.A. Suspensions" Incident], JURISUTO, Feb. 1, 1994, at 43, 44.

As Frank Upham has written, “[e]merging alongside [the] legal scholarship is a growing body of literature on Japanese social conflict that has revealed Japanese society to be much more complicated and contentious than the popular perception of harmony and consensus would imply.”<sup>23</sup> This Article attempts to shed light on both legal and extra-legal conflict resolution through examination of the common environment of the publishing industry. Defamation suits, along with related actions against publishers by private individuals, represent the predominant formalized legal channel for signaling a personal grievance. At the same time, self-restraint and the absence of any group libel law<sup>24</sup> have made protest campaigns by social pressure groups against authors and publishers a significant extra-legal channel for influencing content. Both mechanisms carry considerable potential for chilling a publisher’s enthusiasm to provide readers with important material, and to some extent these legal and extra-legal mechanisms have even begun to interrelate.<sup>25</sup>

After a brief overview of the publishing industry, including particularly noteworthy trends of the past decade, a summary of the legal foundations for formal content restraint follows.<sup>26</sup> Thereafter this Article examines recent important print-media cases grounded in Japanese defamation (*meiyo kison*), privacy (*puraibashii*), and “right to likeness” (*shōzōken*) law.<sup>27</sup> A section focusing on social pressure groups and self-imposed publishing restraints follows, including discussion of the recent public interest in problems associated with “discriminatory expression” (*sabetsu hyōgen*).

Finally, this Article weighs the implications of a perceived increase in litigation by individuals against a new and emerging

23. UPHAM, *supra* note 7, at 2.

24. See *infra* notes 272-78 and accompanying text.

25. For discussion of “spill-over” defamation suits, see discussion *infra* Part III.C.3. For discussion of “spill-back,” i.e. manipulative non-disclosure of information by a public agency based on potential legal consequences, see discussion *infra* Part IV.A.

26. Space does not allow for discussion of two important areas, one formal and legally derived, the other informal and of sociocultural origin. Regulation of obscene materials through application of Article 175 of the Criminal Code (刑罰) is currently undergoing some revision in interpretation, but Lawrence Beer’s chapter on obscenity in BEER, *supra* note 10, at 335-61, is still an excellent starting point for research in this area. The second area untouched in this paper is press treatment of the imperial household, mentioned briefly in Smith, *supra* note 11, at 890-91. See also Beer, *supra* note 1, at 221. This topic is also of some renewed public interest in Japan of late, as shown by a seven-installment series in the weekly SHUKAN GENDAI from April 30 through June 18, 1994, *Kōshitsu hōdō ni tsuite* [Press Coverage of the Imperial Household].

27. *Shōzōken* has also been translated as “a right not to be photographed without consent.” See *infra* note 75 and accompanying text.

consensus on press obligations vis-a-vis social protest groups. In so doing, the author concludes that while extra-legal restraint arguably played the dominant role in the past, legal restraint by means of civil litigation is now the source of at least equal concern among professionals in the Japanese publishing industry. The role of law, then, appears to have increased considerably in this vital, dynamic, and constitutionally protected sector of cultural and economic activity.

## II. THE PUBLISHING INDUSTRY IN JAPAN

According to the Japan Book Publishers Association, in 1992 publishers in Japan released over 45,000 new book titles.<sup>28</sup> Nearly 4,000 periodicals were available in the same year.<sup>29</sup> The 1980s saw magazines surpass books in sales, a phenomenon apparently caused by publishers' efforts to concentrate on the relatively high-profit margins achievable through advertising-based periodicals.<sup>30</sup> Many of the large publishing houses in Japan began their businesses in magazines, only later to enter book publishing as a field.<sup>31</sup> Only 25 out of a total of approximately 4,300 publishers had more than 1,000 employees, but the largest 120 companies accounted for about 50% of the total sales volume for books and magazines in 1990.<sup>32</sup> Total circulation of monthly magazines rose from 2.15 billion copies in 1987 to 2.64 billion copies in 1992, while circulation for weekly magazines rose from 1.76 billion to 2.11 billion during the same period.<sup>33</sup> Approximately 1.4 billion copies of books were published in 1992.<sup>34</sup> The daily circulation of newspapers in Japan had exceeded 52 million copies as of October, 1993.<sup>35</sup> "Five nationwide newspapers accounted for 62 percent of the daily total" in 1980,<sup>36</sup> demonstrating the wide distribution and importance of Japan's major newspaper publishers.<sup>37</sup> Despite the traditional respect accorded to the national dailies, however, television and photo-weekly magazines (*shashin shūkanshi*) developed into important competitive sources of information for many Japanese during the

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28. JAPAN BOOK PUBLISHERS ASSOCIATION, AN INTRODUCTION TO PUBLISHING IN JAPAN 1994-1995 7 (1994).

29. *Id.*

30. *Id.* at 10.

31. PUBLISHERS ASSOCIATION FOR CULTURAL EXCHANGE, PRACTICAL GUIDE TO PUBLISHING IN JAPAN 19 (1991).

32. *Id.*

33. JAPAN BOOK PUBLISHERS ASSOCIATION, *supra* note 28, at 9.

34. *Id.*

35. NIHON SHINBUN KYOKAI, THE JAPANESE PRESS 15 (1994).

36. BEER, *supra* note 10, at 283.

37. For a comparative table of major newspaper publishers' circulations and relative market shares over the years 1967-1981, see HORIBE, *supra* note 3, at 333.

1980s.<sup>38</sup> Indeed, the Japan Newspaper Publishers & Editors Association (*Nihon Shinbun Kyōkai*) seems resigned to the fact that Japanese readers are increasingly likely to perceive the major dailies as merely one more news source of the “same quality” as other media.<sup>39</sup>

In 1972, Lawrence Beer wrote that “[w]eekly magazine spokesmen at times emphasize the people’s right to know about public figures and the fierce competition between periodicals . . . . Little is said of the press’ social power or interest in profit.”<sup>40</sup> Two decades later, economic competition among titles in the same genre, as well as among entire sectors of the publishing industry as a whole, appears to have further intensified.<sup>41</sup> Katō Masanobu of Nagoya University attributes this to the “merchandising of curiosity” (*kōkishin no shōhinka*) now prevalent in Japan, as well as to an overall deterioration of journalistic standards.<sup>42</sup> “What was once just fodder for idle chit-chat is now marketed in mass quantities.”<sup>43</sup> The success of such content-based marketing can result in pressure on the more traditional and generally respected mass media to follow suit in the exposé business.<sup>44</sup> “The bad money drives out the good money”<sup>45</sup> unless the latter responds at least somewhat in kind.

Press critic Iimuro Katsuhiko views the situation somewhat differently:

My impression is that the press is becoming increasingly polarized. There is an increase in serious newspaper and television coverage that is respectful of reputation and privacy interests. However, there is also an increase in sensationalistic media that go far beyond previously held standards in their coverage. For example, . . . sports newspapers (*supōtsu shinbun*), some of the weeklies (*ichi-bu no shūkanshi*) and the photo-weeklies.

The sports newspapers are particularly noteworthy. In their efforts to transform themselves into mass-appeal papers (*taishūshi*), they began to include coverage of social and political news . . . without any know-how on matters of human rights. At the same time, they do not sell well unless they contain exciting stories. The result is a trend toward ever more harmful material being published.<sup>46</sup>

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38. NIHON SHINBUN KYOKAI, SHIN HO TO SHINBUN [LAW AND NEWSPAPERS - NEW EDITION] 1 (1990).

39. *Id.* at 3.

40. Beer, *supra* note 13, at 195.

41. See generally NIHON SHINBUN KYOKAI, *supra* note 38, at 1-10.

42. Katō, *supra* note 17, at 55.

43. *Id.* at 56.

44. *Id.* at 55.

45. *Id.* at 55.

46. Symposium, *supra* note 17, at 13.

Whether one subscribes to Katō's "split the pie" analysis or Iimuro's "polarized growth" theory, certain segments of Japan's print-media industry are clearly pushing commercialized information in new directions. Photo-weeklies as a genre established their market strength in the mid-1980s,<sup>47</sup> contemporaneous with the transformation of the sports newspapers into generalized tabloids.<sup>48</sup>

The line between traditional, generally respected media (*ippan media* or *ippan masukomi*) and low-brow amusement (*kyōmi hon'i*) media thus seems to have blurred considerably over the past decade.<sup>49</sup> This has led some press critics to wonder whether journalistic standards as a whole in the industry are still possible to maintain.<sup>50</sup> Conversely, from the standpoint of those individuals or organizations who are, for whatever reason, deemed newsworthy by the media, the risk of false, misleading, invasive, or otherwise harmful exposure seems to have greatly increased over the past decade.

### III. LEGALLY IMPOSED RESTRAINTS ON PUBLICATION OF HARMFUL CONTENT

#### A. LEGAL FOUNDATIONS

Article 21 of the Japanese Constitution of 1946 explicitly guarantees freedom of the press.<sup>51</sup> "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed."<sup>52</sup> The Japanese Constitution also explicitly forbids any maintenance of censorship.<sup>53</sup> Promulgation of the postwar Constitution abolished all previous Meiji-era statutes

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47. See Burgess, *supra* note 9 for a brief discussion of the success of the original Japanese photo-weekly FOCUS, published by Shinchōsha, and the subsequent appearance of similar magazines from other publishers.

48. Furukawa Toshimi pinpoints 1985 as the watershed year in this trend, noting that it coincided precisely with the period surrounding the arrest of Kazuyoshi Miura. Furukawa, *supra* note 22, at 44. See discussion of the Miura arrest and resulting defamation and privacy suits filed by Miura *infra* at Part III.C.1.

49. Iimuro uses the term *ippan shinbun* to imply the non-tabloids. Symposium, *supra* note 17, at 13. Katō uses the term *ippan masukomi* to also include traditional television news formats as well as print journalism, and *kyōmi hon'i* to describe rumor or gossip-based media, implying tabloids and afternoon television "wide shows." Katō, *supra* note 17, at 55.

50. See Symposium, *supra* note 17, at 23.

51. Horibe, *supra* note 3, at 316.

52. KENPO [CONSTITUTION], art. 21, para. 1. The Japanese-language version of the Constitution uses the phrase "*shuppan no jiyū*," translated generally as "freedom of the press." See, e.g., Horibe, *supra* note 3, at 316. "*Shuppan*," however, is the common word for "publishing" in general and does not necessarily carry the strong implication of periodical journalism of the English word "press." Book publishers are *shuppan-sha*, while newspaper publishers are *shinbun-sha*.

53. KENPO [CONSTITUTION], art. 21, para. 1.

regulating the publishing industry, including the Newspaper and Publication Regulation of 1869, the Press Act of 1893, and the Newspaper Act of 1909.<sup>54</sup>

Constitutional counterbalance to unbridled freedom of the press is found in Article 11, which "guarantees 'fundamental human rights' as 'eternal and inviolable.'"<sup>55</sup> Discussion of the legal boundaries of the relationship between the press and individuals in Japan frequently emphasizes this human rights perspective.<sup>56</sup> Increased respect for individual human rights is an important characteristic of a maturing post-war Japanese constitutional democracy.<sup>57</sup> Even so, tugging the focus back to freedom of expression is the "public welfare" (*kōkyō no fukushi*) language found in Articles 12 and 13.<sup>58</sup> For example, Article 12 states that constitutional freedoms and rights are "guaranteed to the people," but that the people "shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."<sup>59</sup> If popular recognition of the importance of a free press in a democratic society can be taken as a legitimate public goal,<sup>60</sup> then arguably the "public welfare" can be harmed by citizen actions that attempt to dissuade the press from their mission.<sup>61</sup>

In the current absence of any general press laws, defamation of character and obscenity are statutorily restricted,<sup>62</sup> as are disclosures relating to military secrets and certain disclosures by public employees.<sup>63</sup> Defamation (*meiyo kison*), the principal formal restriction examined in this Article, is proscribed by both the Criminal Code (*Keihō*) and Civil Code (*Minpō*).<sup>64</sup> Article 230 of the Criminal Code explicitly differentiates "between ordinary defamation, which is *not* excused by proving the truth of allega-

54. Horibe, *supra* note 3, at 317, 335 n.9. For an English-language translation of the Newspaper and Publication Regulation of 1869, see Horibe, *supra* note 3, at 317.

