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Fundamental Human Rights Compared in Two Progressive Constitutions: Japan and Montana

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by fritz snyder*  
- the fundamental human rights  
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Introduction

Professor Noriho Urabe has said that the protection of individual rights, due process of law, and judicial review are the core of the rule of law in the United States. The Japan Constitution established the concept of fundamental human rights, together with the system of judicial review for protecting those rights. When Article II of the Japan Constitution is read in conjunction with Article 97, it is readily apparent that “the fundamental human rights” of this Constitution are “guaranteed to the people of Japan.” Article 98 states that the Constitution is “the supreme law of the nation.” This implies the rule of law is paramount for Japan. “The new Constitution officially replaced ‘rule by law’ with ‘rule of law’ and gave Japanese courts, not legal scholars and politicians, the power to review legislation and government actions for the first time.”

“Japanese constitutional theory is built on the proposition that pacifism [world peace], popular sovereignty [democracy], and the guarantee of fundamental human rights are the foundations of the Constitution.”

While the British constitutional structure influenced Japan’s Constitution with respect to the Diet (the Japanese legislature or congress), the Cabinet and the Emperor, the United States Constitution was more influential in areas closely associated with people’s daily lives. “The single most important contribution of the United States Constitution to that of Japan was the concept of democracy.” While this may be true, another commentator notes that the Constitution of Japan can be called “the Constitution of peace and welfare.” Welfare in this context refers to fundamental human rights.

General Douglas MacArthur, the Supreme Commander of the Allied Powers (SCAP), directed the allied occupation of Japan from the end of the Second World War to 1952. He and his staff essentially imposed democracy on Japan: “It apparently did not occur to MacArthur, or to many other Americans, that there was any contradiction in imposing democracy on another nation, or that many Japanese might not select democracy, as understood in the United States, if given a free choice.”

In pre-war Japan, even the word “democracy” was not permissible because it seemed to conflict with the Emperor’s sovereignty. “[T]he respect for individual rights...[is] the most important feature differentiating postwar and prewar Japanese society.” Chapter III of the Japan Constitution, “Rights and Duties of the People,” contains 30 articles. The basic Bill of Rights of the United States Constitution contains ten items, although several later amendments dealt with individual rights as well. The Constitution of the State of Montana, which I will be comparing with the Japan Constitution in large part, has 35 sections in its Article II, “Declaration of Rights.”
Dr. Harry Wildes, a member of the Japan constitution-drafting Civil Rights Committee noted: “We have the responsibility to effect a social revolution in Japan, and the most expedient way of doing that is to force through a reversal of social patterns by means of the constitution.”

General MacArthur and his staff made many reforms in Japan based on simple logic:

Militarism stemmed from monopoly, tyranny, and poverty. . . . [Japan] required . . . vast reforms to smash authoritarian political rule, equalize political rights and . . . wealth, and transform values.” SCAP [issued] . . . declarations that guaranteed freedoms of speech, press, and assembly and . . . ordered the Japanese government to extend civil and political rights to women.

With these steps, the Americans sent a clear message that democracy should be the cornerstone of a new Japan. The capstone of this effort was a rewriting of the constitution. This was drafted by a committee of occupation officials . . . [and] discussed and ratified in . . . the imperial Diet. . . . It was promulgated in November 1946 and took effect in May 1947.

Constitutions are a reflection of their times. The Japan Constitution incorporated the spirit and ideals of the American New Deal;” . . . it mirrored the strong idealism and optimism that pervaded the world during the 1930s and 1940s.

In a similar manner, the political climate that created the new and current Montana Constitution, drafted in 1972, reflected the national mood of the early 1970s: the new environmental movement and a general distrust of government growing out of the Watergate hearings. In addition, the old Montana Constitution had become outmoded.

“Of the twenty articles in the 1889 Montana Constitution, nine remained unchanged by amendments during the period prior to the 1972 [Montana] Constitutional Convention. . . . The 157 sections of the 1889 Constitution were increased to 181 through amendments.”

“In Montana . . . the early years of the twentieth century produced increased demands for government services and programs. By 1920, the original 20 executive offices, commissions, and boards had grown to 104” which was strongly criticized by the Montana Legislative Counsel.

