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Freedom Of Mass Media And Laws In Japan

By

Yoshimi Uchikawa
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Freedom of Mass Media and Law in Japan

Yoshimi Uchikawa

Introduction

Reflecting on the country's historical experience of having been led by ultra-nationalism and militarism into the tragedy of World War II, Japan adopted in 1946 a new Constitution whose keynotes are democracy and pacifism. Article 21 of that Constitution guarantees freedom of speech, press and all other forms of expression. In the intervening years, various court rulings have established the position of freedom of speech and press as taking priority over all other fundamental freedoms. The position of freedom of speech and press is based on the national consensus and perception that it is a basic condition essential to sustaining and advancing democracy. Plainly, Japan today is among the countries which enjoy the greatest degree of freedom of speech and press.

Aside from the Broadcasting Law, explained later, there are no laws that control each form of mass media in Japan.

Needless to say, freedom of speech and press is always exposed to danger. For example, members of the ruling Liberal-Democratic Party submitted to the Diet (Japan's parliament) in autumn last year the National Secrets Protection Bill. The reason for submitting the bill was that because Japan has no law to control espionage activities, the country has become a paradise for

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spies. There is a modicum of truth in what they claim. However, the mass media vehemently opposed the anti-espionage bill, arguing that it leads to the danger of restricting freedom of speech and press, because the definition and scope of "secrets" as provided in the bill and the definition of channels of unlawful access to secrets are ambiguous. As a result, the Government and the ruling party decided to scrap the anti-espionage bill at the end of last year.

On the other hand, infringement on privacy by some mass media and excessively lewd presentations of sex are quite often condemned by the public. Thus, excesses in the exercise of freedom have often become a problem. Threats to freedom of speech and press not only come from forces outside the mass media but exist within the mass media, as well. Up to now, the dominant view has been that excesses in the exercise of freedom should be resolved not by expansion of legal restraints but by the awareness of its social responsibility by the mass media which exercises the freedom. From this standpoint, the Japanese mass media itself has made various efforts at self-control.

The following is a brief review of the freedom of mass media and law in Japan.
Mass Media and Constitutional Guarantee of Freedom of Speech and Press

1. Prohibition of Censorship

The Japanese Constitution clearly proscribes censorship stating "No censorship shall be maintained..." in Article 21 Clause 2. The Japanese mass media suffered under the old pre-war regime, stringent restrictions on their activities to freely criticize and comment, through censorship applied by government administrators based on the Newspaper Law, Publishing Law, Film Law and Wireless Law then in force. Hence, the above guarantee provided by the Constitution is appreciated as having immense significance in maintaining the freedom of speech and publication today.

Furthermore, these stipulations in the Constitution are being interpreted as a statement of absolute prohibition of censorship to be practiced by administrative authorities (Supreme Court Judgment, Dec. 12, 1984). However, this does not mean that all pre-publication restriction applied by Government authorities has been eliminated. Following exceptions do exist.

1) The Customs Duty Rate Law stipulates that the customs authorities can check imported goods to see that no writings, pictures, sculptures and other materials likely to injure public security and moral order are brought in.

2) The Ministry of Education exercises rights to check the contents of school books granted under the School Education Law.

There are criticisms that both of the above "exceptions" are acts of
censorship, and hence unconstitutional. Another "exception" in existence is:

3) Local government authorities have issued local regulations applicable to
the area over which the local government has jurisdiction, prohibiting sales
of, and display of, publications dealing with overt sex and violence likely to
influence upon the young people.

In this third case as well, interpretation that such prohibitive rules
which are too ambiguous are unconstitutional, is generally accepted.

2 FREEDOM OF REPORTING AND NEWS GATHERING

The freedom of expression and publication as guaranteed under the
Constitution fundamentally means the freedom to publish ideas and opinions.
On the other hand, the freedom of reporting is primarily the freedom to
transmit information on facts and events by such mass media as newspapers
and broadcasting stations. However, it is quite obvious that without the
freedom of reporting, the freedom of speech and publication becomes
practically insignificant in the modern society. In that sense, it is generally
recognized today that the freedom of reporting constitutes a part of the
freedom of speech and publication.

