Tulsa Law Review

Volume 14 | Number 3

1979

Individual Civil Liberties and the Japanese Constitution

FORUM

Individual Civil Liberties and the Japanese Constitution

Let the hundred flowers bloom.
Let a hundred schools of thought contend.
—Chinese Saying

Japan provides a unique combination of characteristics: constitutional democracy, civil law tradition, a post-1945 incipient common law tradition, indiginous non-Western sociolegal traditions still full of vitality, substantial modern legal history as an independent state, a wealth of indigenous scholarship and a very large, educated, urbanized, industrialized, internationally involved non-Western society.[1]

I. INTRODUCTION

With the increasing world awareness of human rights, Japan stands as a unique example of legal cross-currents; it is in a position to provide valuable lessons in jurisprudential evolution. The Japanese Constitution of 1947 dramatically altered not only the law but also society. This article will assess the Constitution through a selective examination of the protection of individual civil liberties guaranteed by that document. Where appropriate, these will be compared to similar guarantees in the United States Constitution. It will be concluded that the constitutional experiment in Japan has been successful, and, although there is room for advancement, concern for human rights and civil liberties has a firm constitutional foundation upon which to build.

II. HISTORICAL BACKGROUND

Prior to the fifth century A.D., the tribal communities of Japan were introduced, through the Koreans, to the advanced culture of China, including Chinese written script.[2] The latter made it possible for the Japanese to absorb much of the Chinese culture including Con-

1. Beer & Tomatsu, *A Guide to the Study of Japanese Law*, 23 AM. J. COMP. L. 284, 285 (1975).

2. Wren, *The Legal System of Pre-Western Japan*, 20 HASTINGS L.J. 217, 217 (1968). Chinese writing can be traced back more than 6,000 years. *See generally* Chou, *Chinese Oracle Bones*, SCI. AM., April 1979, at 134.

fusian ethics,[3] the Buddist religion,[4] and the Chinese administrative system.[5] By 600 A.D., the Japanese had formed a highly organized judiciary, with a body of native law and practice which had developed through the use of precedential court decisions in a manner similar to *stare decisis*.[6] "Common law, putatively the parent, did not fully initiate this method until after 1400 A.D."[7] In 604 A.D., the document which became known as the Constitution In Seventeen Articles of Prince Shōtoku[8] was adopted in an attempt to codify legal principles for the nation as a whole.[9]

Japanese culture was influenced both by the Chinese administrative system and by the feudal system which grew out of the native Japanese clan society. Thus, the positive law, as reflected in the Code of 702 A.D. and the Yoro Code of 757 A.D., was based on Chinese models blended with the customary law of the Japanese tribes.[10] Eventually,

3. See Wren, *supra* note 2, at 221-22.

4. *See generally*, A. WATTS, THE SPIRIT OF ZEN (1958); A. WATTS, THE WAY OF ZEN (1957). The flavor of the philosophical underpinnings may be gleaned from POEMS OF THE LATE T'ANG (A. Graham trans. 1965); LAU TZU, THE WAY OF LIFE (TAO TE CHING) (W. Bynner trans. 1944) [hereinafter cited as LAO TZU]; ZEN POEMS OF CHINA AND JAPAN (L. Stryk, T. Ikemoto, T. Takayama trans. 1973).

5. Belli, *Japanese Law*, 11 HASTINGS L.J. 130, 135 (1959).

6. *Id.*

7. Wren, *supra* note 2, at 217. *See generally* Jones, *Studying the Ch'ing Code—The Ta Ch'ing Lü Li*, 22 AM. J. COMP. L. 330 (1974). Until the Chinese revolution of 1911, the Chinese Code of laws was probably the oldest continually operating legal system in the world. *Id.* at 330. The law was highly bureaucratic in nature and not concerned with personal relationships of the kind commonly thought of in torts or contracts. It was a protection of government. Under it, there were "no 'persons' who, as beings with legal capacity to be the bearer of rights (*Rechtssubjekte*), might make declarations of intention (*Willenserklärungen*), and engage in juristic arts [*sic*] (*Rechtsgeschäfte*). *Id.* at 356.

The history of Japanese law may be divided into six parts:

1. The period from about 660 B.C. to 702 A.D.
2. From 702 A.D., the date of the Taiho Code, to 1232 A.D., the date of the adoption of the Skikomoku Code.
3. From 1232 A.D. to 1600 A.D. and the Tokugawa Codes.
4. From 1600 A.D. to 1868 A.D.
5. From 1868 A.D. to 1946 A.D.
6. From 1946 A.D. to the present.

8. See app. A *infra*. Although long attributed to Prince Shōtoku, modern Japanese scholars believe the "Constitution" was written after his death. Maki, *The Japanese Constitutional Style*, 43 WASH. L. REV. 893, 895 n.1 (1968) *citing* 1 G. SANSOM, A HISTORY OF JAPAN TO 1334, 51-52 (1958).

9. Wren, *supra* note 2, at 217. *Compare* the Constitution *with* LAO TZU, *supra* note 4. It is clearly written in the style of the Chinese classics of Confucian and Buddhist thought.

10. Wren, *supra* note 2, at 218. For an excellent analysis of the Code of 702 A.D. (The Taiho Code) which was in effect for 500 years, see Carkeek, *The Taiho Code, The First Code of Japan*, 1 WASH. L. REV. 182 (1926).

> Whatever may have been the effects of the old Taiho Code, it is interesting to know that while Europe was spending a large portion of its time in wars and while England was governed by the Saxons with no idea of a unified English spirit, the Japanese had unified

there was a resurgence of native tradition as Chinese importations ceased. For several hundred years, there followed a similar ebb and flow of military feudal governments which characterized all governments prior to Westernization,[11] and which was not unlike similar developments in England.

In 1603, after a series of civil wars, the Tokugawa family gained control when Ieyasu was appointed *Shōgun*.[12] He and his successors adopted policies both of expulsion of foreigners and their influences from Japan and of complete isolation of Japan from the rest of the world. This isolationism followed a long and brisk period of maritime trade which rivaled the trade of the same period in Europe.[13] "During this period, Japanese culture developed to a level analogous to that of the France of Louis XIV. For 250 years, Japan remained secluded from the rest of the world, but at complete peace."[14]

Tokugawa law[15] was predominately customary law, particularly suited to Japan. Under this law there were cultural and artistic ad-

---

their country, had established a thoroughly nationalistic spirit and had laid the foundation of a most interesting theory of jurisprudence by the enactment of their first code. *Id.* at 194.

11. Wren, *supra* note 2, at 218-19, states:

> Toward the end of the twelfth century, Japan suffered its War of the Roses, wherein the Minamoto clan gained supremacy over the Taira clan. The leader of the Minamoto family, Yoritomo, established a stable military government based on feudalism, a pattern which characterized all later Japanese governments prior to Westernization. At the head of this feudal government was a military leader, or generalissimo, known as the *Shōgun*. From 1185 to 1333, the Minamoto family, with its headquarters at Kamakura, maintained hegemony over the other clans. During this period, the Japanese successfully repelled the Mongol invasion led by Kublai Khan. It was also at this time that the Japanese penchant for indirect rule reached its height; the *Shōgun*, who ruled in the name of the Emperor, was in turn controlled by a regent. Ultimately, the regency rule was ended when the Ashikaga family gained control over the Shogunate.
>
> Under the Ashikaga *shōguns*, the arts of Japan as well as trade made remarkable strides. Japanese maritime enterprises grew steadily and easily kept pace with similar developments in Europe. But from about 1500, almost continuous civil war kept the attention of the leaders of the country on matters at home. In the middle of the century, Japan had its first contacts with the West, and by the end of the century, the Jesuit missionaries, under the leadership of St. Francis Xavier, had succeeded in converting over 300,000 Japanese to Christianity.

12. *Id.* at 219. *Shōgun* meant "Barbarian Subduing General." Carkeek, *supra* note 10, at 187 n.9. *See generally* M. MARUYAMA, STUDIES IN THE INTELLECTUAL HISTORY OF TOKUGAWA JAPAN (M. Hane trans. 1974).

13. Carkeek, *supra* note 10, at 187 n.9.

14. Wren, *supra* note 2, at 219.

15. *See generally* Henderson, *Some Aspects of Tokugawa Law*, 27 WASH. L. REV. 85 (1952). The emphasis on the more negative aspects of these laws and the culture in this article may be explained by the Cold War period of analysis and the fact that the author was postulating that it was the lingering influence of those laws which was causing difficulties for democracy in the Far East in general and in Japan in particular. It is suggested that the article is filled with cultural and ethnocentric bias and should be discounted accordingly. *See also* Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Wren, *supra* note 2, at 220-44.

vances and a "remarkable development"[16] of positive law.[17] After Westernization and the importation of Western codes, however, Tokugawa law was regarded as feudal and was abolished. Nevertheless, in some of its aspects it is a living law and continues to have influence in modern Japan.[18]

Constitutional law in the Tokugawa period was much simpler than the elaborate system developed after Westernization.[19] In essence, each *Shōgun*, at the beginning of his regime, reenacted the "known" laws, which were usually criminal but were occasionally administrative, much as did the Roman consuls.[20] However, the Law of the Court and the Shōgunate In Eighteen Articles was of great importance in establishing the order and allocation of power, especially between the Emperor and the *Shōgun*.[21] Article I stated: " If the Emperor be assiduous in study, if the people are happy and the four seas are tranquil, his sagacity and virtue are revealed. The Emperor's duty is to guard the three sacred emblems.' "[22] In contrast, the *Shōgun* was given unlimited authority and the duties of defending the Imperial Palace, maintaining peace, and defending the countryside from outside enemies.[23]

Only three *Shōguns* were able to establish one-man rule.[24] The actual power of government resided in a Council of State made up of the *Toshiyori* (Elders) and the *Wakadoshiyori* (Junior Elders) selected from the *daimyo* (feudal lords).[25] The *Tairo* (Chief Minister) presided over the council and was often the most powerful figure within the administration.[26] Thus, constitutional law under the Tokugawas was functionally equivalent to that under the *curia regis* of England in the

16. Wren, *supra* note 2, at 219.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 227-28.
21. *Id.* at 228.
22. *Id. quoting* Gubbins, *Some Features of Tokugawa Administration*, 50 T.A.S.J. 59, 67 (1922).
23. Wren, *supra* note 2, at 228. Article four gave the rationale for that power:
> In ancient times, the Emperor used to visit the shrines and temples of Kumano. This was done to remedy the troubles of the people. The form of government by Imperial Ministers has now been changed, and a military rule established. If there be maladministration in this respect, in the future, it will be the fault of the *Shōgun*. Therefore, the reigning Emperor, the previously cloistered Emperor, and the newly cloistered Emperor . . . shall not in future make state progresses outside their Palaces.

