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The Public Welfare Standard and Freedom of Expression in Japan

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III. FUNDAMENTAL RIGHTS

THE PUBLIC WELFARE STANDARD AND FREEDOM OF EXPRESSION IN JAPAN

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INTRODUCTION

This article analyzes the constitutional right of free expression, exercised by political demonstrations, in the political context of contemporary Japan, where consensus among political parties on the constitutional framework itself is lacking. The Japanese people possess an unusually strong sense of cultural unity, and strong emphasis is placed on harmony and consensus in social relations. On the other hand, the excesses and strident tone of many mass demonstrations strikingly illustrate the absence of consensus between groups and the pervasive tendency toward "groupism" which distinguish the Japanese from the American political setting. Although the sociopolitical tensions may have become great in some sectors of the American constitutional system, the United States still enjoys a broadly based, deep and long-established consensus among its leaders of support for the constitution which has yet to develop in Japan. It would be less than humble for an American observer to pass judgment on the work of the Japanese Supreme Court on the assumption that the social and political context of constitutional law in Japan closely parallels that of the United States. The paradoxes of the sociopolitical setting within which demonstrations take place in Japan must be penetrated if the reader is to see the Supreme Court decisions delineating the relationship between the public welfare and the freedom of assembly in proper perspective.

Public political demonstrations are a pervasive aspect of the Japanese political style. The judicial decisions discussed in this article deal only with demonstrations which violate the "harmony between . . .

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various fundamental human rights" that the Supreme Court believes to be a necessary condition for constitutional order. Political demonstrations ranging from small groups of university students marching on the sidewalks of Tokyo to vast and vociferous throngs milling about local and national government buildings have been a more persistent and vital part of sociopolitical life in postwar Japan than in America. Some demonstrations are characterized by a mild holiday mood; many are intense, colorful but peaceful protests or presentations of demands. Only rarely has a life been lost during a demonstration, but the incidence of violence is rather high in demonstrations organized by small ultra-rightist groups,[1] by leftist labor organizations such as *Sōhyō,* (the General Council of Japan Labor Unions), and by politically frustrated minority parties such as the Japan Socialist Party[2] and the Japan Communist Party.[3] The leaders of such organizations tend towards an elitist dogmatism which manifests little practical respect for the Constitution or the preferences of the Japanese citizenry, which is one key reason for their perennial failure to rise to power through elections. The contention that public demonstrations "are the sole form of expressing political ideas open to the common people who ordinarily do not have access to the media and the press" is an oversimplification of Japan's political context.[4] While there is widespread public dissatisfaction with certain policies of the Liberal Democratic Party government, and while the Japanese tend to be more accustomed to and more tolerant of demonstrations (especially student demonstrations) than many Americans, the vast majority of Japanese support the present constitution and decry the coercive excesses of some leftist and rightist political demonstrations which flow from ideological rejection of the Constitution itself. Because demonstrations are so common a mode of political participation, and because the profound differences between the political forces in power and out of power are often expressed through public demonstrations, Supreme Court decisions setting forth the limits of freedom of assembly under local public safety ordinances and the public welfare clauses in the Constitution of Japan have been a delicate, central and controversial issue in Japanese constitutional law.

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[1] *See, e.g.,* I. MORRIS, NATIONALISM AND THE RIGHT WING IN JAPAN (1960).
[2] *See* A. COLE, G. TOTTEN, & C. UYEHARA, SOCIALIST PARTIES IN POSTWAR JAPAN (1966).
[3] *See* R. SCALAPINO, THE JAPANESE COMMUNIST MOVEMENT: 1920-1966 (1967).
[4] M. ITŌ *The Rule of Law: Constitutional Development,* in LAW IN JAPAN 205, 237 (A. Von Mehren ed. 1963) [hereinafter cited as VON MEHREN].

Chapter 3 (Articles 10 to 40) of the Constitution of Japan sets forth an impressive array of constitutional rights, freedoms, and ideals. Article 21 guarantees freedom of expression; Article 28 grants workers the right to act collectively; Article 16 deals with the right of petition.[5] But the principle that human rights shall "be the supreme consideration in legislation and in other governmental affairs" (Article 13) is qualified by the public welfare *(kōkyō no fukushi)* standard. In Articles 12, 13, 22, and 29, the rights and freedoms of the individual are explicitly counterbalanced by the requirement that these rights and freedoms be exercised for and within the limits of the public welfare.[6] Articles 22 and 29 are specific provisions, protecting the right to choose one's occupation and place of residence and safeguarding property rights. But Articles 12 and 13 are comprehensive. It is principally under Article 12 that the Supreme Court invokes the public welfare standard in delimiting the freedom of assembly. Neither Article indicates, nor has the Supreme Court held, that any right or freedom, such as the freedom of expression, should be put in a preferred position in relation to the public welfare.[7] Article 13 requires that the right of individuals "to life, liberty, and the pursuit of happiness . . . be

[5] *Article 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. . . .

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

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

All references to articles of the Constitution of Japan are taken from THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES (Ministry of Justice, 1958).

[6] In Article 22, the public welfare qualifies the freedoms to choose one's place of residence and one's occupation; Article 29 provides that "property rights shall be defined by law, in conformity with the public welfare." The expression "the public welfare," as used in these two articles, has not been authoritatively interpreted to mean anything basically different from what the expression means in Articles 12 and 13, but Japanese scholarly opinion is divided on this point, *see* L. Beer, The Doctrine of the Public Welfare and the Freedom of Assembly under the Constitution of Japan ch. 5 (unpublished thesis, Univ. Wash.).

Reflecting the spirit of the Constitution's provisions concerning the public welfare and especially relevant to Article 29, is Article 1 of the Civil Code:

1. All private rights shall conform to the public welfare.
2. The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust.
3. No abusing of rights is permissible.

Concerning the meaning of the public welfare in the Civil Code, see Wagatsuma *Kōkyō no fukushi shingisoku kenri-ranyō no sōgo no kankei* (The relationships among public welfare, good faith and abuse of rights), in 1 KENRI NO RANYŌ (Abuse of rights) 46 (1960).

[7] For example, the Supreme Court has held:

> It is clear from the provisions of Articles 12 and 13 of the Constitution that no freedom of expression may oppose the public welfare.

the supreme consideration" of government "to the extent that it does not interfere with the public welfare [*kōkyō no fukushi ni hanshinai kagiri*]." In effect, Articles 12 and 13 establish the public welfare as "the supreme consideration" of law and government.

In determining the constitutionality of limits placed on the freedom of assembly by local public safety ordinances, it therefore has been normal practice for the Japanese courts to make use of the public welfare standard.[8] In a 1950 decision, the Supreme Court spoke explicitly of the meaning of the public welfare: "the maintenance of order and respect for the fundamental human rights of the individual person—it is precisely these things which constitute the content of the public welfare."[9]

Sakanara v. Tokyo Express Railways, 5 Minshū 214, 217 (Sup. Ct., G.B., April 4, 1951).

> [Also the people] have a responsibility at all times to exercise them [i.e., the freedoms of expression] for the public welfare; in this respect they do not differ from other fundamental rights (see Article 12 of the Constitution).

Japan v. Ito, 14 Keishū 1243 (Sup. Ct., G.B., July 20, 1960).

[8] The freedom to assemble and to engage in collective activities is regulated in Japanese statutory law under *Dōrokōtsūhō* (Road traffic law) art. 7 (Law No. 105, 1960), *Densenbyō yobōhō* (Communicable disease prevention law) art. 19 (Law No. 36, 1897), *Hakaikatsudō bōshihō* (Subversive activities prevention law) arts. 5, 7 (Law No. 240, 1952), and *Kokumin kōen kanri kisoku* (National public park regulations) art. 4 (Ministry of Welfare Order No. 19 of 1949, in OFFICIAL GAZETTE (No. 938) 7, 1949), which was involved in the first Supreme Court decision dealing with the freedom of assembly (Sōhyō v. Minister of Welfare, 7 Minshū 1561 (Sup. Ct., G.B., Dec. 23, 1953).

For discussions of the problem of public safety ordinances and related issues, *see, e.g.*, Y. Okudaira, *Shūkai-kessha no jiyū* (Freedom of assembly), in 2 KEMPŌ, SŌGŌ HANREI KENKYŪ SŌSHO (Comprehensive case study series, constitutional law) 89 (1962); 1961 MUNICIPAL YEARBOOK 60; JURISUTO (No. 208) (1960) and (No. 377) (1967); HANREI JIHŌ (No. 435) (1966); K. Fujinaga, *Saikin no kōanjōrei ni kansuru saibanrei no mondaiten* (Problems of the recent judicial decisions concerning public safety ordinances), JURISUTO (No. 379) 63 (1967); O. Hitsui, *Demo no jitta to kisei* (The reality of demonstrations and their regulation), JURISUTO (No. 378) 114 (1967); HŌRITSU JIHŌ (Special issue on Kōanjōrei) (Oct., 1967).

[9] Japan v. Sugino, 4 Keishū 2012, 2014 (Sup. Ct., G. B., Oct. 11, 1950). The expression, "the public welfare," is the official English translation of the Japanese term *"kōkyō no fukushi"* in the Constitution of Japan. By itself, *"kō"* means "public." *"Kyō"* means "together with," and adds to *"kō"* the connotation that what is public is shared in by the members of the community. Hence, by itself, the term *"kōkyō"* means the public society or the community. The addition of the connective *"no,"* as in *"kōkyō no,"* gives *"kōkyō"* an adjectival meaning and denotes "public" or "communal." In *"fukushi," "fuku"* means good fortune and *"shi"* means happiness; thus, *"fukushi"* denotes "prosperity," "well-being," "welfare."

For a discussion of representative Japanese views on the meaning and use of the public welfare clauses in the Constitution, see I. SATŌ, 2 KEMPŌ KENKYŪ NYŪMON 25-117 (1966).

> Before the establishment of the Constitution of Japan, words like *"kōkyō no kōfuku"* [the public happiness] or *"kōkyō no fukuri"* [the public benefit, welfare or prosperity] were used, but instances of *"kōkyō no fukushi,"* at least in legal enactments, are not to be found. It is not at all clear to me to what degree *"fukushi"* differs from *"kōfuku"* and *"fukuri"* as legal phraseology.

