THE RIGHTS OF NEWSPAPER REPORTERS AND THE PUBLIC WELFARE STANDARD IN JAPAN

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The Constitution of Japan[1] is one of the most liberal in the world.[2] It "grants an impressive and comprehensive catalogue of civil liberties"[3] to the Japanese people. Chapter III of the Constitution, denoted "Rights and Duties of the People,"[4] sets forth a broad listing of constitutional rights and freedoms. One freedom that is clearly enshrined in the Constitution of Japan is freedom of the press. Article 21 makes this freedom explicit, stating: "Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."[5] This freedom is guaranteed by another constitutional provision which provides: "These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights."[6]

The Japanese Constitution does, however, allow for a limiting of the freedom of the press. This freedom is expressly limited by the requirement that it be exercised for and within the limits of the "public welfare." Article 12 states that "the freedoms and rights

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1. For the full text of the Constitution, *see* VIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1 (A. Blaustein & G. Flanz eds. 1979).

2. One commentator has written that the section dealing with human rights contains "perhaps the world's most extensive constitutional guarantees of civil rights." Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980, 1000 (1956).

3. A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 59 (1976).

4. This Chapter of "Rights & Duties of the People," it can be argued, is misnamed since so many of its provisions deal with the rights of the people and so few with their duties. Of the thirty-one articles in this section, twenty-nine deal with the rights of the people; only two deal with their duties. This part of the Constitutiuon could more properly be called "the Many Rights & Few Duties of the People."

5. KENPO (Constitution) art. 21 (Japan), in Blaustein & Flanz, *supra* note 1, at 3.

6. *Id.* art. 11 in Blaustein & Flanz, *supra* note 1, at 2.

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guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare."[7]

Whenever the rights of news reporters have been at issue in Japan, the Japanese Supreme Court has balanced the reporter's rights against the public welfare standard articulated in Article 12. The Court has consistently held that the rights of a reporter cannot oppose the public welfare.[8] In effect, the Japanese Supreme Court has established an order of constitutional values which holds the public welfare standard superior to the rights of news reporters.[9]

This rating of constitutional values by the Japanese Supreme Court has been vehemently criticized by many legal scholars. Ito Masami,[10] a professor of law at the University of Tokyo, has written that the Court's elevation of the public welfare standard to such a high place means that virtually any law abridging the rights of reporters could be presumed constitutional on the basis of the public welfare provision. "[W]henever a law is enacted," he explains, "some kind of danger to the public welfare can be easily found as a legal regulation would rarely, if ever, be imposed in case no danger exists."[11] He argues that freedom of the press in Japan is so crucial that no presumption of constitutionality should exist as regards a law abridging rights of this kind.[12] He cites two reasons for his statement. The primary one is that a representative democracy such as Japan's cannot function unless the public can freely and

7. Article 1 of the Japanese Civil Code reaffirms this emphasis on the public welfare:
1. All private rights shall conform to the public welfare.
2. The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust.
3. No abusing of rights is permissible.
Beer, *The Public Welfare Standard and Freedom of Expression in Japan*, in THE CONSTITUTION OF JAPAN ITS FIRST TWENTY YEARS, 1947-67 205, 207 (D. Henderson ed. 1968) [hereinafter cited as THE CONSTITUTION OF JAPAN].

8. The Supreme Court has held, for example, that "it is clear from the provisions of Articles 11 and 13 of the Constitution that no freedom of expression may oppose the public welfare." Sakanara v. Tokyo Express Railways, 5 Kakyū Minshū 214, 217 (Sup. Ct., G.B., April 4, 1951).

9. Article 13 of the Constitution also declares the public welfare to be of primary importance. It declares the right of the people "to life, liberty, and the pursuit of happiness . . . be the supreme consideration" of government "to the extent that it does not interfere with the public welfare." Blaustein & Flanz, *supra* note 1, at 2.

10. All Japanese names are written as they are in Japan, i.e., with the surname first.

11. Ito, *The Rule of Law: Constitutional Development*, in LAW IN JAPAN 205, 221 (A. von Mehren ed. 1963).

12. *Id.*

with knowledge choose among political views and candidates through dissemination of political opinions and views by the newspapers.[13] Secondly, he asserts that restriction of the press' freedom also limits the opportunities for the aggrieved to obtain relief by the political process.[14]

Ito is not alone in his criticism of the Court. Alfred Oppler, a member of the Government Section of the Supreme Commander of the Allied Powers (SCAP) in Japan after World War II, believes that a Japanese Supreme Court "rigidly oriented toward law and order could, under this" public welfare criteria, "weaken or even emasculate" the people's civil liberties.[15] In Oppler's opinion, a better standard for the Court would be the clear and present danger test.[16] Similarly, Professor John Maki has written that there is abundant ground for asserting that the Japanese Supreme Court has not chosen to act as the watchdog for encroachments of Japanese constitutional freedoms.[17]

Why has the Japanese Supreme Court chosen to place the public welfare standard on a higher level than freedom of the press? This Article examines that issue and shows that the answer lies in the past, in the history and tradition of Japan. If one traces the legal and social history of Japan, one sees that the importance of the group has been considered paramount to that of the individual for at least the last four centuries. The Meiji Constitution took this group value and made it part of the law of Japan. By interpreting the current Constitution in such a way that the public welfare clause will be elevated above the rights of news reporters if these two constitutional standards clash, the Japanese Supreme Court has acted in a manner consonant not only with the Constitution but also the social and legal history and traditions of Japan.

I. PRE-CONSTITUTIONAL JAPAN

Prior to 1889 Japan had no constitution.[18] Although there had been a codified pronouncement of law, the Jushichi Kempo (the

13. *Id.*

14. *Id.* at 213-14.

15. OPPLER, *supra* note 3, at 325.

16. Justice Holmes first articulated this view in Schenck v. United States, 249 U.S. 47 (1919).

17. J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, at xl (1964).

18. Japan's first Constitution, promulgated in 1889, is commonly called the Meiji Constitution, named after the then Emperor.

Constitution of 17 Articles) in 604 A.D., which some considered to be a constitution, this document was more a code of political and social moralities than a detailed structure of law.[19]

Toward the end of the fourth century A.D. the development of the Japanese legal system was significantly affected by the introduction of the characters of the Chinese language to Japan. This development was important in that the Japanese, through their understanding of the Chinese language, were able to absorb much of the Chinese system and culture, including Confucian ethics.[20] By 1603 the Japanese had combined their interpretation of Confucian ethics with their own feudal morality to create a legal system.

Historically, 1603 is a significant date in Japanese history, for it was in that year that Tokugawa Ieyasu was appointed Shōgun[21] by the Emperor, beginning a Tokugawa family rule that was to last 265 years (1603-1868).[22] The Tokugawa period, one characterized by political peace and social stability, is an especially important one in Japan's legal history. Although the system of law during this period was feudal, the basic principles of Tokugawa jurisprudence still exercise a "lingering influence in present-day Japan."[23]

Tokugawa law was rooted in both custom[24] and the Confucian tenets that had been imported by the Japanese from China and then reinterpreted in light of their own morality.[25] Throughout the

19. This set of maxims has commonly been attributed to Prince-Regent Umayado (usually referred to as Shōtoku Taishi, the Crown Prince Shōtoku). Many recent historians, though, believe it was not written in 604 A.D. but rather a generation or two later. *See* G. SANSOM, A HISTORY OF JAPAN TO 1334, at 51-52 (1958).

20. One writer has called this importation of Chinese ideas by the Japanese a "great watershed in the development of Japanese law." George, *The Right of Silence in Japanese Law*, in THE CONSTITUTION OF JAPAN, *supra* note 7, at 257.

21. The word Shōgun means "General" but is generally used as an abbreviation of Seii-Tai-Shōgun, a title conferred by the Imperial Court upon military dictators. G. SANSOM, JAPAN—A SHORT CULTURAL HISTORY 544 (1952).

22. Although the Emperor really had only nonsecular authority at the time, his "appointment" of Ieyasu as Shōgun gave the Tokugawa family an important legitimacy. Even though the Shōgun in form was only the Emperor's generalissimo, in actuality he wielded the power of the central government. *See, e.g., id.* at 445-47.

23. Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 85 (1952).

24. Tokugawa Japan had no constitution. The document called the Buke Shohatto (Various Regulations for the Military Houses) which was promulgated in 1615 and subsequently reissued in slightly revised forms by later Shōguns upon their accession to power, did discuss constitutional functions in the English sense. The Buke Shohatto defined the duties and relationships of the daimyōs (i.e., the feudal lords) and the Shōgunate. I D. HENDERSON, CONCILIATION AND JAPANESE LAW—TOKUGAWA AND MODERN 31-32, 89 (1965).

25. Wren, *The Legal System of Pre-Western Japan*, 20 HASTINGS L.J. 217, 219-21 (1968).

Tokugawa period this system of law was devoid of almost any foreign influence, for in 1637 the government of the Shōgun, the Bakufu,[26] decreed that no Japanese subject could leave the country or, having left it, return (the penalty for an attempt in violation of the law was death).[27] In 1639, this policy of seclusion was further tightened; no foreign ships were allowed to enter Japan.[28] Western books were banned. This national policy of seclusion and exclusion[29] was to remain in effect for over two centuries, until the appearance of Commodore Perry and his famous four Black Ships at the harbor of Uraga on July 8, 1853.