55. Beer, *supra* note 1, at 223 (citing KENPO, art. 11).

56. See, e.g., Symposium, *supra* note 17, at 15. See also Imuro's analysis of the sports newspapers' lack of sensitivity to human rights, *supra* note 46 and accompanying text.

57. Symposium, *supra* note 17, at 15.

58. Beer, *supra* note 1, at 223 (citing KENPO, arts. 12, 13).

59. KENPO, art. 12. English translation from NIPPONKOKU KENPO (Shōgakukan, 1982).

60. See Horibe, *supra* note 3, at 315.

61. See Beer, *supra* note 1, at 223 for further discussion of judicial interpretation of the "public welfare" language as it relates to freedom of expression.

62. JAPAN BOOK PUBLISHERS ASSOCIATION, *supra* note 28, at 44.

63. Horibe, *supra* note 3, at 319.

64. *Id.* at 328.

tions, and defamation that involves a public interest."<sup>65</sup> The latter is specifically addressed in Article 230.2: "When the statement . . . relates to matters of public concern (*kōkyō no rigai*) and has been made solely (*moppara*) for the purpose of promoting the public interest (*kōeki*), the person making that statement shall not be punished if the truth thereof is established upon inquiry into its truth or falsehood."<sup>66</sup> The Criminal Code also makes defamation of dead persons punishable only if "based on a falsehood."<sup>67</sup>

The harshness of an absolutist truth requirement for media defendants to escape punishment was softened by a unanimous Japanese Supreme Court in 1969.<sup>68</sup> Thereafter in Japan, "where a public interest is involved and served, the truth of allegations need not be proved, and [s]ufficient [g]rounds (*sōtō no riyū*) for belief of truth absolves one of both punishment and illegality."<sup>69</sup> Thus the standard for media defendants regarding public interest matters is now one of reasonable belief and good faith effort.<sup>70</sup> As Ellen Smith has pointed out, the approach still differs from that of the U.S. courts' approach to libel, which emphasizes the public identity of the individual rather than the public-concern value of the subject matter.<sup>71</sup>

Article 723 of the Civil Code recognizes defamation as a tort (*fuho kōi*), and permits the court to require the liable party to take "suitable measures" (*tekitō naru shobun*) for the restoration of the defamee's reputation "either in lieu of or together with compensation for damages."<sup>72</sup> Although the Civil Code contains no explicit "public concern" provision as in the Criminal Code, in 1966 the Supreme Court held that the same principle should be utilized in civil cases.<sup>73</sup> Two causes of action related to civil defamation also bear mention. A right of privacy (*puraihashii-ken*) was established in civil law under the "broad terms" of tort Articles 709 and 710 of the Civil Code by a 1964 Tokyo District Court decision concerning a Mishima Yukio *roman a clef*.<sup>74</sup> Also, a

65. BEER, *supra* note 10, at 319 (emphasis added). See also Horibe, *supra* note 3, at 328.

66. Horibe, *supra* note 3, at 328. See also Beer, *supra* note 13, at 197. Japanese-language terms added by the author, based on KEIHO [CRIMINAL CODE], art. 230-32 in SANSEIDO SHIN ROPPO 808 (1994).

67. *Id.* (citing KEIHO, art. 230, para. 2).

68. Beer, *supra* note 13, at 202.

69. *Id.* at 203.

70. See Smith, *supra* note 11, at 883.

71. *Id.*

72. Horibe, *supra* note 3, at 330 (quoting MINPO, art. 723).

73. See *id.* at 330. See also BEER, *supra* note 10, at 320 for a complete discussion of "The Ex-Convict Candidate Case," which served as the basis for the decision.

74. See Horibe, *supra* note 3, at 331; BEER, *supra* note 10, at 325-26. The novel, UTAGE NO ATO [AFTER THE BANQUET], was based on the marital life of an unsus-

right to likeness (*shōzōken*), i.e. "a right not to be photographed without consent," was recognized "as an aspect of the right to privacy" in 1969.<sup>75</sup>

Sakamoto Masanari of Hiroshima University has summarized Japanese precedent and doctrine to define legal reputation interest as the "enjoyment of objective measures of esteem and good name in society."<sup>76</sup> He also notes that liability for damage to the reputation interest of an individual is not grounded in "presumptions of legal theory, but must be assessed on a narrow case-by-case basis, taking into consideration the manner of expression, the purpose of the statements, the degree of factual investigation, etc."<sup>77</sup> Sakamoto posits that even though the Criminal Code does not explicitly address privacy issues, "publication of a person's private life" now falls within the scope of criminal sanction.<sup>78</sup> "In terms of legal protection, social esteem and emotional tranquility certainly overlap."<sup>79</sup>

This blending of defamation and privacy doctrine, though perhaps not unique to Japan, obviously differs from that of traditional Anglo-American doctrine.<sup>80</sup> In Japan, "the law has taken a different course, and libel and privacy are to a great extent, still intertwined."<sup>81</sup> This may be due to a Japanese tendency to view "all such offenses as relational,"<sup>82</sup> or perhaps to the "therapeutic social benefits" goal of Japanese libel law.<sup>83</sup> Detailed analysis of the cultural and jurisprudential sources of this overlap is better left to scholars such as Sakamoto Masanari<sup>84</sup> and John Haley.<sup>85</sup> Suffice it here to note that, despite the ostensibly strict confines of a codified system, Japanese courts have shown a remarkable

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cessful Tokyo gubernatorial candidate. MISHIMA YUKIO, *UTAGE NO ATO* (1960). The district court awarded an unprecedented sum in damages for mental distress, and the case settled while on appeal.

75. BEER, *supra* note 10, at 325.

76. Sakamoto Masanari, *Meiyo-puraibashii no shingai to hyōgen no jiyū* [*Reputation Loss, Invasion of Privacy, and Freedom of Expression*], *JURISUTO*, July 1, 1990, at 36, 36. In English, Horibe notes that "Japanese law defines defamation as reducing the respect of another in the community or lowering him in the estimation of his fellows." Horibe, *supra* note 3, at 327.

77. Sakamoto, *supra* note 76, at 37 (emphasis added).

78. *Id.*

79. *Id.* That the overlap carries over into Japanese scholarly analysis is demonstrated by *Jurisuto's* consistent use of the combined term "*meiyo-puraibashii*" in its titles for articles on this area of law. See, e.g., *supra* note 17.

80. Rosen, *supra* note 11, at 148-49.

81. *Id.* at 149.

82. *Id.* at 163.

83. Smith, *supra* note 11, at 872.

84. See generally Sakamoto, *supra* note 76.

85. See, e.g., John O. Haley, *Introduction: Legal vs. Social Controls*, 17 *LAW IN JAPAN* 1 (1984).

willingness to carve out new protectable interests based on circumstantial rather than doctrinal or historical origins.<sup>86</sup>

Finally, a cautionary word concerning the value of precedent merits inclusion. "Technically, earlier court decisions (*hanrei*) are not 'case law.' . . . The U.S. legal doctrine of *stare decisis* does not apply in Japan."<sup>87</sup> That being said, legal rules can serve as "guiding principles,"<sup>88</sup> and "judicial precedents play an important role in law"<sup>89</sup> along with scholarly opinions (*gakusetsu*).<sup>90</sup> The result is a system that generally honors consistency but can produce lower court decisions at variance with each other or even with Supreme Court doctrine.<sup>91</sup> "The well-informed Japanese lawyer, if asked whether case precedents are law in Japan will say, 'Substantially, yes; but formally no.'"<sup>92</sup> If, as Sakamoto asserts, defamation and related actions must be approached narrowly on their facts, and, as also discussed above, the operational definitions of these actions are hazy or intertwined, then the imprecise value of precedent may render this area of Japanese law particularly problematic.<sup>93</sup> Such circumstances no doubt vex publishers in many other civil law countries, as day-to-day decisions on editorial content and potentially libelous references require internally consistent judicial guidelines.

## B. ENFORCEMENT AND REMEDIES

"For most violations of the law, the Japanese rely on criminal sanctions, a cumbersome and often impractical approach."<sup>94</sup> At least as of the 1970s, this appeared to be the case in defamation actions as well.<sup>95</sup> In 1993 Ellen Smith reiterated this assertion, albeit without any supporting data, saying that "injured parties resort more often to criminal prosecution, perhaps because the costs of civil litigation are much higher, and the civil damages awarded are usually nominal."<sup>96</sup> Japanese professional discussion of recent cases, however, focuses nearly exclusively on

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86. See BEER, *supra* note 10, at 325 for discussion of the emergence of privacy law "with little initial support in legal and social tradition."

87. *Id.* at 137.

88. Haley, *supra* note 85, at 1.

89. THE JAPANESE LEGAL SYSTEM 59 (Hideo Tanaka ed., 1976).

90. *Id.*

91. See Beer, *supra* note 10, at 137.

92. 2 LAW & THE LEGAL PROCESS IN JAPAN 151 (John Owen Haley and Dan Fenno Henderson eds., 1978).

93. Press critic Imuro Katsuhiko addresses inconsistent and hasty judgments in defamation cases in Symposium, *supra* note 17, at 25.

94. Haley, *supra* note 85, at 2.

95. Beer, *supra* note 13, at 192.

96. Smith, *supra* note 11, at 881.

civil defamation and privacy suits and their growth.<sup>97</sup> A semi-formal alternative to bringing a lawsuit is to lodge a complaint with Japan's Human Rights Commissioners (*jinken yōgo iin*) or Local Administrative Counselors (*gyōsei sōdan iin*).<sup>98</sup> These well-educated and trained volunteers provide conciliation services and referrals in cases of serious rights violations.<sup>99</sup> Although they are highly regarded and officially supported, their ability to actually enforce their own warnings or agreements is limited.<sup>100</sup> Horibe does not discourage use of these organizations, but notes that "even if the legal system is slow and has its own strange and immature aspects, . . . bringing a lawsuit is still the most effective strategy [for resolving defamation disputes.]"<sup>101</sup>

Punishment under Criminal Code Article 230 consists of "imprisonment with or without forced labor for not more than three years or by a fine of not more than 500,000 yen."<sup>102</sup> Remedies under the Civil Code Articles 709 and 710 require compensation for pecuniary and non-pecuniary damage.<sup>103</sup> In addition, as mentioned above, "suitable measures" may be ordered by the court in defamation cases under Article 723.<sup>104</sup> Frequently, these measures take the form of public apology (*shazai kōkoku*) "in a national or local newspaper,"<sup>105</sup> or public retraction (*torikeshi kōkoku*).<sup>106</sup> A court-ordered public apology does not violate constitutionally protected freedom of conscience (*ryōshin no jiyū*) under Article 19,<sup>107</sup> nor does it "necessarily imply personal recognition of wrongdoing."<sup>108</sup> Public apology is not an appropriate remedy in cases where only privacy is at issue, however, "restoration of the status quo ante [being] impossible."<sup>109</sup>

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97. See, e.g., Symposium, *supra* note 17, at 22. See also Akiyoshi Kenji, *Meiyō-puraibashii kanren hanrei no genjō* [Present State of Decisions on Reputation and Privacy], JURISUTO, Feb. 1, 1994, at 48 for detailed discussion of important libel cases from 1990-1994, all of which are civil actions.