Yamamoto, *Kōkyō no fukushi* (Public welfare), 8 NIHONKOKU KEMPŌ TAIKEI 16 (1965).

Considerable controversy has taken place in Japan over the theoretical meaning and the judicial interpretation of the public welfare standard.[10] Many Japanese intellectuals fear that regular official use of the public welfare criterion may result in reversion to the pre-1945 pattern of state supremacy and disregard of individual freedoms, when similar phrases were used to unite the populace behind state policies.[11] Others disagree. A public opinion poll taken during the investigations by the Commission on the Constitution indicated on the one hand opposition to a constitutional revision which would make the public welfare clauses more clearly restrictive of rights, and on the other hand a feeling that at present Japanese should place more emphasis on the public welfare than on individual rights.[12]

Almost all nations at least pay lip service to the "status symbol" of human rights.[13] But there are significant differences in what people mean by freedom in different cultural, political and academic worlds

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[10] Japanese constitutional scientists *(Kempō gakusha)* have divergent views on interpretive methodology, constitutional theory, case law, and the political implications of judicial use of the public welfare standard. In contrast to American practice, each of these (and other) aspects of constitutional law is dealt with separately and systematically by Japanese constitutional lawyers.

[11] The following comments of Professor Toshiyoshi Miyazawa bring into focus the controversial background of the public welfare as a constitutional standard:

> There can be no objection to translating such words as *salus publica, bonum commune,* and *Gemeinnutz* as *"kōkyō no fukushi"* [the Japanese words for the public welfare]; but these words have often been used in a more or less anti-individualist sense. Similarly, words used in Japan during the war, such as *"kōeki"* in *"kōeki yūsen"* [forget yourself and revere the community], are not significantly different from *"kōkyō no fukushi,"* considered simply as words. Perhaps some of that wartime coloring has stuck to the phrase *"kōkyō no fukushi."*
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> ....
>
> But the *"kōkyō no fukushi"* of the Constitution of Japan differs significantly from those wartime expressions in that its meaning is firmly grounded in individualism....

T. MIYAZAWA, NIHONKOKU KEMPŌ (Constitution of Japan) 205 (1963). Professor Miyazawa's use of the term "individualism" should be seen in the context of his state theory, in which great emphasis is placed upon the individual person's rights and freedoms, and the person is conceived of in a highly socialized, rather than in an individualistic, manner. The essential features of his view seem the most common and most influential in Japanese constitutional science. *Id.* at 202.

[12] See the extract from SOME MATERIALS OF PUBLIC OPINION CENSUS 3-4 (Information Section, Prime Minister's Office, January 1963), presented by Professor Isao Satō, then of the Commission on the Constitution, in a report to the Modern Japan Seminar, University of Washington, Seattle, 1963.

On the law, background, composition, task, accomplishments, and publications of the Commission on the Constitution, see two articles in 24 J. ASIAN STUDIES (No. 3) (1965): Ward, *The Commission on the Constitution and Prospects for Constitutional Change in Japan,* at 401-29; and Maki, *The Documents of Japan's Commission on the Constitution,* at 475-89. For commentary and discussion of the final report of the Commission, see HŌRITSU JIHŌ (No. 419) 363-74 (1964) and JURISUTO (No. 303) 10-26 (1964).

[13] *See, e.g.,* D. BAYLEY, PUBLIC LIBERTIES IN THE NEW STATES 22 (1964).

and in the ways they integrate freedom and right consciousness with law and public-welfare consciousness. These factors in turn affect judicial thought and behavior patterns.[14] What may appear to some outsiders to be oppressive infringement of rights and freedoms or excessive legal leniency in the enforcement of order may often be acceptable and legitimate in the eyes of the citizen judging the situation according to his community's standards of democratic behavior.[15] Before considering the Supreme Court's use of the public welfare standard in cases involving the freedom of assembly, the evolution of the right consciousness affecting these cases in Japan's "living constitution" will be analyzed.[16]

I. THE JAPANESE CONSTITUTIONAL SETTING

The Constitution of Japan opts for respect for the individual person rather than for individualism, as the latter term is understood in the United States. Traditionally the Japanese have stressed sociality rather than individualism. This remains true today. Opposition to the public good through over-assertion of individual rights is looked upon as reprehensible egotism. And it is unlikely that the development of an individualist right consciousness closely paralleling American right consciousness would contribute to the dialogical self-realization of the

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[14] Professor Takayanagi contrasts the legal approaches of Japanese and Philippine jurists:

> It is quite natural that those rules and principles [of common law] were interpreted by Japanese jurists according to the civilian methods in which they were experts. If one compares commentaries on the Philippine constitution with those on the new Japanese constitution, he will be surprised at the striking difference in the mode of exposition and interpretation, even in cases in which the constitutional text is the same. The former works reveal the mind of common-law lawyers, the latter that of jurists trained in the civil law.

K. Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in VON MEHREN 5, 37.

For similar results in the area of constitutional theory, one might compare the works of Toshiyoshi Miyazawa and Edward Corwin. Miyazawa develops a systematic state theory, whereas Corwin's constitutional theory flows out of legal history and case law and is not highly systematized. *See, e.g.*, T. MIYAZAWA, KEMPŌ (Constitution) (1962) *and* T. MIYAZAWA, NIHONKOKU KEMPŌ (Constitution of Japan) (1963); E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1959) *and* E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (1963).

[15] For example, a judgment of the Supreme Court regarding a specific exercise of the freedom of assembly would be based upon Japan's empirical standards of morality as modified by the commitment of the Constitution of Japan to the service of the persons affected as persons.

[16] *See* K. Takayanagi, *Kempō chōsakai ni okeru kempō rongi no shisōteki haikei* (The constitutional controversies in the Commission on Constitution and their ideological background), JURISUTO (No. 309) 36-46 (1964). Professor Takayanagi focuses on "the living constitution" as the dominant concept emerging from the work of the Commission on the Constitution.

individual Japanese.[17] The Japanese apparently are adapting to the requirements of an urban industrial society and a new constitutional system without jettisoning evolving traditional values necessary for the individual's sense of belonging, well-being and self-respect.[18] In a sense, the only fundamental change in the spectrum of Japanese socio-political ideals wrought by the Constitution of Japan has been the elevation of respect for the individual Japanese to the position of being the ultimate constitutional value, superceding prior dominant values such as service of the Emperor and adherence to a strict social hierarchy. But central to the further development of the rule of law is the perception by Japanese of a necessary relationship between the values of law and individual in such a way that this perception will mesh with, while influencing, Japanese community standards.

A. Traditional and Contemporary Japanese Right-Consciousness

The integration of old and new understandings of rights under the Constitution of Japan presents some difficult problems. In Tokugawa Japan, which still influences Japanese society, the fulfillment of one's duties according to one's place in the status hierarchy rather than the recognition of the rights of the individual person was a pervasive imperative.[19] This is not to say that individual right consciousness did

[17] One way of formulating the basic right which sums up all the social, political, and economic rights of the individual person is the freedom of self-realization. Because the individual in a constitutional democracy normally achieves his development through dialogue with other persons, *i.e.*, the dynamic exchange of ideas, information, judgments and feelings, the freedom which constitutes the operational guideline (the public welfare) of a constitutional democracy might be termed the "freedom of dialogical self-realization." For a similar formulation, see C. FRIEDRICH, TRANSCENDENT JUSTICE 100 (1964).

Interference with another's freedom while asserting one's rights is not only an infringement on his rights, but it is also an interference with one's own self-realization as a person since fulfillment, in this line of reasoning, is achieved by treating other persons with respect. Violation of others' rights is not compatible with such respect.

[18] *See* CHANGING JAPANESE ATTITUDES TOWARD MODERNIZATION 43-89 (M. Jansen ed. 1964), concerning Japanese responses to modernization.

[19] ... [T]he standards of correct conduct were elaborately implemented by a complex of practical rules, centering around the five Confucian relationships, which were quite suited to implement the controls of the Shogunate. These relationships—lord-man, father-son, husband-wife, older-younger brother, friend-friend—provided a fabric of detailed and fixed rules to handle most situations of daily life in such a way as to reduce volition, self-assertion, and choice—hence personal responsibility—to a minimum. As taught in the village and family circles, they engendered conformity and submissiveness at such a tender age that these characteristics became the outstanding features of the personality. They tended to negate individuality; even the superior was not an individual, but the most important part of the group. Yet the superiors could be held strictly accountable to the Shogunate for the conduct of their groups which was convenient for authoritarian control.

D. HENDERSON, CONCILIATION AND JAPANESE LAW 41 (1965).

not exist in Tokugawa society. It seems probable that in many villages, with their considerable body of local customary law, there was little gap between perceived rights and empirically protected rights.[20]

Whatever may have been the abuses of discretion by Tokugawa or local authorities, who combined administrative and judicial functions[21] in the name of *dōri* (natural justice, reason), every Japanese had some recognized duties, and in this Confucian system, these were understood to be in some degree reciprocal. Duties differed with one's status, but even persons in a privileged status had duties to other persons in their own status, to those above them, and to those below them. Though admittedly suits could not be instituted against Confucian authorities, so that enforceable rights vis-à-vis superiors were not characteristic of Tokugawa law,[22] irresponsibility was not an accepted principle of law and government.[23]

Where there is a mutuality of duties, there is often at least some implicit perception of individual rights and mutuality of rights following from an awareness of the duties of another person (or status) to oneself (or one's status). Thus, a very real right consciousness existed in Tokugawa Japan, however much the rights and duties were balanced in favor of the privileged status group.[24] To some extent this Tokugawa right consciousness seems to modify contemporary right consciousness and duty consciousness in Japan.