While these policies were in effect the Tokugawa system flourished. Its basic unit of society was the group, not the individual.[30] The individual had no legal existence except as part of a group. The head of the household had total legal control over the persons and property of the family and was responsible for all the duties, both public and private, of the family members.[31] This principle of vicarious responsibility was consistently applied up each rung of the ladder of authority of the Tokugawa local government. Not only was the village headman, as the head of the group, often punished for crimes of individual members of the village, but fines were often assessed against the entire village for acts done by an individual member.[32] In short, this concept of group responsibility permeated Tokugawa society.[33]

The stress in Confucian philosophy on family morals and welfare, rather than that of the individual, fit perfectly within the Tokugawa system, since Confucian philosophy emphasizes that the

26. Bakufu is a Japanese word that literally means "tent government." It came to be used as a description of the government headquarters of a military dictator. Bakufu is the word usually used by the Japanese when referring to the governments of successive Shōguns dynasties. SANSOM, *supra* note 19, at 533.

27. *Id.* at 454.

28. There were two exceptions to this edict. The Dutch and Chinese were allowed to trade under restricted circumstances at the island of Deshima in Nagasaki Bay. The Dutch traders could only reside there, and could not travel elsewhere without special permission. M. HANE, JAPAN: A HISTORICAL SURVEY 149 (1972).

29. The Japanese call this seclusion policy Sakoku (literally, the country in chains).

30. Henderson, *supra* note 23, at 104.

31. *Id.*

32. *Id.* at 104-05. There were five household groups called the Gonin-gumi, who were jointly responsible for the acts of each individual member. The Gonin-gumi were vicariously responsible if an individual member of their group committed an offense. If tax payments of a member were in arrears, for example, they had to furnish security for the amount due. G. SANSON, A HISTORY OF JAPAN 1615-1867 101-02 (1963).

33. *Id.* at 104.

individual should not seek to vindicate whatever individual rights he may possess.[34] To insist on asserting one's individual rights is counter to the Confucian philosophy. Instead, the individual should seek to establish and maintain harmonious relationships, because the preservation of that harmonious relationship is believed to be so crucial to society. Thus, Confucianists believe that "the proper disposition with regard to one's interests is the predisposition to yield rather than the predisposition to insist."[35] If a dispute arises, one should not seek to appeal to a general rule that will prove his legal position. Rather, he should seek to find the compromise solution that will promote the greatest harmony among the parties.[36] Compromise is posited by Confucianists as the greatest virtue. The letter of the law is not nearly as important as saving the "face" of the disputants, even if one party is clearly in the wrong.[37] Nearly all disputes are to be settled by compromise.[38]

Confucianism also emphasizes loyalty. This stress on loyalty came to characterize every known relationship in Tokugawa society.[39] Each inferior in Tokugawa society—and societal status was clearly delineated[40]—owed a duty of loyalty to his superior.

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34. HENDERSON, *supra* note 24, at 40-42.

35. Schwartz, *On Attitudes Toward Law in China*, in M. KATZ, GOVERNMENT UNDER LAW AND THE INDIVIDUAL 29 (1957).

36. Wren, *Japanese Law or Logic*, 68 CASE & COM. 36 (Nov.-Dec. 1963).

37. This factor is still present in Japan today, although in a more limited fashion. *See id.* In that article, the author describes a collision she witnessed between a bus and a bicycle in Japan. Although the bicycle driver clearly was in the wrong, the matter was settled so that no party suffered "dishonor."

38. *See* HENDERSON, *supra* note 24, at 132-62 in which Professor Henderson relates the details of a dispute during the Tokugawa period and shows the enormous pressure employed by Shōgunate officials to settle such disputes.

39. Henderson, *supra* note 23, at 105.

40. Professor Henderson has written that Tokugawa Society was stratified with classes within classes. The society's fundamental principle was that men are born unequal and they should be treated unequally. He breaks up Tokugawa society in this way (from the apex down):

(1) the Emperor
(2) the Shōgun
(3) the Kuge (Imperial Court Nobles)
(4) the Buke (military nobility)
    (a) Daimyō (the word refers to the great feudal lords of Japan who ruled fiefs of over 10,000 koku of rice, a koku being about five bushels and the standard unit of value in Tokugawa Japan. Most historians believe that a koku was in general adequate to satisfy one person at that time for one year).
    (b) Samurai (ruled fiefs of under 10,000 koku of rice).
(5) hyakusho (farmers)
(6) shokunin (artisans)
(7) shonin (merchants)
(8) eta (the outcasts)
(9) hinin (the beggars)

The Tokugawa government used Confucian ethics to reinforce the values implicit in their system of government.[41] Confucianism became the orthodox official philosophy of Tokugawa Japan.[42] In fact, Sir George Sansom, a renowned historian of the Tokugawa era, has written that in the Tokugawa period "Confucianism may almost be regarded as having the position of an established religion."[43] This emphasis by the Tokugawa government on Confucianism was not misplaced; although the philosophy is Chinese in origin, it had so permeated the Japanese system during the Tokugawa period that it was universally regarded by the Japanese as being "Nihon-teki."[44]

There was, as one legal scholar has written, a "remarkable correspondence between the real world as viewed from the Edo castle [i.e., the home of the Shōgun] . . . and the natural-law order envisaged by orthodox Confucianism."[45] The union of the authoritarian Tokugawa system and Confucian philosophy was totally compatible and guaranteed the perpetuation of the values emphasized concurrently by the two systems. The emphasis on the group rather than the individual, on a rigidly stratified social order characterized by loyalty to the group and to one's superior, on duties instead of rights, and on the reluctance of the individual to press for vindication of his rights, were all values deeply impressed on Japanese society by the Tokugawa government and Confucianism working in tandem.[46] Furthermore, the absence of foreign influence on Japan during virtually all of the Tokugawa period[47] meant that no Western concept of "individual rights" or of the law in general could penetrate the borders of Japan. No countervailing foreign influences could threaten the strength of these Japanese values, and the island of Japan became a nation of homogeneous values.[48] In fact,

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Id. at 92-93.

41. *See* Wren, *supra* note 25, at 221.

42. HENDERSON, *supra* note 24, at 37.

43. SANSOM, *supra* note 21, at 505.

44. This phrase means "that which is essentially Japanese." It has five connotations: (1) what prevails in Japan; (2) what is good for Japan; (3) what concerns Japan; (4) the Japanese point of view; (5) the fundamental spirit of Japan. Wren, *supra* note 25, at 221 n.6.

45. HENDERSON, *supra* note 24, at 47.

46. *Id.* at 48-49.

47. *See* note 29 *supra*.

48. "With few exceptions Japanese political thinkers of the Tokugawa period shared certain basic assumptions. It mattered little whether their primary allegiance was to Buddhism, Neo-Confucianism, or Shinto. All saw the state as an ethical order; all lacked a concept of law comparable to that found in the West . . . ." R. MINEAR, JAPANESE TRADITION AND WESTERN LAW 148 (1970).

because of these values the lack of a consciousness of individual rights was so strong that the Japanese language had no word or phrase that corresponded to the Western concept of "individual rights" until the late nineteenth century.[49]

The entrance of Commodore Matthew Perry and his Black Ships[50] into Shimoda Bay in 1853 marked the beginning of the demise of the Tokugawa government. Internal forces had already been at work eroding the foundations of the system, and the Tokugawa laws, geared to a static, isolated, and feudal society, were inadequate to cope with the fundamental commercial and social changes taking place in Japan.[51] By the 1860's the once-solid Tokugawa system was crumbling. On January 3, 1868, the Tokugawa rule ended with the establishment of a new central government in the name of the Emperor Meiji; this marked the beginning of the era called the Meiji Restoration.[52]

The values of the Tokugawa system lasted long beyond the demise of the Tokugawa era. These values, especially those of the primacy of the group and the reluctance of individuals to assert their rights, continue to strongly influence Japan. In pre-1945 Japan these two values, ones directly attributable to the influence of Confucianism and the Tokugawa system, helped to create a situation whereby the concept of individual civil liberties had little importance.[53] Instead, the traditional value system of Japan emphasized contrary values — subordination of the individual to the group and the predisposition of the individual to desist from

49. The Chinese, from whom the Japanese imported Confucianism and its emphasis on duty, loyalty to one's superior, and the lack of a consciousness of individual rights, similarly had no word at this time that would correspond to the Western notion of "individual rights." *See* HOZUMI N., THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE (1912), *quoted in* Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632, 649 n.79.

50. The Japanese were astonished at the sight of Perry's ships which billowed black clouds of smoke. They thought that the "barbarians" had harnessed volcanoes. Thus, they called Perry's fleet "the black ships." H. BORTON, JAPAN'S MODERN CENTURY 27 (1955).

51. Henderson, *supra* note 23, at 91. The social system, for example, soon became totally inconsonant with the economic situation. As trade grew in Japan, the merchant class acted as bankers and their economic power grew while that of the samurai class fell. Yet, the social situation of the two classes in a highly stratified system was wildly disparate from the economic realities. *See* SANSOM, *supra* note 21, at 517-28. Some historians believe that the feudal Tokugawa system simply could not cope with the emergence of capitalism in Japan. The "kozama" historians such as Hattori Shiso, Hirano Yoshitaro, and Toyama Shigeki view the Meiji Restoration as the victory of the feudal-capitalist alliance in a class struggle with the peasantry and "urban proletariat."

52. *See* G. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION 1 (1957).

53. *See, e.g.*, R. MINEAR, JAPANESE TRADITION AND WESTERN LAW 172 (1970).

asserting or vindicating his rights.[54] The strength of these traditional values has continued for almost 400 years and has greatly affected Japanese society and its legal system's view of individual rights, including the view of the Japanese Supreme Court.