The Supreme Court has handed down a judgment that the activities of
the newspapers to report facts is a part of the freedom of expression
guaranteed by the Constitution in Article 21 (Judgment of February 27th,
1958). Furthermore, in another later judgment handed down by the Court, it
was argued that the functions of the mass media to report constitutes a
service to the people to supply important information so that the people can
participate in governing the country, thus serving the people's right to
Hence, it goes without saying that the freedom to report facts, together with the freedom to express opinions is protected by Article 21 of the Constitution guaranteeing the freedom of expression (Supreme Court Judgment, November 26th, 1969).

However, the freedom of reporting is incomplete without the freedom to gather information material. Whether the guarantee under the Article 21 of the Constitution also applies to the freedom of news gathering, has been a debatable point. The Supreme Court, in a judgment of 1952, held the view that the freedom of news gathering cannot be protected by the Constitution. However, the Court handed down a judgment in 1969 that in order to enable the mass media to report facts truthfully, the spirit of the Article 21 should be respected in regard to the freedom of news gathering as well (Judgment, November 26th, 1969). This was the first where the Supreme Court acknowledged that the freedom of news gathering should also be brought under the umbrella of the Article 21.

3. Restrictions to Reporting and News Gathering

As I mentioned above, the Supreme Court has ruled that the constitutional guarantee of the freedom of speech and press fully covers the freedom of reporting as well. Thus, any rules or laws which restrict the freedom of reporting are unconstitutional except in some very limited cases. One such exception is the Public Office Election Law. Under Article 148 of the said law, the qualifications of newspapers and magazines
allowed to freely report and comment on the election during legally specified electioneering period are formally specified so that the conduct of fair elections might not be harmed by newspapers and magazines. The article further specifies that any reports and comments by such newspapers and magazines must not be based on falsehoods or distortions.

Some difference of interpretation does exist among law scholars whether such rulings of the Public Office Election Law might or might not be unconstitutional.

It is generally accepted that the freedom of news gathering comes under the protection provided by Article 21 of the Constitution. However, as gathering of information prior to news publication is an act of preparation, it cannot be said that all activities of news gathering come under the priority protection of the Constitution.

It is considered that each individual case must be weighed according to the principle of comparative balancing vis-a-vis the public welfare to decide whether they qualify for the application of constitutional guarantee. For instance, the question of whether to permit mass media news photo and television cameramen into a court of law for picture taking is a matter for the court to decide according to the Criminal Litigation Law. It is left to the discretion of the court to decide, after comparative balancing of such factors as the fair trial and the human rights of the accused person, whether to grant the permission to photograph the court proceedings or not.

Another important question related to the freedom of news gathering
is the journalists' right to keep secret their news sources. In one criminal case, a District Court demanded from a journalist to make a testimony who was the source of the news story he had written for his newspaper. The reporter refused to name the source. The Supreme Court handed down a judgment in 1952 that the right to refuse testimony on secrets obtained professionally as applied to doctors and lawyers cannot be applied to newspaper reporters, and gave precedence to the interest of securing a fair trial over the freedom of news gathering. Thus, the Supreme Court sustained the judgment of a lower court which had found the reporter guilty of the crime of refusal to testify (Supreme Court Judgment, August 6th, 1952).

On the other hand, in another similar civil case in 1980, the Supreme Court recognized in principle a journalist's right to refuse testimony on his news source after comparative balancing of its merits vis-a-vis the need to maintain fair trial. The court stated that it was important to weigh most scrupulously the necessity of giving precedence to the merits of keeping the news sources secret, and in effect had made a judgment, which attracted a lot of attention, in favor of protecting the freedom of news gathering (Supreme Court Judgement, March 6th, 1980).