1. *Tokugawa Japan*

Traditional aspects of Japanese right consciousness place emphasis upon duty consciousness. In this context, one's self-realization is achieved by freely fulfilling one's duties to other persons. The duty consciousness of the individual Japanese includes a correlative awareness of the duties owed him by the persons (or groups) to whom he has duties. This mutual awareness is one of diffuse interpersonal responsibilities, rather than of narrowly defined and individualistically conceived reciprocal duties. In a sense it can be said that the basic right of the Japanese is the right not to autonomy, but to belong to a world of loyalties and duties which surrounds, serves, and protects

[20] *Id.* at 91.
[21] *Id.* at 58-59, 74.
[22] *Id.* at 60 and ch. V. *Cf.* 62 n.38: "The coverage of Shogunate law was quite shallow, both in terms of territory controlled directly and persons affected directly." Popular rights existed outside of the positive law and unchanged by the positive law.
[23] *Id.* at 87, 59 and n.35.
[24] *Id.* at 60, 87. The aim of rights litigation was didactic rather than remedial. *Id.* at 82.

the individual person. This world of obligations, for example to one's family and occupational group, demands much of the individual person, but assures the effective integration of his individuality with the group.

In contrast Western right consciousness, which also influences contemporary Japan, emphasizes the autonomy of the individual and the propriety of maximum self-assertion consonant with respect for the autonomy of other persons. The stress is upon individual rights, the right "to stand up for one's rights," the right not to belong or conform, because the maintenance of individuality, free from the encroachments of other persons or government, is considered essential for self-realization. The notion of duty is seen in a somewhat negative way. To do something because it is a duty is often thought to imply that the action is not done freely. Not to act freely is not to act authentically; the world of duties is carefully limited so that duty interferes as little as possible with individual fulfillment. The basic right then is the right to fulfillment through *individual* freedom, the right not to belong and not to assume duties rather than the right stressed in Japanese society to belong to a group and to become involved in a demanding but protective world of duties.

Also in contrast to the United States, disputes in Japan from the Tokugawa period to the present time have more often been settled by voluntary or compulsory conciliation than by adjudication. Perhaps "conciliable rights" (that is, rights effectively safeguarded in dispute situations by means of a conciliation process) might be a better term to use than justiciable rights when speaking of individual rights in the Tokugawa context.[25] The aim of conciliation is external interpersonal harmony, and ideally, an emotive atmosphere of harmony. By the involved presence of at least a third person (who is not a judge or arbitrator but traditionally a local status bearer), the dispute situation is generally transformed from a one-to-one to a triangular group relationship and the desired result becomes *group* harmony. Despite the involuntary nature of some conciliations, especially in the past, Japanese still very often consider conciliation a more desirable course of action than litigation or arbitration.[26] The tradition of compulsory

[25] *Id.*, especially chs. I and X. For the meanings of conciliation, see *id.* at 1-13. For references to conciliation practices in other societies, and for an assessment of the significance of conciliation in relation to the rule of law, see *id.* at 238-54.

[26] The Japanese people prefer the mediation method to the black-and-white judicial method in the resolution of disputes. Some account for this attitude by the deep influence of the Confucian teaching that "harmony is to be valued,"

conciliation may reinforce the contemporary use of powerful socio-psychological pressures to force an individual to conform to the group. Emphasis upon conformity with the group, to the point of psychological coercion, is perhaps the greatest single obstacle to the evolution of a balanced right consciousness in Japanese society. It is perhaps difficult for many Westerners to understand that in a free society like Japan psychological force without attendant physical coercion or governmental sanction can be a very significant obstacle to the development of democratic constitutionalism. But the stress in Japan is more upon "the social nexus" than upon the individual and his rights.[27] The origins of this emphasis lie in the nature of past Japanese society which strongly emphasized the familial relationship, duty, group loyalty, and group harmony.[28] This emphasis on social ties continues in the context of present Japanese life,[29] modified by ideas and practices imported from the West.

2. *Contemporary Japan*

Consciousness of duty, of individual freedom, of the public welfare, of conciliation, and of litigation all interact in contemporary Japanese

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that is to say, by the general feeling that the judicial method is not conducive to abiding harmony between the parties concerned. Others attribute the attitude to the feudal sentiment that it is morally wrong to trouble the mind of the lord about private matters. Still others say it is due to the Japanese national character, that the Japanese people are less assertive of their rights than Anglo-Saxons or Germans, being rather more like the Austrians.... A more prosaic explanation is that the utilization of the judicial apparatus is to be avoided because it is too expensive and time-consuming.... Each of these explanations may hold an element of truth, but no single explanation can account for the general trend.

Takayanagi, *supra* note 14, at 39. *See also* D. HENDERSON, *supra* note 19, at 173 (reasons why the Japanese supported conciliation); *Id.* at 195 (concerning the continuing Japanese dislike for arbitration); *Id.* at 56, 226-30, 191; T. Kawashima. The Notion of Law, Right, and Social Order in Japan (a paper delivered at the Fourth East-West Philosophers' Conference (no date)); T. Kawashima, *Dispute Resolution in Contemporary Japan*, in VON MEHREN 41-72.

[27] H. NAKAMURA, THE WAYS OF THINKING OF EASTERN PEOPLES 407 (1964).

[28] Japanese society... developed from small localized farming communities.... People living on rice inevitably have to settle permanently in one place. In such a society *families* continue on, generation after generation. Genealogies and kinships of families through long years become so well known by its members that the society as a whole takes on the appearance of a family. In such a society individuals are closely bound to each other and they form an exclusive social nexus. Here an individual who asserts himself will hurt the feelings of others and thereby do harm to himself. The Japanese learned to adjust themselves to this type of familial society and created forms of expression suitable to life in such a society.... The Japanese have learned to attach unduly heavy importance to their social ties in disregard of the isolated individual.

Id. at 413.

[29] Despite changes in the nature and direction of expression, loyalty of the individual to his group remains the most important attribute of the respected person. In its extreme form, loyalty means that the individual can be counted on

right consciousness. Both traditional and western-derived elements of right consciousness may have worked for and against the evolution of a balanced right consciousness which acknowledges the primacy of the individual rather than the group or the state. Some negative aspects of this interaction within Japanese right consciousness will be considered before examining positive aspects.

By overemphasizing the duty of the individual to conform to the group or to conciliate, traditional right consciousness does not manifest what most constitutionalists would consider adequate respect for the individual's right to express himself with psychological freedom and to associate or dissociate from any private group. At the same time this overemphasis on conformity leads the individual Japanese to identify his personal rights with his group's rights, in much the same manner that citizens of a newly independent nation initially tend to identify their personal rights with the international rights of their nation.[30]

As Western ideas of individualism and litigiousness have become embodied in the Japanese sociopolitical matrix, they have combined with this over-identification of the individual with the group to encourage an extreme idea of group rights. Relations between rival groups have never been particularly cordial in Japan; but the new constitutional emphasis upon the individual and his rights seems to have led as much to a heightened consciousness of the individual *group's* rights vis-à-vis the government and other groups, as to an enhanced appreciation of the rights of the individual.

The individualistic element of Japanese right consciousness thus

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to place group interests above his own. Group loyalty means not only identification with group goals but a willingness to co-operate with the other members and to respond to group consensus enthusiastically. If given an assignment by his group he must accept the responsibility. He should avoid any situation that might be embarrassing to a member of his group and always maintain an interest in the welfare, comfort, and sense of honor of the others.

E. VOGEL, JAPAN'S NEW MIDDLE CLASS 147 (1963).

[30] There is considerable discussion about Western concepts of individualism *(kojin-shugi)* but, ... individualism is opposed to loyalty.... [T]hey do not conceive of individualism as the responsibility of a person to be true to his own ideals. Individualism does not imply a sense of oughtness or responsibility, but rather it is seen as the right and privilege of an individual to look out for his own interests even against the interests of the group.... What democracy and individualism mean to the Mamachi resident is that subordinates now have the right to expect something from their superiors.... [But] it is still considered crude and selfish for a person to stand up for his rights. Few people in Mamachi consider it a higher morality to be concerned more with one's own benefit than with the welfare of one's group.

One of the characteristics of loyalty as a basic value is that no principle is more important than regard for the other members of one's own intimate group. Hence, there is no fully legitimate basis for standing against the group. Once group consensus is reached, one should abide by the decisions.

Id. at 147-48.

seems to have heightened a tendency toward "individualistic groupism" in Japanese society. Relations *between* groups have not generally been as deeply affected by the tendencies to conciliate and mutually conform as interpersonal relations *within* groups. The Japanese group tends to be cliquish, exclusive rather than open, emphasizing strong internal cohesion and loyalty. It is hard for the member to think and act as an independent person because of this stress upon unity. Those outside the group are not clearly recognized as having equal rights; the rights of the group are limited only by the power of the group, untempered by the very strong social awareness which Japanese display within their groups. There are numerous cases of individualistic groupism which point to the difficulty of integrating an imported individualist emphasis with traditional Japanese right consciousness.[31] Seemingly, an individualistic understanding of rights tends to strengthen the ideological oppositions and the tendency to cliquishness in Japan: in labor, government, politics, and other areas of sociopolitical life. That rights are not absolute in the legal order is clear; but the individualistic theory of rights seems to have heightened problems when separated from the restraining and rationalizing power of its cultural and political matrix in the West and let loose along with such dogmatic theories as Marxism in a nation like Japan with a significantly different historic experience and political culture.[32]

The way in which the Japanese have integrated traditional right consciousness with individualistic right consciousness (and in this case Marxism) is exemplified by the practice of *seisan kanri* (production control). *Seisan kanri* "means the seizure of a place of business by those who work there, the expulsion of the management, and the continuing conduct of the business by its captors."[33] This practice has

[31] The well-known factionalism of Japanese political parties is but one aspect of the pervasive pattern of groupism. Though the ties between factions within a Japanese political party are not necessarily warm or stable, the party does form a group context within which factions co-exist. More appropriate as an example of the groupism under discussion is the absence of ties and the radical opposition between the Japan Socialist Party and the Liberal Democratic Party. *See* R. SCALAPINO & J. MASUMI, PARTIES AND POLITICS IN CONTEMPORARY JAPAN (1962); and COLE, TOTTEN & UYEHARA, *supra* note 2.

[32] The judgment that Japanese should develop "the aggressive individualism required for effective citizenship in a democracy" exemplifies a Western-oriented emphasis which does not seem to take sufficient account of the sociopolitical attitudes of Japanese. H. QUIGLEY & J. TURNER, THE NEW JAPAN 175 (1956). For a recent discussion of Japanese intellectuals' search for an undertanding of Japanese democracy, see S. Matsumoto, *Introduction,* J. SOC. & POL. IDEAS IN JAPAN 2-19 (1966).