II. FREEDOM OF THE PRESS UNDER THE MEIJI CONSTITUTION

The Meiji Restoration brought a termination to the Tokugawa policy of seclusion. Japan's self-imposed isolation ended, and the Japanese people were exposed to Western ideas. One Western enterprise which was readily integrated into Japanese society was the modern newspaper.[55]

By 1870 the first Japanese daily newspaper, the *Yokohama Mainichi Shimbun* appeared.[56] Less than ten years later there were nearly 300 newspapers in Japan and their combined yearly circulation was an astronomical 38,000,000 copies.[57] Newspapers soon played an important role in the political process by mobilizing public opinion. The oligarchs of Japan, people such as Kido Koin, Okubo Toshimichi, and Ito Hirobumi became incensed as the papers began to openly discuss various political issues.[58] They feared that their privileged position might be lost if newspapers were allowed to continue expressing their opinions. This perceived threat was further heightened by the adoption of the principle of universal education in 1872[59] (and the consequential rapid rise in literacy). In an effort to curb the activities of newspaper writers the government introduced a series of press laws.

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54. HENDERSON, *supra* note 24, at 47-62.

55. Actually, the present Japanese newspaper can trace its origin to the "yomiuri" (news-sheet). The yomiuri, however, consisted of only one sheet of news or a leaflet, and was far from being a modern newspaper since it was only printed sporadically. It was printed from a block and sold in the streets by a vendor who read the contents of the yomiuri aloud and in this way attracted the interest of passers-by. The yomiuri began in the seventeenth century. *See* A. ALTMAN, THE EMERGENCE OF THE PRESS IN MEIJI JAPAN 4 (1966) and J. HAYASAKA, AN OUTLINE OF THE JAPANESE PRESS 1 (1938). When Townsend Harris, the first American Ambassador to Japan, arrived there in the late 1850's, printed accounts of him with illustrated drawings were circulated by the thousands. Harris wrote that these accounts were "not in the form of newspapers but are analogous to the 'broadsheets and little books' that preceded that mighty engine — the newspaper." T. HARRIS, THE COMPLETE JOURNAL OF TOWNSEND HARRIS 400 (1968).

56. In 1862, even before the Meiji Restoration, the Bakufu had ordered its Foreign Language Investigation Office to translate Dutch Newspapers published in Batavia, Java. Soon, newspapers such as the *Japan Commercial News* and *Japan Times* were being published by Occidentials in Yokohama. BORTON, *supra* note 50, at 185.

57. *Id.*

58. K. KAWABE, THE PRESS AND POLITICS IN JAPAN 60 (1921).

59. BECKMANN, *supra* note 52, at 44.

In 1873 the first repressive measures against the press were initiated by the Japanese government. In that year a press law was issued which required newspapers to obtain an official authorization to publish.[60] In addition, the law prohibited any comment at all by the press upon government officials while they served in office. Editorials opposing governmental policies were also banned, as were discussions of laws by reporters.[61]

In 1875 criticism by the press[62] enraged the oligarchs and convinced them that the measures enacted in 1873 were ineffectual. As a result, the oligarchs repealed the 1873 law and enacted the draconian Libel Law and Press Law of June 28, 1875.[63] This law ushered Japan into an age of strict censorship.

The Press Law of 1875 made it a crime for newspapers to criticize governmental policy.[64] Both the editor of the newspaper and the writer of the article could be punished for such an offense by a fine or imprisonment. The newspapers did not submit easily to such a repressive measure and circumvented this law by hiring dummy "editors" (called by the public "prison editors").[65] These people paid the fine and served the prison sentence while the paper continued publication.[66] The government disliked this loophole and barely one year later acted to remedy this weakness in the law. In 1876 the law was amended to give the Minister of Home Affairs the power to delay or even suppress a newspaper's publication.[67] The criminal penalties of fines and imprisonment remained part of the law. The new law was strictly enforced, and by the end of 1876 forty-nine editors and reporters had been fined or imprisoned or both.[68]

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60. The Education Law of 1872 established compulsory elementary school education in Japan.

61. BECKMANN, *supra* note 52, at 44-45.

62. For example, in June of 1875 the oligarchs of the Meiji government were considering establishing in Japan some form of constitutional government, and an assembly of prefectural governors was convened to discuss this matter. The oligarchs allowed two delegates representing the people to be admitted. The oligarchs believed this assembly to be a gesture of democratic beneficence by them to the people. The press, unintimidated by the Press Law of 1873, refused to laud the oligarchs' act. Instead, they criticized this arrangement as inadequate. *See* Colegrove, *The Japanese Constitution*, 31 AM. POL. SCI. REV. 1027, 1036 (1937).

63. The Zamboritsu (Libel Law) and the Shimbunshi Jorei (Press Law) were promulgated in the Dajokwan Fukoku, or "Notifications of the Dajokwan," No. 110 and 111, (July 28, 1875), *reprinted in* MCLAREN, JAPANESE GOVERNMENT DOCUMENTS 5397-40.

64. *Id.*

65. BORTON, *supra* note 50, at 186.

66. *Id.*

67. *Id.*

68. Professor Beckmann in *The Making of the Meiji Constitution* puts this figure at sixty.

During the early years of the Meiji era the adoption of a constitution emerged as an important issue.[69] By 1881 popular demand for reform had grown so strong that the Emperor promised the Japanese people a constitution and a parliament.[70] Motivated by a desire to first consolidate their own position and power,[71] the oligarchs, however, continually cautioned against hastily writing a constitution. The democratic movement was incensed by the oligarchs' delay, and their insistence on the prompt writing of a constitution was echoed—and even amplified—by the press.[72] The oligarchs were enraged at this criticism of their inaction and again looked to enact harsher measures against the press. This desire to control the press was intensified by the press' effort to fully and freely report about a revolt against the Meiji government by a group of discontented samurai.[73]

New laws were enacted in 1883 and 1885 which required each paper to deposit 1000 yen with the Ministry of Home Affairs.[74] This money was forfeited each time the Ministry decided that an article was contrary to the public welfare.[75] Nevertheless, newspapers proliferated and their influence grew.[76] However, the oligarchs' need to repress them diminished as the democratic movement so fervently supported by most newspapers lost much of its effective force.[77] In addition, by 1885 the oligarchs had quietly implemented measures to reorganize the government structure and had drafted a constitution which would safeguard their political power.[78] Consequently, a revised press law was issued in 1887 which, for the first time, modified the strict control of the press.

However, most historians believe the correct number to be forty-nine. *See* HANE, *supra* note 28, at 308.

69. BECKMANN, *supra* note 52, at 26.

70. *Id.* at 53.

71. *Id.* at 58-60.

72. *Id.* at 46 n.24.

73. Colegrove, *supra* note 62, at 1037.

74. BORTON, *supra* note 50, at 186.

75. *Id.*

76. In 1883, for example, there were 199 newspapers in Japan. By 1890, this number had risen to 716. HANE, *supra* note 28, at 308.

77. Splits within the leadership of the democratic forces in Japan had a seriously deleterious effect on their image in the eyes of the general public. *See* BECKMANN, *supra* note 52, at 65-68.

78. The Emperor Meiji had earlier in 1873 approved the suggestion of Kido Koin, one of the oligarchs, that a constitution be considered. He appointed two other oligarchs, Ito

The new law eliminated the 1000 yen deposit requirement and only required the prospective publisher to inform the ministry of his intent to publish.[79] The Ministry of Home Affairs was declared the sole governmental power capable of suppressing newspapers or confiscating the plant where they were published.[80] This provision lessened governmental control over the press since it stripped the prefectural authorities of their powers.[81]

The oligarchs realized that social, economic, and military reforms were needed[82] if Japan was to prove to the West that she was a modern nation. In an effort to establish her status as a modern nation, and to have the insulting treaty provisions imposed by the West lifted,[83] Japanese leaders[84] travelled abroad. They realized that to accomplish these goals many of the West's systems had to be imported into Japan[85]—including a Western legal system.

One large problem in importing a Western legal system was that there was no concept of "individual rights" in Japan.[86] In fact,

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Hirobumi and Terajima Munenori, to make a general study of constitutional governments. At Ito's urging, Kido wrote a draft constitution.

The fundamental principle of Kido's draft was that "to each person there are reserved certain inherent rights conferred by heaven." One of these inherent rights was freedom of speech. There were, though, certain strong qualifications to this freedom. Slander of the government or fellow citizens, for example, was prohibited. Newspapers could not be published without the permission of the government. Publishers were to be held strictly liable for articles in their newspapers. This "freedom" could also be suspended in whole or in part in time of war.

Kido's draft was rejected, though. Okubo asserted to Ito and Terajima that Japan was in a transition from a feudal state to a modern nation. He argued that imperial absolutism was needed to facilitate this transformation so that Japan could reach as quickly as possible a position of equality with the West. Attracted by Prussian concepts of government and Bismark's strong leadership, Okubo believed that an absolute government led by a capable oligarchy was both consistent with Japanese tradition and in her best interests. Ito and Terajima, influenced by Okubo, came to the same viewpoint. *Id.* at 26-38.

79. *Id.* at n. 46.

80. *Id.*

81. *Id.* at 64.

82. *See id.* at 22.

83. These provisions were regarded by the Japanese as a slur to their sovereignty for two reasons. One reason was that the treaties provided a foreigner alleged to have committed a crime on Japanese soil, was to be tried not by the Japanese, but by the courts of his own nation. The second reason was that the treaties forced Japan to accept very low preset duty and custom rates. *See* Weil & Glick, *Japan—Is the Market Open? A View of the Japanese Market Drawn from Corporate Experience*, 11 LAW. & POL'Y INT'L BUS. 845, 851 (1979). The extraterritoriality provision was imposed, *inter alia*, because the Western nations believed the Japanese did not have a modern legal system.