98. Beer, *supra* note 1, at 225. Beer referred to this system of volunteer commissioners in 1972 as the "Civil Liberties Bureaus," but now apparently prefers a more literal translation of *jinken yōgo* - "human rights protection." See Beer, *supra* note 13, at 193.

99. Beer, *supra* note 1, at 226-27.

100. Symposium, *supra* note 17, at 30.

101. *Id.*

102. KEIHO, art. 230 in SANSEIDO SHIN ROPPO 808 (1994). Horibe, *supra* note 3, at 328, 337 n.58 provides a similar translation using older fine figures.

103. Horibe, *supra* note 3, at 329-30.

104. See *supra* note 72 and accompanying text.

105. Horibe, *supra* note 3, at 330.

106. BEER, *supra* note 10, at 315.

107. Katō, *supra* note 17, at 58.

108. Horibe, *supra* note 3, at 330.

109. Beer, *supra* note 1, at 236.

In rare instances, a prior-restraint injunction may legally issue, based on the 1986 *Hoppō Journal* case.<sup>110</sup> The Supreme Court in that case held that injunctions should be allowed only in exceptional circumstances, and that such measures did not constitute state-authorized censorship because they were not ordered by government administrative personnel.<sup>111</sup> The article in question was apparently "so extreme in its insults, vulgarity, and personal attack as obviously to lack credibility,"<sup>112</sup> and therefore "[t]o the Court, character assassination trumped the public-interest value of comment[.]"<sup>113</sup>

Katō Masanobu notes in his analysis of 45 libel cases from 1989-1993 that combined requests for both damages and public apology were most prevalent, with requests for damages alone made in only 17 cases.<sup>114</sup> In no instance was public apology alone requested.<sup>115</sup> While some courts were willing to award damages but no apology in cases of combined requests, no court authorized an apology only in such circumstances.<sup>116</sup> Although damages were awarded in over 60% of the media-defendant cases analyzed, in general the amount awarded by the court was far below that requested by the plaintiff.<sup>117</sup> Katō also notes that awards averaged only about 750,000 yen,<sup>118</sup> that only two judgments resulted in awards of 2 million yen or more, and that in general, award amounts in Japan remain "extremely low."<sup>119</sup> Akiyoshi Kenji's analysis of cases over a similar span notes larger awards to plaintiffs prevailing over *non*-media defendants or media and non-media co-defendants.<sup>120</sup> The implication of this trend is that while courts are not unwilling to recognize media liability in defamation cases, they do not see publishers as mere "deep pockets." This may be due to judicial realization of the potential for libel chill on the print media as they carry out their constitutional mission. Young C. Kim implies that low damage awards probably sit well with the media, as "they would rather pay damages than print an apology or [a] retraction."<sup>121</sup> While no prior-restraint injunctions issued in the period analyzed, Katō

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110. See Kyu Ho Youm, *supra* note 11, at 72 for a particularly complete English-language discussion of this case.

111. See *id.* at 72-73.

112. Beer, *supra* note 1, at 235.

113. *Id.*

114. Katō, *supra* note 17, at 58.

115. *Id.*

116. *Id.* at 60.

117. *Id.* at 61.

118. Approximately U.S. \$7,500 at an exchange rate of 100 yen to U.S. \$1.00.

119. Katō, *supra* note 17, at 61.

120. Akiyoshi, *supra* note 97, at 49.

121. YOUNG C. KIM, JAPANESE JOURNALISTS AND THEIR WORLD 117 (1981).

did note two cases in which post-printing injunctions were at issue.<sup>122</sup> The first involved a small-circulation (*minikomi*) paper in a Tokyo subcenter that defamed a metropolitan council representative.<sup>123</sup> The Tokyo District Court rejected the plaintiff's request for a public apology,<sup>124</sup> but awarded 1,000,000 yen in damages and issued an injunction disallowing "sale, gratis distribution or any transfer [of the materials] to third persons."<sup>125</sup> In the second case, a popular novelist sued a photo-weekly for violation of right to likeness based on publication of a photograph of a female social companion.<sup>126</sup> The Tokyo District Court awarded 1.1 million yen in damages despite a request for 3 million yen.<sup>127</sup> The court rejected a request to compel defendants to print an advertisement in national newspapers calling for purchasers and possessors of the magazine in question to cooperate in its collection and disposal (*kaishū kyōryoku*). The court also rejected the plaintiff's request that the defendant produce and distribute to libraries notice stickers to be affixed to the offending publication.<sup>128</sup>

John Haley has noted that "Japanese courts do not have the equity powers available to judges in common law systems to fashion nonstatutory remedies to provide for meaningful relief."<sup>129</sup> Even so, the "suitable measures" language of Civil Code Article 723 statutorily allows for judicial discretion in defamation cases, and thereby allows plaintiffs to state their own preferred remedies, including injunctions, when they bring suit. Based on Katō's research, however, Japanese courts are still not comfortable with creative remedies,<sup>130</sup> a comforting situation for media defendants in an age of increasing libel litigation.

### C. RECENT AND NOTEWORTHY CASES

#### 1. *The Miura Phenomenon*

Convicted and sentenced to life imprisonment in 1994 for conspiring to murder his wife during a trip to Los Angeles in 1981,<sup>131</sup> Miura Kazuyoshi has sent shock waves through the Japa-

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122. Katō, *supra* note 17, at 60.

123. *Id.*

124. *Id.* at 63 chart 6.

125. *Id.* at 60 (citing 1328 HANJI 74 (1989)).

126. Katō, *supra* note 17, at 60, 63 chart 6. It is not entirely clear from Katō's description precisely who brought the suit - Inoue Hisashi himself, the woman in question, or both persons as co-plaintiffs.

127. *Id.* at 63 chart 6.

128. *Id.* at 60.

129. Haley, *supra* note 85, at 1.

130. Katō, *supra* note 17, at 60.

131. See *Guilty Verdict in Miura Murder Case*, NIKKEI WKLY., Apr. 4, 1994, at 20. [hereinafter *Guilty Verdict*].

nese legal and publishing communities for over ten years.<sup>132</sup> Miura first achieved press notoriety as the grieving husband of a victim of American violent crime, nursing his comatose wife for a year until her ultimate demise.<sup>133</sup> In January 1984, however, the weekly *Shūkan Bunshun* began a seven-part series linking Miura to the fatal event.<sup>134</sup> Following that series, the Japanese media launched frenzied coverage of Miura's life.<sup>135</sup> "His home and office were besieged around the clock and he had to run the gauntlet of hundreds of baying reporters and photographers whenever he ventured outside."<sup>136</sup>

Miura filed a criminal complaint and a civil suit in defamation against *Shūkan Bunshun's* publisher soon after the initial release, claiming the series was without "factual basis."<sup>137</sup> He also filed for an injunction against sale of the sixth installment, which dealt with his alleged past as a juvenile delinquent.<sup>138</sup> A Tokyo court dismissed the injunction request and prosecutors dropped the criminal complaint.<sup>139</sup> After nearly ten years and 17 oral arguments, however, judgment in the civil damages suit against *Shūkan Bunshun* was finally postponed pending the outcome of Miura's criminal trial in the murder conspiracy case.<sup>140</sup>

Miura was arrested and placed into custody in September, 1985.<sup>141</sup> That the *Shūkan Bunshun* series led to his criminal investigation is unquestioned.<sup>142</sup> Yet over the years from his detention house, Miura filed over 230 defamation and related-action suits against Japanese media organizations,<sup>143</sup> predominantly the print media.<sup>144</sup> Miura has had considerable success in these suits, resulting in an unprecedented number of quickly rendered judgments holding publisher defendants liable.<sup>145</sup> So in-

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132. Furukawa, *supra* note 22, at 43.

133. See *Guilty Verdict*, *supra* note 131.

134. Furukawa, *supra* note 22, at 43.

135. *Id.*

136. Geoffrey Murray, *Lurid News Coverage is Raising Issue of Right to Privacy in Japan*, CHRISTIAN SCI. MONITOR, June 29, 1984, at 9.

137. Furukawa, *supra* note 22, at 44.

138. *Id.*

139. *Id.*

140. As of March, 1995, the original SHOKAN BUNSHUN suits were not resolved, as Miura's murder conspiracy verdict awaits appeal. Interview by facsimile with Yamaguchi Jirō, Legal Affairs Dept., Magazine House Ltd., Tokyo, (March 2, 1995). The Tokyo High Court has, however, already rejected Miura's appeal of an earlier conviction based on a previous and separate unsuccessful attempt to murder his wife. See *Court Rejects Miura's Appeal, Judge Rules That Confession by Female Accomplice Is Truthful*, THE DAILY YOMIURI, June 23, 1994, at 3.

141. Furukawa, *supra* note 22, at 44.

142. *Id.* at 43.

143. See *Guilty Verdict*, *supra* note 131.

144. Furukawa, *supra* note 22, at 44.

145. *Id.*

tense was his litigiousness that *Jurisuto's* 1994 charts reviewing libel judgments in Japan between 1990 and 1993 are sub-divided into "Miura" and "non-Miura" columns.<sup>146</sup> *Masukomi Rinri*, the monthly newsletter of the Japanese Mass Communications Ethics Discussion Group (*Masukomi Rinri Kondankai*), regularly tabulates Miura judgments and totals.<sup>147</sup> As of late December 1994, Miura has prevailed in 77 cases, with damages awarded totaling 36,750,000 yen.<sup>148</sup> The courts have rejected liability in 43 cases.<sup>149</sup> Miura apparently filed and litigated all or nearly all of these suits *pro se*, and used the awards to finance his professionally-waged criminal defense, as well as ongoing civil litigation.<sup>150</sup> Out-of-court settlements have also added considerably to his compensation.<sup>151</sup>

Publishers and legal commentators are searching for lessons from the Miura phenomenon. The former editor-in-chief of *Shūkan Bunshun* notes that "Our investigative reporting was thorough and serious, and we have always stood by the content of our articles. Other media have been losing in the courts because of the manner of expression used in their pieces . . . . It is unfortunate that their later coverage may have adversely affected the trustworthiness of our work."<sup>152</sup> Furukawa Toshimi in *Jurisuto* points to several factors that appear to have influenced the courts' decisions in the Miura cases, including the degree of effort expended to corroborate those stories only indirectly related to Miura's criminal prosecution.<sup>153</sup> In this respect, Japanese defamation inquiry appears to accept the premise that a post-arrest criminal suspect's personal reputation, although no doubt tarnished by the arrest itself, can be further legally damaged by "backgrounder" stories about the suspect's past if such stories lack a reasonable basis for belief.<sup>154</sup> This confirms Ellen Smith's observation that Japanese libel law focuses on the public nature of the subject matter in question, rather than of the person involved.<sup>155</sup>

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146. Akiyoshi, *supra* note 97, at 49.

147. Furukawa, *supra* note 22, at 44.

148. *Miura kazuyoshi hikoku meiyō kison soshō* [*Defamation Suits by Defendant Miura Kazuyoshi*], *MASUKOMI RINRI*, (Masukomi Rinri Kondankai, Tokyo), Dec. 25, 1994, at 3. The figures include final judgments and changes in amounts granted on appeal.

149. *Id.*

150. Furukawa, *supra* note 22, at 46. See also Akiyoshi, *supra* note 97, at 50.

151. Furukawa, *supra* note 22, at 44.

152. *Id.*

153. *Id.* at 45.