Id.
24. Iyeyasu, his grandson Iemitsu, and Yoshimune. *Id.*
25. Wren, *supra* note 2, at 228.
26. *Id.* After the Council of State, the hierarchy recognized numerous official posts, e.g. Town, Temple, and Finance Magistrates, who, along with one representative from the Council,

twelfth century. At the top of the hierarchy was an emperor who reigned but did not rule; while governmental power rested in the hands of the *Shōgun* and the Council of State, with the latter often having controlling authority.[27] In the provinces, the local feuds were ruled by the local *daimyos* under the authority and control of the central government.[28] Interestingly, the "legal function of the central government was segregated from the administration through the *Hyojosho*. This body had both prescribing and applying functions. No such segregation existed at the provincial level, where the local magistrate applied customary law to settle disputes."[29]

A. The Meiji Constitution of 1889

Japan was opened again to trade in 1859.[30] Ten years later, the chiefs of the four major clans turned their fiefs over to the Emperor, requesting that he organize them under a unified system of law.[31] Distinctions between nobles and lower chiefs were abolished; in 1871, territorial nobles lost their nobility, and local autonomy was fused within the central government.[32] There was widespread political reform. In 1881, a National Parliament[33] was ordered to be established in 1890 which was to be governed by a written constitution. This Constitution, however, was not promulgated until 1889.[34] Drafted by Marquis Ito, who personally inspected American and European versions,[35] the Constitution created an absolute sovereignty in the Emperor. Although it created separate executive, legislative, and judicial branches, it did not

---

made up the *Hyojosho* (Chamber of Decisions). The *Shōgun*'s Osaka Governor and Resident in Kyoto, as well as the head of the secret police were other important officials. *Id.* at 228-29.

27. Administration of this central government was carried out by a large number of professional bureaucrats. *Id.* at 229.

28. It is noted that bi-annual trips to Edo required of the vassals kept them sufficiently impoverished to negate them as a threat to the central government. *Id.*

29. *Id.*

30. E. REISCHAUER, JAPAN: THE STORY OF A NATION 115-16 (1974); C. YANAGA, JAPAN SINCE PERRY 25-26 (1949). *See Generally* A. WALWORTH, BLACK SHIPS OFF JAPAN (1946).

31. Belli, *supra* note 5, at 135. The Tokugawa regime was "dramatically" overthrown in 1867-68. Maki, *supra* note 8, at 896.

32. Belli, *supra* note 5, at 136.

33. *Id.* at 136. The National Parliament consisted of a House of Peers (similar to the House of Lords) and a House of Representatives with 300 members in each House. *Id.*

34. Maki, *supra* note 8, at 896. The delay was due to (1) a conscious effort on the part of the established leaders to monopolize the drafting so as to produce what they considered an ideal Japanese instrument which would provide for only limited sharing of power and (2) the practical delays experienced because there was no real precedent in Japanese history and thus other constitutional systems had to be studied. *Id.*

35. Belli, *supra* note 5, at 136.

provide for separation of power or for checks and balances.[36] Instead, the three branches were regarded merely as facets of a unitary imperial sovereignty.[37] Indeed, the ambiguity of the constitutional provisions permitted domination by the executive branch and led ultimately to a completely authoritarian government in later decades.[38]

The Constitution of 1889 was innovative in that it recognized such fundamental freedoms as speech, assembly, association, and religion; however, these freedoms could only be exercised " 'within the limits of the law.' "[39] Although there were no constitutional limits on government's ability to restrict these freedoms, they were never totally withdrawn at any point.[40] Between 1889 and 1930, the development of Japanese government was a blend of authoritarian elements and modified democratization without either phenomenon coming into constitutional conflict. From 1930 to the end of the Second World War, authoritarianism dominated and gave rise to militaristic aggression, both of which were constitutional in the sense that no provision of the 1889 Constitution was violated or suspended.[41]

---

36. Maki, *supra* note 8, at 896. *See also* Takayanagi, *Contact of the Common Law with the Civil Law in Japan*, 4 AM. J. COMP. L. 60 (1955).

37. *Id.* at 897 *citing* H. ITŌ, COMMENTARIES ON THE EMPIRE OF JAPAN (M. Itō trans. 1889).

38. Maki, *supra* note 8, at 897. In addition to the new Constitution, Japan was revising and adopting vast new codifications of law based on Western models.

> The year 1890 was an active one in Japanese jurisprudence. The criminal code was thoroughly revised. A civil procedure law was completed, a commercial code was introduced, and the Courts Organization Law, fashioned after France, was enacted. But still the problem of the civil code had to be solved. A commission was appointed to consider this matter but could not convince the authorities to accept a civil code, patterned on the French code. Another commission labored through 1893 to 1895 and patterned a new draft which was almost identical to the original draft of the German civil code, a draft which many European jurists regard as more scientific than the final German draft. This first draft code had been presented to the German Bundesrat in 1887 but was rejected because it had been prepared by "The Romanists" and "contained too much Roman law." But to the Japanese this draft seemed ideal for their purpose; it was adopted and went into effect in 1898.
>
> The first three books of the civil code deal with "Property Rights," "General Principles of Law," and "Obligations." These are copied from the Germanic code. However, in book [*sic*] four and five the former customary law of Japan was codified with embellishments to conform to the demands of modern times.

Belli, *supra* note 5, at 137. *See generally* W. BEASLEY, THE MEIJI RESTORATION (1972); CENTRE FOR EAST ASIAN STUDIES, MEIJI JAPAN THROUGH CONTEMPORARY SOURCES (1972); JAPANESE CULTURE IN THE MEIJI ERA (Y. Okazaki ed., V. Viglielmo trans. 1969).

39. Belli, *supra* note 5, at 137.

40. Maki, *supra* note 8, at 897.

41. *Id.* However, "although there was never an absolute denial of freedom even in the darkest period of authoritarian government during the Second World War, there was likewise never an unimpeded freedom to criticize and challenge the government, or indeed the system as it developed under the 1889 Constitution." *Id.*

B. The 1947 Constitution

Shortly after the Japanese surrender in World War II, General Douglas MacArthur, as Supreme Commander for the Allied Powers (SCAP), notified Prime Minister Kijurō Shidehara that a complete revision of the Constitution of 1889 must be given immediate attention by the Japanese government.[42] After several drafts were rejected by SCAP as too closely following the 1889 Constitution, the Government Section of SCAP secretly drafted and submitted its own draft which was eventually approved, after slight amendment, by the Japanese Parliament.[43] Based on the Potsdam Declaration of July 26, 1945, the new Constitution was aimed at establishing a democratic government in place of the authoritarian regime and at replacing militarism with pacifism.[44] Whether this Constitution was "imposed" upon Japan is subject to debate; leading Japanese scholars are of the opinion that it was not.[45] But it cannot be denied that the circumstances under which the Constitution was executed were abnormal—the nation was not an independent sovereign, and occupation obviously played a role in determining the form and content of the document.[46]

Several human rights, including freedom of thought and conscience, freedom of religion, and freedom of assembly and association were guaranteed under the old Constitution, but the extent of these freedoms was determined by the government, an idea clearly derived from the German theory of *Vorbehalt des Gesetzes*.[47] In addition, constitutional freedoms could be abrogated by statute.[48] The new Constitution embodied three new and enlightened areas. These aspects of enlightenment were the renunciation of war,[49] provisions for popular

42. Maki, *supra* note 8, at 898.

43. *Id.* at 898-99. See app. B.

44. Note, *The New Japanese Constitution*, 4 INT. & COMP. L.Q. 197, 197 (1955).

45. *See, e.g.*, Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, 43 WASH. L. REV. 961, 966-78 (1968). Dr. Takayanagi was president of Seikei University and Chairman of the Commission on the Constitution from 1957-64. *Id.* at 961.

46. Maki, *supra* note 8, at 899-900.

47. "Reserved of the Statutes." *The New Japanese Constitution, supra* note 44, at 200.

48. Blakemore, *Post-War Developments in Japanese Law*, 1947 WIS. L. REV. 632, 649.

49. Article 9, the part of the Constitution which provides for the renunciation of war, may be unique in constitutions of the world and provides a fascinating study in its own right. *See generally* Maki, *supra* note 8, at 900-01; Takayanagi, *supra* note 45, at 973-78; *The New Japanese Constitution, supra* note 44, at 197-99. It has been said that article 9 appears in the Constitution because it was imposed by the United States [but this is contradicted by Takayanagi, *supra* note 45, at 976, who attributes it to Shidehara]; nevertheless, it has remained in force in the face of revisionism because the Japanese people "warmly support it." Maki, *supra* note 8, at 900-01.

> What was not so apparent when the Second World War ended was that the great majority of the Japanese people ardently desired to see authoritarianism and militarism extir-

sovereignty,[50] and, the aspect which will receive attention here, funda-

---

pated from their society. Not only is the rejection of militarism and authoritarianism a key aspect of the new constitutional style, but it is one of the strongest currents in popular thought and feeling. To understand this is to understand much about postwar Japanese government, politics and society.

The reason for the deepseated aversion to militarism and authoritarianism is simple: the depth of the traumatic experience suffered by the Japanese people between 1931, the year of the Manchurian Incident which was the opening chapter of the Second World War, and 1945, the year of the A-bombs. The catastrophe of Japan's shattering experience with war engulfed almost all adult Japanese. A review of its principal features shows why there had been a society-wide revulsion against the historical experience with militarism and authoritarianism and an equally wide commitment to bar their return: hundreds of thousands of military and civilian casualties at home and abroad; the disruptions of patterns of family life by mobilization, the evacuation of cities, and the shifting of workers; the distruction of family property and family resources directly and indirectly by military action; the distruction and draining away of untold national treasure; the destruction of cities and industrial installations of all kinds; near-starvation, malnutrition, illness and disease born of war and its consequences; the collapse of the dream of empire; the complete discrediting of both military and civilian leadership; the destruction of the old concept of national destiny; and the collapse of a system of government and politics deemed not only superior but permanent. In addition, there was an awareness that Japan's acts abroad had made both the country and the people hated and despised, an awareness sharpened by the fact that the Japanese themselves accepted the correctness of the world's judgment of what the nation had done. This awareness led many Japanese to reject their own immediate past and the leadership responsible for it; but more importantly it inspired them to embark on a course that will hopefully guarantee that, by no act of its own, will Japan become involved in a war that will visit such disaster on them again.