84. *See* Mukai & Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era*, in 1 LAW IN JAPAN: AN ANNUAL 25, 30-33 (D. Henderson ed. 1967).

85. *Id.*

86. *Cf.* note 49 *supra*.

the Japanese language had no word at this time that would express *per se* the western concept of individual rights.[87] Thus, when Mitsukuri Rinshō was commissioned to translate the French Civil Code into Japanese for possible adoption in Japan, he was stumped as to how the French expression "droits civil" could be translated into Japanese. Mitsukuri described the situation in this way:

> whereupon at that time I translated the words droits civil as minken [people's powers or authority] there was an argument over what did I mean by saying that the people have power [ken]. Even though I tried to justify it as hard as I could, there was an extremely furious argument. . . .[88]

Mitsukuri's recitation of this episode indicates how difficult it was for the oligarchs to accept the concept of people having "rights." "Kenri," the word that Mitsukuri eventually decided to use as the Japanese equivalent of "droits civil" has kept the meaning given it by Mitsukuri.[89]

On February 11, 1889, the Meiji Constitution was promulgated.[90] The basic premise of the constitution was the doctrine that supreme political power rested in the person of the Emperor.[91] The Emperor was the center of political power, not by divine right, but rather by divine descent. The Preamble to the Constitution stated that "the rights of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to our descendants."[92] Article 4 of the Constitution added that "the Emperor is the head of the Empire, combining in himself the rights of sovereignty, and he exercises them according to the provisions of the present Constitution."[93]

The Meiji Constitution did grant to the people a limited degree of freedom of the press. Article XXIX declared that "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writ-

87. Noda, *Nihon-Jin No Seikaku To Sono Ho-Kannen (The Character of the Japanese People and their Conception of Law)*, 140 Misuzu 2, 14-26 (1971), *translated and quoted in* THE JAPANESE LEGAL SYSTEM 305 (Tanaka H. ed. 1976) [hereinafter cited as Tanaka].

88. Mukai & Toshitani, *supra* note 84, at 38 n.23.

89. Tanaka, *supra* note 87, at 305.

90. The Meiji Constitution was promulgated on February 11, 1889, to coincide with the observation of an important date in Japanese history. That day is the National Festival of Kigensetsu, or the anniversary of the founding of the Japanese Empire by Japan's first emperor, Jimmu Tenno. HOZUMI N., ANCESTOR-WORSHIP AND JAPANESE LAW 75 (1912).

91. CONSTITUTION OF THE EMPIRE OF JAPAN 1889, *reprinted in* MCLAREN, JAPANESE GOVERNMENT DOCUMENTS 136-44.

92. *Id.*

93. *Id.*

ing, publication, public meetings, and associations."[94] To the Japanese at that time this provision was an important development in the evolution of freedom of the press.[95] Never before had this freedom been recognized so explicitly. Yet, at the same time it is especially important to realize how limited freedom of the press was under this provision. By the wording of Article XXIX, freedom of the press was not recognized as a fundamental right. This point is clear from the method by which it was guaranteed "within the limits of the law."[96] By this language, any law limiting the press' freedom was constitutional. Since the Meiji Constitution did not allow judicial review of the constitutionality of legislation by either the regular courts[97] or the administrative ones,[98] the power of the government to limit whatever freedom the press possessed was totally unfettered. Thus, the freedom of the press delineated in Article XXIX was more verbiage than reality.

Even the language of Article XXIX, however, was considered too liberal by some of the oligarchs. When the Constitution was presented to the Emperor's Privy Council some of its members proposed that the title of the civil rights section be changed from "Rights and Duties of Subjects" to "Responsibility of Subjects."[99] They argued that since the Japanese citizens could have nothing but the responsibility of a loyal status of subjection in relation to the Emperor, it would be improper to imply anything else by using the word "rights" in this context.[100]

The contrast between the concept articulated by the Meiji Constitution of heaven-given state rights and state-given human rights, and the Western idea of heaven-given human rights and people-given state rights is striking. Even to mention an ideology of fundamental human rights under the Meiji Constitution was to question the very legitimacy of the government.[101] Hozumi

94. *Id.*

95. *Cf.* Comment, *Individual Civil Liberties and the Japanese Constitution*, 14 TULSA L.J. 515, 520 (1979).

96. MCLAREN, *supra* note 91.

97. Great Court of Judicature Judgment, Decision of March 3, 1937, 16 Keishu 193.

98. Administrative Court Judgment, Decision of December 27, 1927, 38 Gyoroku 1330. There were a few legal scholars who believed that the courts had the power of judicial review. *See, e.g.*, VESUGI S., KEMPŌ JUKTSUGI (Explanations on the Constitution) 602 (11th ed. 1922). Their views were in the minority and not endorsed by the courts.

99. Ukai, *The Individual and the Rule of Law Under the New Japanese Constitution*, 51 NW. U. L. REV. 733 (1957). *See also* Abe, *Criminal Justice in Japan: Its Historical Background and Modern Problems*, 47 A.B.A.J. 555, 557-58 (1961).

100. *Id.*

101. Minobe Tatsukichi, Professor of Constitutional Law at Tokyo University, was bit-

Yatsuka, an important interpreter of the Meiji Constitution,[102] wrote that rights such as "freedom" of the press were dependent in the long run upon the will and bent of the government. His thinking reflects the standard political beliefs of the Meiji era:

> The "rights of subjects" presented in the Constitution are not heaven-given rights, nor the right to resist state rights; they amount to no more than the right to avoid excessive use of intervention by the administration dependent upon the guarantees of that Constitution (State Rights). Following long-established custom, they were clearly represented in the text of the Constitution as examples, but they do not actually possess great initial significance . . . The present Constitution has not adopted the idea of heaven-given human rights.[103]

The Meiji Constitution was the culmination in Japan of the societal emphasis on loyalty to one's superiors that had been used in Japan's feudal period by the Tokugawa government to enhance its own system through its stress on Confucian philosophy and values.[104] The Meiji government transformed this emphasis on loyalty to one's superiors into a spirit of super-patriotism based upon loyalty to the Emperor, the very incarnation of Japan.[105] In 1890 the Imperial Rescript on Education stressed to the people that one of the foundations of the Japanese system was this underlying theme of loyalty to the Emperor:

> Be filial to your parents, affectionate to your brothers and sisters; as husbands and wives be harmonious; as friends true; bear yourselves in modesty and moderation; . . . always respect the Constitution and observe the laws; should emergency arise, offer yourselves courageously to the State; and thus guard and maintain the prosperity of our Imperial Throne coequal with heaven and earth.[106]

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terly attacked, for his "Emperor as an organ" theory. He asserted that the Emperor was only an organ of the State and that his purpose was limited to exercising sovereignity. *See* Nagao, *The Legal Philosophy of Tatsukichi Minobe*, in 5 LAW IN JAPAN: AN ANNUAL 165 (1972).

102. *See* F. MILLER, MINOBE TADSUKICHI 26 (1965).

103. HOZUMI, N., SHUSEI ZOHO KEMPO TEIYO (A Constitutional Law Summary) 13-21 (1935), *quoted in* Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, in 8 LAW IN JAPAN: AN ANNUAL 39, 42-43 (1975).

104. BECKMANN, *supra* note 52, at 94-95.

105. During this period, the word "kokutai" was used by many Japanese to express this idea. This word has no exact counterpart in English, but can be roughly translated as the concept of "the essence of Japan which has made her nationhood so superior." *See, e.g.*, W. BEASLEY, THE MEIJI RESTORATION 429 (1972).

106. Under this overriding concept of the Emperor as the father of Japan and the Japanese people as his children, the freedom of the press described in Article XXIX was more verbiage than reality. Not only did the constitutional provision explicitly state that this free-

This interpretation of Confucian philosophy was an attempt by the Meiji government to put new vigor into the concept of the Emperor as the father of Japan and the Japanese people as his children. The people owed the Emperor loyalty; he, in turn, would exercise paternal beneficence to guard their welfare. In this way the Meiji government equated political obligations with filial piety. There would thus be no conflict between family and state, since loyalty to the state and filial piety were one and the same.[107]

In reality, there was no weapon in the Meiji Constitution—or in the underlying political thought of Japan—which could protect the freedom of the press from encroachment by the government.[108] During the existence of the Meiji Constitution the ability of the press to report freely on matters was severely circumscribed by the Japanese government. In 1909, for instance, the Minister of Home Affairs was given the power to prohibit the sale or the distribution of newspapers and to seize them if he found that they disturbed security and order or injured morality.[109] His determination, moreover, was nonreviewable.[110]

Through the end of World War II the government of Japan often used its powers under the Meiji Constitution to restrict severely the ability of the press to report matters.[111] Any article by the press that, in the eyes of the government, tended to subvert the political institutions of Japan, lead to a breach of the peace, or was contrary to good morals, was punishable by criminal penalties.[112] The ambiguity of this law gave the government even more control over the press since one cannot define with specificity what characterizes an article that "tends" to subvert the political institutions of Japan, "leads" to a breach of the peace, or is "contrary" to good morals.[113] Thus, the press often had to function as its own censor to avoid transgressing a law which had such unclear parameters.[114]

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dom of the press was enjoyed by the Japanese people "within the limits of the law," but there was no check on the power of the government to limit this freedom. The constitution clearly stated that the courts had no power to review an alleged infringement of constitutional rights by the government. BORTON *supra* note 50, at 177-78.

107. *Id.*

108. *Cf.* G. UYEHARA, THE POLITICAL DEVELOPMENT OF JAPAN 1867-1909 132 (1910).