154. *Id.*

155. See *supra* notes 70-71 and accompanying text.

Also appearing to drive some decisions in Miura's favor was "the forceful creation of an impression among readers, prior to any actual determination of [his] guilt, [that Miura] was in fact a criminally-liable murderer."<sup>156</sup> Furukawa points to the large number of cases won against publishers of sports newspapers and photo-weeklies who used such headline language as "Enjoying The Criminal Life" or "A True Scoundrel," noting that courts found liability based on "excessive insult" (*gendo o koeta bujoku*).<sup>157</sup>

In addition to defamation actions, Miura also filed suits grounded in right to privacy and right to likeness.<sup>158</sup> Liability for invasion of privacy was found for certain press reports on Miura's previous arrests or convictions,<sup>159</sup> as well as for disclosure of the titles of periodicals to which he subscribed.<sup>160</sup> In one of the more important right to likeness cases, however, the Tokyo High Court reversed a district court finding that a photo-weekly's publication of a picture of Miura in police escort custody (*gosō shashin*) constituted a violation of Miura's rights.<sup>161</sup> "Freedom of expression is essential to fostering democracy and forms the very roots of our mental freedom. It should therefore be respected to the highest degree. Even when the expression violates a right to likeness (*shōzōken*), as an exercise of freedom of expression within broad boundaries, it must not be held unlawful."<sup>162</sup> The court noted that "circumstances surrounding a person indicted of a serious crime are of appropriate concern to the public," and thus asserted that the "public purpose" (*kōeki mokuteki*) requirement in such cases was met.<sup>163</sup>

Further judicial pronouncement on the importance of journalism occurred in reaction to an apparent chutzpah defense by the tabloid *Tōkyō Supōtsu*.<sup>164</sup> The paper insisted that "our readers are different from those of papers that specialize in news (*nyūsu*) coverage, in that our readers are not concerned with the truth of the articles. Our articles are only read for amusement

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156. Furukawa, *supra* note 22, at 45.

157. *Id.*

158. *Id.* at 45-46.

159. *Id.* at 45. See *infra* Part III.C.2 for discussion of the 1994 Japanese Supreme Court holding on civil liability for reporting of previous convictions and prior arrests.

160. Furukawa, *supra* note 22, at 45.

161. *Id.* at 46.

162. *Id.*

163. *Id.* See also Symposium, *supra* note 17, at 26 for detailed discussion of the photo-weekly Focus' use of a similar custody photograph. After losing at trial, Focus prevailed on appeal.

164. Furukawa, *supra* note 22, at 45.

(*kyōmi hon'i*).<sup>165</sup> The Tokyo District Court firmly rejected this argument and awarded Miura 500,000 yen in damages.<sup>166</sup> “Even in the case of sports newspapers, for socially significant articles (*shakaiteki kiji*) such as the one here, it is clear that readers read them assuming their truth . . . . It is not overstatement to say that [*Tōkyō Supōtsu*’s] argument, coming from a newspaper as an instrument of journalism, is equivalent to an act of suicide.”<sup>167</sup> Quite by contrast, however, the evening tabloid *Yūkan Fuji* prevailed both at trial in Tokyo District Court and on appeal in the Tokyo High Court based on reasoning essentially similar to that of the *Tōkyō Supōtsu* defense.<sup>168</sup> The upper court affirmed by noting that “general readers only peruse (*ichidoku*) these articles for amusement, and therefore they do not result in defamation.”<sup>169</sup> Judgments such as these certainly raise the specter of judicial inconsistency in multiple defamation actions. In Imuro Katushiko’s opinion, Japanese judges frequently do not recognize the importance of some of the closer cases.<sup>170</sup> “It may be true that many of these cases can be dispensed with easily. Yet there are cases, . . . such as with the custody photographs, . . . that push the limits both ways. [Even in those cases], some courts just seem to hand down media liability as ‘routine work’ (*ruutin waaku*).”<sup>171</sup> Media researcher Oda Haruo agrees, detecting “judicial ‘blurs’ (*bure*) . . . that result in unworkable legal theory.”<sup>172</sup> Oda posits that both media organizations and the lower courts would ultimately be served better if more cases went to the Japanese Supreme Court for judgment.<sup>173</sup>

Of the 88 Miura cases studied by Furukawa in early 1994, 26 had been filed against sports newspapers, 21 against evening tabloids (*yūkanshi*), 27 against weeklies (presumably including photo-weeklies), eight against monthlies or book publishers, and only six against “respectable” general newspapers (*ippanshi*).<sup>174</sup> Although only one of the general newspaper suits resulted in trial court judgment for Miura, one was also reversed on appeal in his favor.<sup>175</sup> The average awards in sports newspaper, evening tabloid, and weekly magazine cases were higher than those in the

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Symposium, *supra* note 17, at 25, 27.

171. *Id.* at 27.

172. *Id.*

173. *Id.*

174. Furukawa, *supra* note 22, at 44.

175. *Id.*

general newspaper or book categories.<sup>176</sup> Furukawa does point out, however, that Miura's awards on average have been relatively small, even given the already low amounts characteristic of successful Japanese libel actions.<sup>177</sup> Using *Masukomi Rinri's* figures, Miura's average award to date stands at approximately 477,000 yen,<sup>178</sup> or less than \$5,000. This is considerably lower than the approximately 900,000 yen average award cited by Furukawa as typical in libel cases over the past ten years.<sup>179</sup>

The substantial number of Miura's wins combined with his relatively low awards point to two distinct, yet related messages. First, Japanese courts are clearly willing to hold the print media liable when they exceed certain subjectively determined boundaries of intrusiveness or sensationalized expression. Second, although Miura's rights to privacy and reputation may have been legally damaged, it appears that his objective "base line" for judicial computation of personal loss was already at a comparatively low level. Therefore, whether or not Miura's particular circumstances will overshadow any judicial objective of deterring harmful press content in the future remains unclear. In this respect, Tokyo High Court judge Takeda Minoru has suggested that "careful thought should be given to boldly increasing awards" so that overzealous media coverage can be effectively thwarted.<sup>180</sup> The stimulus for such increased compensation, however, will apparently have to come from plaintiffs with less controversial pasts than Miura Kazuyoshi.

## 2. Other Individual Actions

Oda Haruo's wish that the Japanese Supreme Court examine more media cases<sup>181</sup> was at least partially fulfilled in February, 1994, when a petty bench decision issued in the *Gyakuten (Reversal)* case.<sup>182</sup> The plaintiff in the case had been acquitted of murder but convicted of assault in the 1960s in Okinawa, and had served over two years in prison.<sup>183</sup> Defendant-author Isa Chihiro had served on the jury in the case and wrote a very well-received

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176. *Id.*

177. *Id.* at 46.

178. *See supra* note 148.

179. Furukawa, *supra* note 22, at 46.

180. *Id.* at 47.

181. *See supra* note 173 and accompanying text.

182. Horibe Masao, *Nonfikushon sakuhin to zenka-nado ni kakawaru jijitsu no kōhyō [Public Disclosure of Facts in Prior Criminal Records and Their Use in Non-Fiction Works]*, JURISUTO, Oct. 1, 1994, at 85.

183. *See Rosen, supra* note 11, at 154. Rosen's article contains a brief description and analysis of the case through its first appellate stage at the Tokyo High Court in 1989.

book, *Gyakuten*, about his experience.<sup>184</sup> Isa used the plaintiff's real name in his book, along with the names of others tried in the same criminal proceeding, the latter having given Isa permission to do so.<sup>185</sup> Plaintiff, having relocated to Tokyo to start a new life,<sup>186</sup> sued Isa for emotional distress and demanded 300 million yen in damages.<sup>187</sup> In 1987, the Tokyo District Court found for the plaintiff, awarding 500,000 yen.<sup>188</sup> The Tokyo High Court affirmed the decision in 1989,<sup>189</sup> noting that use of the plaintiff's real name and previous conviction, even in a serious work of non-fiction, was not immune from liability unless "indispensable to achieving a goal in line with the public interest."<sup>190</sup>

The Japanese Supreme Court affirmed the judgment for the plaintiff.<sup>191</sup> The decision rests on two bases. First, the Supreme Court reasserted a 1977 holding that an individual's previous indictments, convictions, or periods of penal servitude directly affect that person's reputation (*meiyo*) and degree of trust (*shinyō*), and that therefore such a person does have a legally protected interest in non-disclosure unless he or she grants authorization.<sup>192</sup> The 1977 holding was founded on the theory that even though prior criminal records are derived from public materials, social rehabilitation of persons with prior criminal histories should be encouraged.<sup>193</sup> The 1977 Court also noted that the resocialization process, with its attendant need for emotional tranquility (*heion*), would be impeded by unauthorized disclosures.<sup>194</sup> Second, the Court found that in this case, author Isa should have been aware of the personalized social consequences of using the plaintiff's real name and criminal history in his book. Therefore, Isa could not be excused from tort liability.<sup>195</sup>

Horibe notes that although the lower courts specifically addressed the issues of the case in terms of privacy (*puraibashii*) rights, the 1994 Supreme Court did not once use the word in its decision.<sup>196</sup> Instead, the Court emphasized only a narrowly pro-

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184. See *id.* Okinawa was under American administration at the time and apparently utilized juries in criminal proceedings.

185. See *id.*

186. See *id.*

187. Horibe, *supra* note 182, at 85.

188. *Id.* (citing 1258 HANJI 22, 658 HANTA 60).

189. Horibe, *supra* note 182, at 85 (citing 1323 HANJI 37, 715 HANTA 184).

190. Rosen, *supra* note 11, at 154-55 (quoting *Court Upholds Publishing Names with Criminal Records Invades Privacy*, JAPAN TIMES WKLY. OVERSEAS ED., Sept. 23, 1989, at 4).

191. Horibe, *supra* note 182, at 85.

192. *Id.* (summarizing 35 MINSHU 3, at 620).

193. Horibe, *supra* note 182, at 85.

194. *Id.*

195. *Id.*

196. *Id.* at 86.

tected legal interest in non-disclosure of prior criminal records.<sup>197</sup> Moreover, the Court emphasized three factors that generally favor rather than preclude disclosure.<sup>198</sup> First, the Court noted that "we cannot deny that . . . there may be historical and social significance in public disclosure . . . of criminal incidents and trials."<sup>199</sup> Second, the Court acknowledged that persons with prior criminal histories may, to some extent, have to endure difficulties (*junin*) in social activities due to some publication of their records.<sup>200</sup> Third, the Court asserted that prior criminal records of elected officials were of appropriate public interest and potentially valuable in guiding voters' decisions, and that therefore such disclosures were not unlawful.<sup>201</sup> Nonetheless, in order to assess these issues in a particular case, the Court held that "the purpose and nature (*mokuteki, seikaku-nado*) of the work in question must be examined along with the significance and necessity of using the person's real name."<sup>202</sup>

Given this extraordinarily narrow directive for case-by-case appraisal, publishers may still not have a clear idea of how to address such situations in the future, other than those involving elected officials. Horibe sees the decision as effectively precluding disclosure of "old prior records" (*furui zenka*) of "members of the general public" (*ippanjin*).<sup>203</sup> Although the Court remained officially reticent on the topic, Horibe also sees the decision as bringing similar cases within the boundaries of privacy law.<sup>204</sup>

Important questions linger. Must a prior record really be old in order to qualify for legal protection? Given the highly-regarded, indeed award-winning, status of the work in this case,<sup>205</sup> what standards will be used to judge acceptable "purpose and nature"? As a nagging side issue, does the Court's consistent use of the "and so forth" *nado* suffix with the term for prior record (*zenka-nado*) leave the door open for similarly hazy legal protection from disclosure of other publicly-derived personal information? Finally, although the Court obviously paid attention to the social value of disclosure in some instances, it appears that the Court did not specifically address the constitutional freedom of publishers. If this case could not elicit even passing judicial

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197. *Id.* at 87.

