COMMENT

FRANK K. UPHAM*

As Professor Beer stated at the beginning of this symposium, the 1947 Constitution is no longer an experimental document. Not only has it attained the status of one of the oldest existing constitutions, but it is also clear that it forms an integral part of Japanese society. Its origins may have been foreign, but its contemporary function and content is now thoroughly Japanese. And just as Japan's economic and social success has begun to attract attention and admiration from the West, so should its legal system and, perhaps most especially, its constitutional law.

In this context, it would be hard to think of three better papers to lay out the state of Japanese constitutional jurisprudence than those of Professors George, Tomatsu, and Beer.[1] In this regard, Professor George deserves special thanks from the Americans among us. His paper not only gives us a straightforward recitation of the constitutional procedures governing perhaps the world's most celebrated police; it also lays out the statutory and constitutional framework with such encyclopedic thoroughness that its usefulness for reference will rival its analytic power. My sole criticism is that I tend to lean more heavily than does Professor George in the direction of questioning the relationship between the principle (tatemae), or the way things should be or are expected to be, of the Code of Criminal Procedure, and the reality (honne)[2] of actual police practices. Police practices in interrogation and investigation are not always in accord with the spirit if not the letter of the legal rules. It remains true, nonetheless, that the accomplishment of an extraordinarily safe society without recourse to tyranny or widespread police brutality is a remarkable achievement, and the comments in Professor George's paper to this effect are well taken.

Professor Tomatsu's treatment of equal protection doctrine demonstrates the maturity and complexity of Japanese law in this area. I was struck by the Supreme Court justices' willingness to address the malapportionment issue despite the convenient avoidance devices available to them. First, of course, they could have used the political question doctrine that they arguably have used in the Article 9 litigation challenging the Self-Defense Forces and the U.S.-Japan military alliance. Second, they could have decided that the Public

* Professor of Law, Boston College School of Law.

1. *See* Beer, *Freedom of Expression: The Continuing Revolution*, LAW & CONTEMP. PROBS., Spring 1990, at 39; George, *Rights of the Criminally-Accused*, LAW & CONTEMP. PROBS., Spring 1990, at 71; Tomatsu, *Equal Protection of Law*, LAW & CONTEMP. PROBS., Spring 1990, at 109.

2. *Tatemae* and *honne* are used in a way that implies a constant tension between outward appearances and inner reality.

Election Law did not provide a statutory vehicle for attacking constitutional issues. Instead of taking either of these plausible routes—especially plausible for a supposedly conservative court—the justices accepted the question as justiciable and, in at least two instances, determined that the apportionment was unconstitutional. After refusing to avoid the issue, however, the justices were faced with doing something about the unconstitutionality of the apportionment. Here, they became the "yes, but" court: Yes the apportionment is unconstitutional, but we do not choose to do anything about it. This course of action raises the question of judicial capacity and relevance. It would be interesting to analyze the connection between these decisions and the redistricting that has taken place over the years. Has the court played a role and, if so, what has been its nature?

Another issue raised by Professor Tomatsu is the nature of the public-private distinction within Japanese law. His treatment of the discrimination cases brings out an aspect of Japanese constitutional law that I have often wondered about: When does the Constitution apply, albeit indirectly, to private behavior and when does it not? As Professor Tomatsu demonstrates, by using Articles 1 and 90 of the Civil Code, the courts have readily applied constitutional norms of behavior to gender discrimination in post-hiring employment relations. The Court seemed to refuse to apply such norms to discrimination based on political belief, however, in the Mitsubishi Jūshi case.[3] The question of what American lawyers would call "state action" did not play the determining role in either circumstance, however. Given the importance of the public-private distinction in Japanese jurisprudence, I wonder why the courts apparently have been able to collapse the distinction in some circumstances without attracting more attention politically and academically.

The courts' apparent willingness to dissolve the public-private distinction in these two circumstances reminds me of the question raised by Professor Beer's superb article on freedom of expression: what he calls "individualistic groupism" and the occasional tyranny of group expression in Japan. I was once again impressed by Professor Beer's ability to draw new and interesting lessons from his ongoing study of Japanese Supreme Court doctrines and the social and political context in which they function. As his work points out, one cannot look only at "public" restrictions in Japan if one wants to understand how the constitutional guarantee of freedom of expression works in practice in Japan. One must, instead, look at both the public and private dimensions and somehow break down the distinction, which, despite its power in Japanese academic jurisprudence, may be a Western idea that has never grown deep roots in Japan.

Professor Beer indicates that the reporters' clubs are probably a more direct challenge and impediment to certain types of journalism in Japan than is any conceivable government censorship. A similar phenomenon in another

3. 27 Minshū 1536 (Sup. Ct., G.B., Dec. 12, 1973).

area is the use of "denunciation struggle" by the Buraku Liberation League[4] to attack perceived discrimination. The threat of being "denounced" has effectively meant that academic commentators and the many organs of the mass media avoid the *dōwa* problem almost entirely.[5] The result is an informal taboo on discussion of the topic, a taboo so pervasive that, outside areas of large Buraku population, many Japanese are barely aware that the problem of discrimination against Burakumin still exists. Yet our constitutional jurisprudence has no established way to deal with such pervasive but "private" restrictions except to dismiss them as no concern of the law. Fortunately, Professor Beer's development of concepts like "individualistic groupism" and the "ecology of freedom of expression" within the Japanese social and political context may help us attack such issues and phenomena not only in Japanese but also in American constitutional law.

4. Burakumin are descendants of persons classified as nonhuman, or not belonging to human society, during the Tokugawa period (approximately 1600 to 1868). Although all legal classifications of Burakumin were eliminated shortly after the Meiji restoration, social discrimination continues.

5. *Dōwa* is usually translated as "harmony" or "assimilation." It is a euphemism for matters concerning Burakumin. Thus, "*dōwa* administration" or the "*dōwa* problem" refers to government measures taken on behalf of Burakumin or the Burakumin problem.