109. Law No. 41 of 1909.

110. *Id.*

111. F. GIBNEY, JAPAN THE FRAGILE SUPER POWER 253 (1980).

112. Law No. 36 of March 10, 1900.

113. GIBNEY, *supra* note 111, at 253.

114. The *Yomiuri Shimbun* newspaper avoided government censorship for a time by simply not reporting political news. GIBNEY, *supra* note 111, at 252.

The press' ability to do investigative reporting of governmental matters was also severely curtailed. Governmental documents concerning diplomatic, military, or other state matters which were not publicly released by the government could not be made public by the press.[115] The Ministers of War, Navy, and Foreign Affairs were authorized by statute to prohibit publication in the press of matters they unilaterally decided should not be made public.[116] The freedom of newspapers to report on these matters was truly nonexistent since the government could, at its whim, with no outside body having the power to confirm the validity of its judgment, decide a matter should not be mentioned in the newspapers because of an undisclosed diplomatic or military reason.[117]

Laws enacted pursuant to the Meiji Constitution explicitly protected the Imperial Family from libel.[118] Until the Penal Code was revised in 1907, it was a crime to insult members of the government in the press.[119] Newspapers or magazines engaging in defamation first became specifically liable to criminal penalties in 1875.[120]

One writer, Professor Lawrence Beer, has asserted that compared to the other restrictions placed upon it by the government in this period, "Japanese press freedom was recognized to a significant account" in pre-World War II defamation law.[121] To support his statement he points to Article 23 of the Newspaper Ordinance of 1887 which stated that there was no liability for defamation if the newspaper could prove that its allegations were true and were made for the public's benefit and without malicious intent.[122]

During the period of roughly 1873-1930, the press and the government were often at odds.[123] Frequently the press, by incessantly bitter and violent attacks on the government, would whip the popu-

115. *See* Miyaoka, *The Safeguard of Civil Liberty in Japan*, 4 A.B.A.J. 604, 617 (1918). Those interested in the thoughts of the Japanese during this period on the subject of freedom of the press in Japan would be well-advised to read this article. Mr. Miyaoka, a member of the Japanese bar in 1918, argues that there is really no restriction imposed on the legitimate enjoyment of freedom of the press in Japan, since these limitations are for the good of the country.

116. *Id.*

117. *Id.*

118. Beer, *Defamation, Privacy, and Freedom of Expression in Japan*, in 5 LAW IN JAPAN: AN ANNUAL 192, 198 (1975).

119. The Penal Code of Japan, arts. 230-32 (Law No. 45 of 1907).

120. Beer, *supra* note 118, at 198.

121. *Id.* at 198-99.

122. *Id.* at 198.

123. GIBNEY, *supra* note 111, at 252.

lace into such an agitated state that mass meetings would be held in opposition to the government's policy.[124] To counter this groundswell of opposition the government would move to control the newspapers. The more violent the press' attack, the more vigorous the government's suppression of the freedom of the press. For example, at the conclusion of the Russo-Japanese War the government of Prime Minister Katsura was bitterly denounced by many newspapers which contended that the terms of the Portsmouth Treaty were unsatisfactory to Japan.[125] Inflamed by the press' virulent attacks on the Katsura government, a mass of people assembled in Hibiya Park in Tokyo.[126] The crowd became violent and burned police stations and government buildings. Destruction became rampant, and the government was forced to declare marital law.[127] In retaliation, the Katsura government imposed a policy of rigid censorship on all newspapers. No articles could be printed which, in the government's view, threatened the maintenance of order.[128] This policy of strict censorship lasted three months.[129]

A similar situation occurred in the spring of 1914 when four officials in the Japanese Navy were convicted of taking bribes from the Siemens and Schuckert Company. The Japanese public was shocked; here-to-fore they had considered military officials to be patriots, unselfishly dedicating their lives to the service of Japan.[130] At an anti-government rally occasioned by the revelations, a reporter was struck with a saber by a policeman. The newspapers

124. *See, e.g.*, S. OKAMOTO, THE JAPANESE OLIGARCHY AND THE RUSSO-JAPANESE WAR (1970).

125. The policy of the government during the Meiji era of not revealing information to the public through the newspapers for military or diplomatic reasons backfired in this case. At the urging of the newspapers, the Japanese public had pressed for war against the Russians. Once war broke out such great Japanese successes as the overwhelming defeat of the Russian fleet at Port Arthur had led the public to conclude that a great victory was near. Unknown to them, however, the Japanese had few trained officers, weapons, or financial reserves left. The Russians, on the other hand, had just started to shift their prized military forces from Western Europe to the Far East. These factors moved the Japanese military leaders to press the government for a negotiated result to the war. Not possessed of this information, the Japanese newspapers and public were shocked at the terms of the Portsmouth Treaty. They believed that the government had negotiated a peace at terms advantageous to Russia when a great victory was near. *Id.*; J. WHITE, THE DIPLOMACY OF THE RUSSO-JAPANESE WAR 317 (1964).

126. GIBNEY, *supra* note 111, at 56.

127. *Id.*

128. K. HANAZANO, THE DEVELOPMENT OF JAPANESE JOURNALISM 51 (1924).

129. The press attacks on the Katsura government, though, had been so effective that the government was forced to resign on January 7, 1906.

130. KAWABE *supra* note 58, at 142.

jointly expressed their outrage at this injury by asking the Minister of the Interior, Hara Kei, to apologize.[131] Hara refused. Believing the attack to have been a deliberate one, the press vehemently criticized the government. The government responded by punishing every newspaper in Tokyo[132] and forcing three newspapers to suspend publication.[133]

Japanese governments obviously did not hesitate to use the censorship powers they possessed under the Meiji Constitution.[134] In fact, the Japanese government exercised their most rigorous censorship during the 1930's and throughout World War II. Frank Gibney, a renowned commentator on Japanese affairs has written that "as the militarist trend in Japan grew stronger, the papers had increasingly less latitude in which to oppose."[135] The government kept a watchful eye on publications that might put any organ of the Japanese government, especially the military, in a bad light.[136] Those newspapers deemed to be most critical of the government's emphasis on militarism were penalized severely: they had their share of newsprint reduced.[137] It became commonplace for newspaper articles to have many lines deleted.[138] By using these diverse tools of censorship the Japanese government forced those newspapers most offensive to them to cease publication. By 1940 more than 500 publishers had been forced out of business.[139] This atmosphere of intimidation paid immediate dividends for the government. Japan's brutal successes in China in the late 1930's were hailed by the hitherto anti-militarist Japanese newspapers as the

131. *Id.*

132. *Id.*

133. As in the case of the Katsura government, the government was eventually forced to resign.

134. The following chart gives the number of newspapers in 1913 and 1914 which were censored by the Japanese government:

YEAR	SALE FORBIDDEN	SUSPENDED	OTHERS	FINED	GIVEN WARNING
1913	74	2	5	197	103
1914*	453	1	2	114	194

*The greater amount of newspapers whose sales were prohibited in 1914, the beginning of World War I, is due, *inter alia*, to their publication of matters considered by the Japanese government to be military or diplomatic secrets.

See additionally HANE, *supra* note 28, at 397, and HANAZANO, *supra* note 128, at 54.

135. GIBNEY, *supra* note 111, at 253.

136. *Id.*

137. *See* HANE, *supra* note 28, at 499.

138. *Id.*

139. *Id.*

"glorious" victories of the "righteous" Japanese army.[140]

During the period of growing militarism in Japan that began in the late 1920's, the Japanese press did not always criticize the government's emphasis on militarism. On the contrary, a large proportion of the press often berated the government for making what it believed to be concessions to the West and to China. For example, in April, 1930, upon the insistence of Prime Minister Hamaguchi Ōsachi, Japan became one of the signatories of the London Naval Treaty.[141] This agreement had provisions which declared that Japan would build no battleships for six years and would maintain a smaller navy than the United States.[142] The press reacted furiously. It agreed with the objections of the Navy and much of Parliament that the sixty percent ratio imposed on Japan's Navy as compared to the United States' was too low a parity for Japan to maintain an adequate defense.[143] Much of the press also heatedly criticized the policy of conciliation to China pushed by Hamaguchi and his Foreign Minister Shidehara Kijurō.[144]

Immediately after the Japanese attack on Pearl Harbor the government of Prime Minister Tōjō enacted an emergency law which provided, *inter alia*, that no war news could be reported by a newspaper without the approval of the Japanese Supreme Command.[145] In the early stages of World War II when the war situation was proceeding most advantageously for Japan, news reports were released without much interference. However, as the war outlook became bleaker, censorship was applied with a heavy hand.[146] By the end of World War II the Japanese government zealously attempted, usually with great success, to control what reporters could write, thus controlling the public's basic perception of events in Japan (and, indeed, in the world) and the policies of the Japanese government. This lack of freedom of the press—indeed, its complete absence—had an enormous influence on the Japanese public. One historian has written that: "military successes were ex-

140. *Id.*

141. *See* BORTON, *supra* note 50, at 315.

142. *Id.*

143. *Id.*

144. *Id.* at 316.

145. HANE, *supra* note 28, at 499. In March of 1938 the Diet paved the way for passage of this law by enacting the National General Mobilization Act. This statute allowed the government to place the press under strict censorship in time of war or during "incidents" such as that in China. *See* BORTON, *supra* note 50, at 353.