4 National Secrets and the Mass Media

National secrets are always and in all countries a serious impediment to the freedom of news gathering and reporting by the mass media. In Japan, when the present Constitution came into force, all laws and
regulations related to protection of national secrets were abrogated. At the same time, all provisions on the crime of espionage in the criminal law were removed. As a result, all legal restrictions in general on reporting national secrets disappeared.

However, the Special Criminal Code and the Protection of Secrets pertaining to the Agreements between Japan and the United States of America on Mutual Defence Assistance came into being, which were enacted for the purpose of protecting secrets of the United States troops in Japan and cannot be regarded as laws to protect Japanese national secrets.

Only laws in Japan with the purpose of regulating the relationship between national secrets and the mass media are a series of laws relating to obligations of government officials, such as the Government Officials Law, Local Officials Law and Self-Defense Forces Law which contain provisions concerning leaking of secrets by public servants. Under these provisions it becomes a criminal offence if outsiders including journalists should conspire with, or instigate public servants, with obligations to protect secrets which learned in line of their duties, to leak secrets.

In one famous case in which a reporter had made use of a female official of the Ministry of Foreign Affairs to take out a copy of a secret cable from the Ministry, the Supreme Court ruled that the freedom of news gathering of mass media to gather information on national politics must be honored under the Constitution, and that even if a reporter had "instigated" a public servant to leak secrets, his act should be recognized as proper journalistic
function as long as the means taken conforms with socially approved pattern of behavior. However, in this particular case, the means taken by the reporter to "instigate" the ministry official was deemed as improper, and the reporter was found guilty (Supreme Court Judgment, May 31st, 1978).

The mass media in Japan expressed appreciation towards the above judgement as having shown understanding, in general terms, for the news gathering activities of the mass media in trying to obtain national secrets.

As for the definition of "national secrets", the Supreme Court ruled in 1977 that the "secrets" pertaining to the Government Officials Law were to be regarded as such as long as the content of the secret could be deemed as "substantial secrets" truly requiring protection, regardless of whether the government office concerned had designated the same as "secrets" or not. The ruling also specified that the judgment whether it was a substantial secret or not should be left in the hands of a court of law (Supreme Court Judgement, December 19th, 1977).

As I mentioned earlier, a National Secrets Protection Bill, aiming to prevent acts of espionage, obviously inspired by the Government and the ruling party, was presented to the autumn, 1985, Diet session, by members of the ruling party. The text of the bill, however, was couched in such ambiguous terms that it was feared that if the bill was enacted it could seriously threaten the freedom of news gathering and reporting by the mass media and harm the people's "right to know". The media launched, together with the public opinion, a strong campaign of criticism against the bill, and it was finally withdrawn. Although the said bill was withdrawn, attempts to
legislate similar laws are most likely to be repeated in future.

II. PERSONAL RIGHTS AND FREEDOM OF EXPRESSION

1. Libel and Mass Media

The Japanese Criminal Code stipulates in Article 230 that "a person who injures the reputation of another by publicly alleging facts, shall, regardless of whether such facts are true or false, be punished" for the crime of defamation of character. The Civil Code, as well, says that an action which injures reputation of another should regard as an unlawful act and is bound to make compensation for damage arising therefrom." (Article 710)

It is natural, in principle, that the protection under Article 21 of the Constitution cannot be applied to criminal defamation of character. But these two concepts are delicately interrelated in the sense that, if for instance, a person working for mass media is too concerned about defaming the character of another person, he may not be able to perform his news reporting activities satisfactorily. Because of that, the Criminal Code harmonizes the concepts of protecting the freedom of reporting with protection of an individual's character, by stipulating in Article 230 Clause 2 that even if the expression might be defamatory it does not constitute a crime of defamation of character, and that the person concerned is exempted from legal responsibilities, if, (1) the matter concerns public interest, (2) the expression is uttered with the objective of furthering the public interest, and, (3) a proof or proofs exist for the veracity of the fact. As for the condition (3) for exemption, the Supreme
Court has ruled that if this stipulation is interpreted too rigorously it becomes too difficult to harmonize the freedom of reporting with protection of the character of an individual, so that even if sufficient proofs do not exist for the veracity of the fact in question, as long as the expression was uttered in the belief that it was true and there are "sufficient reasons" for having made the mistake, the expression does not constitute defamation of character (Supreme Court Judgment, June 25, 1969).

