

Freedom of Speech in Japan: An Inquiry into Media Ownership and Control*

Yasuo Hasebe

There is nothing striking about the freedom of speech in Japan, if you look at the constitutional text and judicial doctrines. The Constitution of Japan guarantees the freedom of ‘speech, press and all other forms of expression’ (Article 21). The judiciary in Japan has basically accepted American doctrines; several categories of speech, such as obscenity, libel, and sedition, are excluded from constitutional protection,¹ and justifiability of content-based regulations of speech are strictly scrutinised, while that of content-neutral regulations is under intermediate scrutiny.²

Unlike some Asian countries, there is no censorship of newspapers criticising the government in Japan;³ people who protest against government policies are not imprisoned. In other words, ‘unpatriotic’ expressions are also allowed. The general public freely expresses their opinions on the Internet; their expressions are free to the extent that infringements on the rights of honour or privacy occur frequently.

*A former version of this paper was read at the 9th Asian Constitutional Law Forum held in May 2022 in Taipei. I am grateful to the participants, in particular Jiunn-rong Yeh and Jimmy Hsu, for their illuminating comments. The author received financial support from the Nomura Foundation in conducting research regarding this paper.

¹ The Supreme Court decision of 13 March 1957 (Chatterley Case) held that obscene materials were not constitutionally protected. Another Supreme Court decision of 28 September 1990 held that seditious speeches were not constitutionally protected.

² It should be noted that the Supreme Court of Japan uses the so-called *Sarufutsu* test as an instrument of intermediate scrutiny. The test is a corrupt form of the structured proportionality principle and works as a lenient test like the American rational basis test. See on this point, Yasuo Hasebe, *Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism* (Waseda University Press 2021) 261-67.

³ Article 21, Section 2 of the Constitution stipulates that ‘No censorship shall be maintained’.

I. Kisha Club (Reporters' Club)

However, several issues may be peculiar to Japan. One of them is the Kisha Club (Reporters' Club) system. In Japan, each government department has a club of reporters. Most of its members are journalists from mainstream media companies like newspapers and TV broadcasters. For example, as to the Ministry of Finance, usually, only the reporters registered as members of its reporters' club can participate in press conferences conducted by the Ministry.⁴ Perhaps, similar systems may exist in other countries as well, such as the White House Correspondents' Association in the US. However, the club system in Japan is notorious for the highly cosy—in other words, frictionless—relationship between officials and reporters.

Former Prime Minister Yoshihide Suga had served as the Chief Press Officer of the Cabinet under the Abe administration for around eight years and was well known for his blunt replies to reporters' questions. A cliché in his briefings was, 'such criticism is beside the point'. After becoming the Prime Minister in September 2020, Suga had to broadcast many press conferences nationwide. Then, people realised that what he said quite often made a scarce sense. He said very little about what people wanted to know, for example, whether the Olympic games would take place or how the Covid pandemic would be contained. He simply evaded questions. At the worst, delivering his speech, he skipped pages of the text that his speechwriters prepared. People felt that Suga was not straightforward in explaining his policies to the nation. If so, how could he serve as the Chief Press Officer?

One journalist who worked as a member of the reporters' club at the Prime Minister's Office confided to me that he and his colleagues could not often make sense of what Suga said when he was the Chief Press Officer. What he and his colleagues did was to conjecture what Suga meant and wrote news articles on their conjectures. They feared that if they had persistently asked questions to clarify Suga's intentions, they would cross him, which might jeopardise the steady flow of information they receive through their privileged membership in the club.

⁴ Recently freelance journalists are admitted to press conferences by the departments of the central government, especially the Prime Minister's Office.

As a result, readers did not read what Suga actually said, but the reporters' conjectures of his meanings. This is too kind an attitude for journalists towards government officials. They prefer friendly communication to frictions with government officials. The culture of conjecturing in favour of government officials was prevalent not only in the central bureaucracy but also in the media circle. I assume that such a relationship exists at clubs of other departments as well.

II. Regulation of Broadcasters

In Japan, broadcasters are more strictly regulated than the print media. They should provide programmes that are 'politically impartial' and when a programme deals with a controversial issue, diverse views on it should be broadcast (Article 4, Section 1 of the Broadcasting Act). While these are typical content-based regulations, the prevalent view is that they are still constitutional. This is not unique to Japan. Many countries also make a similar distinction between broadcasting and print media and regulate the former more strictly.⁵

What is peculiar to Japan is that the regulator of broadcasters is not an independent commission but a government ministry—since 2001, the Ministry of Internal Affairs and Communications (MIC), before that the Ministry of Posts and Telecommunications (MPT).⁶ Broadcasting licences are accorded by the minister of the MIC.⁷ The MIC asserts that if a broadcaster repeatedly broadcasts excessively partial programmes, it may suspend or even revoke its licence,⁸ but no broadcasting licence has ever been suspended or revoked. Sometimes the MIC issues administrative

⁵ See Hasebe (n 2) 282-88.