[33] *See* K. Ishikawa, *The Regulation of the Employer-Employee Relationship: Japanese Labor Relations Law,* in VON MEHREN 439, 448-64. *See also* Naritomi,

been declared unconstitutional by the Supreme Court of Japan on the grounds that it violates property rights and the "harmony between these various general fundamental human rights and the rights of labor," and that "the appropriate limits of the right to dispute are at a place where this harmony is not disturbed."[34] The harmony of fundamental rights referred to by the Supreme Court exemplifies the Court's basic response to the individualistic assertion of rights and provides an insight into the Japanese judges' manner of conceptualizing and expressing the public welfare standard according to Japanese values. There is a difference in emphasis between the notion of balancing the rights of individuals, which seems to express well the Western idea of the judicial process, and the Japanese notion of harmonizing the rights of all.[35]

Relations of individual Japanese with their government typify their present attitude and approach to sociopolitical problems and rights, while indicating their perception of government attitudes toward the citizenry:[36]

> Although an individual person almost never objects directly to the government about the way he is treated in a government office, groups of citizens occasionally present complaints collectively. For example, some Mamachi residents went in large numbers to complain about the sewer system in their area. Other groups protest plans for roads, noise from factories, or heavy traffic. But even large delegations do not expect to receive much consideration unless they are introduced by a person of power or position in that bureau.

Though a century has passed since the introduction of the word *kenri* (rights) into the Japanese legal vocabulary, the notion of individual rights still remains fundamentally new to the Japanese political community under the Constitution of Japan.[37] The present sta-

From the Rule of Force to the Rule of Law in Labor-Management Relations, 15 BUS. LAW 607 (1960).

[34] VON MEHREN, at 450 (translation of Japan v. Okada, 4 Keishū 2257, 2260-61 (Sup. Ct., G.B., Nov. 15, 1950)).

[35] Other illustrations of group right consciousness in Japan and judicial response to assertions of right are presented in the discussion of Japanese constitutional law regarding collective activities and the public welfare. *See* the Supreme Court cases presented in J. MAKI, COURT AND CONSTITUTION IN JAPAN (1964) [hereinafter cited as MAKI], which indicate the relevance of other elements in Japanese sociopolitical morality for an understanding of Japanese constitutional law.

[36] E. VOGEL, *supra* note 29, at 97-99; *see also id.*, at 99 n.13.

[37] In traditional Japan there was no word for rights, as the word is understood today, though as we have noted there were limited conciliable rights in Tokugawa. The choice of *kenri* to refer to rights was not a particularly felicitous one, because in all previous uses of the character *ken* in compounds, *ken* implied might or power. The use of this term may have reinforced an individualistic interpretation of

tus of right consciousness in Japan was aptly summarized by Mr. S. Suzuki, Director of the Human Rights Protection Bureau of Japan in 1960, in his testimony before Japan's Commission on the Constitution:[38]

> [R]espect for fundamental human rights is as a concept widely diffused among the nation, as are the words "human rights" and "respect for human rights." Respect for human rights, however, cannot yet be said to have become a part of people. I am afraid that among the intelligentsia and the classes which provide leaders there is a tendency for violation of human rights and for human rights problems to be used as a stick with which to beat one's adversary or the organization to which he belongs. One example of this is, as everyone knows, where in labour disputes, etc., one union is fighting another. In such circumstances, whereas one's adversary's violations of human rights are listed with neurotic precision, one is almost indifferent to the violation of human rights by one's own union. There is not yet a wide feeling that protection of human rights means that while protecting one's own rights one takes care not to transgress another's. On the other hand, there are many people who are completely ignorant regarding human rights. We have a mixture of undue sensitivity to human rights on the one hand and complete indifference on the other.

Whatever emerges as the relatively permanent way in which the Japanese community integrates the new awareness of the individual with threads of traditional thought and practice, the pattern will not become settled in a few years. Perhaps the paradox of the conciliatory tendency and the individualistic tendency is the key to understanding the way a balanced Japanese right consciousness may grow.

B. The Democratic Expansion of Duty Consciousness

The following analysis is an attempt to explicate the probable direction of change in Japanese right consciousness, assuming that Japan remains a constitutional democracy. This analysis is not a proposal for coercive social engineering, but it does assume that democratic social change is importantly structured by the evolving content of a nation's cultural, educational, political and legal systems.

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rights in the past century, so as to heighten the contradiction between traditional right consciousness and the Western-derived notion of individual rights, which implied more than a struggle for power. Today, *ken* is found in *jiyūken* (freedom-rights) and *jinken* (human rights). For a history of *kenri*, see C. BLACKER, THE JAPANESE ENLIGHTENMENT 105 (1964); and Kawashima, *supra* note 26, The Notion of Law, Right, and Social Order in Japan.

[38] Translated by D. Sissons, *Human Rights under the Japanese Constitution*, in PAPERS ON MODERN JAPAN 68-69 (1965).

If emphasis is laid, not so much on the individualistic assertion of rights or on conformity with the group, but rather on the development of dialogical sensitivity to the requirements of respectful treatment of the individual *within* the framework of the existing system of reciprocal duties, then perhaps the road to balanced right consciousness can be seen. It is a heightened respect for the individual that is needed, not an abrogation of deep involvement with other persons in the context of the Japanese social world.

Change will depend on the development of attitudes towards other persons by individuals and on the legitimizing of these attitudes by legal, political and social institutions. It is through "the psychological transmission belts" of individuals that a deepened responsiveness to the value of the individual person may be entering Japan.[39]

One avenue to deepening responsiveness without doing violence to operative traditional values is to expand duty consciousness, so that the individual feels a greater sense of obligation to every Japanese, and not just a sense of duty to the narrow circle of one's family, friends and group affiliations. The expansion of duty consciousness in this sense involves an expansion of the concern for other persons necessary for the public welfare of a free political community and is a basis for the legitimate exercise of freedom of expression. In order for this expansion of duty consciousness to be possible, it seems that the system of diffuse reciprocal duties would have to become less demanding. An interpersonal relationship is defined by Japanese society in such a way that potentially great demands in time, energy and resources are made upon the persons who enter into it.

The expansion of duty consciousness to all persons by lessening the implied demands made by an established interpersonal relationship would modify and loosen group bonds, without abrogating the strong Japanese sense of social responsibility.[40] Loosening the person's bonds to the group would open the door for more widely diffused operation of the tendencies to harmony and conciliation in interpersonal and intergroup relations. The rights and needs of other persons in the political community would be taken into account more than at present when asserting the demands of one's own group. An operative stress upon the dignity and rights of the individual as such may well have

[39] D. HENDERSON, *supra* note 19, at 51.

[40] *See* J. LEWIS, LEADERSHIP IN COMMUNIST CHINA (1963), concerning mainland Chinese attempts to modify traditional *li-mao* relations in line with party ideology. A comparative analysis of Chinese and Japanese societal trends and methods of diffusing new sociopolitical values would be useful.

the effect in time of de-emphasizing loyalty to something other than the individual, such as the group.

The group, rather than the atomistic individual, will remain the most important unity in Japan along with the family; but the atmosphere of interpersonal relations within the group may change, as each constituent of the group comes to be viewed as a social whole, rather than as a part of a social whole. By virtue of being a social whole, the individual is an entity more open to dialogue with other persons outside the group than if he is conceived of as a submerged part of the whole.

A group composed of social wholes is less likely to look upon itself as the ultimate point of reference and the final judge of what is reasonable in its relations with the political community. The inner dynamism of a closed group may militate against recognition and acceptance of the legitimacy of standards established by and applicable to the political community as a whole. This is obviously a problem for interest groups in any political community, but the danger of overidentifying the group's position with the reasonable position for the whole political community seems particularly acute when, as in Japan, decisions and opinions are formed in a manner which promotes strong group unanimity and when a consensus on the Constitution itself is lacking among political leaders.

The law, government and education system operative under the Constitution are gradually changing Japan. Conciliation consciousness and democratic right consciousness may become operative in Japanese intergroup and group-government relations in proportion to the growth in the individual's awareness of each member of the group as a social whole.

II. FREEDOM OF ASSEMBLY AND THE PUBLIC WELFARE: THE JAPANESE SUPREME COURT

The cases dealt with below exemplify the most politically dramatic aspect of groupism in Japan—the tendency of some political groups to exercise their freedom to engage in demonstrations with little thought of their responsibility to law, public order and the rights of other citizens. The violent and intolerant tone of some demonstrations goes beyond the limits of what would be considered peaceful exercise of a constitutional right in any democracy.[41] Often the leaders of such

[41] It is worthy of note that when violence does occur, very often more casualties are suffered by the police than by the demonstrators.

demonstrations seem to view *any* type of regulation, whether under a permit system or under a notification system, as an "unconstitutional" infringement of the freedom of expression guaranteed by Article 21 of the Constitution. In only two cases[42] was any attempt made to comply with the ordinances, although the 1966 Tokyo ordinance case[43] also might be included in this category since no possibility of obtaining a permit existed. This is consistent with the rejection by some of the present constitutional order. On the other hand, Justice Tarumi's dissent in *Tokyo*[44] notes that the state of Japanese right consciousness and legal perception is such that, given the Tokyo ordinance provision that "demonstrations in any place whatsoever" must be licensed, law-abiding Japanese have gone so far as to apply for permits for the following: "a social held by the film club of an insurance company . . .; a film preview in a temple compound sponsored by a Tokyo adult education society; the reunion of Class IIId of a high school held in a city office building; a lecture on nutrition . . . at a private home; a film evening of a social club sponsored by an individual and held in his garden."[45]

Further complicating the American's problem of understanding the Supreme Court's decisions is the legal context within which the Court operates. The Japanese judges' decisions reflect an intermingling of Japanese, Anglo-American, and continental European legalism as well as the judges' assessment of contemporary Japanese political culture. One aspect of judicial opinion-making is particularly noteworthy—the explicit use of abstract theory in delineating the meaning of the public welfare in relation to the freedom of assembly in cases where no application for a demonstration permit has been made and therefore no denial of permission is at the base of the controversy.[46] The Court might simply have refused to hear such cases on the grounds of lack of actionable controversy. It would be consistent with the notion of case and controversy for the Court to have held that since no application for a permit was made, no denial of a permit was present as a basis in controversy for challenging the constitutionality of the ordinance on its face. It would seem that when the Supreme Court decides