198. *Id.* at 86-87.

199. *Id.* at 86. Horibe quotes the Supreme Court without citation to MINSHO.

200. *Id.* at 87.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *E.g.*, Rosen, *supra* note 11, at 154.

inquiry into that freedom, what case could? Perhaps waiting for the Supreme Court's announcements on these matters will not prove particularly instructive after all.

Looking at other recent cases from the lower courts, one set of cases clearly shows that, even if defamation or privacy rights for criminal suspects might be limited, their relatives need not suffer if they are willing to bring suit. In 1993, a woman suspected of murder lost her libel suit in Tokyo District Court against a photo-weekly.<sup>206</sup> The court rejected her claim based on the "sufficient grounds to believe truthful" standard discussed above.<sup>207</sup> The suspect's mother also sued the same photo-weekly for defamation, based on hearsay use in the same article that included references personal to her.<sup>208</sup> The mother prevailed both at trial and on appeal.<sup>209</sup> The appellate court, moreover, doubled her damages award to a total of 3 million yen, an extraordinarily high figure in Japanese libel actions.<sup>210</sup> The upper court concluded that it was "difficult to find a reasonable basis to believe truth" in the article's references to the mother.<sup>211</sup>

Politicians will not only have difficulty keeping any criminal histories from being disclosed,<sup>212</sup> they also face steep hills in winning defamation suits based on speculation as to their political financing. In a 1993 battle of big names, former Prime Minister Nakasone Yasuhiro personally sued the venerable *Asahi Shinbun* for an article the paper ran concerning stock swaps made by his political organization under an employee's name.<sup>213</sup> Nakasone asked for 120 million yen in damages and a public apology advertisement.<sup>214</sup> After noting that the fundamental facts concerning the stock trades were not in dispute, the Tokyo District Court then applied what reads like an American "actual malice" test to the *Asahi* article.<sup>215</sup> "Unless the remaining material display[ed] particularly intentional malice (*kotosara na akui*) or deviat[ed] from standard commentary of this type," liability would not be

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206. Akiyoshi, *supra* note 97, at 50.

207. *Id.* See discussion *supra* Part III.A. concerning the standard for truth as a defense.

208. *Id.*

209. *Id.*

210. *Id.* See *supra* notes 118-19 and accompanying text for Katō's figures on average libel awards.

211. *Id.*

212. See discussion of Supreme Court holding in the *Gyakuten* decision, *supra* Part III.C.2.

213. Akiyoshi, *supra* note 97, at 51.

214. *Id.*

215. *Id.* Lawrence Beer notes that important U.S. Supreme Court decisions have indeed influenced Japanese defamation law in the past. See BEER, *supra* note 10, at 331 n.7 for the effect of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), on damages awards in media-defendant cases in Japan.

found.<sup>216</sup> Nakasone appealed his loss to the Tokyo High Court, though it appears that *Asahi* settled before a decision could be reached there.<sup>217</sup>

In January, 1994 a Tokyo court ordered six companies to pay a total of 4.5 million yen in damages to a woman portrayed as an accessory to the murder of her husband.<sup>218</sup> The magazine articles at issue ran in 1988,<sup>219</sup> well after Miura's arrest and generally about the time his initial civil litigation was underway. That the murder took place in Los Angeles is certainly ironic, though perhaps only coincidental in the magazines' decisions to run their articles. Unquestionably similar to some of the Miura cases, however, was the judge's reasoning. "[I]n the reports there were expressions making the ordinary reader believe that the wife was the culprit."<sup>220</sup> A Los Angeles judge had dismissed criminal charges against the wife in 1988.<sup>221</sup> To the extent that she had consistently denied any wrongdoing,<sup>222</sup> her case was again similar to Miura's. In contrast, however, she had been relatively quickly vindicated by a court of law. Whether this fact proved persuasive or merely served a subliminal hindsight purpose in the court's finding for her is unclear.

In a 1994 decision involving two national newspapers, the Yokohama District Court found in favor of a woman allegedly involved in espionage for North Korea.<sup>223</sup> Although the court noted that "it has been recognized as true that she cooperated with North Korean agents,"<sup>224</sup> the judge ruled that "'follow-up reports' by the *Asahi Shimbun* and *Yomiuri Shimbun* 'were not true and brought down [plaintiff's] reputation.'"<sup>225</sup> Ancillary rulings as to each paper's use of photographs resulted in liability for *Yomiuri* only.<sup>226</sup> The total awarded for both cases was 1.1 million

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216. Akiyoshi, *supra* note 97, at 51.

217. *Id.*

218. *See 6 Media Ordered to Pay 4.5 Mil. Yen for Murder Case Libel*, Kyodo News Service, Japan Economic Newswire, Jan. 31, 1994, available in LEXIS, Asia and Pacific Rim Library, JEN file [hereinafter *6 Media Ordered to Pay*].

219. *See id.*

220. *Id.* (Quoting Judge Toshiaki Harada who presided over the case). As the newswire piece ran in English with no citation to Japanese-language sources, the author was unable to confirm the accuracy of the quote. The use of the word "culprit" is particularly odd, as it is not a standard translation for the word *hannin*, or "criminal." Even so, the phrasing is strikingly similar to that quoted by Furukawa, *supra* notes 156-57 and accompanying text.

221. *See 6 Media Ordered to Pay, supra* note 218.

222. *See id.*

223. *See Two Dailies Ordered to Pay 1.1 Mil. Yen in Libel Case*, Kyodo News Service, Japan Economic Newswire, Apr. 22, 1994, available in LEXIS, Asia and Pacific Rim Library, JEN file [hereinafter *Two Dailies Ordered*].

224. *Id.* (quoting the presiding Judge Hiromu Emi).

225. *Id.*

226. *See id.*

yen for each newspaper,<sup>227</sup> not exorbitant by Japanese standards given the apparent co-defendant status of the newspapers.<sup>228</sup> *Asahi* published a front-page correction, though it is not clear if this was ordered by the court.<sup>229</sup> In a particularly interesting twist, the Yokohama court appears to have separated defamation from privacy claims. The plaintiff's full name was used in parts of the articles, "but the ruling said violating [her] privacy by disclosing her identity . . . did not constitute damage to [her] reputation."<sup>230</sup> As discussed above, Japanese doctrine and application do not normally uphold this distinction.<sup>231</sup>

This is not to say, however, that through artful pleading plaintiffs cannot attempt to distinguish those aspects of an article that result in privacy invasions from those that result in loss of social standing. An interesting case in point is that of actress Ichige Yoshie's husband, himself a lawyer.<sup>232</sup> Suing the *Hōchi Shinbun* for an article concerning his married life with the actress, the husband prevailed on privacy grounds as to the general state of their relationship, as well as in defamation based on the paper's intimation that he had physically abused his mother-in-law.<sup>233</sup> Finding for the plaintiff husband, the Tokyo District Court stated:

The article in question clearly dealt with private matters the disclosure of which was not fueled by any public demand. . . . Before undertaking such coverage, the media must first seriously consider whether or not the family members or other third persons associated with the entertainer in question have tolerated or approved of such exposure. The media must also consider whether or not their coverage will unreasonably invade the subjects' privacy.<sup>234</sup>

The reverse implication of this ruling, of course, is that a celebrity's family members who have approved of or tolerated their public exposure in the past would at some point be barred from bringing privacy claims against later media coverage. As for the defamation claim, the court noted that the paper had not attempted to corroborate its story through direct interview of the plaintiff, and "that the court is unable to find sufficient grounds to believe the truth of the matter."<sup>235</sup> *Jurisuto* has neither re-

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227. *See id.*

228. *See supra* notes 118-19 and accompanying text for average award figures.

229. *Two Dailies Ordered*, *supra* note 223.

230. *Id.*

231. *See discussion supra* notes 80-83 and accompanying text.

232. Akiyoshi, *supra* note 97, at 51.

233. *Id.* at 51-52.

234. *Id.*

235. *Id.* at 52.

ported the total amount of the final award in this case nor provided any claim-specific itemization.

### 3. *Defamation Actions and Organizational Conflict*

As a form of legal recourse, defamation claims can intertwine with other actions, particularly when the aggrieved party is in a situation to otherwise influence a publisher's ability to conduct business. Such an instance arose in 1994, when the East Japan Railway Company (JR East) sued the publisher of *Shūkan Bunshun* for libel, seeking 100 million yen in compensation and a public apology.<sup>236</sup> The company claimed that its reputation had been damaged as a result of a series of articles alleging rumors of the use of company funds to pay off extortionists.<sup>237</sup> Prior to filing the libel action, however, JR East had directed its train-station kiosk sales subsidiary to halt all sales of the weekly in advance of the release of the first article in the series.<sup>238</sup> This action effectively thwarted weekly distribution of 110,000 copies, or about 12% of the magazine's entire circulation.<sup>239</sup> *Shūkan Bunshun* applied for an injunction in Tokyo District Court to force the subsidiary to continue sales at train stations.<sup>240</sup> JR East had also filed for a provisional injunction against *Shūkan Bunshun* to halt further publication of articles in the series.<sup>241</sup>

JR East eventually abandoned its prior restraint request after three articles in the series had already been released into national circulation.<sup>242</sup> Three weeks later, moreover, the Tokyo District Court ordered the railway "and its subsidiary to resume sales of the weekly magazine . . . at kiosks in and around JR East stations."<sup>243</sup> The court chose to frame the issue presented as one of contract law between *Shūkan Bunshun*'s publisher and JR East's sales subsidiary.<sup>244</sup> The court declined to rule whether or not refusal to sell the magazine violated constitutionally protected freedom of the press.<sup>245</sup> In November, 1994, approximately five months after the dispute first arose, *Shūkan Bunshun* agreed to apologize and carry corrections in a subsequent issue of the weekly concerning the by then completed series of arti-

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236. *JR East Sues Publisher for Libel*, MAINICHI DAILY NEWS, July 6, 1994, at 2.

237. *Id.*

238. *Publisher Acts Against JR Sales Ban*, THE DAILY YOMIURI, June 19, 1994, at 2.

239. *Id.*

240. *Id.*

241. *JR East, Bunshun Swap Lawsuits*, THE DAILY YOMIURI, June 21, 1994, at 2.

242. *JR East Sues Publisher For Libel*, MAINICHI DAILY NEWS, July 6, 1994, at 2.

243. *Magazine Wins Squabble with JR East*, THE DAILY YOMIURI, July 23, 1994, at 2.

244. *Id.*

245. *Id.*

cles.<sup>246</sup> JR East, it appears, dropped its civil libel suit.<sup>247</sup> A press report at the time noted that “[n]ow that the publisher has decided to apologize for damaging the reputation of JR East, both companies are likely to reach an amicable settlement.”<sup>248</sup>

What can be learned from the JR East affair? First, corporations in Japan, even only nominally private ones such as JR East,<sup>249</sup> need not be bashful in advancing claims of defamation. Second, business relations and publishing distribution systems can be wielded in strategically powerful ways to directly influence publishers’ ability to reach their audiences.<sup>250</sup> Third, vindication by means of agreement with the offending party to issue a public apology may be at least as motivating a concern as monetary settlement, particularly in the case of corporations. Finally and perhaps not surprisingly, courts may prefer to resolve disputes between businesses based on contract or other fields of business law, and, provided that such approaches do in fact resolve the situation, they may eschew constitutional analysis even when free speech issues are clearly present.