Coming as it did less than half a year after the end of the war, Article 9 even in the first draft constituted a dramatic renunciation not only of war itself, but of Japan's own policies and actions, indeed, of Japan's still very recent past. Moreover, for many Japanese it represented at least partial atonement, and a consequent easing of the conscience, for sins of the government and its armed forces against Japan's neighbors. Additionally, it was regarded by the Japanese as a pledge to themselves and the rest of the world not to return to the past. The psychological role of Article 9 in the Japanese consciousness was further enhanced by the fact that Japan was the first major nation to include such a far-reaching renunciation in its basic law. From the beginning, there was also the hope that Japan's action might constitute an example for the rest of the world to follow. Article 9 has been for the Japanese far more than a simple constitutional provision; more, even, than a renunciation of war. This distinctive feature of the constitutional style is a central element of a newly reconstituted Japanese nationalism.

Id. at 903-04. *See also* Slomanson, *Judicial Review of War Renunciation in the Naganuma Nike Case: Juggling the Constitutional Crisis in Japan*, 9 CORNELL INT. L.J. 24 (1975); Rec. Dev., *Japan—Constitutional Law—American Armed Forces Stationed in Japan Not Violation of Japanese Constitution*, 35 NOTRE DAME LAW. 452 (1960).

50. Maki, *supra* note 8, at 904-05, observed:

The reaction against authoritarianism was not as clear-cut as that against militarism. Its impact was neither as broad nor as direct because it came in the narrower and less directly experienced area of politics. As in the case of militarism, the occupation was determined to end the authoritarian system not only because it was regarded as undesirable in itself but also because it was inextricably woven into the old militarism. Here, too, there was an immediate and effective welcoming response from within Japan, not only from the generality of the population, but from those who had openly and covertly opposed authoritarianism. Imprisoned, driven underground or forced into acceptance of the authoritarian regime, it was this group who suffered the most at the hands of the militarists and their supporters who were most keenly aware of what their society had suffered. Their reaction was twofold: warm endorsement of the elimination of the au-

mental civil liberties.[51]

Before examining the new constitutional guarantees, it should be noted that, historically, there has been no notion of "rights" per se as held by an individual in Japan. Rather, the emphasis was upon relationships—dispute resolution involved amending or altering relation-

---

thoritarian regime and even warmer support of the new democratic, constitutional order that was being created to fill the vacuum.

The rejection of authoritarianism plays a dual role in the constitutional style: it keeps the politically conscious alert to any contemporary trend that seems even remotely to resemble authoritarianism; and more importantly, it is the driving force behind the wholehearted support of the present system, especially the guarantee of fundamental human rights, as the best means of preventing the recrudescence of any variation, old or new, on the theme of authoritarianism.

What gave strength and viability to the 1889 Constitution and provided the distinguishing features of its constitutional style was its continuity with the past—particularly, imperial sovereignty. What has contributed broadly to the strength and viability of the 1947 Constitution is a general determination to support and maintain a discontinuity between Japanese society, which is generating a new course of development, and the traditional order which has been rejected.

Id. See generally Blakemore, *supra* note 48, at 632; Maki, *supra* note 8, at 900-16; Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290 (1949).

51. *See generally* Nathanson, *Human Rights in Japan Through the Looking Glass of Supreme Court Opinions*, 11 HOWARD L.J. 316 (1965) [hereinafter cited as *Human Rights*]; Ukai, *The Individual and the Rule of Law Under the New Japanese Constitution*, 51 NW. U.L. REV. 733 (1957).

Law is beginning to be more acceptable as an arbiter in social and business disputes. "It can be argued that the present functioning of the Japanese system is perfectly adequate in that conflicts are generally resolved and relations are formed efficiently and cheaply outside of any legal framework. . . ." Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665, 673 (1971). A trend toward Western legal consciousness, however, is revealed in statistics regarding traffic litigation:

TABLE 1

NUMBER OF TRAFFIC VICTIMS AND MOTOR VEHICLES AND NUMBER OF TRAFFIC-RELATED CIVIL SUITS IN TOKYO, 1963-1969[a]

Year	Traffic Fatalities in Tokyo	Persons injured in traffic accidents in Tokyo	Population of Tokyo	No. of Motor Vehicles Registered in Tokyo	No. of new civil cases filed in the Special Traffic Part of Tokyo District Court[b]
1963	936	54,304	10,467,231	924,816	587
1964	1,050	58,456	10,667,390	1,063,199	683
1965	788	56,672	10,913,891	1,181,010	795
1966	794	67,898	11,025,013	1,337,192	1,078
1967	749	87,534	11,200,717	1,540,626	1,405
1968	716	102,914	11,353,724	1,749,168	1,803
1969	864	106,387	11,457,481	2,005,489	1,997
Percentage increase (decrease)					
1969/1963	(-12.4%)	95.9%	9.5%	116.85%	240.2%

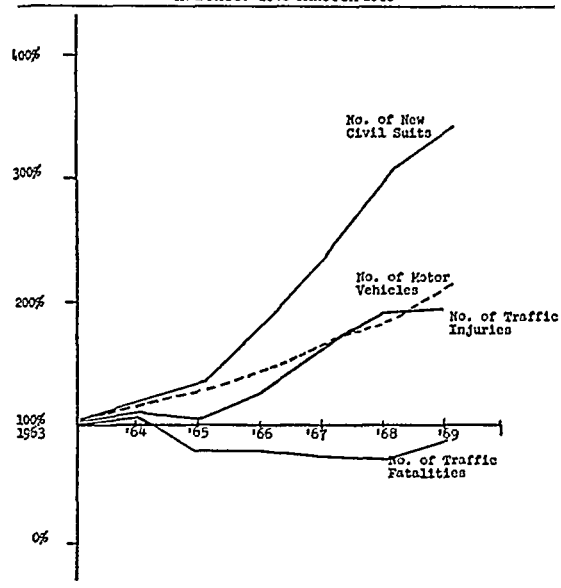
[a] Based on statistics kindly made available to the author by Tokyo District Court and on statistics contained in Keishicho Kotsubu KOTSU NENKAN (Tokyo Metropolitan Police Headquarters-Traffic Division *Traffic Yearbook*) (1970). Unfortunately, the police do not compile statistics on all traffic accidents, including those which do not involve human death or injury.

[b] The Twenty-seventh Part of Tokyo District Court became the specialty division for handling all traffic cases in 1962. 428 new cases were filed in the Twenty-seventh Part in 1962, but 1962 has not been included in the statistics above since it is unclear whether the Twenty-seventh Part's monopoly on traffic litigation encompassed the whole of 1962. The case statistics above might include suits solely over property damage (suits which do not involve death or personal injury), and to the extent such suits are included, they will make the comparison with the death and injury statistics less accurate. It is the author's impression, however, that the vast majority of traffic litigation in Tokyo involves elements of personal injury.

Id. at 674.

FIGURE 1.

PERCENTAGE INCREASE OR DECREASE IN THE NUMBER OF NEW CIVIL SUITS, MOTER [*sic*] VEHICLES, TRAFFIC INJURIES, AND TRAFFIC FATALITIES IN TOKYO: 1963 THROUGH 1969



Id. at 675.

TABLE 2

JUDGMENT AWARDS AND SETTLEMENT AMOUNTS IN TRAFFIC CASES IN TOKYO DISTRICT COURT: 1964-1968[a]

		DEATH CASES					PERSONAL INJURY CASES				
	Amounts	1964	1965	1966	1967	1968	1964	1965	1966	1967	1968
Judgments	$1,388 or less	1 (8.3%)	2 (7.2%)	1 (2.6%)	2 (5.2%)	0 (0%)	24 (68.5%)	22 (59.5%)	32 (41.0%)	34 (30.9%)	73 (46.5%)
	$1,389 to $2,777	3 (25.0%)	3 (10.7%)	8 (20.9%)	5 (12.8%)	2 (5.2%)	6 (17.1%)	8 (21.6%)	20 (28.2%)	40 (43.4%)	42 (26.8%)
	$2,778 to $4,165	6 (50.0%)	3 (10.7%)	5 (13.2%)	7 (17.9%)	1 (2.6%)	2 (5.7%)	5 (13.5%)	7 (9.9%)	10 (10.9%)	18 (11.5%)
	$4,166 to $8,331	2 (16.7%)	12 (40.3%)	15 (39.2%)	10 (25.6%)	17 (43.5%)	3 (8.6%)	1 (2.6%)	7 (9.9%)	6 (6.5%)	15 (9.6%)
	$8,332 to $13,855	0 (0%)	5 (16.7%)	8 (20.9%)	5 (12.8%)	10 (25.6%)	0 (0%)	1 (2.6%)	4 (5.2%)	2 (2.2%)	7 (4.5%)
	over $13,855	0 (0%)	3 (10.7%)	4 (10.4%)	10 (25.6%)	9 (23.1%)	0 (0%)	0 (0%)	1 (1.4%)	0 (0%)	2 (1.3%)
Settlements	$1,388 or less	26 (25.3%)	19 (18.1%)	13 (11.8%)	15 (11.1%)	17 (12.8%)	127 (65.5%)	215 (73.0%)	298 (64.5%)	400 (54.6%)	368 (51.5%)
	$1,389 to $2,777	32 (31.1%)	27 (25.8%)	25 (21.9%)	20 (14.8%)	16 (12.0%)	50 (25.8%)	57 (19.4%)	89 (19.2%)	188 (12.6%)	168 (23.5%)
	$2,778 to $4,165	18 (17.5%)	14 (13.3%)	17 (14.8%)	19 (14.1%)	19 (14.3%)	8 (4.1%)	15 (5.1%)	41 (8.9%)	53 (7.2%)	70 (9.8%)
	$4,166 to $8,331	19 (18.5%)	37 (35.2%)	43 (37.7%)	39 (28.9%)	44 (33.1%)	8 (4.1%)	8 (2.7%)	25 (5.4%)	74 (10.1%)	84 (11.8%)
	$8,332 to $13,885	5 (4.8%)	7 (6.2%)	12 (11.1%)	31 (23.0%)	23 (17.3%)	1 (0.52%)	1 (0.34%)	9 (1.9%)	14 (1.9%)	17 (2.4%)
	over $13,885	0 (0%)	0 (0%)	4 (3.1%)	11 (8.1%)	14 (10.5%)	0 (0%)	1 (0.34%)	1 (0.22%)	4 (0.5%)	7 (1.0%)

[a] Adapted from Kurata MINJI KOTSU SOSHO NO KADAI [*Problems concerning civil traffic suits*] 227 (1970).