146. *Cf.* I. FURUNO, A SHORT HISTORY OF THE NEWS AGENCY IN JAPAN 15 (1963).

aggerated, defeats were never reported, and in this sense it can be said that the public was led blindly to the path of ultimate destruction and defeat while all along being firmly convinced that one magnificent victory after another was being won."[147]

Thus, until after World War II Japan was characterized by an almost complete lack of freedom of the press. Tokugawa Japan had used the stress of Confucianism on loyalty, family welfare, and the subordination of individual rights to reinforce the emphasis its system placed on the group and its welfare. The Meiji Constitution had imposed on Japan an ideology of heaven-given state rights and state-given human rights. Although Article XXIX of the Meiji Constitution did pay obeisance to the concept of freedom of the press, the proviso that it could be exercised only "within the limits of law" was used by the Japanese government as a strict control over the press' opposition to government policies. Japan of both the Tokugawa and Meiji eras emphasized the societal values of loyalty to one's superior, the importance of the group, and the lack of consciousness of one's rights to make group welfare of paramount importance at the expense of individual rights. Under these systems true freedom of the press could not exist. Thus, when the present Japanese Constitution became effective in 1947, a constitution that strongly supports civil rights, there was little history of protection of civil rights to guide the Japanese Supreme Court.

III. FREEDOM OF THE PRESS UNDER THE 1947 CONSTITUTION

On November 3, 1946, a new Japanese Constitution was promulgated;[148] it took effect May 3, 1947.[149] The new Constitution had a totally different ideology from that of the Meiji Constitution.[150] The principle of popular sovereignty, which replaced the

147. HANE, *supra* note 28, at 499.

148. Technically, that document is not a "new" Japanese Constitution. It was formally enacted as an "amendment" to the Meiji Constitution so that the links to the past were maintained. This document, though, establishes such a vastly different governmental system and concept of individual civil liberties than those of the Meiji Constitution that it is usually referred to as the new Japanese Constitution. *See* Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. L. 195, 217 (1958).

149. Some observers argue that the 1947 Constitution was "imposed" upon Japan by General Douglas MacArthur acting as Supreme Commander for the Allied Powers (SCAP). One commentator, for example, has written that the present Japanese Constitution is "in almost all cases substantially identical in content, style, and wording" to the earlier draft version written by SCAP. Ward, *supra* note 2, at 1008.

150. Reform of the Meiji Constitution was necessitated by Japan's acceptance of the Potsdam Declaration, a joint declaration by the United States, the United Kingdom, and China (later joined by the U.S.S.R.) on July 26, 1945. This document stated the terms for

Meiji doctrine of imperial sovereignty,[151] is immediately apparent upon examination of the new Constitution. The Preamble declares that "we, the Japanese people . . . do proclaim that sovereign power resides with the people and do firmly establish this Constitution."[152] Furthermore, Article I states that the "Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom reside sovereign power."[153]

The 1947 Constitution significantly enhanced the freedom of the Japanese press. There are two reasons for this increased freedom. First, the new Constitution places a strong emphasis on fundamental human rights. Article 21 guarantees the freedom of the press and prohibits censorship. Article 11 states that the "fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights."[154] The Imperial Message that accompanied the enactment of the Constitution emphasized the important place that such human rights as freedom of the press occupy in the system of government established by the new Constitution.[155]

The second reason for the increased freedom is that the new Constitution established the Japanese Supreme Court as a court of last resort with the power of constitutional review.[156] Article 81 echoes Chief Justice John Marshall's opinion in *Marbury v. Madison*[157] in giving the Japanese Supreme Court the power to "determine the constitutionality of any law, order, regulation, or official act." The independence of the judiciary is protected by the new Constitution and the courts are given complete judicial

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Japan's unconditional surrender in World War II. The Japanese government had to "remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people," and had to establish in Japan "respect for the fundamental human rights." *See* Tanaka, *A History of the Constitution of Japan of 1946*, in Tanaka, *supra* note 87, at 653-54.

151. Maki, *The Japanese Constitutional Style*, in THE CONSTITUTION OF JAPAN, *supra* note 7, at 11.

152. Blaustein & Flanz, *supra* note 1, at 1.

153. *Id.* at 1.

154. *Id.* at 2.

155. The Imperial Message declared that the new Constitution "represents a complete revision of the imperial constitution. It seeks the basis of national reconstruction in the universal principles of mankind. It explicitly stipulates . . . that having constant regard to the fundamental human rights, the people of Japan will conduct the national affairs on the fixed line of democracy . . . ." Official Gazette, extra, November 3, 1946.

156. KENPO (Constitution) art. 76 (Japan), in Blaustein & Flanz, *supra* note 1, at 6.

157. 5 U.S. (1 Cranch) 137 (1803).

power.[158] The 1947 Constitution is declared to be the supreme law of the land; any governmental act contrary to it is invalid.[159] The cumulative effect of these provisions is to give to the Japanese Supreme Court the power to declare invalid governmental statutes or acts that impinge on the freedom of news reporters as guaranteed by Article 12. In contrast, under the Meiji Constitution, the courts had no power of review over governmental acts. The "freedoms" enumerated in the Meiji Constitution were really not freedoms at all, since they could only be exercised to the degree permitted by the government.

The freedoms and rights guaranteed by the 1947 Constitution are not without limitation. For instance, Article 12 declares that the people shall utilize the freedoms and rights for "the public welfare."[160] Thus, the Constitutional freedoms are sacrosant as long as they are consistent with the public welfare. When they are not, the Japanese Supreme Court has balanced the two and invariably interpreted the 1947 Constitution to read that the public welfare standard is superior.[161] The public welfare standard is a continuation of the group welfare concept that predominated Japan during the Tokugawa and Meiji Constitution periods. The Japanese Supreme Court has chosen to apply this traditional value and standard despite the wide range of new and specific rights and freedoms enumerated in the 1947 Constitution.[162] In balancing, the Court has chosen to reaffirm the traditional value of group welfare at the expense of freedom of news reporters, a Western value newly introduced into Japan. In 1952, for example, the issue at stake was the right of a newspaper reporter, Ishii Kiyoshi, to refuse to testify about his source of news.[163] Ishii, a reporter for the Matsumoto branch office of the *Asahi Shimbun*, was told by a source that the local police planned to arrest an official of the Matsumoto Tax Office, Seki Itaro, on the charge of corruption. The government, believing that secrets about the Seki investigation had been divulged to reporter Ishii in violation of the National Public Service Law[164]

158. KENPO (Constitution) art. 76 (Japan), in Blaustein & Flanz, *supra* note 1, at 6.

159. *Id.* art. 98, in Blaustein & Flanz, *supra* note 1, at 8.

160. *Id.* at 2

161. *Cf.* Ito, *supra* note 11, at 221.

162. Public welfare is a value long held in Japanese society, despite the guarantee of freedom of the press—and the consequential rights granted to news reporters by this guarantee—described in the 1947 Constitution. *Id.*

163. Supreme Court, Decision of August 6, 1952, Keishū 6-8-974. For an English translation of the case, *see* MAKI, *supra* note 17, at 38.

164. Article 100 of that law states that "any public service official shall not leak any of

(since no information about the Seki matter had yet been revealed by the government) opened an investigation.

Ishii was called to testify in court concerning the name of his source.[165] He argued that although the Japanese Code of Criminal Procedure does not include reporters among those who have the right to refuse to answer questions in court,[166] the secrecy of his source of information is guaranteed by the freedom of expression and of the press found in Article 21 of the Constitution.[167] Therefore, cases in which a reporter refuses to testify regarding his source of information fall under Article 161 of the Code of Criminal Procedure which provides that witnesses can refuse to testify if they have "due reason."

The Japanese Supreme Court, sitting Grand Bench,[168] disagreed. The Court unanimously held that reporters have no special guarantee of freedom of expression and no privilege to refuse to testify regarding the identity of news sources.[169] As it has typically done in cases involving questions of individual rights and the public welfare clause,[170] the Court balanced the guarantees of Article

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the secret information to which he or she has gained access through his or her performance of official duties . . . ."

165. *See* note 163 *supra*.

166. *See* Article 147 of the Code of Criminal Procedure which states:

> A witness may refuse to answer any question which may tend to incriminate the following persons:
>
> (1) The spouse, a relative by blood within the third degree of relationship or a relative by affinity within the second degree of relationship of the witness, or a person who was in any of such relationships to the witness;
>
> (2) The guardian, supervisor of guardianship, or curator of the witness.
>
> (3) A person of whom the witness is the guardian, supervisor of guardianship, or curator.

167. *Id.*

168. The Japanese Supreme Court consists of fifteen justices. The Court conducts hearings and renders decisions through either a petty bench court or a grand (i.e., full) bench. The petty benches are three in number and each consists of five justices. Article 10 of the Saiban Shohō (Court Organization Law, Law No. 59, 1947) determines which cases are to be handled by the Grand Bench and which by the Petty Bench. In the following instances, though, the Grand Bench must sit:

> (1) Cases in which a determination is made of the constitutionality of a law, ordinance, regulation, or disposition as a result of a litigant's contention (excluding those cases in which the opinion is the same as that of a previous Grand Bench decision holding such a law, ordinance, regulation, or disposition to be constitutional);
>
> (2) cases other than those previously mentioned in the preceding item when the law, ordinance, regulation, or disposition in question is held to be unconstitutional;
>
> (3) cases in which an opinion regarding the interpretation and application of the Constitution or of any other law or ordinance is contrary to that of a previous Supreme Court decision.

169. *See* note 162 *supra*.

170. *See* THE CONSTITUTION OF JAPAN, *supra* note 7, at 205.