⁶ In 2001 the Ministry of Internal Affairs and the Public Management Agency were integrated with the MPT, and the MIC started.

⁷ Between 1950 and 1952, when Japan was still under the occupation of the Allied Powers, the Radio Wave Commission, an independent commission, administered the regulation of broadcasting. However, as soon as Japan achieved its independence in 1952, the commission was abolished and its functions were integrated into the MPT.

⁸ Many constitutional scholars argue that such suspense or revocation is unconstitutional because its textual foundation—Article 4, Section 1 of the Broadcasting Act—is so vague that broadcasters cannot predict what amounts to an 'excessively partial programme'.

guidance about programmes to broadcasters, but it has never taken any severe action.

There have been a couple of moves to separate the process of regulating broadcasting and have it administered by an independent commission. However, each time such a move was made, the MTP/MIC stubbornly resisted it. Officials at the MTP/MIC fear that being reduced to a commission is downgrading for them because an independent commission has no cabinet minister as its head.

Broadcasters seem to prefer being regulated by a government ministry. They may think in the line that a known devil is better than an unknown angel. A newly created independent commission will be more active than the MIC in regulating broadcasters, because it is the only reason for its existence. If its approach towards broadcasters is the same as the MIC, people will criticise it as a parasite—consuming tax without working.

Alternatively, we may regard it as another case of a cosy relationship between the government and media companies. Once a cosy relationship emerges, the institutional setting that produced it would endure.⁹ Under the Suga administration, tabloid journals reported that top officials at the MIC were extravagantly entertained by media companies, and consequently some of the officials resigned from their posts.¹⁰

However, it should be noted that the relationship between the government and media companies has not always been merely cosy. Under the Abe administration, the MIC changed its interpretation of the ‘political impartiality’ broadcasters should observe under the Broadcasting Act (Article 4, Section 1). For a long time, the MIC stated that the ‘political impartiality’ was estimated through all the programmes of a broadcaster. However, in May 2015, the MIC changed this stance and the Minister of

⁹ This concern was pointed out by UN special rapporteur David Kaye in his report. See https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22/Add.1

¹⁰ A satellite TV company, Tōhoku Shinsha, was reported to have entertained top officials of the MIC and employed the eldest son of Suga, who always attended such parties. This incident has seriously damaged Suga’s popularity. See Takashi Yanagisawa, *Kodoku no Saishō: Suga Yoshihide towa Nanimono Dattanoka?* [*A Lonely Prime Minister: Who was Yoshihide Suga?*] (Bungei-shunjū 2021) 175-78.

the MIC, Sanae Takaichi, who was an ally of the Prime Minister Shinzō Abe, stated at the parliament that one particular programme might be considered against this requirement if its partiality was excessive. And in February 2016, Takaichi confirmed that the MIC could suspend the licence of a broadcaster that infringed the duty of ‘political impartiality’. Obviously, this sudden and bewildering change of interpretation was intended to chill broadcasters, in particular, their news reporting, and attracted a lot of criticism. The leaked official documents reveal that the Prime Minister’s office demanded the MIC this change of interpretation.¹¹

III. Cross-Media Ownership

In Japan, there are five commercial TV networks—Nippon TV, TV Asahi, TBS, TV Tokyo, and Fuji TV, each of which has intimate connections with a particular nationwide newspaper. For example, approximately 25% of the shares of the TV Asahi Holdings Corporation are held by the Asahi Shimbun. Many high-level staff members of the former came from the latter.

While there is no rule prohibiting the dual ownership of TV and newspapers, one MIC regulation in principle prohibits the concentration of three media services: newspaper, TV, and radio.¹² However, when there is no sufficient risk of the monopoly of providing news or information services in a given area, the concentration of the three media services is still allowed.¹³ In other words, a concentration of three services is allowed when there are other media groups that concentrate on the three services. The Yomiuri Shimbun-Nippon TV group and the Sankei Shimbun-Fuji TV

¹¹ *The Asahi Shimbun* (Tokyo, 3, 4 and 8 March 2023). The leaked documents related to this incident are disclosed at: https://www.soumu.go.jp/main_content/000866745.pdf (last accessed on 7 March 2023). The documents reveal that the MIC officials tried to resist the change but were superseded by Mr Abe’s insistence. When the documents were first made public in March 2023, Ms Takaichi dismissed them as fake documents, but later, the MCI admitted that they were authentic official ones. However, even after that, Takaichi still pathetically maintained that the contents of the documents concerning herself were inexact.

¹² The MIC Regulation on the Freedom of Speech of Principal Broadcasters, Article 8, Section 5.