[42] These two cases involved the ordinances of Tokuyama and Saitama Prefectures; *see* notes 73, 76 *infra*, and text accompanying.
[43] *See* note 86 *infra*, and text following.
[44] *See* notes 77, 79 *infra*, and text accompanying.
[45] MAKI, at 98.
[46] It should also be noted that the Supreme Court of Japan has the dual power of deciding constitutional questions and authoritatively interpreting statutes and local ordinances.

to deal with a case in which appellants have made no application for a permit, the burden of proving the permit system unconstitutional because a permit *could have been denied* should rest on the shoulders of the appellants.[47]

Since most of the cases discussed involved challenges to the constitutionality of ordinances on their faces after clear failure of appellants to comply with ordinance requirements, theory was used by the Supreme Court not to pass judgment on administrative applications of ordinances, but to determine the reasonableness of the general intent of an ordinance's provisions taken as a whole. It is of critical importance for an understanding of Supreme Court decisions to recognize that since the Court places ultimate emphasis on the *intent* of an ordinance as a whole, the Court may not be deeply concerned about what it considers slight differences in ordinance or judicial phraseology which lend greater or less specificity to standards. The Court finds the intent of an ordinance constitutional when it is compatible with the Court's theory of the public welfare. While the public welfare concept is also important in the constitutional theory and practice of the United States, it is not used in precisely this manner by American judges.[48] But the Japanese Court's understanding of the public welfare does not involve a restrictive view of the freedom of assembly, nor have its decisions resulted in governmental refusal to allow the pattern of frequent demonstrations to continue. On the contrary, the protection of individual rights is seen as the core of the public welfare; as a result, the exercise of the freedom to assemble is seen as viable and authentic only when it is in harmony with the freedom and interests of the largest relevant group, the community of Japanese citizens. What the Court rejects is an individualistic notion of freedom of assembly which fails to incorporate an adequate sense of responsibility to the rights of the general public, to public order, and to the constitutional system of Japan. The Supreme Court's idea of the public welfare stresses the

[47] *See* note 99 *infra* and accompanying text.

[48] The *importance* of "the public interest" [and the public welfare] is obvious to anyone who reads contemporary law, economics, or political theory. The phrase is used to justify regulatory activities that range from local zoning ordinances and gas rate controls to interferences with scientific publication and "national emergency strikes." "The public interest" is regarded as a guide in determining the amount and kind of public expenditures, the allocation of television channels and airline routes, and a myriad of governmental services. It is assumed to be a meaningful phrase both in political controversy and in scholarly treatises. W. LEYS & C. PERRY, PHILOSOPHY ANE THE PUBLIC INTEREST 5 (1959). Among recent discussions see THE PUBLIC INTEREST (C. Friedrich ed. 1962), and R. FLATHMAN, THE PUBLIC INTEREST (1966).

dialogical nature of freedom in a democratic political community. In the Court's view, the public welfare is achieved by free exchange of ideas and political pressures between individuals and groups in an atmosphere of at least some minimal mutual tolerance and mutual support of the law and constitution, rather than by group assertions of power which involve coercive interference with others' freedom based on a rejection of mutual tolerance, democratic processes and the Constitution of Japan.

Between 1947 and 1967 the Supreme Court of Japan handed down a series of decisions which have authoritatively interpreted the law applicable to freedom of assembly in contemporary Japan. All but the first decision in 1953 involved local public safety ordinances *(kōan jōrei)*.[49]

Many jurists questioned both the strict standards included in some ordinances and the early lower court decisions which generally upheld the constitutionality of public safety ordinances and emphasized a flexible public welfare standard, the propriety of permit systems, the need for public order, and the dangers of mob psychology. This approach led to accusations that the lower courts were hostile toward collective activities (*shūdan kōdō*, a term used by the Supreme Court to designate various types of public gatherings). Generally, as in later Supreme Court cases, the defendants had not complied with ordinance requirements and sought relief by attacking the constitutionality of the ordinances on their faces.[50]

In two pivotal decisions of 1954[51] and 1960[52] concerning the public safety ordinances of Niigata Prefecture and Tokyo respectively, the

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[49] In the initial stage of the occupation the Japanese government was required by the occupation authorities to repeal existing legislation that restricted freedom of expression and association. After the middle of 1948, however, at the suggestion of the American military government detachments, Japanese prefectural and municipal assemblies enacted local ordinances imposing on persons proposing to hold assemblies or demonstrations the duty to notify the local public safety commission, and empowering the latter, in certain circumstances [and localities], to refuse permission.

MAKI, at 84. Concerning the origin of local public safety ordinances during the occupation, see also K. STEINER, LOCAL GOVERNMENT IN JAPAN 128-29 (1965):

> At the time of the Peace Treaty, 130 public peace ordinances were in force in Japan.... At the time of the Supreme Court decisions the number of public peace ordinances had decreased to 67, primarily because many municipal ordinances had been abolished after the transfer of the police function from the municipalities to the prefectures.

[50] Ebashi, *Kōan jōrei hanketsu no dōkō*, JURISUTO (No. 377) 66 (1967).

[51] Japan v. Yamaoka, 8 Keishū 1886 (Sup. Ct., G.B., Nov. 24, 1954) [hereinafter cited *Niigata*].

[52] Japan v. Itō, 14 Keishū 1243 (Sup. Ct., G.B., July 20, 1960) [hereinafter cited *Tokyo*].

Supreme Court attempted to clarify the principles of interpretation appropriate to cases involving the freedom of assembly. As in all of its ordinance decisions, the Supreme Court upheld the prima facie constitutionality of the ordinances in question. Both decisions stirred debate over the application of the judicial principles established. Indeed, a basic tension has been perceived by many scholars between the principles propounded in *Niigata* and those established in *Tokyo;* the latter decision on first reading appears to place more stress on the general intent of the ordinance to grant permits as the decisive consideration in determining constitutionality.

Over the years both the courts and scholarly commentators have debated the problems inherent in the distinction between a notification system and a licensing (permit) system; the establishment of generally acceptable standards, by ordinance and by judicial decision, concerning the time, place, manner, and regulation of demonstrations; the imposition of conditions on the conduct of demonstrations by public safety commissions operating under both permit and notification systems; the absence of redress when a permit is refused through an abuse of administrative discretion and the day of the proposed demonstration arrives; the lack of speedy trial; the proper legal tool (*e.g.*, local ordinances, national law, or traffic regulations) for regulating collective activities; and the appropriate limits of on-the-spot police discretion in dealing with demonstrations.

Underlying the different positions taken on such matters as permit systems and standards are the sociopolitical factors discussed earlier and opposing perceptions of the relative emphasis to be placed on freedom of assembly and on respect for public order, as well as conflicting views of interpretive methodology.[53] Those who oppose the Supreme Court's position attribute to the Court a disproportionate fear of crowd tendencies toward violence and disorder and a "reverse course" policy utilizing the public welfare and other vague standards to favor administrative power over the freedom of assembly. The Supreme Court has countered, through the decisions discussed below, by stressing the duty of local public safety commissions to grant permits with a minimum of regulation unless there is clear danger to the public welfare, by giving greater weight to the general intent of a permit ordinance to grant permission for public gatherings than to any

[53] For the background of disputes on interpretive methodology, see Takayanagi, *The Conceptual Background of the Constitutional Revision Debate in the Constitution Investigation Commission*, in 1 LAW IN JAPAN 1-24 (1967).

enumeration of "reasonable and clear criteria" regarding "specific places or procedures," and by minimizing the distinction between permit systems and notification systems.

The earliest Supreme Court decision dealing with the freedom of assembly, the "May Day Decision" of 1953,[54] is most notable for its clear refusal to recognize unreviewable administrative discretion to regulate collective activities, and for its failure to indicate a road to redress when an abuse of administrative discretion occurs. The General Council of Japan Labor Unions *(Sōhyō)* was refused permission to hold a mass demonstration on the Imperial Palace Plaza in Tokyo on May 1, 1952. The Minister of Welfare contended that this denial of permission was not reviewable in the courts, while *Sōhyō* maintained the denial was an unconstitutional abridgement of freedom of assembly.

The Supreme Court upheld the Tokyo High Court decision of November 15, 1952,[55] which noted that since the day of the proposed demonstration had passed, the suit presented "no legal interest requiring adjudication." In lengthy *obiter dicta* the Supreme Court made it clear that though the Minister had not abused his power in this case, he did not have the unreviewable power claimed. Neither in this decision nor in the subsequent ordinance decisions has the Court indicated how a group can obtain relief when an abuse of administrative discretion results in a denial of permission and the day of the proposed public gathering arrives.[56]

The Niigata ordinance decision of 1954,[57] which presented the Supreme Court's first full discussion of problems attendant to legal regu-

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[54] Sōhyō v. Minister of Welfare, 7 Minshū 1561 (Sup. Ct., G.B., Dec. 23, 1953). The judges participating in the Court action were Justices Tanaka, Shimoyama, Inouye, Kuriyama, Mano, Kotani, Shima, Saito, Fujita, Iwamatsu, Kawamura, Tanimura, Kobayashi, Motomura, and Iriye. For a discussion of this case in English, see K. Hashimoto, *The Rule of Law: Some Aspects of Judicial Review of Administrative Action*, in VON MEHREN 259.

[55] Minister of Welfare v. Sōhyō, 3 Gyōsei jiken saibanreishū [hereinafter cited Gyōsai reishū] 2366 (Tokyo High Ct., Nov. 15, 1952).

[56] The 1960 *Tokyo* decision does not recognize this remedial difficulty as a basis for holding an ordinance unconstitutional, which was one reason for Justice Tarumi's dissent. Permit system ordinances, such as those involved in the *Niigata* and *Tokyo* cases, require that a detailed report stating the reasons for refusal be submitted to the local assembly in the event of a permit denial. The Tokyo District Court injunction of June 9, 1967, against the Tokyo Public Safety Commission provided a remedy for administrative imposition of conditions on a demonstration which might also have relevance to permit denial. Tanaka, *Gyōsei shobun no shikkō-teishi to naikaku sōridaijin no igi*, JURISUTO (No. 377) 55 (1967); and Fujinaga, *supra* note 8.