In another example of inter-organizational clashing that resulted, *inter alia*, in libel actions, 1991 saw the concerted efforts of members of the Kōfuku no Kagaku (“Science of Happiness”) religious corporation to frustrate the publishing activities of Kōdansha, Japan’s largest private book and magazine publisher.<sup>251</sup> One of Kōdansha’s magazines, the photo-weekly *Friday*, had run an article about the leader of the religious group that cast aspersions on his emotional stability.<sup>252</sup> Thereafter, “hundreds” of Kōfuku no Kagaku members surrounded Kōdansha’s Tokyo headquarters, while others seriously hampered the publisher’s operations by jamming its phone lines with calls and faxes for a period of five days.<sup>253</sup> Kōfuku no Kagaku demanded that Kōdansha cease publication of *Friday* and fire its president.<sup>254</sup> Kōdansha filed criminal and civil actions for business

246. *Bunshun to Apologize to JR East*, THE DAILY YOMIURI, Nov. 10, 1994, at 2.

247. *Id.*

248. *Id.*

249. *See JR East - Shūkan Bunshun; Trial Result Aids Press Freedom*, THE DAILY YOMIURI, July 27, 1994, at 3.

250. It is of course arguable that JR East’s highly-reported tactics only resulted in increased attention to and sales of SHOKAN BUNSHUN during the period in question.

251. Kōdansha published nearly 1,500 book titles in 1992 alone. JAPAN BOOK PUBLISHERS ASSOCIATION, AN INTRODUCTION TO PUBLISHING IN JAPAN 1994-1995 93 (1995).

252. Takeshi Maezawa, *Mediawatch*, THE DAILY YOMIURI, Sept. 26, 1991, at 6.

253. *Id.*

254. *Id.*

interference.<sup>255</sup> Members of Kōfuku no Kagaku filed what might best be termed “defamation-like” actions against Kōdansha.<sup>256</sup>

In 1993, seven different district courts dismissed each of seven suits brought by member sub-groups of the organization.<sup>257</sup> Each member in each sub-group sued for 1 million yen in damages based on “harm to religiously derived personal dignity rights (*shūkyō-jō no jinkakuken*)<sup>258</sup> due to publication of the slanderous article concerning [leader] Okawa.”<sup>259</sup> The aggregate number of members participating in the suits reached 2,906 persons, resulting in requests for awards totaling nearly 3 billion yen.<sup>260</sup> According to Akiyoshi Kenji, all of the district courts found that such “religiously derived personal dignity rights” did not constitute a legally damageable interest under Japanese tort law.<sup>261</sup> One English-language report on one of the seven cases noted that the judge “recognized the articles indirectly disrupted the tranquility of the believers and their religious rights had been violated,” yet “ruled that it was not a case for legal redress.”<sup>262</sup> In addition to these individual member suits, Kōfuku no Kagaku as a religious corporation brought three suits, leader Okawa personally brought two suits, and Kōfuku no Kagaku’s own publishing company brought one suit against Kōdansha.<sup>263</sup> As of February, 1994, these actions, along with Kōdansha’s suits against Kōfuku no Kagaku, were still pending trial in Tokyo District Court.<sup>264</sup>

It is not a particularly new phenomenon in Japan for zealous actions by a religious group to result in tension with media organizations. A quarter-century ago, the politically powerful lay Buddhist group Sōka Gakkai used threatening tactics against publishers and distributors who released, or merely scheduled for release, books or articles debunking the organization’s internal

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255. *Id.*

256. *Id.* “Defamation-like” is the author’s term.

257. Akiyoshi, *supra* note 97, at 53.

258. Translation of *jinkakuken* is difficult. Lawrence Beer once translated the term as “rights of the person to good name and privacy.”; Beer, *supra* note 13, at 192. Dictionaries prefer the extremely generalized “personal rights.” See, e.g., Richard S. Keirstad, *TUTTLE DICTIONARY OF LEGAL TERMS* 384 (1993). Given the context and nature of the Kōfuku no Kagaku actions, the author has decided to emphasize the nuance of personal dignity arising from the root word *jinkaku*.

259. Akiyoshi, *supra* note 97, at 53.

260. *Id.*

261. *Id.*

262. *Tokyo Court Rejects Damages Suit by Religious Group*, Kyodo News Service, Japan Economic Newswire, May 21, 1993, available in LEXIS, Asia and Pacific Rim Library, JEN File.

263. Akiyoshi, *supra* note 97, at 53.

264. *Id.*

leadership and financing.<sup>265</sup> A “national debate” emerged concerning freedom of expression, including heated exchanges between politicians both on public television and in the Diet.<sup>266</sup> Notably, however, “the controversy did not issue in major court battles at the time.”<sup>267</sup> Although the 1991 Kōfuku no Kagaku incidents quite obviously did result in legal actions, the impression remains that neither dispassionate judicial resolution nor economic redress served as the principal objectives fueling the litigation, at least from the religious group’s perspective. Rather, the “defamation-like” suits are perhaps best seen as formalistic spill-over, adjunct attempts to exploit the public law of defamation in pursuit of a greater, group-based agenda to pressure publishers and mold public opinion. For its part, Kōdansha did not blink.

According to Takeshi Maezawa, however, much of the mainstream Japanese print media put on blindfolds.<sup>268</sup> “I expected to see objective news coverage and balanced commentary on the incident in the press. Surprisingly, however, neither was to be found in the major daily newspapers.”<sup>269</sup> Although newspapers ran perfunctory reports on the filing of the formal complaints and civil actions, coverage of the actual incidents and discussion of the importance of the context was eerily absent.<sup>270</sup> “While the incident was a matter of public interest and concern, it might have been too delicate for newspapers to handle,” noted Maezawa.<sup>271</sup> This example of self-restraint by the press in the face of authority, controversy, or social protest represents nothing new in Japan, as the following discussion demonstrates.

#### IV. SELF-IMPOSED RESTRAINTS AND PRESS REACTION TO SOCIAL PROTEST GROUPS

##### A. JAPANESE PRESS SELF-REGULATION IN GENERAL

Immediately following a discussion of legal issues in the industry, the Japan Book Publishers Association remarks in its English-language biennial overview that “[a]lthough slightly different in character, protest actions from various groups over discriminatory language are a distressing problem for the publishing

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265. See BEER, *supra* note 10, at 381-87 (describing the “Sōka Gakkai Free Speech Affair” of 1969 and 1970).

266. *Id.* at 386.

267. *Id.* at 381.

268. Takeshi Maezawa, *Mediawatch*, THE DAILY YOMIURI, Sept. 26, 1991, at 6.

269. *Id.*

270. *Id.*

271. *Id.*

industry and the mass media as a whole.”<sup>272</sup> As Horibe has rather obliquely noted, there is no group libel in Japan, “in the strict sense of the word.”<sup>273</sup> In a society where one’s identity may derive to a significant degree from group orientation,<sup>274</sup> it is not surprising to find that perceived harm to group social esteem can result in severe indignation and the urge to take corrective action.

Without group libel, however, legal alternatives to private protest are few, as the *Kōfuku no Kagaku* members discovered. *Kōdansha*’s resistance to such protest notwithstanding, the Japanese publishing industry has for at least the past 25 years generally elected to avoid confrontation with social activist groups, following what commentators refer to as a “wish-it-all-away policy” (*kotonakare shugi*).<sup>275</sup> In spite of their constitutionally protected freedom to publish and apparent legal protection from group-based “defamation-like” actions, press organizations have developed elaborate self-regulation systems to strictly control usage of words and phrases that might give rise to protest actions.<sup>276</sup> The policy of “wishing it all away” appears to be driven at least as much by corporate concern with maintaining day-to-day business operations and avoiding adverse publicity as by editorial concern for the well-being of any groups allegedly harmed.<sup>277</sup> Murky as the root causes of the phenomenon may be, the result of this self-censorship has been to drive significant social debate underground.<sup>278</sup> Viewed from the standpoint of freedom of expression, the cure has arguably become more dangerous than the disease.

In order to understand the current state of press relations with social protest groups, however, one must appreciate the importance of generalized mechanisms for self-restraint in the Japa-

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272. JAPAN BOOK PUBLISHERS ASSOCIATION, AN INTRODUCTION TO PUBLISHING IN JAPAN 1994-1995 46 (1994).

273. Horibe, *supra* note 3, at 327-28.

274. The importance of group orientation in Japan is, at this point, generally unquestioned. With respect to notions of group honor and defamation law, see Kim, *supra* note 121, at 117.

275. See, e.g., *Sabetsu yōgo mondai - kotoba-gari to media-gawa no kotonakare-shugi* [Problems of Discriminatory Language - Word Hunting and the Media’s ‘Wish It All Away’ Policy], SHUKAN GENDAI, Feb. 12, 1994, at 156. [hereinafter *Sabetsu yōgo mondai*]. This was the first installment in a weekly series of articles that ran in SHUKAN GENDAI through April 23, 1994.

276. *Id.*

277. Although difficult to substantiate, the clear implication of popular magazine series such as *Sabetsu yōgo mondai*, *supra* note 275, and *Tettei kenshō - “kotoba-gari”*, *infra* note 300, is that publisher self-interest plays a prominent role in decisions to avoid phrases and topics that might be construed as offensive.

278. See, e.g., comment by Frank Upham, *supra* note 7, and accompanying text (concerning press avoidance of substantive discussion of Burakumin issues).

nese publishing industry. It is no secret that large Japanese press organizations, particularly newspapers, have long utilized internal systems of self-regulation that result in publication of an "official reality," especially vis-a-vis government authorities.<sup>279</sup> Most notably, the 400 or so *kisha kurabu* or "reporters' clubs" have served for decades as a milieu in which reporters and the public figures they cover engage in unwritten agreements as to the release schedule or even non-disclosure of otherwise newsworthy developments.<sup>280</sup> Group pressure within the clubs, moreover, may result in ostracism and sanctions for any reporter who dares to undertake truly investigatory work on his or her own.<sup>281</sup>

Similarly, relations between the press and the police, whether through the official reporters' clubs or through less organized interaction, have become increasingly managed in favor of public authority.<sup>282</sup> Over-reliance on police reports that use cryptonyms in place of suspects' or injured parties' real names has resulted in notably less thorough and less independent press investigation.<sup>283</sup> Commentators note that police agencies exercise ever increasing power over journalists by reminding them of the threat of privacy invasion actions if real identities are disclosed.<sup>284</sup> At the very least, these police references to possible legal repercussion show a remarkably heightened awareness of litigation in Japan. That police agencies can now successfully wield such abstract threats, moreover, indicates a trend toward ever greater complacency by Japanese news organizations.

If the *Kōfuku no Kagaku* suits discussed earlier can be considered formalistic "spill-over" into the legal system,<sup>285</sup> then the police agencies' forceful reminders of potential litigation may represent legally derived but informal "spill-back" from public authorities onto an already compliant press. The result, in any event, is that an already pronounced media bias toward the "police version of the truth" is more apparent than ever in recent press coverage of criminal investigations.<sup>286</sup> Oda Haruo suggests

279. See generally KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER*, 94-99 (1989).

280. Robert M. Orr, *Japan's Mass Media*, TOKYO BUSINESS TODAY, Apr. 1993, at 16.

281. See Kim, *JAPANESE JOURNALISTS*, *supra* note 121, at 179-86 for examples of significant news stories withheld due to peer pressure within reporters' clubs. Also see Beer, *supra* note 1, at 242 for general problems arising from the *kisha kurabu* system.

282. Symposium, *supra* note 17, at 17.

283. *Id.* Names, photographs, and personal information relating to criminal defendants under age 20, however, are statutorily protected from publication by SHONENHO [Juvenile Code] art. 61. See SANSEIDO SHIN ROPPO 892 (1994).