Furthermore, the Criminal Code stipulates in Article 230, Clause 2, Item 2 that facts pertaining to crimes committed prior to prosecution should be regarded as facts pertaining to public interest, as stated in (1) above, and that in the case the other party is a public servant or a candidate in a Public Officers Election, in the interest of giving precedence to the freedom of reporting over the honor of a public figure, a statement or an expression do not constitute a crime of defamation of character as long as a proof (proofs) of veracity of the fact can be obtained.

Furthermore, a lower court passed a judgment that the so-called rule of "fair comment" as defined in Anglo-American body of law exempting legal responsibilities can be applied to statements of character defamation made by the media in "commentaries" instead of in news stories as long as the comments are fair and true (Tokyo District Court Judgement, June 7th, 1958). Such rules and precedents under the Criminal Code exempting legal responsibilities are also being referred to in passing judgements on character defamation suits in civil courts.

Thus, it can be said that in Japan, at least up to now, a legal system,
in which fairly liberal consideration is being given to the freedom of speech and press of the mass media, has been built up. However, reflecting the situation in Japan where consciousness for personal rights has been progressively heightened in the recent years, it is also true that critical comments as to how liberal the legal system is, are emerging.
2. Right of Privacy

The right of privacy is a comparatively new concept of personal rights which originated and developed in the United States. In Japan, a court ruling in 1964 recognized for the first time that the right of privacy is protected by law. The case was the outgrowth of the novel "Utage-no Ato" (After the Banquet) written by the late famous author Yukio Mishima who used former Foreign Minister Hachiro Arita as his model. Arita filed a civil suit against the author on a charge of invasion of privacy, and the Tokyo District Court ruled in his favor. The ruling defined the right of privacy as "the legal right and assurance that one's private life will not be wantonly opened to the public". The ruling further stated that in the case of an infringement of the right of privacy, the act of infringement must be suspended and the demand for compensation for mental distress should be recognized. (Tokyo District Court Judgment, September 28, 1964)

The right of privacy can be regarded as an important personal right in the modern society in which the possibility of infringement of a person's private life has increased greatly as a consequence of urbanization and extensive flow of information. However, the right of privacy is not protected by the Criminal Code but is regarded as an unlawful act under the Civil Code and the protection is limited to legal relief for the damage.
Regarding the right of privacy in relation to the mass media in Japan, there is seen an increase in the number of cases in which some sensation-peddling magazines and TV programs expose the personal secrets and private life of prominent entertainers, such as movie stars and singers. There are also cases of a private individual's photograph, taken without that person's knowledge and used without his or her permission, appearing in magazines and in advertisements. This infringement of the right of image is also one form of violation of the right of privacy.

The relationship between the right of privacy and the mass media's freedom of speech is expected to become more complex in the future as the information-orientation of society progresses.

3. Protection of Juveniles

Japan's Juvenile Law provides for special measures in the treatment of minors under 20 years of age involved in criminal incidents. This is to protect juveniles and to make their rehabilitation easier.

Article 61 of the Juvenile Law states that newspapers and other publications should not publish photographs or information, such as name, age, occupation, address, and physical description on the basis of which readers might be able to identify a juvenile indicted in a criminal case.
However, punishment for violating this article is not stipulated in the law. This is because of a delicate constitutional problem that would arise if the publication of a news report or a photograph were prohibited even if it were in connection with a juvenile who committed a crime. Therefore, it has been left an ethical stipulation without punishment for violation. However, respecting the spirit of Article 61, newspapers and the broadcast media exercise self-control in refraining from making public the name, etc. of juvenile criminals excepting atrocious crimes.