[57] Yamaoka v. Japan, 8 Keishū 1866 (Sup. Ct., G.B., Nov. 24, 1954). For the text of the Niigata ordinance, see MAKI, 71-73 (the provision in question is art. 4(3)).

lation of demonstrations, involved the arrest on April 7, 1949, of:[58]

> [A]bout thirty Koreans . . . in Takada, Niigata Prefecture, on a charge of illicit brewing. The next day a crowd of several hundred people gathered before the police station and demanded their release. The two accused . . . led the demonstration, which included speeches against the government, the singing of communist and Korean patriotic songs, and some scuffling.

The ordinance provided that no demonstration or parade be held without a permit in a place to which the public has free access. The Supreme Court, in upholding a lower court conviction, addressed itself principally to the appellant's contention that the ordinance established an unconstitutional prior restraint on the freedom of assembly.[59] Much debate surrounding Supreme Court doctrine since 1954 has revolved around the emphasis and interpretation to be put upon the Court's statement of principles in this case:[60]

> It is against the intent of the Constitution and impermissible to place prior restraints upon parades, processions, and mass public demonstrations . . . under an ordinance that provides for a general system of licensing rather than a system of simple notification, because the people have the basic freedom to demonstrate unless the purpose and manner of the demonstration are improper and against the public welfare.

The Court qualified this statement by maintaining that "regulations established by ordinance that might prohibit such activities . . . or require a license or notification" are constitutional as long as they deal with "the place and procedure under reasonable and clear criteria in order to maintain public order and to protect the public welfare."[61] In the context of the Court's reasoning, an unconstitutional "general system of licensing" is one which intends "to control all such activities" or which has "the effect of restricting such activities in general" and which gives the public safety commission an "area of discretion" that is "very broad."[62] The Court did not see the words "license" (permit) or "notification" as the crux of the problem, but rather emphasized

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[58] MAKI, at 70.

[59] The other arguments for appeal dismissed by the court were that the court of first instance had not established the date of the legal promulgation of the ordinance, with possible effect on the court's decision, and that one of the defendants was not subject to the Niigata ordinance because he was a resident of Nagano Prefecture and not of Niigata Prefecture. MAKI, 77-78 and 8 Keishū at 1866, 1875.

[60] MAKI, at 70, 75. *See, e.g.*, Ebashi, *supra*, note 50.

[61] MAKI, at 70.

[62] *Id.* at 75-76.

the intent of the ordinance as an "organic whole."[63] The impetus behind judgments holding this and other ordinances constitutional is apparently that mass public gatherings "must be licensed, unless there is a specific reason for not doing so"; that is, licenses must be granted unless "it is foreseen that they may involve a clear and present danger to public safety."[64]

In his dissenting opinion Justice Hachirō Fujita agreed with the majority's initial statement of principle but maintained that the Niigata ordinance was an unconstitutional licensing system and thus "a general prohibition *(ippanteki kinshi)* of such activity."[65] The supplementary opinion of Justices Inouye and Iwamatsu minimized the importance of the distinction between a permit system and a notification system more explicitly than did the Court, noting particularly the provision in the Niigata ordinance allowing a demonstration if, after application for a permit, the Public Safety Commission gave no response by twenty-four hours prior to the proposed activity (article 4, paragraph 4).[66] In his dissent from the Supreme Court's later decision in *Tokyo,* Justice Fujita harkened back to this provision as the reason why the Court judged the "organic whole" of the Niigata ordinance to be the equivalent of a notification system and therefore constitutional, despite its reservations concerning the generality of other provisions of the Niigata ordinance. Because the Tokyo ordinance contained no such provision, Justice Fujita concluded that for consistency's sake the Supreme Court should have held the Tokyo ordinance unconstitutional.[67]

The *Niigata* Court did note that article 1, paragraph 1[68] "has quite general aspects" and that article 4, paragraph 1 "especially, sets forth an extremely abstract standard:" a permit must be granted when "the parade or demonstration concerned involves no threat to public order." The ordinance would not be "in accord with the spirit of the Constitution" if that were the only standard provided by the ordinance, and consequently "it may be desirable to revise the ordinance into clearer

[63] *Id.* at 77.
[64] *Id.* at 75-76.
[65] 8 Keishū at 1878; MAKI, 79-81.
[66] MAKI, 81-82.
[67] *Id.* at 95.
[68] *Id.* at 71, or quoted in 8 Keishū at 1867. Article 1(1) reads as follows:
Parades, processions, and mass demonstrations (anything that involves marching in, or the exclusive use of, a place that the public can freely traverse on foot or by vehicle such as a road or a park...) shall not be conducted without obtaining a license from the public safety commission which exercises jurisdiction over the area concerned.

and more concrete terms."[69] However, the *Niigata* Court nowhere clearly links the constitutionality of the "organic whole" with the provision stressed by the supplementary opinion of Justices Inouye and Iwamatsu and by Justice Fujita's dissent in *Tokyo* or with any other provision stating specific "reasonable and clear criteria."

Dicta in *Niigata* appeared to place considerable stress on clear criteria; but, as in the 1960 *Tokyo* decision, the Court provides only vague standards with an ultimate reliance upon the Justices' collective understanding of the public welfare. The Court seems to prefer the ambiguous flexibility of a public welfare theory which looks primarily for the general intent of the whole ordinance to grant permits; further specificity is considered desirable, but not really necessary.

While most lower court decisions between 1954 and 1960 held ordinances constitutional, disagreement emerged in some cases concerning which elements of the *Niigata* decision—the statement of principles or the Court's flexible application of these criteria—should be followed. The ordinance decisions of the Supreme Court between *Niigata* and *Tokyo* tend to corroborate the basic consistency of the *Tokyo* holding with *Niigata* doctrine.[70]

In a 1955 case involving the Saga prefectural ordinance,[71] as in the *Niigata* and *Tokyo* cases, the appellants made no attempt to comply

[69] MAKI, at 76. Professor Nathanson notes that *Tokyo* "recognized more explicitly than the opinion in the *Niigata* case that this provision presented a serious constitutional problem," but nowhere does *Tokyo* seem to speak as strongly about questionable constitutionality as does *Niigata* in the quoted excerpts above. *See* Nathanson, *Constitutional Protection of Freedom of Assembly in Japan and the United States*, 12 INT'L & COMP. L.Q. 1033 (1962).

[70] *See, e.g.*, Ebashi, *supra* note 50, at 68-70. Two of the three Supreme Court ordinance decisions in 1955 were handed down by Petty Benches, which are required by law to follow prior Grand Bench judgments of constitutionality. Concerning the three Petty Benches and related technicalities affecting judicial decision-making, see MAKI xxiii-xxix, and D. Henderson, *Law and Political Modernization in Japan*, in POLITICAL DEVELOPMENT IN MODERN JAPAN 387, 439-56 (R. Ward, ed. 1968). Article 10 of *Saibanshohō* (Court organization law) (Law No. 59, 1947) provides as follows:

> Regulations of the Supreme Court shall determine which cases are to be handled by the Grand Bench and which by Petty Benches; however, in the following instances, a Petty Bench cannot render a decision:
> (1) Cases in which a determination is made of the constitutionality of a law, ordinance, regulation or disposition, as a result of the contention of a litigant (excluding cases where the opinion is the same as that of a decision previously rendered through a Grand Bench in which the constitutionality of the law, ordinance, regulation or disposition is recognized);
> (2) Cases other than those mentioned in the preceding item when the unconstitutionality of a law, ordinance, regulation or disposition is recognized;
> (3) Cases in which an opinion concerning the interpretation and application of the Constitution or of any other laws or ordinances is contrary to that of a decision previously rendered by the Supreme Court.

[71] Japan v. Miyake, 9 Keishū 119 (Sup. Ct., P.M., Feb. 1, 1955). Participating in the decision were Justices Inouye, Shima, Kawamura, Kobayashi, and Motomura.

with the ordinance. A communist-led demonstration took place in front of the Saga Tax Office following rumors of corruption on the part of a Saga Prefecture tax official. The Petty Bench, referring to the *Niigata* Grand Bench decision, upheld the constitutionality of the Saga notification system against the appellants' contention that the ordinance—especially article 4 which allows officials to impose conditions on the conduct of a demonstration—established unconstitutional burdens on the freedom of assembly. The Saga notification system, like many permit and notification systems, grants very broad discretionary power, allowing officials to "attach appropriate conditions it deems necessary for the maintenance of order,"[72] but the Court, as in subsequent decisions, did not balk at this. Such grants of power in notification system ordinances are one reason for questioning the relevance of the distinction between the permit and notification ordinances.

Another 1955 Petty Bench decision, quoting *Niigata* almost verbatim, upheld the Tokuyama municipal permit ordinance.[73] The local branch of the Japan Communist Party applied for and received a demonstration permit. In violation of the permit conditions added by the local Public Safety Commission, demonstration leaders entered the Tokuyama Tax Office in an effort to persuade officials to negotiate with them concerning tax problems. As in *Niigata,* the Court minimized the distinction between a permit system and a notification system and stressed the propriety of provisions "concerning the place and procedure under reasonable and clear criteria in order to maintain public order and to protect the public welfare against serious harm."[74] But again, the Court failed to identify the "reasonable and clear criteria." Of particular note, in the light of Justice Fujita's later stress on its importance in the 1960 *Tokyo* case, is the absence of any provision in this permit system allowing public gatherings when officials fail to act on a permit application.[75]

The Saitama prefectural ordinance at issue in a 1955 Grand Bench decision[76] establishes a notification system which contains more detailed standards than the previous ordinances. It requires more in-

[72] 9 Keishū at 120.

[73] Japan v. Sasaki, 9 Keishū 967 (Sup. Ct., P.B., May 10, 1955). On the bench were Justices Shima, Kawamura, Kobayashi, and Motomura. Both related lower court decisions are reported in 4 Kōtō saibansho keiji hanreishū 2005, 2014 (1951).

[74] MAKI, at 75-76.

[75] *See supra* at p. 1117.