21 against the public welfare standard—and found for the public welfare. The Court stated that a reporter cannot refuse to testify concerning the identity of his source since the duty to testify is "indispensable to the proper operation of the judicial process, which is of the highest importance to the public welfare."[171] The Court declared that Article 21, which guarantees freedom of the press, creates for news reporters no special rights concerning their duty to testify in court. For any such special privilege to exist, it must be declared by the legislature.[172]

Six years later, in 1958, the Japanese Supreme Court was again confronted with a clash between the standard of freedom of the press and that of the public welfare. Again, the public welfare standard emerged triumphant.[173] While a burglary and murder case was being tried in the Kushiro District Court a reporter for *The Hokkaido Times* took pictures of the defendant in open court, contrary to the instructions of the Chief Justice. The reporter was charged with violating the Act for the Maintenance of Order in Court[174] and argued that the reporting of facts by the press (including the taking of pictures in court) is guaranteed by the freedom of the press declaration found in the Constitution. The Japanese Supreme Court disagreed, and held that the freedom of news reporters as defined by Article 21 is not an unlimited one; it must, said the Court, always be utilized for the public welfare.[175] Therefore, information-collecting and information-reporting activities of news reporters which disturb the order of trials are not permitted. News reporters, even in the exercise of their very functions, cannot interfere with the public welfare.

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171. MAKI, *supra* note 17, at 42.

172. Subsequent efforts by Japanese interests to have a statutory newsman's privilege established have been ineffectual. *See* Beer, *Freedom of Information and the Evidentiary Use of Film in Japan: Law and Sociopolitics in an East Asian Democracy*, 65 AM. POL. SCI. REV. 1119, 1123 (1971). The holding in this case presaged by twenty years that of Branzburg v. Hayes, 408 U.S. 665 (1972), in which the United States Supreme Court held that the First Amendment gives to the press no special right to refuse to testify before state or federal grand juries.

173. Supreme Court, Decision of February 17, 1956, Keishū 12-2-255.

174. Law Concerning the Maintenance of Order in Court, Etc., Law No. 286 of 1952.

175. The Japanese Supreme Court is not the only court in Japan to emphasize this point. In 1963, for example, the Tokyo District Court held that the freedoms guaranteed under Article 21 (such as freedom of the press) are not unlimited. They are subject to "rational restrictions" in order to establish the "public welfare." Tokyo District Court, Decision of December 20, 1963, Hanrei Jihō 359-96; *noted in* Brown, *Government Secrecy and the "Peoples Right to Know" in Japan Implications of the Nishiyama Case*, in 10 LAW IN JAPAN: AN ANNUAL 112, 120 (1977).

The Japanese Supreme Court has not restricted the freedom of news reporters in all cases. In fact, the Court has been a staunch defender of reporters' freedom when it has not clashed with the public welfare. In the case referred to by many legal scholars as the Kochi defamation matter,[176] a case whose holding closely resembles that of the United States Supreme Court in *New York Times v. Sullivan*,[177] the Japanese Supreme Court (sitting Grand Bench) unanimously recognized a large degree of press freedom against claims by individuals that they had been defamed in newspaper articles.[178]

The case began in February, 1963, when the *Yukan Wakayama Jiji* newspaper published a series of articles about Sakaguchi Tokuichirō, the publisher of an allegedly sensationalist newspaper. The articles were titled "The Sins of the Vampire Sakaguchi Tokuichirō." In the title of the articles Sakaguchi's given name Tokuichirō was subjected to a play on Japanese characters such that the character in his name meaning virtue, "toku," was replaced by a homonym meaning gain or profit.[179]

An article on February 18 alleged that Sakaguchi had told public officials in Wakayama that stories in his newspaper that would put the officials in a negative public light would not be printed if Sakaguchi was paid money in return. The publisher of the *Yukan Wakayama Jiji*, Kōchi Katsuyoshi, was prosecuted for defamation under Article 230(1) of the Criminal Code.[180] That statute provides that "a person who defames another by publicly alleging facts shall, regardless of whether such facts are true or false, be punished . . ."[181] Kōchi was convicted by the Wakayama District Court. The Osaka High Court sustained the conviction. On appeal, though, the Supreme Court's Grand Bench unanimously reversed the judgment.

After engaging in a careful balancing test, the Supreme Court decided that there should be a large degree of press freedom in such cases. The Court weighed the protection of the individual's good

176. Supreme Court, Decision of June 25, 1969, Keishū 23-7-259. *See also* THE CONSTITUTIONAL CASE LAW OF JAPAN — SELECTED SUPREME COURT DECISIONS, 1961-70 175 (H. Itoh & L. Beer eds. 1976) for an English translation of the case [hereinafter cited as Itoh & Beer].

177. 376 U.S. 254 (1964).

178. *See* Itoh & Beer, *supra* 176.

179. *Id.* at 176 n.*.

180. *See* note 176 *supra*.

181. *See* Beer, *supra* note 118, at 195.

name on the one hand and the guarantee of freedom of the press on the other. The Court said that even if the statements of the newspaper are false, the crime of defamation is not present if the defendant can prove two points: (1) the defendant believed the statements to be true, and (2) the evidence shows there was sufficient reason for this mistaken belief.[182] Therefore, evidence at the trial that had been ruled hearsay and inadmissible by the trial judge that a third party (i.e., a news "source") had provided the defendant with information that was printed in the article and which the source had heard from officials at Wakayama City Hall was improperly struck from the record.[183]

In this case the Japanese Supreme Court balanced against the protection of an individual's good name not only the constitutional standard of freedom of the press but also that of the public welfare. The added element of the public welfare standard may have been the determining factor that tipped the scales in favor of freedom of the press. This opinion strenghtens freedom of the press and of news reporters by holding that untrue statements by news reporters do not now expose a newspaper to charges of defamation as long as the two-pronged test stated above is met. The public welfare, though, is also furthered by the decision in this case. By its holding, the Japanese Supreme Court allowed the press to use their knowledge and ability to serve the Japanese people by reporting the news freely. In this way many viewpoints on issues can be expressed, and the electorate can be better informed.[184] This served the public welfare by assuring potential voters that reporting would not be inhibited as long as there was a reasonable and honest belief by the reporter that the article was true. A contrary decision by the Court would have prevented reporters from reporting on the people in the news unless there was absolute proof that what they were reporting was true. Information from sources would not have been printed unless it was checked and double-checked to insure its accuracy. Not only could information from sources now be printed in newspapers without the paper being liable for defamation (as long as the reporter had sufficient reason to believe the information to be true), but in 1977 the Tokyo High Court took this holding one step

182. Itoh & Beer, *supra* note 176, at 177.

183. *Id.*

184. The Japanese press is an integral part of the electoral process in Japan, because Japan has the highest literacy rate in the world. *Cf.* Halloran, *Japan: Images and Realities*, in POSTWAR JAPAN—1945 TO THE PRESENT 381 (J. Livingston, J. Moore, & F. Oldfather eds. 1973).

further and ruled that unless an advertisement defamed a party, the party had no right to require the newspaper to publish its rebuttal free of charge.[185]

In 1969 another conflict between the Constitution's guarantee of freedom of the press and the public welfare standard developed.[186] Predictably, the public welfare provision emerged triumphant. Although the case involved the freedom of a television station, its language and reasoning are clearly analogous to the situations involving newspapers. The case was based on an order by the Fukuoka District Court requiring four television stations to turn over to the court their film of an incident at Hakata Station. That incident took place on January 16, 1968, and involved activist students who had demonstrated against the visit to Japan of the U.S.S. Enterprise, an American nuclear-powered aircraft carrier. Detained at Hakata Station by the police, the students sued the Prefectural Police Commissioner and others for abuse of police authority. After the television companies refused to present the film as evidence to the Court, the Fukuoka District Court issued an order compelling its production. The companies appealed the order to the Supreme Court as a violation of freedom of the press.

The press had by now learned how much weight the Japanese Supreme Court placed on the public welfare standard of the Constitution. Accordingly, the television companies argued that the public welfare could be guaranteed only by a decision in their favor. The companies asserted that to protect fully their freedom to report the news, their freedom to gather news also had to be guaranteed. They argued that if they were compelled to turn over these films to the lower court, public confidence in the press would be diminished since the product of the companies' news reporting activities would be used for purposes other than that of simply reporting the news. As the public lost confidence in the press, the electorate would rely less and less on the press for the reporting of the news. The electorate's ability to reach a decision on the issues would thus be deleteriously affected, and the public welfare would be the ultimate loser as the press lost its most valuable asset—the trust of its consumers.[187]

185. Tokyo District Court, Decision of July 13, 1977, Hanrei Jihō 857-30.

186. Supreme Court, Decision of November 21, 1969, Keishū 23-11-1490. For English translations of the case, *see* Tanaka, *supra* note 87, at 742, and Itoh & Beer, *supra* note 176, at 249.

187. *Id.*

Sitting as the Grand Bench a unanimous Court rejected this argument. Once again the Court reminded the press that its rights under the Japanese Constitution were not absolute. The Court stated that the guarantee of a fair trial was more important to the public welfare than the press' freedom.[188] The films possessed by the four television companies were necessary as evidence to secure a fair criminal trial. The Court asserted that in this case the public welfare was better served by seeing that all evidence indispensable to determining the guilt or innocence of the defendants was produced than by protecting the freedom of the press to gather news.[189]

Once again the Court held that freedom of the press (albeit television stations and not newspapers) must yield to the public welfare. The press had by now learned the primacy to the Japanese Supreme Court of the public welfare standard: it had couched its argument in those terms. The Court, though, had held that the interest to society of a fair criminal trial—with its concomitant guarantee that all necessary evidence would be available for protection at trial—outweighed the freedom of the press.[190] After this decision and that involving reporter Ishii,[191] it appears likely that a court in Japan would be able to order a news reporter to turn over his notes and other material concerning a story if those notes are necessary evidence at a criminal trial.