Id. at 666.

ships among the parties.[52] In addition, the love of compromise in Japanese society[53] fostered the notion that even a wrongdoer should not suffer dishonor.[54] The concept of rights vested in individual citi-

TABLE 3
NUMBERS OF CIVIL SUITS OF VARIOUS TYPES
FILED IN DISTRICT COURT
1969-1970

Types of Suits	1967	1968	1969	First 10 Months of 1970
(*ta*) Personal Affairs	491	477	513	[417] 454
(*gyo*) Administrative Law	232	263	273	[229] 211
(*u*) "Regular" (*Tsujo*) Suits	(13.81%)	(12.72%)	(13.68%)	[1698] (14.38%)
Real Estate	1,972	1,962	2,048	1,659
	(10.56%)	(10.16%)	(10.53%)	[1300] (8.90%)
Building and Construction	1,508	1,568	1,576	1,026
Money Claims				[900]
	(9.60%)	(8.87%)	(7.03%)	(6.36%)
(i) Bills and Notes	1,370	1,368	1,052	734
	(9.83%)	(11.65%)	(13.27%)	[1602] (15.62%)
(ii) Traffic Suits	1,403	1,797	1,986	1,802
	(43.06%)	(43.96%)	(43.93%)	[5438] (43.83%)
(iii) Other Money Claims	6,147	6,783	6,577	5,055
	(13.14%)	(12.65%)	(11.57%)	[1472] (10.90%)
Other Regular Suits	1,876	1,951	1,732	1,257
				[12,410]
Regular Suit Sub-Total	14,276	15,429	14,971	11,533
				[3,865]
(*shu*) Bills and Notes	6,358	5,961	4,593	3,087
				[289]
(*re*) Appeals	374	348	337	275
				[7]
(*ka*) Retrials	7	8	12	10
TOTAL	21,738	22,486	20,699	15,561
Percentage of All Suits Represented by Traffic Suits	6.45%	7.99%	9.59%	11.58%

Notes: (a) These statistics were kindly made available to the author by Tokyo District Court.
(b) The figures in parentheses ( ) indicate the percentage of all Regular Suits of each of the Regular Suit sub-types for each of the years in question.
(c) The figures in brackets [ ] indicate comparable numbers for the first 10 months of 1969.

Id. at 667.

52. The notion of right did not originally exist in Japan before the introduction of Western Jurisprudence. Many Western writers assume that right is coeval with law, and law and right are only two terms expressing the same notion from different points of view. Some even go so far as to affirm that right is anterior to law, and the latter only exists for the assurance and protection of the former. In Japan, however, the idea of right did not exist so long as her laws belonged to the Chinese family. There was indeed the notion of *duty* and *obligation* but neither the notion of right nor the word for it existed in either Japanese or Chinese.

Blakemore, *supra* note 48, at 649 n.79 *quoting* H. NOBUSHIGE, THE NEW JAPANESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE (1912) (without citation of a page number).

53. "[T]he Japanese are very sensitive about loss of face. And Japanese frequently feel that they suffer impairment of honor, a loss of face, by losing a law suit. Since compromise does not involve assessment of right and wrong, the actual loser can escape impairment of his honor." Ohta & Hozumi, *Compromise in the Course of Litigation*, 6 LAW IN JAPAN 97, 100-01 (1973). *See also* D. HENDERSON, CONCILIATION AND JAPANESE LAW TOKUGAWA AND MODERN (1965); Rokumoto, *Problems and Methodology of Study of Civil Disputes*, 5 LAW IN JAPAN 97 (1972).

54. For an anecdotal, first hand account of the resolution of a crash between a bus and bicycle, see Wren, *Japanese Law or Logic*, 68 CASE & COMMENT, Nov.—Dec. 1963, at 36. Other

zens accompanied the Westernization of Japan. As for *fundamental* rights, they were not considered to be the Western "heaven-given human rights and people-given state rights;"[55] rather the Japanese utilized the concept of "heaven-given state rights and state-given human rights"[56] in a classic display of Western individualism contrasted with Japanese national character.[57] This is basically the limited concept of rights embodied in the Meiji Constitution of 1889.[58]

It was against this backdrop that an extremely liberal[59] Constitution emerged in 1947 which granted a long list of "heaven-given rights," beginning with: "The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights."[60] Articles 10 through 40 guarantee an incredibly impressive array of human rights. They include: equal treatment under the law regardless of race, creed, sex, social status or family origin and prohibition of discrimination in political, economic or social relations;[61] the right to life, liberty, and the pursuit or happiness;[62] democratic process, universal adult suffrage, and secret ballots;[63] freedom of thought and conscience;[64] freedom of assembly, association, speech,

---

differences exist. For example, three basic Western assumptions are not wholeheartedly accepted in Japan:

> first, that a high degree of predictability is to be assured as to the consequences of particular conduct long before the conduct has occurred or any dispute has arisen; second, that full effect is to be given to a party's legally justified claims, a plaintiff ordinarily receiving all or nothing at all; finally, that individual disputes should be resolved without regard to the social and economic backgrounds of the persons involved. These Western assumptions reflect thinking about the problems of man and his society against the background of the West's moral assumptions, cultural traditions, historical experience, and economic potential. It remains to be seen whether, in due course, Japanese law will approximate Western law as it has in more formal matters.

Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486, 1496 (1958). See note 51 *supra*.

55. Ishida, *Fundamental Human Rights and the Development of Legal Thought in Japan*, 8 LAW IN JAPAN, 39, 43 (1975), *citing*, H. KAWAKAMI, ZENSHŪ (Collected Works) 190 (1964).

56. *Id.*

57. *Id.*

58. *See generally*, Ishida, *supra* note 55.

59. Arguably, it is much more liberal than our own. *See, e.g.*, article 14 which prohibits discrimination in "political, economic or social relations because of race, creed, sex, social status or family origin." *See also* Ishida, *supra* note 55.

60. Art. 11.

61. Art. 14.

62. Art. 13.

63. Art. 15.

64. Art. 19.

press "and all other forms of expression;"[65] freedom to travel;[66] academic freedom;[67] equal education, correspondent with ability, coupled with free compulsory education;[68] workers' rights to organize and bargain collectively;[69] virtual *Miranda* warnings and right to counsel with freedom from self-incrimination;[70] and even the right to sue the state for redress if acquitted after being arrested or detained.[71] These guarantees, unlike those of the Meiji Constitution, may not be limited or abrogated by statute, and the courts may review both statutes and governmental orders on their constitutionality.[72] As might be expected, the constitutional rights and freedoms are not absolute. Article 12 provides that the people "shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the *public welfare*."[73]

To say that the adoption of such a document represented a radical shift in legal, philosophical, and jurisprudential thinking would be an understatement. But two factors appear to have mitigated the repercussions. First, the Constitution is still new and the provisions are being subjected to interpretation; secondly, the populace, accustomed as it was to other concepts, was not attuned until recently to theories of rights and "constitutional consciousness." But there is some evidence that this is changing,[74] especially with the "permeation of 'human

65. Art. 21.
66. Art. 22.
67. Art. 23.
68. Art. 26.
69. Art. 28.
70. Arts. 34, 36, 37, 38.
71. Art. 40. Some Japanese scholars have distinguished two separate categories of human rights in the 1947 Constitution:

> (1) "the liberal fundamental rights" which cover freedom of thought and other rights and have been found in every constitution of the nineteenth century, and (2) "the social fundamental rights" exemplified by several articles of the Constitution which oblige the State to carry out some sort of social service. "All people shall have the right to maintain the minimum standards of wholesome and cultured living" (Art. 25) and the right to education (Art. 26) are examples of social fundamental rights. In a *laissez faire* society with a simple police state, freedom from State intervention was held to be the overriding ideal. However, at a time when capitalistic society has attained maturity, it is quite natural that more or less socialistic adjustments are required. "The right of workers to organise and bargain and act collectively is guaranteed" (Art. 28) presents a suitable example. Such a right is obviously not a right or freedom which any person enjoys in the state of nature, but a right which has to be created by positive State measures.

The New Japanese Constitution, supra note 44, at 201. By way of comparison, see the Constitution of the Union of Soviet Socialist Republics (1936), PEASLEE, 3 CONSTITUTIONS OF NATIONS 989 (Rev. 3d ed. 1974), which guarantees the right to rest and leisure as fundamental. Art. 119.
72. Arts. 81, 98.
73. Emphasis added.
74. Ishida, *supra* note 55, at 66, *citing* N. KOBAYASHI, NIHON NI OKERU KEMPŌ DŌTĀI NO

rights consciousness' . . . among the younger generation."[75]

III. CONTEMPORARY CONSTITUTIONALISM AND INDIVIDUAL RIGHTS—SELECTIVE EXAMINATION

A. Freedom of Assembly

Two famous cases[76] decided by the Supreme Court of Japan[77] have upheld regulations requiring a license before holding parades, processions, or demonstrations in public places. In both cases, demonstrations were held without first obtaining a license, and the ordinances were challenged as unconstitutional under article 21. The first case, known as the Niigatta Ordinance Case,[78] held that the controlling standard for refusing to issue a license was "threat of a disturbance to the public order."[79] But the decision turned more on statutory than on constitutional questions, and, despite the broad discretion given to deny permits, the Court interpreted that discretion to involve imposing reasonable regulations of time, place, and manner rather than denying a permit because of the character or content of the expression.[80] The second decision, the Tokyo Ordinance Case, has been more criticized.[81] It went beyond a time, place, and manner rationale and held that a demonstration may be banned if it "will directly endanger the maintainence of public peace."[82] Two justices dissented, believing that although mere restrictions on time, place, and manner could be consti-

---

BUNSEKI (Analysis of the constitutional movement in Japan); NIHON KOKU KEMPO NO MONDAI JŌKYO (Circumstances of Japanese constitutional problems) (1964); KEMPO ISHIKI NO TEICHAKU (The stability of constitutional consciousness) (Society of Legal Sociology ed. 1963); and NIHONJN NO KEMPŌ ISHIKI (Constitutional consciousness of Japanese People) (Kobayashi ed. 1968).