[76] Japan v. Kuroshiro, 9 Keishū 562 (Sup. Ct., G.B., Mar. 30, 1955). Participating in the judgment were Justices Tanaka, Inouye, Kuriyama, Mano, Otani, Shima, Saitō, Fujita, Iwamatsu, Kawamura, Tanimura, Kobayashi, Motomura, Iriye, and

formation than other ordinances on the notification form, exempts more assemblies from the prior notification requirement, and prescribes procedures and conditions to be observed in carrying on collective activities.

The conviction of the appellant-demonstrators was based upon failure to comply with the limitations set down on the notification form. On March 27, 1950, about 150 day-laborers gathered to petition for labor reforms in front of the Kawaguchi City Hall. Since the officials did not prove responsive, the crowd forced its way into a city council meeting, and its leader delivered a speech from atop the recording secretary's desk. The demonstration continued into the night and involved considerable scuffling with the police; the next day a related demonstration was held without prior notification.

Against the appellants' contention that the Saitama ordinance established an unconstitutional "general licensing system," the Supreme Court, with Justice Fujita participating, unanimously held that in light of *Niigata* all ordinance provisions are clearly constitutional and that they establish clear and reasonable standards for protecting the public welfare.

Five years later the 1960 *Tokyo* decision[77] emerged against a background of judicial and scholarly debate concerning the application of the *Niigata* principles, failure of an attempted revision of the Police Duties Law to allow greater police discretion in regulating demonstrations, and the Security Treaty Crisis of 1960. Besides declaring the Tokyo ordinance unconstitutional in decisions of 1958 and 1959, the Tokyo District Court in November, 1959, had refused to authorize police detention of demonstrating students who had not applied for a permit:[78]

> In these circumstances the Supreme Court, at the request of the Tokyo prosecutor, agreed to deal with three cases simultaneously as a matter of urgency: an appeal directly to the Supreme Court from a decision of

Ikeda. An example of great specificity is article 3, paragraph 3, which provides that demonstrators will march in groups of no more than four abreast and twenty-five in length, that each group have a leader, that each group must remain at least five meters from any other group, and that the demonstrators are not to snake-dance. Article 4 empowers the chief of police "to take necessary measures to maintain public order" when other ordinance provisions are violated.

[77] Japan v. Itō, 14 Keishū 1243 (Sup. Ct. G.B., July 20, 1960), and MAKI, 85. For the text of the Tokyo ordinance, see MAKI, 85-87.

[78] MAKI, at 84. Concerning the Security Treaty Crisis, see E. WHITTEMORE, THE PRESS IN JAPAN TODAY: A CASE STUDY (1961); J. CARY, JAPAN TODAY (1962); and especially G. PACKARD, PROTEST IN TOKYO (1966); *See also* the relevant sections of J. MAKI, GOVERNMENT AND POLITICS IN JAPAN (1962), *and* R. SCALAPINO & J. MASUMI, PARTIES AND POLITICS IN CONTEMPORARY JAPAN (1962).

'unconstitutional' by the Tokyo District Court, and appeal against the Hiroshima and Shizuoka High Courts' decisions of 'constitutional' and 'unconstitutional,' respectively.

The Supreme Court, focusing on the Tokyo ordinance, held the ordinances constitutional, with Justices Fujita and Tarumi dissenting.[79] More fully than any other ordinance decision, the *Tokyo* decision presents the Court's theoretical analysis of the freedom of assembly, the ordinance's intent, and the public welfare within the Japanese sociopolitical context.[80] As suggested in the discussion of the *Niigata* and post-*Niigata* Supreme Court decisions, the contention of the dissenting opinions and of some legal commentators that *Tokyo* is inconsistent with *Niigata* is at least debatable. But the *Tokyo* opinion shows some impatience with emphasis upon specific criteria, whereas *Niigata's* statement of principles stresses (in a general way) specificity.[81] Because *Tokyo* offers a classic example of the Supreme Court's mode of reasoning, and because of its continuing impact on Japanese legal and political life, the opinion of the Court in *Tokyo* deserves careful analysis. The Court noted that:

(1) The guarantee of freedoms such as the freedom of assembly

[79] Justices Tanaka, Kotani, Shima, Saitō, Fujita, Kawamura, Iriye, Ikeda, Tarumi, Kawamura, Shimoiizaka, Okuno, Takahasi, Takagi, and Ishizaka were on the bench.

In his discussion of the *Niigata* and *Tokyo* cases from the American lawyer's standpoint, Professor Nathanson notes that current American adjudication "supports in general the constitutional principles announced in the dissenting opinions of Justice Fujita and Justice Tarumi." He notes "troublesome ambiguities" in the Tokyo majority opinion, which "suggests for example that permission need not be given if the Commission should find a direct danger inimical to the preservation of public peace and order." Justice Tarumi supports an almost identical standard as the "strict standard" which the court should use (MAKI, at 99). Justice Tarumi later speaks in great detail of standards; his mode of judicial reasoning seems substantially the same as that of the majority. Professor Nathanson suggests despite his above reservations that the *Niigata* and *Tokyo* cases "would have been disposed of in essentially the same way by American courts." Nathanson, *Constitutional Protection of Freedom of Assembly in Japan and the United States*, 12 INT'L & COMP. L.Q. 1032, 1042 (1963).

> ... I am not inclined to be quite as critical of the decisions as some of my Japanese friends and former colleagues, in view of the fact that in neither of the cases had the demonstrators made any effort to obtain a license in the first place....[T]he ordinances were at least susceptible to the kind of interpretation which would require an actual abuse in their application through denial of a license before holding them unconstitutional.

Nathanson, *Human Rights in Japan Through the Looking-Glass of Supreme Court Decisions*, 11 How. L.J. 316, 319 (1965); Nathanson, *Constitutional Adjudication in Japan*, 7 AM. J. COMP. LAW 195 (1958).

[80] *See* F. MILLER, MINOBE TATSUKICHI ch. 8 (1965); and L. Beer, *supra* note 6, at ch. 3, for a brief analysis of Supreme Court interpretive methodology as "socio-teleological." For a discussion of the "sociological" and "teleological" methods of judicial decision-making in Japan, which bear consideration in relation to American "sociological jurisprudence," see K. Takayanagi, *supra* note 53.

[81] See *supra* at pp. 1115-20.

"is the most important feature that distinguishes democracy from totalitarianism. . . ."[82]

(2) The people may not abuse the freedoms of expression such as freedom of assembly, "but have a responsibility at all times to exercise them for the public welfare; in this respect they do not differ from other fundamental rights (see Article 12 of the Constitution)."[83]

(3) The task of the courts is "to draw a proper boundary between freedom and the public welfare,"[84] to guarantee the freedom to hold assemblies characterized by "pure freedom of expression (which should comport [themselves] peacefully, respecting order),"[85] and to determine whether and to what extent legal restrictions should be placed on public gatherings.

(4) The nature of the activities regulated is the determining factor in the degree and the kind of restriction which the law places on such activities. The activities referred to by the word "expression" are quite varied in nature. Collective activities are not like mere speech or writing, because they involve "the might of a large number of people actually assembled together in a body, a type of latent physical force . . . [which] can be set in motion very easily" and result in excitement, anger and even a violent "mob whose own momentum impels it toward the violation of law and order, a situation in which both the crowd's own leaders and the police are powerless. So much is clear from the laws of crowd psychology and from actual experience."

Therefore, it is "unavoidable that local authorities, in due consideration of both local and general circumstance," adopt by public safety ordinances "prior to the fact the minimum measures necessary to maintain law and order."

(5) In determining whether the measures provided by a specific ordinance are within the bounds of what is minimum and necessary, we must not be distracted from the real problem by emphasis upon words such as "license" and "notification," but must rather "consider

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[82] MAKI, at 88.
[83] *Id.*
[84] *Id.*
[85] MAKI, at 91. Quotations which follow are at 89-91. Professor Nathanson finds the opinion "quite baffling in analogising the effect of the ordinance to one which would simply require a report of the proposed demonstration." Nathanson, *Constitutional Protection of Freedom of Assembly in Japan and the United States*, 12 INT'L & COMP. L.Q. 1032, at 1034 (1963).

Perhaps the difficulty lies in not recognizing the Court's primary stress on ordinance intent and the Court's knowledge that overly restrictive prior conditions can be placed on demonstrations under notification systems as easily as under permit systems. *See infra* note 99.

the spirit of the ordinance as a whole, not superficially, but as a functional entity."

(6) The provisions of the Tokyo ordinance are within the bounds of what is minimum and necessary. Article 3 makes it a clear duty for the Public Safety Commission to grant a license unless "it is clearly recognized" that the collective activity in question "will directly endanger the maintenance of public peace." (Compare with Niigata ordinance standard: "in cases wherein it recognizes that the . . . demonstration concerned involves no threat of disturbance to public order.") "The circumstances in which it can refuse are strictly limited," so this licensing system is essentially the same as a notification system. But "the prerequisites for collective activities . . . are immaterial so long as freedom of expression is not thereby improperly restricted."

(7) The Public Safety Commission must use its discretion after "concrete study and consideration of the various factors operating in the particular situation," with "maximum respect to freedom of expression" and a sense of its "responsibility to the inhabitants to maintain law and order." "The ordinance is (not) entirely free from the danger" of abuse, but that is no reason for holding the ordinance unconstitutional.

(8) The lower court decision notes the absence of a provision permitting a group activity when the commission has not indicated refusal of permission by a certain time before its scheduled commencement. An unlicensed collective activity results in prosecution, and the court of first instance "inferred from this that the ordinance is a general prohibition on collective activities" and therefore unconstitutional. The lower court decision also claimed unconstitutionality because "the applicant is provided with no means of redress when the appointed day arrives and the decision is still deferred." This thinking, said the Supreme Court, "mistakenly evaluates the problem and is quite wrong."

(9) The original decision is also wrong in claiming unconstitutionality because of the generality of article 1. Article 1 regulates collective activities "in streets and other public places" and, with respect to mass demonstrations, "in any place whatsoever." Constitutionality does not depend on the specificity of references to place. Some degree of generality in place designation is unavoidable; it is "completely profitless" to debate such a matter.