In 1978 another case arose which involved the standards of freedom of the press and the public welfare.[192] However, in this case the Japanese Supreme Court stated that the two constitutional standards were not in opposition but rather on the same side. The case concerned a political reporter Nishiyama Takichi, who had obtained previously secret cablegrams involved in the negotiations over Okinawa between Japan and the United States. Nishiyama had obtained these cablegrams from Mrs. Hasumi Kazuo, secretary to Deputy Foreign Vice Minister Takeshi Yasukawa. Hasumi was prosecuted for the crime of divulging classified secret information

188. *Id.*

189. The Court did appease the press somewhat in stating that the press was required to turn over evidence for use at court only if the necessity and value of the material for use at trial outweighed the degree to which freedom in news-gathering by the press would be hindered by the presentation in court of the material. *See* Tanaka, *supra* note 87, at 742, and Itoh & Beer, *supra* note 176, at 249.

190. *Id.*

191. MAKI, *supra* note 17, at 38.

192. Supreme Court, Decision of May 31, 1978.

as provided for in the national Public Employees Act.[193] Reporter Nishiyama was charged with the crime of instigation under Article 111 of the same law, which provides a criminal penalty for one inducing a civil servant to commit a crime.[194]

The Supreme Court's decision in this case is important in several respects. Although it did leave several questions unresolved, the Court did stress the importance of the press in Japan by stating that news reports serve the public's right to know by helping fully inform the people about the government's activities. More importantly, however, the Court opened to the press sources of news concerning the government that were previously unavailable by expanding its definition of the parameters of the lawful activities of the press.[195] In striking language the Court argued that the press' role in keeping the people informed is so important that its efforts to obtain information concerning governmental activities "necessarily" involve attempts to expose governmental secrets. The Court cast very strong doubt on whether in the ordinary course of a reporter's activities that reporter could be prosecuted under Article 111 of the National Public Employees Act for inciting a civil servant to commit a crime by divulging classified information, the very crime for which Nishiyama was prosecuted.[196] The Court stated that even if a reporter tries to acquire information about the government by attempting to induce a public employee to disclose confidential information, his act is not illegal *per se*. In fact, it is a "justifiable act" as long as a two-pronged test is met: (1) it is motivated by what the Court stated to be a "genuine desire" to keep the public informed, and (2) the means used by the reporter are justifiable in light of the spirit of the laws and the common sense of society.[197]

What the Japanese Supreme Court did by formulating this two-pronged test was to link the freedom of the press and of news reporters with the public welfare in regard to the press' efforts to reveal secret information of the government to the public. The Court asserted that the role of the press in keeping the public informed is so crucial to the public welfare that as long as its actions

193. *See* note 164 *supra*.

194. Article 111 of the National Public Employees Act declares that "a person who has attempted, ordered, deliberately acquiesced, instigated, or abetted any of the acts mentioned . . . shall be punished with the penalty provided in respectively in those Articles."

195. *See* note 192 *supra*.

196. *Id.*

197. *Id.*

are "justifiable," the press can even induce government employees to reveal confidential information (i.e., induce them to commit an illegal act).[198] Apparently, the Court believes that the public welfare is better served by having an informed public than by seeing that government secrets are kept confidential.

The opinion does, however, leave several issues unresolved. First, what of the reporter's source, the government employee?[199] If the reporter is justified in inducing the employee to violate the law, then should the employee, the revealer of the secret information, still be criminally liable for violating the National Public Employees Act?[200] Are the motives of the employee relevant? Second, in this case the Court did ultimately sustain Nishiyama's conviction on the ground that his acts were unjustifiable, that the means employed by him exceeded the proper limits of news-gathering activities in light of the spirit of the law and the common sense of society.[201] But is the reporter's conduct really relevant? If the role of the press in keeping the public informed is as essential to the public welfare as the Court said it was in this case, then aren't the acts of a reporter justified *per se* if he does reveal governmental information to the public? Third, the Court declared that the activities of the reporter in seeking to persuade others to disclose confidential information are lawful, *inter alia*, if the means used by the reporter are justifiable "in light of the spirit of the laws and the common sense of society."[202] What does this standard mean in actuality? Fourth, no matter how pure its motives, is the press indeed justified in revealing information to the public that the government has decided should be confidential? *Arguendo* the reporter's motive and means are justifiable, can the press now reveal any confidential information to the public by rationalizing that it is in the public's interest to be informed about these matters—no matter how important it is to the government to keep the material secret?[203] Are any

198. *Id.*

199. This issue was not before the Supreme Court, since the appeal to the Court involved only the acts of the reporter Nishiyama. *See* Brown, *supra* note 175, at 113-14.

200. *See* note 164 *supra*.

201. The Supreme Court found it outrageous that, as the trial testimony revealed, reporter Nishiyama had seduced Mrs. Hasumi with the sole objective of using her to obtain the secret documents and that as soon as he achieved his purpose he ended his relationship with her.

202. *See* note 191 *supra*.

203. In New York Times Co. v. United States, 403 U.S. 713, 726 (1971), Mr. Justice Brennan, an ardent advocate of freedom of the press, wrote that the press would not be justified, in revealing military secrets.

government secrets immune from disclosure in the press after this case? These issues will surely confront the Japanese Supreme Court in the future.

These unresolved questions aside, the significance of the Nishiyama case should not be underestimated. *Arguendo* that the reporter is motivated by a genuine desire to keep the public informed and that the means he uses are justifiable, the Japanese Supreme Court has ruled that the role of the news reporter in helping to keep the electorate informed by gathering and reporting news is so crucial to a democracy that the public welfare is better served by his revelation of information deemed confidential by the government than it is by safeguarding the secrecy of the information and the government's decision to keep it confidential through criminal prosecution of the reporter. The Court did state that these two constitutional standards, those of freedom of the press and the public welfare, were not in opposition in that case but rather went hand-in-hand. Thus, the case has great portent for the future. If the Court persists in finding these two values to be on the same side in future balancing tests, it will necessarily mean an expansion of the press' freedom and that of news reporters. Since the Japanese Supreme Court has so consistently held the public welfare to be of paramount importance in the Constitution's set of values, any Court held tie-in between freedom of the press and the public welfare can only lead to an expanded interpretation of the former.

IV. Conclusion

Despite the broad guarantee of freedom of the press found in the 1947 Constitution—and the corresponding rights granted to news reporters by this guarantee—the Japanese Supreme Court has chosen to emphasize the primacy of the group welfare standard described in Article 12 of the Constitution. This writer believes that the reason for this stems from the history and traditions of Japan. As we have seen, before the enactment of the 1947 Constitution the wide range of specific rights, freedoms, and immunities described in that document were unfamiliar to Japan. Not only were these freedoms not known to Japan, but the social, legal, and governmental systems of the last four centuries had emphasized the welfare of the group at the expense of individual rights. When Occidental ideas of individual freedoms were abruptly put into effect in Japan by the present Constitution, a Japan lacking in a tradition of civil

liberties was suddenly confronted with what one could say was a veritable plethora of them.

Despite these broad constitutional freedoms the Japanese Supreme Court has continued to stress the traditional Japanese value of the primacy of the group over the rights of reporters. Unlike the United States Supreme Court, the Japanese Supreme Court played no significant role in the evolution of civil liberties in its country. Prior to 1947 the Japanese Supreme Court had never defended an individual's right against encroachment by the state.[204] Perhaps the lack of an important role for the Japanese Supreme Court in the evolution of civil liberties in Japan has caused the Court to move slowly. One writer has suggested that "the rights, such as freedom of the press, were mere "givens" under the postwar Constitution and hence were not appreciated in the same way as when rights are "won" through legal tests."[205]

It is my belief that the reason for the lack of protection for freedom of the press has to do with the strength of the value of the primacy of the group in the Japanese ethos. Apparently, the Court believes that the new concept of civil liberties so abruptly introduced into Japan by the 1947 Constitution should not mean the abandonment of such long-standing values as the importance of the group welfare. The Court has seemingly assigned to itself the task of preserving the traditional group welfare value of Japan while at the same time taking steps to insure that the constitutional rights of news reporters suffer no fundamental damage. When the public welfare standard and freedom of the press are not in opposition but rather on the same side, the Court has not hesitated to expand the rights of news reporters (its decision in the reporter Nishiyama case has apparently greatly enhanced the ability of reporters to reveal hitherto secret government matters to the public).

It is important to remember that while the Japanese Supreme Court has invariably held the public welfare standard to be superior to that of the freedom of the press, the Court has not unduly restricted the rights of news reporters. Only since 1947 has freedom for news reporters truely existed in Japan. In its decisions since then, the Court has acted to preserve the traditional Japanese value of the primacy of the group welfare while at the same time seeing that freedom for news reporters does exist in Japan. None of the

204. Kim, *Constitution and Obscenity: Japan and the U.S.A.*, 23 AM. J. COMP. L. 255, 265 (1975).

205. Brown, *supra* note 175, at 115 n.10.

decisions of the Japanese Supreme Court since the enactment of the 1947 Constitution smack of censorship or strict controls over the press. Instead of criticizing the Court for not breaking with the Japanese traditional value of the public welfare and being more assertive of the freedom of the press, perhaps it is better to laud the Court for protecting the freedom of the press and news reporters enshrined in the 1947 Constitution while it maintains the values traditionally held by the Japanese. The Court has acted to guard that the rights of news reporters incur no fundamental damage while at the same time insuring that the presence of this new civil liberty in Japanese jurisprudence does not signify an end to the traditional Japanese value of the primacy of the public's welfare.