75. *Id.* On the question of whether the Japanese Constitution should be a living or static document and whether it should be historical, grammatical, teleological, or sociological, see Takayanagi, *The Conceptual Background of the Constitutional Revision Debate in the Constitutional Investigation Commission*, 1 LAW IN JAPAN 1, 12-21 (1967). That author concludes that constitutions must be flexible. *Id.* at 21. *See generally* M. BELLI & D. JONES, BELLI LOOKS AT LIFE AND LAW IN JAPAN (1960).

76. State v. Ito, 14 Sup. Ct. Rep. 1243 (1960); Yomaoka v. State, 8 Sup. Ct. Rep. 1866 (1956).

77. For a general discussion of the approaches and attitudes of the Japanese Supreme Court with some emphasis on constitutional questions, see Itoh, *Judicial Decision Making in the Japanese Supreme Court*, 3 LAW IN JAPAN 128 (1969). For an analysis of the Supreme Court and its decision-making process, see D. DANELSKI, THE SUPREME COURT OF JAPAN: AN EXPLORATORY STUDY, COMPARATIVE JUDICIAL BEHAVIOR 121 (1969). *See also* Danelski, *The Political Impact of the Japanese Supreme Court*, 49 NOTRE DAME LAW. 955 (1974). *See also* note 128 *infra.*

78. *Human Rights, supra* note 51, at 317, *citing* MAKI, COURT AND CONSTITUTION.

79. *Id.*

80. Nathanson, *Constitutional Protection of Freedom of Assembly in Japan and the United States*, 12 INT. & COMP. L.Q. 1032, 1033 (1963) [hereinafter cited as *Constitutional Protection*].

81. *Human Rights, supra* note 51, at 318.

82. *Id.*

tutionally valid, absolute prohibitions could not be.[83]

Although these decisions may, at first blush, appear repressive, Professor Nathanson has made a detailed, exhaustive, and convincing analysis of American decisional law dealing with similar cases, and he concludes that "although the opinion of the Japanese court in the *Tokyo ordinance* case is not entirely in accord with the latest American law on the subject, it is unlikely that the ultimate result in the particular case would have been any different in the American legal system."[84]

B. Habeas Corpus

A more troublesome decision involved a petition for habeas corpus by a Chinese citizen being held by the Immigration Department for unlawful entry.[85] The writ was sought under articles 33[86] and 34[87] of the Japanese Constitution, as well as under a habeas corpus statute which provided relief for one subjected to physical restraint by other than lawful procedures.[88] Despite this formidable array of substantive and procedural safeguards, the Supreme Court found it unnecessary to reach the merits of the application. The majority relied on a decision relating to war criminals in which the Court had held that application for habeas corpus could be made only where the restraint, or judgment or administrative decision relating to the restraint, was either patently without authority or seriously and patently violative of established procedures at law.[89] Five Justices dissented, claiming either that a constitutional question was present or that the Constitution had in fact been violated.[90]

What the decision portends is unclear. If the Court intended to hold articles 33 and 34 applicable only to criminal and not to adminis-

---

83. *Id.* Justices Fujita and Tarumi were the dissenters.

84. *Constitutional Protection, supra* note 80, at 1043-44.

85. *Human Rights, supra* note 51, at 319.

86. Art. 33. "No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offence with which the person is charged, unless he is apprehended, the offence being committed [*sic*]."

87. Art. 34.

> No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

88. *Human Rights, supra* note 51, at 319.

89. *Id.*

90. *Id.*

trative matters, which is unlikely,[91] "the result would be so shocking as to be almost unbelievable."[92] If, however, the majority was merely of the view that the petitioner was being properly held under procedures satisfying articles 33 and 34 for illegally entering the country, the result would not appear divergent from the habeas corpus cases and procedures in the United States concerning immigration and deportation.[93]

C. Defamation, Freedom of Expression, and Right to Privacy

Free speech, defamation, and privacy cases in Japan provide additional grist for constitutional analysis. Some controversy was raised and tensions were created when compulsory apology, in which the court orders a defamer to apologize publicly, was deemed not to be in a violation of freedom of conscience and, therefore, an appropriate remedy for defamation.[94] As suggested earlier,[95] rights in Japanese society were traditionally more relational than individual. Protection from defamation[96] is not strong in Japan, perhaps because of the group-orientation and the right of the group to intrude into the life of the individual.

> The individuals [*sic*] great concern for face in Japan may in part result from the weak societal protection of the individual's privacy within the group, as well as strong group insistance upon the individual's loyal maintainance of the group's good name before society. In this context, good name and privacy are viewed as important values primarily in terms of interactions taking place in the group or the group's relations with society, not in terms of the individual's rights as a member of society.[97]

Indeed, suits are rarely brought by those who have been publically wronged; the usual remedy is to "bemoan their fate among relatives

91. The view often expressed in Japan concerning the 1947 Constitution is that subjecting administration action to judicial review is a most significant advancement. *Id.*

92. *Id.*

93. *Id. See generally* Scarlett, *Habeas Corpus*, 18 MERCER L. REV. 354 (1967); Sutton, *Habeas Corpus—Its Past, Present and Possible World-Wide Future*, 44 DENVER L.J. 548 (1967).

94. *See generally* Ouchi, *Defamation and Constitutional Freedoms in Japan*, 11 AM. J. COMP. L. 73 (1962).

95. See notes 52-60 *supra* and accompanying text.

96. There is no distinction between libel and slander in Japan. Beer, *Defamation, Privacy, and Freedom of Expression in Japan*, 5 LAW IN JAPAN 192, 192 (1972), *citing* K. IGARASHI & H. TAMIYA, MEIYO TO PURAIBASHI (Reputation and Privacy) 1-19 (1968); SHINHŌRITSUGAKU JITEN 933-34.

97. Beer, *supra* note 96, at 196. Of all the reported cases involving defamation in Japan between 1950 and 1966, only 42 ordered an apology or payment of damages, with the usual award being less than 10,000 yen ($278). *Id.* at 192.

and friends" and to go to bed weeping (*naki neiri shita*).[98]

But code and case law does exist for the vindication of human rights. Article 723 of the Civil Code provides that defamation (*meiyo kison*) is an unlawful act (*fuhōkōi*) for which money damages or "other suitable compensation,"[99] such as a public apology, may be obtained:

> If a person has injured the reputation of another, the Court may, on the application of the latter, make an order requiring the former to take suitable measures for the restoration of the latter's reputation either in lieu of or together with compensation for damages.[100]

The civil provisions which follow are also applied in defamation cases and constitute the principal basis for the right of privacy in code law:[101]

> Article 709. A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.
>
> Article 710. A person who is liable in compensation for damages in accordance with the provisions of the preceding Article shall make compensation therefor even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty, or reputation of another or to his property rights.

The Penal Code, on the other hand, distinguishes ordinary defamation, to which truth is not a defense, from defamation involving matters of public interest:[102]

> Article 230. A person who defames another by publicly alleging facts shall, regardless of whether such facts are true or false, be punished with imprisonment at or without forced labor for not more than three years or a fine of not more than 1,000 yen.

---

98. *Id.* at 194.

99. *Id.* at 197. Demand for compensation must be made within three years of the plaintiff's awareness of his injury and within 20 years of the wrongful act, under article 724. *Id.* at n.23 *citing* K. IGARASHI, *supra* note 96, at 49-59, 96-116. This is to be contrasted with the strict approach of American courts applying short (usually one year from the act) statutes of limitation.

100. Beer, *supra* note 96, at 197.

101. *Id.* Beer notes that articles 709 and 710 are the most comprehensive of only 16 articles found in Japanese tort law. The notion of an "unlawful act" (*fuhōkōi*) is, like the German *unerlaubte Handlung* from which it was derived, the equivalent of common law tort. *Id.* at n.24. *See also* Kato, *The Concerns of Japanese Tort Law Today*, 1 LAW IN JAPAN 79 (1967).

102. Beer, *supra* note 96, at 197-98. *Compare* New York Times v. Sullivan, 376 U.S. 254 (1964) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Also, article 231, a product of the Meiji period, provides sanctions for "a person who publicly insults another even without alleging facts," but it is rarely used. *Id.* at 198.

2. A person who defames a dead person shall not be punished unless such defamation is based on falsehood.

Article 230-2. When the act provided for in paragraph 1 of the preceding Article is found to relate to matters of Public Interest (*kōkyō no rigai*) and to have been done Solely *(moppara)* for the benefit of the public and, upon inquiry into the truth or falsity of the alleged facts, the truth is proved, punishment shall not be imposed.

2. In the application of the provisions of the preceding paragraph, matters concerning the criminal act of a person for which prosecution has not yet been instituted shall be deemed to be matters of public interest.

3. When the act provided for in paragraph 1 of the preceding Article is done with regard to matters concerning a public servant or a candidate for elective public office and, upon inquiry into the truth or falsity of the alleged facts, the truth is proved, punishment shall not be imposed.

In both civil and criminal defamation cases today, the principle focus is upon the question of fact *(jijitsu no shōmei)* and the implications of "matters of public interest" in Penal Code article 230-2. In both instances, "liability may be escaped when mistaken allegations concerning a matter of public interest were made in a belief that they were true which is based upon what the court considers sufficiently objective grounds."[103] This standard became settled in Supreme Court decisions in the latter half of the 1960's,[104] and it is not substantially different from the United States' approach.