284. Symposium, *supra* note 17, at 18.

285. See *supra* Part III.C.3, notes 251-67 and accompanying text.

286. Symposium, *supra* note 17, at 18-19.

that interested parties should combine the "positive" group-based strengths of the *kisha kurabu* system to register meaningful protest against these police practices, and thereby encourage the release of newsworthy information.<sup>287</sup>

Trade organizations also play a role in media self-restraint, though their influence over particular publishers is difficult to assess. "Like other mass media industries, publishing is not regulated primarily by law, but under the canons of ethics (*rinri kōryō*) established by the principal related self-regulatory (*jishu kisei*) organizations."<sup>288</sup> The Japan Newspaper Publishers & Editors Association (*Nihon Shinbun Kyōkai*), the Japan Magazine Publishers Association (*Nihon Zasshi Kyōkai*), and the Japan Book Publishers Association (*Nihon Shoseki Shuppan Kyōkai*) are examples. Lawrence Beer notes that although such organizations "do not set policies for individual business enterprises," the Shinbun Kyōkai in particular will "on occasion, [issue] weighty policy statements."<sup>289</sup> The Shinbun Kyōkai's Canons of Journalism were promulgated in 1946, and emphasize "complete freedom in reporting news and in making editorial comments, unless such activities interfere with public interests or are explicitly forbidden by law."<sup>290</sup> Horibe notes that although the Shinbun Kyōkai may expel member publishers for violations of the Canons, "the association has never exercised this power," and that the Canons themselves "provide no enforcement mechanism for violations."<sup>291</sup> Attempts by the author to clarify the position of the Shinbun Kyōkai concerning industry self-restraint practices met with denial of any real power to control member organizations' use or non-use of potentially harmful expression.<sup>292</sup>

## B. RECENT CONTROVERSIES INVOLVING SOCIAL PROTEST GROUPS

In July, 1993 the Japan Epilepsy Association demanded that publisher Kadokawa Shoten expunge from one of its high school textbooks an excerpted novel by noted black humorist Tsutsui Yasutaka.<sup>293</sup> The Association felt that the novel "encouraged

287. *Id.* at 21.

288. BEER, *supra* note 10, at 283. Translated terms in original.

289. *Id.* at 287.

290. *Id.* Japanese-language original available in BESSATSU JURISUTO, MASUKOMI HANREI HYAKUSEN [SELECTED DECISION ON MASS COMMUNICATIONS] 23 (Itō Masami & Horibe Masao eds., 1985). Similar canons by the Nihon Shoseki Shuppan Kyōkai and Nihon Zasshi Kyōkai also included at 39.

291. Horibe, *supra* note 3, at 334.

292. Telephone Interview with A. Akao, Nihon Shinbun Kyōkai Kenkyūjo, Tokyo (Feb. 1, 1995).

293. *Kyōkasho kara sakujo de gōi* [Agreement Reached to Delete Novel], ASAHI SHINBUN, Nov. 8, 1994, at 21 [hereinafter *Kyōkasho*].

discrimination against those afflicted with epilepsy.”<sup>294</sup> Kadokawa Shoten refused to delete the excerpt, and Tsutsui announced in September that he would discontinue all writing activities in order to protest what he felt had become “a society in which novelists can no longer write freely.”<sup>295</sup> Publicity surrounding Tsutsui’s “writer’s strike” (*danpitsu sengen*) escalated into full-scale public debate about the dangers to free speech posed by “word hunting” (*kotoba-gari*) pressure groups.<sup>296</sup>

By spring 1994, weekly magazines began running series of articles analyzing media industry self-censorship of disfavored or potentially harmful words and phrases.<sup>297</sup> Oe Kenzaburō, Nobel Prize winner-to-be and perhaps Japan’s most famous parent of a disabled child,<sup>298</sup> engaged Tsutsui in a spirited discussion of writers’ and publishers’ obligations on the opinion page of *Asahi Shinbun*.<sup>299</sup> Clearly the Tsutsui announcement had touched a nerve among writers, editors, and publishers. Media monitoring and pressure tactics by social activists to control usage of certain themes and terminology had ultimately prompted a period of critical backlash.

Among the industry practices that came to light was the extensive compilation and use by newspaper companies in particular of “alternative expression” (*ii-kae*) manuals.<sup>300</sup> *Asahi Shinbun*, for example, had released for in-house use a massive study of “discriminatory terms” (*sabetsu yōgo*), complete with a chart indicating present do’s-and-don’ts as well as specific examples of phrases that had elicited protest actions in the past.<sup>301</sup> *Yomiuri Shinbun* found its own disfavored words list splashed over 6 pages of the weekly *Shūkan Bunshun*.<sup>302</sup> The *Yomiuri* list featured a three-tiered ranking system, wherein “A” words were not to be used under any circumstances, “B” words were only to be used in special circumstances, and “C” words were not to be used in certain combinations or contexts (*bunmyaku ni yotte*

294. *Id.*

295. *Id.*

296. *Id.*

297. *See id.*

298. For an illuminating account of Oe’s highly public upbringing of his severely disabled son, now-acclaimed composer Oe Hikari, see Lindsay Cameron, *Finding His Voice in Music*, N.Y. TIMES, Mar. 5, 1995, at H25.

299. *Sōten [Point of Contention]*, ASAHI SHINBUN, May 10, 1994, at 16.

300. *Tetei kenshō - “kotoba-gari” to sabetsu 3 [Complete Investigation - “Word Hunting” and Discrimination - Part 3]*, SHŪKAN BUNSHUN, Feb. 24, 1994, at 42. This series of articles ran in SHŪKAN BUNSHUN weekly from February 10, 1994 until March 24, 1994. Individual installments are noted *infra* as necessary by installment number and date.

301. *Id.*

302. *Id.* at 44-51.

*tsukawanai hō ga yoi*).<sup>303</sup> The largest portion of the list comprised subcategories on both physical and mental disabilities.<sup>304</sup> Also categorized were terms descriptive of, or that could possibly be read as allusions to, national origin, occupation, and social status.<sup>305</sup> One report noted that a major newspaper's word processing equipment automatically highlighted and questioned any pre-designated "discriminatory words."<sup>306</sup> Lest even such straightforward discussion of words and practices become the source of ill-will, articles treating these practices included disclaimers such as: "This magazine does not maintain that any particular word or phrase discussed herein is not discriminatory. These materials are presented only so that readers may apprise the realities of the situation."<sup>307</sup>

There is of course nothing particularly bizarre about newspapers utilizing style manuals, and press sensitivity to words with historically discriminatory overtones is certainly not unique to Japan. Yet the newsworthiness and degree of detail apparent in these 1994 articles do indicate the exacting methods with which Japanese publishers had purged potentially offensive terms from their pages. It is difficult to discern whether any particular restraint arose from mere discretion or from a press environment where "persuasion slides into coercion and voluntary response becomes involuntary compliance" in the face of organized social protest.<sup>308</sup> Undeniably, however, certain activist groups have periodically waged highly confrontational campaigns based on usage of words and phrases they feel perpetuate discriminatory attitudes.

Organized protests in the early 1970s by the Burakumin Liberation League (*Buraku Kaihō Dōmei* - BLL), the activist organization representing descendants of the historically outcast group, initially provided the impetus for particularized self-restraint by major press organizations.<sup>309</sup> In its widespread activities, the BLL "[has] consistently eschewed litigation on the grounds that it fostered dependence . . . . Instead of litigation, [it] has mounted vigorous 'denunciation' campaigns, using limited violence to force their opponents and selected bureaucrats

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303. *Id.* at 44.

304. *Id.* at 48-49.

305. *Id.* at 44, 50-51.

306. *Tettei kenshō* - "kotoba-gari" to sabetsu 5, SHŪKAN BUNSHUN, Mar. 10, 1994, at 53.

307. *Tettei kenshō* - "kotoba-gari" to sabetsu, SHŪKAN BUNSHUN, Feb. 10, 1994, at 35.

308. BEER, *supra* note 10, at 381.

309. *Tettei kenshō* - "kotoba-gari" to sabetsu 4, SHŪKAN BUNSHUN, Mar. 3, 1994, at 50.

to negotiate . . . .”<sup>310</sup> Denunciation (*kyūdan*), although sometimes taking the form of mere requests for access to decisionmakers, “differs from mere persuasion or the exercise of the freedom of expression in that implicit in all [BLL] denunciation is the actual or threatened use of limited physical force.”<sup>311</sup>

By 1994, not only such historical terms as *eta*, but former government euphemisms with nominally assimilative intentions such as *tokushu buraku* (special community) and *shin-heimin* (new citizens) had become de facto unprintable terms.<sup>312</sup> Publishers have been known to edit or delete passages from previous printings or older editions that carry these or any of many other terms that have become the target of denunciation campaigns.<sup>313</sup> Historically objective terminology such as “*shi-nō-kō-shō*” denoting Tokugawa social hierarchy, or “*iegara*” (family lineage) in the context of marriage or employment have been purged as associationally discriminatory.<sup>314</sup> Inadvertent or historical use generally merits attention equal to that of intentional or topical use.<sup>315</sup> Needless to say, the “success” of these campaigns in shaping editors’ decisions, even in unrelated contexts, eventually dampened any substantive discussion of Burakumin discrimination. Twenty years of consistent hounding resulted in media avoidance rather than public debate.<sup>316</sup> 102 of 135 media professionals polled by *Shūkan Bunshun* replied that “discrimination issues” (*sabetsu mondai*) had essentially become taboo at their organizations.<sup>317</sup>

Other groups, such as Zenshōren (National Disabled Persons Liberation Association) and Tenkan Kyōkai (Japan Epilepsy Association) have lodged protests over the years based on their own agendas, though with less threatening tactics than the BLL.<sup>318</sup> References that might carry pejorative overtones to Korea or persons of Korean ancestry have also been protested extensively.<sup>319</sup> Sanitation workers<sup>320</sup> and meat processors<sup>321</sup> have

310. UPHAM, *supra* note 7, at 23.

311. *Id.* at 78.

312. *Tettei kenshō* - “*kotoba-gari*” to *sabetsu* 3, SHŪKAN BUNSHUN, Feb. 24, 1994, at 44.

313. *Tettei kenshō* - “*kotoba-gari*” to *sabetsu* 5, SHŪKAN BUNSHUN, Mar. 10, 1994, at 54.

314. *Tettei kenshō* - “*kotoba-gari*” to *sabetsu* 3, SHŪKAN BUNSHUN, Feb. 24, 1994, at 44.

315. *Id.* at 47.

316. *Tettei kenshō* - “*kotoba-gari*” to *sabetsu* 4, SHŪKAN BUNSHUN, Mar. 3, 1994, at 52.

317. *Tettei kenshō* - “*kotoba-gari*” to *sabetsu* 5, SHŪKAN BUNSHUN, Mar. 10, 1994, at 52.

318. *Tettei kenshō* - “*kotoba-gari*” to *sabetsu* 3, SHŪKAN BUNSHUN, Feb. 24, 1994, at 44.