Structural change was necessary. In 1968, this same Legislative Council concluded that “[o]f the 262 sections in the 20 substantive articles of the constitution . . . 53 sections (20 percent) should be revised and 85 sections (32 percent) should be repealed.”

In November 1970, 65 percent of the voters voted in favor of calling a constitutional convention. Because of reapportionment, only 20 percent of the convention delegates were farmers and ranchers, and, because of voter displeasure with recent Republican efforts to pass a statewide sales tax, only 36 percent of the delegates were Republicans. Moreover, sitting legislators in 1971 were not allowed to be delegates. Thus the Montana Constitution, as drafted and ratified, reflected the populist inclination of the delegates. It enhanced the powers of the voters and encouraged direct participation in governmental decision making. For example, it relaxed the requirements necessary to place initiatives and referenda on the ballot; it required that the question of whether to hold a constitutional convention be submitted to the voters at least every 20 years; it required local governments to periodically review the structure of local government; and it provided the public a right to participate in the operation of government agencies.

In this article I focus on certain of the fundamental or inalienable rights of the Japan Constitution and compare and contrast them with their counterparts in the Montana Constitution. It is true that Japan is a prominent nation and that Montana is only one state among many in the United States. However, the important point is that both political entities have constitutions that are progressive and modern and were written only 25 years apart. The fundamental human rights guarantees of the Japan Constitution are noted throughout this article. With respect to the Montana Constitution, former Montana Governor Mark Racicot has called it “a model constitution” with “very progressive ideas” such as the right to participate in government and the guarantee of equal educational opportunity. James C. Garlington, a delegate to the Montana Constitutional Convention in 1972, said:

I thought a Constitution should assure the citizen his personal freedoms. We have clearly done this by a Bill of Rights [Declaration of Rights] which not only has all the freedoms of the last 80 years, but includes a broad band of additional rights that will serve well in our ever more complex society.

These additional rights include “demanding protection for human dignity, and expanding ideas of individual privacy and citizen participation.”

By comparing the two constitutions key fundamental rights provisions, I believe we can focus on these issues in a new way using a new lens. Moreover, by examining Japan and Montana Supreme Court decisions that have interpreted each of the important articles or sections dealing with the rights and duties of the people, we can provide additional clarification and elucidation.
events leading up to the Japanese constitution

Japan's first Constitution, called the Meiji Constitution, was promulgated in 1889, the very same year Montana's first Constitution came into being. The Meiji Constitution had a relatively weak idea of constitutional rights: "...[E]very provision in the Meiji Constitution that sets out a right possessed by Japanese subjects contains some language limiting that right or otherwise expressly tying it to the requirement that its exercise not be inconsistent with the laws of Japan."

Americans actually drafted the new Japan Constitution. However, the Americans and the Japanese maintained a facade of Japanese authorship, so that no one could challenge its legitimacy. "...[T]he members of the 90th Imperial Diet, in 1946, had a chance to debate the Constitution, but they played no part in formulating it, and made only a few minor changes in its text."

On the constitution-drafting Civil Rights Committee, in addition to Harry Wildes (a journalist in civilian life), there were Pieter Roest, a Dutch-born intellectual, and Beate Sirota, a young euro-american woman who had spent ten years of her childhood in Japan.

In addition to guaranteeing civil liberties, these members were determined to introduce the various economic and social rights that the New Dealers had only partially successfully attempted to introduce in the U.S., such as social security, public health, free education, and the abolition of child labor. Sirota, in particular, was concerned with the status of women in Japanese society, and it was chiefly through her efforts that a clause stipulating the equality of the sexes (something the U.S. Constitution itself does not contain) was incorporated into Japan's Constitution.

Sirota's draft even contained provisions such as free medical care for pregnant women and for mothers with infants which the Steering Committee deleted.

In drafting the Constitution, the Americans intended to guarantee the rights and liberties of the Japanese people to teach the Japanese about democracy and popular sovereignty. Chapter III in particular, "Rights and Duties of the People," stunned the Japanese political elite because of its departure from Japanese history and tradition which do not emphasize the role of the individual: the "individual exists as a part of society in a mutually supportive relationship..." Moreover, the elite had to pass this off to the people as the government's own recommendation. However, the people themselves responded enthusiastically to the new constitution.