In a related area, the Japanese courts have been quite creative in their use of code and constitutional articles to find a right to privacy for the protection of rights similar to the rights protected by Prosser's four torts of invasion of privacy.[105] The analysis used indicates that courts in Japan are willing to be interpretative in their application of the law and to break new ground where justified.[106] The right to privacy or, as

103. Beer, *supra* note 96, at 199.

104. *Id. citing* H. SHIMIZU, HŌTO MASU KOMYŪNIKĒSHON (Law and Mass Communications) 263-71, 276-88 (1970). For a comparison of criminal and civil defamation in the context of actual cases, see Beer, *supra* note 96, at 199-203.

105. Prosser examined the existing confusion in the right to privacy, first exposed in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and found four torts to exist under the general heading of privacy: intrusion; public disclosure of private facts; false light in the public eye; and appropriation. *See generally* Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

106. *See generally* Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. L. 195 (1958).

[T]he Japanese have an impressive record in borrowing and adopting to their own needs

it is sometimes characterized, the right to control information about oneself and to be left alone, was first recognized in 1964 in the Tokyo district court decision of *Utage ne Ato*, the After the Banquet Case.[107] Articles 709 and 710, referred to above, provided the major underpinnings for the privacy protection, but other provisions were noted: article 235, thought to be significant in a crowded, urbanized nation, states, "A person who constructs at a distance of less than one meter from the boundary line a window or verandah which overlooks the garden of another person shall put a screen thereto."[108] Also, articles 133 and 134 make criminal the opening of sealed letters and the divulging of professional secrets.[109] Indeed, article 9 of the Postal Law insures that the mails will be secret, and article 21 of the Constitution prohibits the violation of "the secrecy of any means of communication." The Minor Offenses Law provides sanctions against peeping toms,[110] and a court decision has recognized "the Right of a Person to his own likeness (*shōzōken*, the right not to be photographed without consent).[111] Finally, it has been postulated that the right of privacy is ultimately grounded in article 13 of the Constitution, which purports to guarantee that "[a]ll of the people shall be respected as individuals . . . [and they shall have the] right to life, liberty and the pursuit of happiness."[112] Recognition of the right of privacy in Japan is deemed significant, not only because the recognition furthers fundamental human liberties, but also because it illustrates the willingness of the courts to apply common law theories of judicial legislation, social engineering, and *stare decisis* in the context of civil law code provisions and constitutional questions.

---

the legal conceptions of other countries. It is in keeping with this tradition that the Supreme Court of Japan should now have a unique opportunity, in its role of the ultimate constitutional interpreter, to lead the way in molding the fundamental law so as to reflect the highest aspirations of the Japanese people. In the performance of this exciting and exacting task, it may even be a blessing in disguise that the Court need not be too concerned to discover and to perpetuate the exact objectives of any group of "founding fathers." Instead, it may draw freely upon the experience of all countries that have struggled with similar constitutional problems, both in determining its own role in the dynamics of government and in helping to assure a realistic content for those guarantees of freedom and self-government to which the Japanese people are thus far constitutionally committed.

Id. at 217-18.

107. Beer, *supra* note 96, at 203. For details on the decision, see *id.* at 204-05.

108. *Id.* at 203.

109. *Id.*

110. *Id.* at 204. Perhaps in deference to equal rights between the sexes, this characterization should be changed to "peeping Tommys."

111. *Id.* Note the similarity in our own appropriation law. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

112. Beer, *supra* note 96, at 204.

It is a welcome example of the courts going beyond the enumerated constitutional guarantees to find protection for additional human rights.[113]

Related to the question of freedom of expression is the question of obscenity. In this area Japanese courts have been far less willing to permit liberal construction of the constitutional guarantees.[114] The Japanese law on obscenity, which may be seen as being in conflict with freedom of expression, is found in article 175 of the Penal Code:

> A person who distributes or sells an obscene writing, picture, or other thing or publicly displays the same, shall be punished with penal servitude for not more than two years or a fine of not more than five thousand yen or a minor fine. The same shall apply to a person who possesses the same for the purpose of selling it.[115]

Because of numerous censorship provisions which were widely used in controlling so-called obscene materials, the provision was rarely invoked until after 1947, and it received scant interpretation.[116] One 1918 case, however, dealing with the exhibition of an imitation sexual organ, attempted to define the concept of obscenity thusly:

> the so called obscene writing, picture or other thing as proscribed in Art. 175 of the Penal Code, designates writing, pic-

---

113. For an analysis of other privacy cases and the development of the law in Japan, see *id.* at 204-08.

114. *See generally* N. ST. JOHN-STEVAS, OBSCENITY AND THE LAW 253-55 (1974); Note, *The Japanese Law of Obscenity*, 75 L.Q. REV. 183 (1959). This article, however, is entirely unfootnoted and relatively useless as a research tool.

115. Kim, *Constitution and Obscenity: Japan and the U.S.A.*, 23 AM. J. COMP. L. 255, 255-56 (1975).

> The original article as contained in Law No. 45, 24 April 1907, reads: Every person who has distributed or sold an obscene book (writing), picture, or other thing or has publically displayed the same, shall be fined with a fine of not more than 500 yen or a minor fine. The same (penalty) applies to every person who has possession of the same with the intent to sell.
>
> This translation is derived from Sebald, *The Criminal Code of Japan* 128 (1936). There is no basic change on the issue of obscenity in the proposed revision of the Japanese Penal Code. The newly proposed article reads:
>
> Article 262. Distribution, etc. of Obscene Matter:
>
> (1) A person who distributes, sells, lends in the course of business or publically displays an obscene writing, picture, or other matter shall be punished by imprisonment for not more than two years or a fine not exceeding 500,000 yen.
> (2) The same shall apply to a person who manufactures, possesses, transports, imports or exports an obscene writing, picture or other matter with intent that it shall be used in a violation of paragraph (1).
>
> This translation is derived from the American Series of Foreign Penal Codes, *A Preliminary Draft for the Revised Penal Code of 1961*, 81-82 (George trans.) (1964).

Id. at 256 n.6.

116. *Id.* at 256.

> tures and all other items which stimulate and excite or satisfy sexual desire. Accordingly, to be an obscene item, it is required to arouse in a person a sense of shame and disgust.[117]

The landmark decision in the obscenity area came in the 1957 case of *Koyama v. State*, which involved the translation of D.H. Lawrence's classic, *Lady Chatterly's Lover*, into Japanese.[118] Although part of the opinion is an "engaging essay in literary appreciation,"[119] the work was held obscene. Indeed, it was first acknowledged that the work as a whole was an artistic and thoughtful work which enjoyed a high reputation in English literature.[120] But, under the bifurcated approach followed by the Court, that which is a work of art may also be obscene. "Artistry and obscenity are concepts that exist side by side. There are cases where what we ordinarily recognize as an artistic composition does possess the character of obscenity,"[121] and here the depiction of sex went "beyond the limits recognized by the prevailing ideas of society."[122] Secondly, the Court noted that "fundamental human rights are not unlimited and can be restricted for the public welfare."[123] Finally, the Court found that the sexual depictions were an affront to the Japanese "sense of shame"[124] underlying the definition of obscenity.[125] The Court pointed out that in traditional Japanese thought sex is only for procreation, not enjoyment; man's nobler nature and dignity rebel against sexual feelings; the good of society must prevail over the needs and desires of the individual; and anything that would exploit or publicly describe the sex act would, therefore, arose one's feelings of shame.[126]

In 1969, the Court again addressed the obscenity question in the case of *Shibuzawa v. State*, which involved a translation of *Historie de*

117. *Id. citing* Nakeyama, *Nihono Hanreini okeru Waisetuseino Suii*, JURISTO 16-18 (No. 474, 1971), noting that the word "disgust" has disappeared from later decisions. Kim, *supra* note 115, at 256 n.11.

118. *Id.* at 257. The Court had, five years earlier, held a pulp magazine, *Sunday Recreation*, obscene since "it is recognizable that this article altogether excites and stimulates sexual desire and impairs the ordinary sexual sense of shame of a common person and runs counter to good moral concepts regarding sex." *Id. See also Human Rights, supra* note 51, at 322-23.

119. *Human Rights, supra* note 51, at 322. Note that the author of this work has confused the date of the case.

120. Kim, *supra* note 115, at 260.

121. *Id.* at 260.

122. *Id.* In addition, the Court has determined that it will be the final authority on what those prevailing ideas are.

123. *Id.* at 261.

124. *Id.; Human Rights, supra* note 51, at 323.

125. Kim, *supra* note 115, at 280.

126. *Id.*

Juliette, ou les Prospérités du Vice by the Marquis de Sade.[127] A divided Court held that this work, too, was obscene, but the presence of five dissenting opinions is notable.[128] The Court initially reaffirmed that a work may be both literary and ideological (artistic) and obscene.[129] Secondly, it held that articles 21 and 23 of the Constitution could overcome the public welfare limitation on the obscenity issue.[130] The only requirement in the majority opinion which favored freedom of expression was the holding that passages should be judged, not in isolation, but within the framework of the entire composition.[131] An extensive analysis has been made of constitutional law in the area of obscenity in Japan as compared with that of the United States.[132] The conclusion is that much less freedom of expression of a sexual nature is tolerated in Japan.

> The Japanese Supreme Court decisions from the beginning established a trend favorable to censorship of "obscene" material. Development of the standards to define obscene material did not reflect the same concern with a balancing of the state interests in censorship and the individual interests in free speech and press as did the initial American decisions. Although the Japanese courts recognize the new rights granted in the new constitution, they seem to favor a preferred position for the public welfare standard and the concepts of the

---

127. *Id.* at 262.

128. *Id.* at 260-61.

In the *Sade* case trial, thirteen judges participated. Of the eight who subscribed to the majority opinion, one added a supplementary opinion and one "an opinion." Four judges wrote individual opposing opinions separately. One judge, without expressing his individual view, agreed with one of the four opposing opinions. The Supreme court of Japan consists of fifteen judges. The Court conducts hearings and renders decisions through either a full bench court or a petty bench court. The petty benches are three in number and each consists of five judges. Cases are at first heard by a petty bench and in the following instances they are to be transferred to the full bench: 1. where the determination of the constitutionality of a law, ordinance, regulation or official act is to be made on the contention of a litigant; 2. where a petty bench is of the opinion that a law, ordinance, regulation or official act is unconstitutional; 3. where the opinion of a petty bench covering the interpretation and application of the constitution or any other law or ordinance is contrary to that of a decision previously rendered by the Supreme Court; 4. where the opinion of the judges constituting the petty bench is equally divided; 5. where a petty bench is of the opinion that it is appropriate to decide a specific case by the full bench court.