Following the *Tokyo* doctrine, Supreme Court Petty Bench deci-

sions have upheld convictions under the Kyoto ordinance (decision of September 29, 1960), the Mie prefectural ordinance (November 15, 1963), the Aichi prefectural and Nagoya municipal ordinances (December 12, 1963), and the Tokyo ordinance (March 3, 1966).[86] The most recent case, to cite but one example, involved a 1952 demonstration of young leftist workers in Tokyo without a permit during which some grappling with the police occurred. After a series of lower court decisions stretching from 1958 to 1965, the Supreme Court upheld the conviction of the appellants for violating the provisions of the Tokyo ordinance.[87]

The appellants maintained that article 2 of the ordinance required a license only of the sponsor *(shusaisha)* and not of the leaders or inciters of a demonstration. The Court disagreed:[88]

> Those activities which exceed the bounds of pure freedom of expression (which should comport itself peacefully, respecting order), which disturb the peace, and which involve physical might which may lead to violence, are by common agreement subject to a certain measure of legal control. Never is it true, as the appellants contend, that the sponsor alone is responsible when a demonstration is engaged in without a license, and that demonstrations carried out in such circumstances are neither dangerous nor illegal.

The appellants further contended that the ordinance was not operative law at the time of the demonstration, since there was no possibility of any group in Tokyo obtaining a license to demonstrate due to an occupation prohibition. They also called for dismissal of the case on grounds of a lack of speedy trial and the failure of 1954 amendments to the police law, modifying the operation of ordinance systems, to indicate how cases arising prior to 1954 should be disposed of. The court summarily dismissed lack of speedy trial as a basis for overturning a lower court decision[89] and noted that contentions about the construction of facts and law are not grounds for *jōkoku* appeal under Articles 405 and 411 of the Code of Criminal Procedure in this case.[90]

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[86] For an outline presentation of these and other Supreme Court and lower court ordinance decision from Nov., 1949 to June, 1967, see Ebashi, *Kōan jōrei ni kansuru shuyōhanrei ichiranhyō*, JURISUTO (No. 377) 72-77 (1967).

[87] Japan v. Kayano, 20 Keishū 57 (Sup. Ct., P.B., Mar. 3, 1966).

[88] 20 Keishū at 60.

[89] 20 Keishū at 61.

[90] The Code of Criminal Procedure provides:

Article 405. *Jōkoku* appeal may be lodged against a judgment in first or second instance rendered by a High Court in the following cases:

(1) On the ground that there is a violation of the Constitution or error in the construction, interpretation or application of the Constitution;

III. Conclusion

The impact of the 1960 *Tokyo* decision has been considerable. A number of ordinances, such as those of Hiroshima, Gunma, and Aichi, were revised or written anew to conform with the Tokyo ordinance. For a time it appeared that, at least in the courts, the dispute on public safety ordinance constitutionality had been struck a death blow. The lower courts became increasingly more concerned with the refinement of Supreme Court doctrine than with prima facie constitutionality. Although some lower court decisions interpreted aspects of the *Tokyo* doctrine in a manner reminiscent of Justice Fujita's views and post-*Niigata* lower court judgments of unconstitutionality, there were no subsequent holdings of unconstitutionality until a February 1967 decision of the Kyoto District Court. Also adding new vigor to the debate on public safety ordinances in 1967 was Prime Minister Sato's criticism of a Tokyo District Court for enjoining an administrator's imposition of conditions on a demonstration.[91] Decisions since then sometimes seem to manifest open hostility to the Supreme Court's alleged return to the overemphasis on the public welfare and the dangers of crowd psychology with an attendant hostility toward demonstrations, said to characterize pre-*Niigata* lower court holdings.[92]

Critics have maintained that Supreme Court doctrine unduly strengthens the hand of the police vis-à-vis activist elements of the citizenry. It has been suggested that the 1960 *Tokyo* decision established by judicial decision and local ordinance the controversial 1958 Police Duties Bill which failed to come to a vote in the Diet.[93] The Court's dismissal of the distinction between notification and permit systems as unimportant is also questioned. Critics call for more stress than is found in *Tokyo* upon specificity regarding place and procedure and upon the "clear and present danger" test mentioned in *Niigata* as the criterion for administrative discretion.[94]

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(2) On the ground that a judgment has been formed incompatible with the judicial precedents formerly established by the Supreme Court;
(3) In cases for which there exist no judicial precedents of the Supreme Court, on the ground that a judgment has been formed incompatible with the judicial precedents formerly established by the former Supreme Court *(Daishin'in)* or by the High Court of *Jōkoku* appeal or, after the enforcement of this Code, by the High Court as the court of *Kōso* appeal.

[91] M. Tanaka, *supra* note 56; and Fujinaga, *supra* note 8.

[92] *See* the discussions in Jurisuto (No. 377) (1967). *See supra,* pp. 1113-14 concerning early lower court decisions. For a study of lower court trends, see Fujinaga, *supra* note 8, and Ebashi, *supra* note 50 at 70-71.

[93] Ebashi, *supra* note 50 at 69-70, and *The Police Bill Controversy* (American Universities Field Staff pamphlet) (Nov. 1958).

[94] *See, e.g.,* Satō, *Kempō,* Jurisuto (No. 385) 48 (1967).

Considering Japan's legal and political past under the Meiji Constitution and the militarist regime of the pre-1945 period, these criticisms manifest an admirable dedication to freedom, to the clarification and refinement of legal standards, and to the limitation of bureaucratic *kanson mimpi* (looking-up-to-officials-and-down-on-the-people) tendencies. On the other hand, whatever one may say of the Supreme Court's caution in the context of the 1960 political crisis and its modes and standards of judicial interpretation, the Court can easily be interpreted as having shown consistency and commitment to constitutional democracy. In the last analysis, there is rather common agreement among scholars that the key problems are the concrete meaning of "public welfare" and the reasonableness of limitations on freedom and administrative discretion in individual cases. The general trend in the courts is to attempt to demonstrate such reasonableness with greater specificity than in the past.[95] In its notion of the public welfare the Supreme Court includes a strong emphasis upon freedom which is more in keeping with Japanese constitutionalism than are some of the demonstrations involved in court cases; but, with sensitivity to the group-oriented nature of Japanese sociopolitical life, the Court also stresses the dimensions of sociality and responsibility as essential to a viable Japanese understanding of freedom of assembly. The Supreme Court's decisions illustrate its manner of utilizing public welfare in deciding constitutional problems, but do not clarify the standards required for judging official discretion in applying ordinances, partially because of their preoccupation with the prima facie constitutionality of the ordinances in question.

It does not appear that expulsion of the public welfare from the judicial chambers or revision of Chapter 3 of the Constitution to strengthen or weaken the public welfare standard vis-à-vis civil rights in one of the many ways suggested in the Reports of the Commission on the Constitution *(Kempō chōsakai)* would soften the politically charged disputes over standards and the exercise of rights.[96] But mod-

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[95] *Id.*

[96] *See Kempō chōsakai hōkokusho fuzoku bunsho* No. 3 (Report of the Commission on the Constitution, Attached Document No. 3), KEMPŌ CHŌSAKI DAI-ICHI IINKAI, KEMPŌ UNYŌ NO JISSAI NI TSUITE NO CHŌSA HŌKOKUSHO: KOKUMIN NO KENRI OYOBI GIMU, SHIHŌ (First committee of the Commission on the Constitution, Report of the investigation relating to the actual operation of the Constitution: Rights and duties of the people and the Judiciary) (1964); I. SATŌ, KEMPŌ CHŌSAKAI HŌKOKUSHO NO GAIYŌ (An outline of the report of the Commission on the Constitution) (1964). *See also,* KEMPŌ MONDAI KENKYŪKAI, KEMPŌ O IKASU (1961); and L. Beer, *supra* note 6.

ification in support of more specific standards of the Japanese judiciary's "socio-teleological" approach to decision-making might facilitate the delineation of the freedom of expression in specific cases.[97]

Whether notification systems or licensing systems should be used seems a question of little practical import. In 1959, for example, permits to hold collective activities were requested in 19,908 cases, and permission was refused only once.[98] More meaningful is the problem of limiting by careful judicial construction and ordinance drafting the conditions which can be imposed with equally broad administrative discretion under both permit systems and notification systems.[99] The extreme flexibility of the Supreme Court's standards could perhaps legitimize a rather restrictive posture vis-à-vis public gatherings, but it can also legitimize, to a greater degree in view of the Court's stress on freedom, a liberal stance on freedom of assembly, as manifested in some lower court decisions since 1960. It does not seem crucial that the courts and ordinances establish "clear and present danger,"[100] the public welfare, or some other general criterion mentioned in the cases discussed, as long as the accumulating judicial precedents, without unrealistic liberalism or excessive caution, gradually refine the practical meaning of these standards in a manner which supports and encourages freedom of assembly. The task of the judicial servants of the status quo is not an easy one, since the sociopolitical context of Japan is in two senses revolutionary: in the sense that some elements in the political spectrum favor revolutionary changes in the present constitution of Japan; and in the sense that traditional elements of sociopolitical behavior are going through a peaceful revolutionary process of integration with the principles of a democratic constitution. In the end, the mode and degree of freedom allowed the individual by evolving patterns of group behavior will continue to substantially con-

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[97] *See supra* note 80.

[98] KEMPŌ UNYŌ NO JISSAI NI TSUITE NO CHŌSA HŌKOKUSHO: KOKUMIN NO KENRI OYABI GIMU SHIHŌ, *supra* note 96, at 124.

[99] In 1959, for example, conditions were imposed on the conduct of collective activities roughly 21% of the time under permit systems and 27% of the time under notification systems. *Id.* Compare, for example, the standards established by the Niigata and Tokyo permit systems with that found in the Saga prefectural ordinance, *supra* note 71 and accompanying text.

[100] Edward Corwin remarked on the dangers of the phrase:

> 'It is one of the misfortunes of the law, wrote Justice Holmes in 1912, 'that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.' No better confirmation of this observation could be asked than that which is afforded by the remarkable extension of the 'clear and present danger' formula both *with* courts and commentators.

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dition the effectiveness of the law discussed and the status of freedom of expression and the public welfare in Japan.

Mason & G. Garvey eds. 1964). *See also*. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 102 (1967).