"If Americans were responsible for introducing fundamental human rights as a basic principle of democratic constitutionalism, then it was the Japanese who in practice adopted and cultivated them and harvested the fruits." Compared to pre-war Japan, one thing that distinguished the Japanese people of today is their regard for fundamental human rights.

Although the terms used to describe human rights in the two constitutions differ, fundamental rights and inalienable rights mean essentially the same thing: a right found within the Montana Constitution's Declaration of Rights and within the Japan Constitution's Chapter III Rights and Duties of the People or a right "without which other constitutionally guaranteed rights would have little meaning."

"Once the Occupation ended in 1952, [Japanese political] conservatives repeatedly attempted to revise the Constitution arguing that it had been imposed on Japan by the Occupation. The Socialists, in contrast, wholeheartedly supported the Constitution, and tried to promote its...ideals." In fact, the Constitution has never been amended.

"The very fact that the current Constitution has weathered 50 years of turmoil has profound significance for Japanese society... The Constitution designed a society around an intellectual value — respect for the individual — that replaced veneration of the emperor... The institutional changes carried out by the Occupation — for example, land reform, the emancipation of laborers, and the liberation of women... — were anchored in place by the Constitution.

"The 1947 Constitution of Japan is one of the world's most revered modern national legal documents. "Japanese college-educated adults now express more confidence in the 1947 Constitution than in any other national institution." Even though it was drafted by foreigners, the Constitution of 1947 has enjoyed the general support of the public and is considered the most suitable post-war constitution for Japan, preferable to all other constitutional drafts by Japanese, including that of the Japanese Government."

japan courts and judges

Since 1947, the judiciary has become widely trusted and respected throughout Japan. "Its roles in enforcing the rule of law are crucial and complex; its record in confirming human rights mixed" under a dynamic fusion of Japanese, European, and American legal elements. Under the Meiji Constitution (Japan's old constitution), the judiciary was part of the executive branch and thus, one of the
judges, prosecutors and attorneys... [are] graduates of the INTERNATIONAL LEGAL PERSPECTIVES Supreme Court’s Legal Training and Research Institute, Supreme Court justices, Court.60 All judges in Japan, except for nine of the 15 Family Courts to High Courts and then to the Supreme Summary Court to the District Court, from District or Summary Courts below District Courts. Appeals go from eight High Courts (three judges on each); below them for courses in conflicts of law. Below the Supreme Court and no jurisdictional issues to contend with and no need Japan has a unified court system. There are no federalism studying American law.59

many Japanese judges spend time in the United States an extensive collection of treatises and law reviews. Also, The Japan Supreme Court Library has a complete collec-
tion of American federal and state law reporters as well as an extensive collection of treatises and law reviews. Also, many Japanese judges spend time in the United States studying American law.59

Japan has a unified court system. There are no federalism and no jurisdictional issues to contend with and no need for courses in conflicts of law. Below the Supreme Court are eight High Courts (three judges on each); below them are 50 District Courts and 50 Family Courts with Summary Courts below District Courts. Appeals go from Summary Court to the District Court, from District or Family Courts to High Courts and then to the Supreme Court.60 All judges in Japan, except for nine of the 15 Supreme Court justices, are career judges. “Virtually all judges, prosecutors and attorneys...[are] graduates of the Supreme Court’s Legal Training and Research Institute, which admits fewer than 500 [people] a year based on the National Law Examination.”56

The justices are appointed by the Cabinet, normally as recommended by the Chief Justice. Justices are over 60 when appointed and must retire at 70. Lower court judges must retire at 65.62 The justices come from specified career backgrounds: six are career judges (four of whom specialized in civil cases; two of whom specialized in criminal cases); two are former prosecutors; four are lawyers; one is a diplomat; one is a law professor; one is an administrative agency official. When a justice retires, his successor comes from the same group or occupation.63 Most cases are decided by the justices when sitting as three Petit or “Petty Benches” of five members each. The Supreme Court only sits as a whole en banc or as “the Grand Bench” when hearing the following kinds of cases: (1) constitutional issues; (2) “socially important issues”; (3) cases in which at least two Petty Benches have split; and (4) cases which may call for setting new precedent and overruling old precedent.64