Id. at 262-63 n.39. *See also* SUPREME COURT OF JAPAN, OUTLINE OF JAPANESE JUDICIAL SYSTEM (1970); Itoh, *How Judges Think in Japan*, 18 AM. J. COMP. L. 775 (1970); Note, *The Judicial System in Japan*, 6 CASE W. RES. J. INT. L. 294 (1974).

129. *Id.* at 262.

130. *Id.*

131. *Id.*

132. *Id.* at 264-83.

> prevailing ideas of society and the art/obscenity two-dimensional approach. The result of these different doctrinal views has been that even though the Bill of Rights guaranteed under the constitutions in both countries appear to be similar in scope, in actual application they are significantly different.[133]

It is noted, however, that the differences in the approaches of the two countries cannot be explained by the constitutional provisions themselves because they are so similar in their essence. The discrepancy must, therefore, be attributable to the cultural differences which exist between the two nations. Japan's emphasis upon social interaction and inter-group responsibilities and duties is seen in its opinions, while the United States places more stress upon individualism.[134] That Japan has been more conservative in its approach to obscenity cannot be denied. But, if the five dissenting opinions in the *Shibuzawa* case are any indication,[135] as the concept of human rights and individual liberties becomes more ingrained and as the culture becomes more Westernized, a liberalizing trend quite probably will develop.

IV. CONCLUSION

A comprehensive analysis of human rights is not possible here, and numerous areas, notably criminal procedural and substantive safeguards,[136] have been omitted. But it is clear that the last century has been significant in the development of fundamental individual liberties in Japan. That nation has shown a marked and steady progression culminating in the adoption of a constitutional document rich in freedoms. Perhaps none of these have as yet been fully recognized, but an inexorable movement in the direction of greater, not lesser, personal rights is clearly discernable.[137] At its inception, and for years thereaf-

133. *Id.* at 283.

134. *Id. See also* Tokikuni, *Obscenity and the Japanese Constitution*, 51 KY. L.J. 703 (1963).

135. One of the dissenting justices wrote:

> The legal interest invaded by the obscene creation, and the public interest feature which honors artistic, ideological and literary creation, are to be comparatively balanced. Thus, when there is a logical reason to advance the need of the former at the sacrifice of the latter, then it is to be interpreted to punish (the author of the creation) for the crime of obscenity.

Kim, *supra* note 115, at 263. This balance of interests test is arguably a higher protection for expression.

136. *See generally* George, *The Impact of the Past Upon the Rights of the Accused in Japan*, 14 AM. J. COMP. L. 672 (1966); Ukai, *supra* note 51.

137. One writer has commented:

> The detailed character of the guarantees of personal freedom in the Japanese Constitution is due to the fact that we did not enjoy those freedoms in the past. They are an ideal

ter, the apparent gap between the Constitution as formulated and Japanese society led some observers to regard that document as merely an interesting experiment being conducted by interested aliens,[138] and they concluded that it would be replaced or heavily revised.[139] Instead, there has been a tremendous reshaping of the entire Japanese society brought about by many forces—not the least of which is the Constitution itself.[140] And, significantly, with this new Constitution has come "the constructive and integrative response of the Japanese people themselves who have undertaken one of the broadest and to date most successful tasks of social engineering that the twentieth century has witnessed."[141]

Tyrus V. Dahl, Jr.

APPENDIX A

THE TEXT OF THE JAPANESE CONSTITUTION IN SEVENTEEN ARTICLES ENACTED BY PRINCE SHOTOKU IN 604 A.D.

I. Concord is to be honored, and discord to be averted. Every one has his bias, and few are farsighted. Hence there are those who disobey their lords and fathers, and who dissent from their neighbors. But when concord and union are maintained between those above and below, and harmony rules in the discussion of affairs, the right reason of things will prevail by itself. Then what could not be accomplished?

II. Sincerely revere the Three Treasures. The Three Treasures

---

which we are still struggling to obtain, and the provisions of the Constitution have to be read as the means for their attainment.

Ukai, *supra* note 51, at 744.

138. Maki, *supra* note 8, at 929.

139. *See generally* Fukui, *Twenty Years of Revisionism*, 43 NW. U.L. REV. 931 (1968).

140. Questions of whether, to what degree, and how rapidly law is able to affect the actions of society are the subject of great debate and uncertainty. It is suggested here that the Constitution is only one of many factors. Indeed, the affects of society upon the Constitution may be as great or greater. *See generally* L. FRIEDMAN & S. MACAULAY, LAW AND THE BEHAVIORAL SCIENCES 193-828 (1977).

141. Maki, *supra* note 8, at 929. For a discussion of the impact of the Japanese Constitution on relationships between private parties, see Horan, *Contemporary Constitutionalism and Legal Relationships Between Individuals*, 25 INT. & COMP. L.Q. 848, 859-67 (1976); Mehren, *The Legal Order In Japan's Changing Society: Some Observations*, 76 HARV. L. REV. 1170 (1963). *See also* Oikawa, *Application of Beutel's Experimental Jurisprudence to the Japanese Sociology of Law*, 39 NEB. L. REV. 629 (1960).

are Buddha, Dharma and Sangha, which constitute the final resort of all kinds of living beings and the ultimate foundation of all realms. Should any age or any people fail to honor this truth? There are few men who are utterly vicious. Every one will realize it if adequately instructed. Could any crookedness be made straight without taking refuge in the Three Treasures?

III. Attend with respect to the orders of the Sovereign. The lord is like Heaven, and the vassal like Earth. Heaven overspreads and earth upbears; the four seasons pursue their due course (between the two) and all forces obtain therein their efficacy. Should the earth attempt to spread over the heaven, all would fall in ruin. Therefore, when the lord speaks, the vassals listen; when the superiors act, the inferiors comply. Thus be assuredly attentive on having received orders from the Sovereign. When one fails in this, ruin would be the natural consequence.

IV. Ministers and functionaries, make the propriety of demeanor a basal principle, for in ruling the people basis lies in the propriety, of demeanor. If the superiors do not behave with propriety, offenses will necessarily follow. Therefore when the vassals (superiors and inferiors) behave with propriety, the rank order will be indisturbed; when the people behave with propriety, the State will naturally be in good order.

V. Banishing avaricious desires and giving up coveting, decide justly the law-suits. Of suits brought by the people there are a thousand in one day; so many in one day, how many in a series of years? Nowadays, those who settle the suits make profiting their motive, and attend to the cases on seeing bribes. Hence the suits of the wealthy are like a stone thrown into water, while complaints of the poor resemble water dropped upon a stone. Thus, the poor do not know where to appeal, and also the way of the vassals is thereby obliterated.

VI. Chastise evil and promote good, this is an excellent rule of antiquity. Conceal not, therefore, the good of others, and fail not to correct what is evil when you see it. Hypocrites are a sharp weapon that overthrows the State, a pointed sword that ruins the people. Likewise sycophants are fond of dilating to the superiors on the blunders of the inferiors; to the inferiors they censure the faults of the superiors. Men like these are never loyal to the lord, nor benevolent towards the people. All this is the source of grave disorders.

VII. Every man has his own charge, let not the spheres of duty be confused. When wise men are entrusted with offices, the voice of praise arises; when corrupt men hold offices, disasters are multiplied. There are few who are endowed with inborn wisdom; through earnest aspiration one may become a sage. In any affairs, whether great or small,

find the right man, then all will surely be well ordered; in any periods, whether critical or peacefully settled. In this way will the State be lasting and the realm be relieved from dangers. Hence did the sage sovereigns of antiquity seek the man for the sake of the office, and not the office for the interest of the man.

VIII. Ministers and functionaries, attend the court early and retire late. The public affairs do not admit of remissness, the whole day is hardly enough for performing them. If, therefore, one attends the court late, emergencies cannot be met; if one retires early, the affairs cannot be accomplished.

IX. Good faith is the basis of righteousness. In everything let there be good faith, for upon it depends the good or bad, the success or failure. If all the vassals lack good faith towards one another, everything shall end in failure.

X. Banish wrath and give up angry miens. Be not resentful when others dissent from us, for everyone has his mind and each mind has its holdings. I may regard as wrong what the other holds as right, he may regard as wrong what I hold as right. I am not assuredly a sage, nor he assuredly a fool. Both of us are simply ordinary men. How can the distinction between the right and wrong be defined? For we, all and each of us, are wise and foolish, like a ring which has no end. Therefore, although we may be sure of our right, let us act in harmony with many.

XI. Discern clearly merit and demerit, and execute with surety its reward or punishment. In these days reward does not attend upon merit, nor punishment upon crime. Ye ministers taking charge of affairs, make clear rewards and punishments.

XII. Provincial governors and district administrators, do not levy exacting taxes on the people. In a realm there should not be two lords; the people have not two masters. The people of the whole realm have the Sovereign as their sole master. The officials appointed are all his vassals. How can they levy arbitrary taxes on the people in the manner of public administration.

XIII. Let all persons entrusted with offices attend equally to their functions. Owing to the illness or to their being sent out on missions, their work may be interrupted. But whenever they attend to the work, let them accommodate themselves as if they had cognizance of the matter, and not obstruct public affairs on account of having not personally shared in them.

XIV. Vassals and functionaries, do not harbor envy. If we envy others, they in turn will envy us. The evils of envy know no limit. For if others excel us in intelligence, we are not pleased; if they surpass us

in ability, we are envious. Thus, after a lapse of five hundred years at last we find a wise man, and even in a thousand years we can hardly expect a sage. Without securing wise men and sages, wherewith shall the realm be in good order?

XV. To turn away from the private and to turn towards the public, this is the way of the vassals. When one is moved by private motives, he is necessarily resentful. When he cherishes grudging feeling, he fails to co-operate with others. When co-operation fails, the private obstructs the public. When grudging feeling arises, it dissents from order and overthrows law. Therefore it was said in the first article that those above and below should be harmonious. The purport is the same as this.