319. *Id.* at 48.

consistently protested references to their occupations that they felt implied social repugnance. Again, although awareness and discretion may have been the ostensible goals of these actions, fear and avoidance by publishers, not to mention a great deal of stilted euphemism, have resulted.<sup>322</sup>

Future relations between publishing organizations and social activist groups, however, may be taking a turn for the better as a result of the media attention of the past year. BLL Media Affairs chief Kobayashi Kenji now admits that the tactics of the past might have been excessive and that, in general, they would be unnecessary today.<sup>323</sup> He also insists that much of the self-censorship that developed in the 1970s and 1980s was actually the product of editorial over-reaction by publishers.<sup>324</sup> "In the end, it is the mass media doing the 'word hunting,' through self-regulation (*jishu kisei*) arising from a lack of confidence in dealing with human rights issues."<sup>325</sup> Rather than expunging older or historically descriptive works of burakumin references, Kobayashi advocates adding brief prologue explanations to new editions.<sup>326</sup> When he hears of publishers recalling or destroying entire print runs of books based on fears of protest, Kobayashi says he is frustrated that "the industry always thinks the BLL pressured the publishers to act."<sup>327</sup> The reality, he asserts, is that publishers and editors act independently over their own authors' objections, and without pressure from the BLL.<sup>328</sup>

"Perestroika" (*peresutoroika*) may well have occurred at the BLL,<sup>329</sup> yet inter-relational tensions between the print media, authors, and watchdog groups will no doubt persist. What impresses the observer in the end is that fora for extremely vigorous debate about freedom of expression increased remarkably in 1994. Airing their differences in the *Asahi Shinbun*, one-time novelist turned conservative politician Ishihara Shintarō and one-time BLL secretary general turned socialist politician Komori Ryūhō agreed that they had more in common than previ-

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320. *Id.* at 44.

321. *Id.* at 51. Butcher work was traditionally a burakumin occupation. The BLL generally joins meat processing workers' unions in protesting media representations. *Id.*

322. *Id.* at 43.

323. *Tettei kenshō* - "kotoba-gari" to sabetsu 4, SHOKAN BUNSHUN, Mar. 3, 1994, at 52.

324. *Id.* at 51.

325. *Id.* at 55.

326. *Id.*

327. *Id.* at 54.

328. *Id.*

329. *Id.* at 56.

ously thought.<sup>330</sup> Ishihara insisted that “the trend to masochistic self-regulation . . . would lead only to dangerous politics in the end.”<sup>331</sup> He maintained that his freedom-of-expression right to use words or phrases rooted in Japanese linguistic tradition such as *mekura-ban* (“rubber stamp decision,” literally “blindman’s judgment”) outweighed any perceived reinforcement of social discrimination.<sup>332</sup> In reply, Komori conceded that he could not make “blindman” disappear as a word from the Japanese vernacular, but that public use of idioms such as “blindman’s judgment” served only to insult those with the disability and was therefore inappropriate and irresponsible.<sup>333</sup> The salient feature of this debate, of course, was not so much which party proved more convincing, but that it involved two important public figures and took place in the pages of a highly respected national newspaper read by millions of Japanese.

That “word hunting vs. freedom of expression” emerged as an important social controversy in 1994 out of the original Tsutsui incident is not without irony. Tsutsui’s indignation arose from the Japan Epilepsy Association’s protest over inclusion of his novel in a school textbook.<sup>334</sup> As textbooks in Japan must be pre-approved by government authority,<sup>335</sup> the propriety of state involvement in the publication of allegedly discriminatory speech was certainly debatable. Yet this arguably even more urgent issue remained noticeably unaddressed in the barrage of magazine articles decrying restraint on freedom of expression. The textbook context surfaced meaningfully only in sporadic discussion of the specific dispute between Tsutsui and the Japan Epilepsy Association.<sup>336</sup> Even then, the Association urged a “captive audience” line of reasoning to bolster its position, and did not forcefully address the overriding implications of government imprimatur.<sup>337</sup>

In November, 1994, Tsutsui and the Japan Epilepsy Association nominally resolved their dispute through an agreement that Kadokawa would delete Tsutsui’s novel entirely from future editions of the textbook in question.<sup>338</sup> The original edition contain-

330. *Tettei tōron - “sabetsu to hyōgen no jiyū”* [Thorough Debate - “Discrimination and Freedom of Expression”], ASAHI SHINBUN, June 17, 1994, at 21.

331. *Id.*

332. *Id.*

333. *Id.*

334. See *supra* Part IV.B., notes 293-96 and accompanying text.

335. See, e.g., BEER, *supra* note 10, at 260-62.

336. See, e.g., *Danpitsu sengen sono go - “Sabetsu suru jiyū” wa kiken* [After the Writer’s Strike Declaration - “Dangers of the ‘Freedom to Discriminate’”], ASAHI SHINBUN, Feb. 25, 1994, at 21.

337. *Id.*

338. *Kyōkasho*, *supra* note 293, at 21.

ing the novel had already been distributed to over 150 high schools and new editions were not scheduled until 1998.<sup>339</sup> In explaining his decision to direct Kadokawa to delete the work in the future, Tsutsui said that "although there have been no such incidents to date, I would feel bad if reading the work in a textbook resulted in any kind of bullying or discrimination."<sup>340</sup> In so doing, Tsutsui was able to frame his position solely in terms of schoolchild bullying, an intensely discussed social problem wholly separate from freedom of expression.<sup>341</sup> Tsutsui also insisted he had no intention of abandoning his views on self-regulation by publishing companies, and vowed to continue his "writer's strike."<sup>342</sup> The Association, for its part, had to admit that only the narrow problem of one particular textbook had been resolved, but maintained that its original goal in making the protest had been achieved.<sup>343</sup> Whether or not the novel in question was inherently and harmfully "discriminatory" remained unaddressed by the agreement.

Lawrence Beer notes that during the Sōka Gakkai intimidation incidents of 1970, "a developing crescendo of newspaper and magazine articles" emerged addressing free speech issues in Japan.<sup>344</sup> "The net effect of the controversy seems to have been a slightly heightened awareness of freedom and its problems among concerned opinion leaders and the public."<sup>345</sup> A cynic would point out that the flurry of self-analytical media activity in the wake of the Tsutsui incident represents little more than opportunistic pity-mongering by an industry whose woes are principally of its own making. From a larger perspective, however, it is difficult to deny that important tensions between group reputational rights and freedom of the press were aired in public for the first time in nearly 25 years. Whether the net effect of the Tsutsui incident will prove significant or not in terms of publisher self-restraint systems and pressure groups' abilities to influence content remains to be seen.

## V. CONCLUDING REMARKS

"Sometimes now we find ourselves thinking like lawyers as well as journalists," stated *Asahi Shinbun* reporter Konishi Hiroshi in *Jurisuto's* 1994 symposium on Japanese defamation

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339. *Id.*

340. *Id.*

341. *See, e.g., VAN WOLFEREN, supra note 279, at 91-92.*

342. *Kyōkasho, supra note 293, at 21.*

343. *Id.*

344. BEER, *supra note 10, at 386. See also supra notes 264-66 and accompanying text.*

345. BEER, *supra note 10, at 386.*

and privacy law.<sup>346</sup> Clearly Konishi was not pleased about this state of affairs.

The relative difficulty of assembling data on lawsuits in Japan renders any objective study of litigation trends problematic.<sup>347</sup> Yet the tone of relevant Japanese commentary indicates that a strong perception exists that defamation and privacy actions against print media organizations are on the rise to a troubling degree. Such terms as *soshō rasshu* ("flurry of lawsuits")<sup>348</sup> and *hikokuseki no media* ("the media in the defendant's seat")<sup>349</sup> clearly show concern, if not outright alarm. Libel chill is a subtle phenomenon, as likely to be grounded in perceptions as empirical data.<sup>350</sup> Tensions between citizens asserting individual rights and media reporting on matters of public interest may well be the sign of a healthy, mature publishing industry in an advanced democracy.<sup>351</sup> Only time will tell, however, whether the perceived increase in plaintiff success in defamation and privacy actions, particularly that owing to Miura Kazuyoshi, actually results in new boundaries and techniques in reporting and commentary.

Troubling questions remain about the ability of Japanese courts to effectively and consistently treat the potentially momentous implications of defamation and privacy actions on the constitutional right to freedom of expression. Certainly it is not for foreign analysts to grade the Japanese judiciary on their performance. Yet the concern voiced by Japanese professionals over this same problem should not go unnoticed.<sup>352</sup> The impression persists that Japanese judges, particularly at the lower court level, often render conflicting decisions based on extremely subjective factors such as the wording or overall tone of a given article.<sup>353</sup> If that be the case, then freedom of expression in the mass-circulation print media may hinge to a significant degree on the semantic tastes of the Tokyo District Court's judges. This is certainly a disturbing thought for journalists, not to mention constitutional purists.

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346. Symposium, *supra* note 17, at 23.

347. Ellen Smith's 1993 analysis underscores the problem. Her only statistics cover the period 1950-1968. Smith, *supra* note 11, at 890 n.26. Cf. BEER, *supra* note 10, at 315-16.

348. Symposium, *supra* note 17, at 22.

349. *Id.* at 23.

350. See Smith, *supra* note 11, at 888.

351. Symposium, *supra* note 17, at 14.

352. See, e.g., *id.* at 23-27.

353. See discussion of conflicting Miura judgments, in particular *supra* notes 170-73 and accompanying text. Also see discussion of Miura judgments in Furukawa, *supra* note 22, at 45. The problem is addressed generally in Sakamoto, *supra* note 76, at 37.

Recent revisionary (and quite valid) scholarship notwithstanding,<sup>354</sup> resolution of personal conflict through direct confrontation is hardly a hallmark of Japanese culture. Perhaps, then, the apparent rise in media-related litigation does represent a significant shift in public attitudes toward the value of individual assertiveness against large authoritative organizations. Such a shift would be difficult to measure, but even if it does not yet exist to a quantifiable degree, observers of Japanese law would do well to monitor media-defendant cases in addition to those brought in other burgeoning fields such as product liability or health care.

"The Japanese have a keen sense of honor, but it arises most often in relation to the groups to which they belong. Sensitivity to the insult of an individual has been relatively weak."<sup>355</sup> Young C. Kim made this observation fifteen years ago, and to a great extent it still rings true today. The lack of any group libel law or other formalized group grievance procedure in Japan, therefore, is ostensibly puzzling. Perhaps the origins of this situation lie more deeply in sociohistorical group power relations than in doctrinal development, to the extent that these fields are suitable for discrete analysis.

Lack of statutory authority, on the other hand, has clearly not inhibited allegedly harmed groups from asserting their reputation and self-esteem interests against Japan's publishing industry, as shown by the tradition of protest and denunciation discussed above. Nor has it dissuaded some groups such as Kōfuku no Kagaku from bringing formal lawsuits, albeit not with great success and possibly only for publicity reasons. The BLL and Japan Epilepsy Association protests show that extra-legal group assertiveness can have a pronounced effect on publishers' willingness to discuss sensitive topics as well as use terms or phrases of historically delicate origin. Did self-restraint mechanisms developed by the press in reaction to these actions over the past two decades represent only a heightened Japanese "political correctness," a self-imposed abridgment of constitutional freedom, or both? Will the apparently softened, cooperative stance of the BLL result in more meaningful public discussion of discrimination issues in Japan, and will other groups follow suit? The ultimate impact of 1994's public debate on "word hunting" is difficult to foresee in precise terms. Suffice it to note, however, that "dedicated and competitive group action continues to invig-

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354. See, e.g., Upham, *supra* note 7, at 1-27. For discussion challenging the notion that Japanese are inherently non-litigious, see John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUDIES 359 (1983).

355. Kim, *supra* note 121, at 117.

orate freedom with respect to expression,"<sup>356</sup> especially if the protesters are willing to engage and the press is willing to listen.

Defamation and privacy actions may indeed continue to rise, while extreme examples of group intimidation actually decline. The role of law, then, may become stronger than Japan observers have heretofore been willing to acknowledge, at least as relates to content restraint in the publishing industry as it seeks to fulfill its constitutionally protected mission. *Asahi Shinbun* journalist Konishi would no doubt find this a disquieting turn of events. Given the numerous other mechanisms for self-regulation still thriving in the Japanese press, the vast majority of his readers will probably never notice the difference. A few more than in the past, however, will have their days in court.

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356. BEER, *supra* note 10, at 387.