III "Obscenity" and Freedom of Expression

Article 175 of the Criminal Code prohibits the distribution, sale and display of "obscene" writing and picture, etc., and provides for punishment of violators. The definition of "obscenity", however, is diverse and, furthermore, ambiguous and vague. The Supreme Court handed down a ruling in 1957 in the case of the Japanese translation of D.H. Lawrence's "Lady Chatterley's Lover" which was charged as being pornographic. In handing down its judgement on the case, the Supreme Court defined "obscene" writing as one which (1) wantonly arouses and excites sexual desire, (2) offends an ordinary person's normal feeling of sexual shame,
and (3) runs counter to proper concepts of sexual morality. (Supreme Court Judgment, March 13, 1957).

Although subsequent court rulings on cases of "obscene" writing have been based on this definition, they tended to make more specific the standards for determining whether a work fell in the "obscene" category. In 1969, the Supreme Court adopted new standards for judging "obscenity" with respect to the case of the Japanese translation of Marquis de Sade's "Prosperity of Vice". The standards were (1) the proportion to the whole of the parts dealing with sexual description, (2) the relationship between the sex portrayal and the philosophy of the literary work in which such portrayal appears, (3) the extent to which the artistic and philosophical nature of the work as a whole mitigates the sexual stimulation. These standards attracted much attention and exercised a big influence on subsequent court rulings. (Supreme Court Judgment, October 15, 1969)

In recent years, along with the changes in the people's sense of value, society's attitude towards "obscenity" has been changing rapidly. Therefore, as a practical problem, sexual portrayal is approaching a state where there is no limit. The view is also strong that pornography should be liberated. On the other hand, strong views are also held by many people that pornography has a bad influence on juveniles and moral order.
IV Freedom and Restrictions of Broadcasting

1. Broadcast Law and Freedom of Broadcasting

Japan's Broadcast Law is not like the restrictive laws of many European nations which are based on the thinking that broadcasting is part of the state's communication domain. In Japan's case, the law is based on the need to secure the public character of broadcasting in view of the scarcity of radio frequencies which are regarded as the common property of the people. In this context, state regulation is recognized only within a specified framework. Therefore, neither unlimited nor excessive intervention and regulation are permitted. This is because broadcasting is included in the guarantee of freedom of speech and press stipulated in Article 21 of the Constitution. This is why Article 3 of the Broadcast Law declares the freedom of editing of broadcasting programs.

The broadcasting system in Japan consists of two pillars, public broadcasting by the Japan Broadcasting Corporation (NHK) and commercial broadcasting by private enterprises. In fact, it might be more accurate to say that it is made up of three pillars, by including the University of the Air which was inaugurated in April 1985. Although NHK is a special corporation established under the Broadcast Law, its programs are completely independent of the government. The compiling and broadcasting of its programs are under the above mentioned Article 3 of the Broadcast Law.
This, it goes without saying, is the same as in the case of commercial broadcasting.

State regulation of broadcast programs stipulated in the Broadcast Law at present are (1) obligation to broadcast corrections or erroneous reports broadcast earlier (Article 4), (2) working rules on editing of broadcast programs (Article 44 Paragraph 3), and (3) obligation to provide equal time to candidates for public office (Article 52). All these are generally considered as the minimum necessary in view of the public nature of broadcasting.

The working rules on editing of broadcast programs, or item (2) above, consist of the following four points: (1) respect for public security and morals, (2) political impartiality, (3) reporting without distortion, and (4) treatment of controversial issues from many different angles (the so-called fairness doctrine).

There are no provisions for punishment directly related to infringements of Article 44 Paragraph 3 concerning the working rules on editing of broadcast programs. For this reason, the working rules are regarded as an ethical regulation. However, under the Radio Wave Law, the Minister of Posts and Telecommunications is empowered to order the suspension of operations in the event of a violation of the Broadcast Law. Until now, there has been no case in which this power has been exercised. However, the fact that the
minister does have such a power leaves open a way for a constitutional question to arise in connection with the ambiguity of the wording of the working rules on editing of broadcast programs, particularly with respect to (1) and (3).