XVI. Employ people at seasonable times, this is an excellent rule of antiquity. Therefore employ the people in the winter months when they are at leisure. In the season of agriculture and sericulture, from Spring to Autumn, do not employ them. For when agriculture is neglected, what will there be to clothe?

XVII. Decisions on matters should generally not be done by one alone, but they should be discussed with many. As minor matters are of less consequence, there is little necessity of consulting many. In the case of discussing weighty matters, the fear is that there may be faults, so that they should be examined together with many. Then the deliberation will arrive at the reasonable.

Shotoku, *The Text of the [Japanese] Constitution in Seventeen Articles*, CASE & COMMENT, July-Aug. 1953, at 20.

APPENDIX B

THE CONSTITUTION OF JAPAN
NOVEMBER 3, 1946

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful co-operation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the

people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy and honoured place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

CHAPTER I
THE EMPEROR

Art. 1. 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 resides sovereign power.

Art. 2. The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.

Art. 3. The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.

Art. 4. The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.

The Emperor may delegate the performance of his acts in matters of state as may be provided by law.

Art. 5. When, in accordance with the Imperial House Law, a Regency is established, the Regent shall perform his acts in matters of

state in the Emperor's name. In this case, paragraph one of the preceding article will be applicable.

Art. 6. The Emperor shall appoint the Prime Minister as designated by the Diet.

Art. 7. The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:

Promulgation of amendments of the constitution, laws, cabinet orders and treaties.
Convocation of the Diet.
Dissolution of the House of Representatives.
Proclamation of general election of members of the Diet.
Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers.
Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights.
Awarding of honours
Attestation of instruments of ratification and other diplomatic documents as provided for by law.
Receiving foreign ambassadors and ministers.
Performance of ceremonial functions.

Art. 8. No property can be given to, or received by, the Imperial House, not can any gifts be made therefrom, without the authorizatioon of the Diet.

CHAPTER II

RENUNCIATION OF WAR

Art. 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

CHAPTER III

RIGHTS AND DUTIES OF THE PEOPLE

Art. 10. The conditions necessary for being a Japanese national shall be determined by law.

Art. 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Art. 12. The freedom and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

Art. 13. All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.

Art. 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

Peers and peerage shall not be recognized.

No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

Art. 15. The people have the inalienable right to choose their public officials and to dismiss them.

All public officials are servants of the whole community and not of any group thereof.

Universal adult suffrage is guaranteed with regard to the election of public officials.

In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

Art. 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters, nor shall any person be in any way discriminated against for sponsoring such a petition.

Art. 17. Every person may sue for redress as provided by law

from the State or public entity, in case he has suffered damage through illegal act of any public official.

Art. 18. No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.

Art. 19. Freedom of thought and conscience shall not be violated.

Art. 20. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.

No person shall be compelled to take part in any religious act, celebration, rite or practice.

The State and its organs shall refrain from religious education or any other religious activity.

Art. 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Art. 22. Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.

Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.

Art. 23. Academic freedom is guaranteed.

Art. 24. Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual co-operation with the equal rights of husband and wife as a basis.

With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Art. 25. All people shall have the right to maintain the minimum standards of wholesome and cultured living.

In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Art. 26. All people shall have the right to receive and equal education correspondent to their ability, as provided by law.

All people shall be obligated to have all boys and girls under their

protection receive ordinary education as provided for by law. Such compulsory education shall be free.

Art. 27. All people shall have the right and the obligation to work.

Standards for wages, hours, rest and other working conditions shall be fixed by law. Children shall not be exploited.

Art. 28. The right of workers to organize and to bargain and act collectively is guaranteed.

Art. 29. The right to own or to hold property is inviolable.

Property rights shall be defined by law, in conformity with the public welfare.

Private property may be taken for public use upon just compensation therefor.

Art. 30. The people shall be liable to taxation as provided by law.

Art. 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

Art. 32. No person shall be denied the right of access to the courts.

Art. 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offence with which the person is charged, unless he is apprehended, the offence being committed.

Art. 34. No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Art. 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or excepts as provided by Article 33.

Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Art. 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

Art. 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

He shall be permitted full opportunity to examine all witnesses, and he shall have the right to compulsory process for obtaining witnesses on his behalf at public expense.

At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Art. 38. No person shall be compelled to testify against himself.

Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

No person shall be convicted or punished in cases where the only proof against him is own confession.

Art. 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

Art. 40. Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

CHAPTER IV

THE DIET

Art. 41. The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.

Art. 42. The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.

Art. 43. Both Houses shall consist of elected members, representative of all the people.

The number of the members of each House shall be fixed by law.

Art. 44. The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.

Art. 45. The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.

Art. 46. The term of office of members of the House of Council-

lors shall be six years, and election for half the members shall take place every three years.

Art. 47. Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law.

Art. 48. No person shall be permitted to be a member of both Houses simultaneously.

Art. 49. Members of both Houses shall receive appropriate annual payment from the national treasury in accordance with law.

Art. 50. Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.

Art. 51. Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.

Art. 52. An ordinary session of the Diet shall be convoked once per year.

Art. 53. The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.

Art. 54. When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convoked within thirty (30) days from the date of the election.

When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session.

Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.

Art. 55. Each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two thirds or more of the members present.

Art. 56. Business cannot be transacted in either House unless one third or more of total membership is present.

All matters shall be decided, in each House, by a majority of those present, except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue.

Art. 57. Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two thirds or more of those members present passes a resolution therefor.

Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy.

Upon demand of one fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes.

Art. 58. Each House shall select its own president and other officials.

Each House shall establish its rules pertaining to meetings, proceedings and internal discipline, and may punish members for disorderly conduct. However, in order to expel a member, a majority of two thirds or more of those members present must pass a resolution thereon.

Art. 59. A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two thirds or more of the members present.

The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.

Failure by the House of Councillors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection of the said bill by the House of Councillors.

Art. 60. The budget must first be submitted to the House of Representatives.

Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the

House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

Art. 61. The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.

Art. 62. Each House may conduct investigations in relation to government and may demand the presence and testimony of witnesses, and the production of records.

Art. 63. The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations.

Art. 64. The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.

Matters relating to impeachment shall be provided by law.

CHAPTER V
THE CABINET

Art. 65. Executive power shall be vested in the Cabinet.

Art. 66. The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided by law.

The Prime Minister and other Ministers of State must be civilians.

The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

Art. 67. The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.

If the House of Representatives and the House of Councillors disagree and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.

Art. 68. The Prime Minister shall appoint the Ministers of State.

However, a majority of their number must be chosen from among the members of the Diet.

The Prime Minister may remove the Ministers of State as he chooses.

Art. 69. If the House of Representatives passes a no-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign *en masse*, unless the House of Representatives is dissolved within ten (10) days.

Art. 70. When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign *en masse*.

Art. 71. In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed.

Art. 72. The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.

Art. 73. The Cabinet, in addition to other general administrative functions, shall perform the following functions:

Administer the law faithfully; conduct affairs of State.

Manage foreign affairs.

Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.

Administer the civil service, in accordance with standards established by law.

Prepare the budget, and present it to the Diet.

Enact cabinet orders in order to execute the provisions of this Constitution and of the law.

However, it cannot include penal provisions in such cabinet orders unless authorized by such law.

Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.

Art. 74. All laws and cabinet orders shall be signed by the competent Minister of State and countersigned by the Prime Minister.

Art. 75. The Ministers of State, during their tenure of office, shall not be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

CHAPTER VI
JUDICIARY

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

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

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

Art. 77. The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.

Public procurators shall be subject to the rule-making power of the Supreme Court.

The Supreme Court may delegate the power to make rules for inferior courts to such courts.

Art. 78. Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.

Art. 79. The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.

The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives followint their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.

In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.

Matters pertaining to review shall be prescribed by law.

The Judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Art. 80. The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court.

All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.

The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.

Art. 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Art. 82. Trials shall be conducted and judgment declared publicly. Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offences, offences involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

CHAPTER VII

FINANCE

Art. 83. The power to administer national finances shall be exercised as the Diet shall determine.

Art. 84. No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.

Art. 85. No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.

Art. 86. The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.

Art. 87. In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorized by the Diet to be expended upon the responsibility of the Cabinet.

The Cabinet must get subsequent approval of the Diet for all payments from the reserve fund.

Art. 88. All property of the Imperial Household shall belong to the State. All expenses of the Imperial Household shall be appropriated by the Diet in the budget.

Art. 89. No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Art. 90. Final accounts of the expenditures and revenues of the State shall be audited annually by a Board of Audit and submitted by the Cabinet to the Diet, together with the statement of audit during the fiscal year immediately following the period covered.

The organization and competency of the Board of Audit shall be determined by law.

Art. 91. At regular intervals and at least annually the Cabinet shall report to the Diet and the people on the state of national finances.

CHAPTER VIII

LOCAL SELF-GOVERNMENT

Art. 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Art. 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law.

The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by laws shall be elected by direct popular vote within their several communities.

Art. 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Art. 95. A special law applicable only to one local public entity cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

CHAPTER IX

AMENDMENTS

Art. 96. Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

Amendments when so ratified shall immediately be promulgated

by the Emperor in the name of the people, as an integral part of this Constitution.

CHAPTER X
SUPREME LAW

Art. 97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Art. 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Art. 99. The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

CHAPTER XI
SUPPLEMENTARY PROVISIONS

Art. 100. This Constitution shall be enforced as from the day when the period of six months will have elapsed counting from the day of its promulgation.

The enactment of laws necessary for the enforcement of this Constitution, the election of members of the House of Councillors, and the procedure for the convocation of the Diet and other preparatory procedures necessary for the enforcement of this Constitution, may be executed before the day prescribed in the preceding paragraph.

Art. 101. If the House of Councillors is not constituted before the effective date of this Constitution, the House of Representatives shall function as the Diet until such time as the House of Councillors shall be constituted.

Art. 102. The term of office for half the members of the House of Councillors serving in the first term under this Constitution shall be three years. Members falling under this category shall be determined in accordance with law.

Art. 103. The Ministers of State, members of the House of Representatives, and judges in office on the effective date of this Constitution, and all other public officials who occupy positions corresponding to such positions as are recognized by this Constitution, shall not forfeit their positions automatically on account of the enforcement of this Constitution unless otherwise specified by law. When, however, successors are elected or appointed under the provisions of this Constitution they shall forfeit their positions as a matter of course.