¹³ *Ibidem*.

group are typical media groups with three services. Both groups are known for their conservative inclination.

Such a media environment seems to reinforce the cosy relationship between the media and the government. We suspect that the government can affect the tone of newspapers through the regulation of broadcasters of the same media groups. This environment will also undermine healthy checks and balances between newspapers and broadcasters.¹⁴

IV. Financing the NHK

In a 2017 decision, the Supreme Court held that the receiver's fee system that financed the public broadcaster NHK was constitutional.¹⁵ According to Article 64 of the Broadcasting Act, when someone installs a TV receiver set at his home, he must make a 'receiver's contract' with the NHK, and as a result, he should pay his receiver's fee to the NHK.¹⁶ In this case, the defendant argued that the receiver's fee system infringed on people's freedom to contract and view television without paying his receiver's fee. The Court reasoned that broadcasting service presupposes some legal framework set up by the parliament and that instituting the so-called binary system composed of commercial televisions and the public broadcaster, the NHK, to enhance the fecundity of broadcasting programmes is within the legislator's discretion. To sustain such a binary system, sufficient financial resources for the NHK are required. Therefore, the Court held that freedom to view commercial television channels without paying the receiver's fee is not guaranteed under the Constitution.

¹⁴ As to the beneficial consequences from the checks and balances of newspapers and broadcasters under the partial regulation of the mass media, see Hasebe (n 2) 285-86.

¹⁵ The Grand Bench decision of 6 December 2017, 71 MINSHŪ 1817.

¹⁶ Unlike Britain's license fee, there is no criminal sanction when a person installing a TV set does not make a 'receiver's contract' or not pay his receiver's fee. The fee is considered not as a price for the broadcasting services—even if a person does not view the NHK's channels at all, he still has to pay it—or as a tax—it is collected by the NHK's staff, not by tax collectors. The current amount of the receiver's fee is ¥1310 (equivalent to 10USD) for terrestrial channels per month, and ¥2280 (equivalent to 17USD) for terrestrial and satellite channels per month (At the time of writing this article). The NHK broadcasts two terrestrial channels and two satellite channels. If your TV set is equipped with a special tuner, you can also view 4K and 8K satellite channels.

The Court asserts that the receiver's fee system is required to guarantee that the NHK autonomously makes and provides its programmes. However, the current Broadcasting Act stipulates that the amount of each year's receiver's fee is to be determined by the parliament (Article 70, section 4); that is, the NHK may be inclined not to displease politicians, particularly those in the government party. In 2001, the NHK was suspected to change the contents of its programme, which dealt with the so-called comfort women during the Second World War, after its executive officer met the then Vice Chief Press Officer of the Cabinet.¹⁷ This officer was Shinzô Abe, the later Prime Minister. We may regard this as another case of a frictionless relationship between the government and a media company. In this case too, between the institutional setting and the obscure relationship feedback loops have seemed to emerge.

The decision of 2017 does not signify that the receiver's fee system will be secure in the long run. The Court, in its decision, declared that although the environment of broadcasting has been changing, the rationale for the receiver's fee system has not yet been lost. This leaves room for doubt that the Court may hold in the future that the receiver's fee system has lost its rationality and becomes unconstitutional.

V. Conclusion

As previously stated, there is no open oppression against media companies or citizens in Japan. However, as elaborated by this report, the relationship between the government and media companies is not as healthy as to be hoped in a liberal democratic society. According to the Reporters Without Borders' 2023 World Press Freedom Index, Japan is ranked 68th in the World.¹⁸ Its ranking will not be improved if the cosy and obscure relationship continues. The advance of the Internet may undermine such cosy relationships in the future by reducing the positions of newspapers

¹⁷ This case was presented before the Supreme Court. The Court held that the right to compile and edit a broadcasting programme ultimately belongs to a broadcaster—in this case, the NHK. See the First Petty Bench decision of 12 June 2008, 62 MINSHŪ 1656.

¹⁸ <https://rsf.org/en/index>; In 2010, under the Democratic Party administration, Japan was ranked 11th. Its ranking has deteriorated considerably under the Abe administration.

and TV broadcasters. The advertising revenue for traditional media is rapidly decreasing.¹⁹ Simultaneous delivering of TV programs on the Internet will further reduce the revenue of local TV broadcasters. The receiver's fee system for the NHK may become less convincing in such a media environment. However, it is still questionable whether such a future would be a salvation for democratic politics in Japan. Weakening traditional media's power will not automatically make them aggressive towards government officials.

¹⁹ The advertisement revenue of all the TV broadcasters in 2020 was around 1.6 trillion yen (14.5 billion USD at the time of writing this article), which is 300 billion yen less than that in 2017 according to the *Asahi Shimbun*, 7 January 2022, evening edition.