As for cable TV broadcasting, under the Cable Television Broadcast Law (established in 1973) it is treated as the same as wireless TV broadcasting, and almost the same regulations are applied on its broadcast programs.
2. Broadcast Program Consultative Committee

The Broadcast Law requires both NHK and commercial broadcasting stations to set up a broadcast program consultative committee which is made up of representatives of the audience, with intent of opening up the way for viewer/listener participation and thereby rationalizing broadcasting programs. The law makes it mandatory for each broadcasting station to consult this committee before deciding or changing its basic programming policy.

Some people, however, question the role of what may be called an audience's watchdog body in the broadcasting industry, saying that it is now reduced to a mere formalism, having little effect in achieving the intended purpose.

3. Restrictions on Ownership and Control of Broadcasting Stations

In the Japanese broadcasting industry, NHK is required by the Broadcast Law to spread broadcasts across the country, while commercial stations under private management are expected to provide broadcasting service to certain communities. When there exist two or more commercial stations in a single community, each is desired to operate mutually independent broadcasting stations to furnish multiple information to residents of that community. From this viewpoint, the Ministry of Posts and Telecommunications is carrying out rules it has developed restricting
the ownership and control of broadcasting stations in a community, to screen license applications filed by intending commercial broadcasters in compliance with these guidelines (of September 18, 1959).

The first thing of what these guidelines provide is that a person is permitted, as a general rule, to own and control a single broadcasting station only within a single community. However, the operation of stations giving both radio and television broadcasts is an exception to this rule. Specified judgment criteria for control include: (1) owning 10% or more of the total voting stocks, (2) serving one-fifth or more of the directorate concurrently, and (3) serving concurrently as a director having representative power or as a full-time director.

Secondly, the guidelines set it a disqualification for a person to combine or control radio, television and newspaper businesses within the community.

These deconcentration measures have been applied almost as they are, except for the limit on investments being lowered to 25% of the total amount of capital, when the Ministry of Post and Telecommunications decided the guidelines for screening license applications of the teletext broadcasters. A teletext or television text broadcasting station, one of the so-called new media, was opened in the autumn of 1985.

However, there are loud cries for a relaxation of
the policy aimed at decentralizing electronic media so that it could meet the needs of the multiple media age, the progress of which is being accelerated by the advent of new media.

V Other Laws and Regulations

In addition to the above, there are a number of laws and regulations now in operation that have direct or indirect relevance to mass media. Most of them provide for matters concerning mass media, such as management, distribution, and advertising.

Of these, the Law concerning Restrictions on the Transfer of Stocks of the Daily Newspaper Companies (1951) is worth special mention as it is directly related to the freedom of mass media. In 1950, the commercial law was amended to generally prohibit private businesses from restricting transfer their stocks. In keeping with this amendment, the said law was made to specify an exceptional rule that can limit the transfer of stocks to enable newspaper firms to engage in free discussion, keeping away from unfair control by outside capital. The law was partially revised in 1966.

VI Conclusion: Recent Problems

One of the noticeable trends in recent problems concern-
ing the law and freedom of mass media is that receivers - readers and viewers/listeners - are taking an increasingly critical view of what mass media are doing. Criticism is particularly harsh on an infringement on human rights, such as privacy, by some magazines and TV programs. An increasing number of academic people are discussing the freedom of the present-day press within the framework of a tripolar structure involving the government, mass media and people, rather than the conventional bipolar concept of the government versus mass media (as representatives of people).

Some of them take an affirmative stance toward the so-called right to access. This idea, however, is not yet supported by a large majority because making the right to access to mass media, including the right of reply, into law will have more adverse effects on the freedom of the press than otherwise.

The concept of people's "right to know" as a theoretical base for the freedom of the press is virtually coming to stay here in Japan. Based on this concept, there is a strong movement on foot to enact a Japanese version of the Freedom of Information Act, calling for the buildup of a procedural system that will allow people access to information being stored by the central and local governments. At present, however, moves of this sort are active chiefly
on the local government level, with nearly no progress being made at the central government level.

The end.