Twenty to thirty research judges provide research support and advice to the justices in a manner similar to law clerks for justices in the United States. However, the research judges are career judges and not newly-graduated law students.68 From 1948 - 1998, the Supreme Court reviewed about 700 criminal cases and 170 civil cases.66

Judges and justices are not selected for their ideological views or partisan concerns. At the same time, it is fair to say that Japan’s senior judges share the views of Japan’s political elite, which, by and large, are the views of the general public.69 The danger with the Japanese judicial selection process is that...judges seeking promotion may sacrifice their individual judicial independence by not rendering controversial decisions.68

[T]he Japanese Supreme Court has been reluctant to exercise judicial review of government administrative actions. This reluctance may stem from the sense of unity with the government and may be a product of the desire to avoid confrontation that may jeopardize the status and prestige of the judiciary...[T]o be truly independent, the judiciary must confront government agencies when necessary to protect rights guaranteed by the Constitution.69

Article 76 says: “All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.” However, career judges do not have the freedom from hierarchical control, nor the policy-making role, enjoyed by common law judges in the United States.70 Professor Okudaira has argued that the constitutional founders in Japan took care not to include
due process, so as to eliminate the possibility of a judicial activist interpretation.\textsuperscript{71}

Japanese courts have a great respect for the status quo. The Japan Supreme Court “...has never been the subject of bitter criticism or high praise from the outside world, and it seems the justices are quite satisfied with their situation.”\textsuperscript{72} The “Court simply declines to interpose its will over the will of the Diet [without a] compelling reason for doing so.”\textsuperscript{73} Moreover, “the Supreme Court has rarely invalidated what appears to be an excessively broad delegation of legislative power to administrative agencies...”\textsuperscript{74} “[T]o the extent that a lawsuit brings a government agency into direct conflict with members of the community, it detracts from the agency's standing within the community.”\textsuperscript{75}

In fact, the Japan Supreme Court has minimized its explicitly granted power of judicial review. A Japanese scholar has criticized this tendency: “Judicial passivity has been too great in Japan. Too much modesty has been shown and too much deference has been paid to the policy makers of the legislative and executive branches. More deference could be shown to the Constitution’s mandate for full protection of human rights.”\textsuperscript{76}

Since the promulgation of the Constitution in 1947, the Japan Supreme Court has struck down national legislation only five times.\textsuperscript{77} Lawrence Beer, one of the most knowledgeable American academics about the Japan Supreme Court, has noted that the Court is criticized by many analysts for being too bureaucratic and for too often approving the government’s views with respect to constitutional issues.\textsuperscript{78} Others have argued that the Supreme Court’s constitutional case law has gradually narrowed the parameters in which government discretion is permitted.\textsuperscript{79} Yet another commentator has said that the Court has demonstrated a commitment to the protection of the individual from the state. “....[w]ith respect to the state, the Japanese people are among the world's most free.”\textsuperscript{80}

the constitutions compared

The Preambles

Preambles are only general guides, but they can help the people and their representatives better understand constitutional goals. Although the United States Constitution has no preamble, both the Japan and Montana Constitutions do. These preambles set the course in words that are both lofty and instructional. Montana’s is one sentence long and it stresses the importance of the environment, “the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains..., [as well as] the blessings of liberty.” Japan’s is longer and emphasizes “peaceful cooperation with all nations,” proclaims that “sovereign power resides with the people” and stresses that “[g]overnment is a sacred trust of the people, the authority for which is derived from the people....”\textsuperscript{81}

Professor Tetsumi Takara, Professor of Law, University of the Ryukyus, Okinawa Prefecture, Nishihara, Japan, who teaches Constitutional Law, thinks the Preamble is one of the most important parts of the Japan Constitution with its emphasis on peaceful cooperation with all nations and with its emphasis on the sovereignty of the people.\textsuperscript{82} Article II, Section 1 of Montana’s Declaration of Rights complements the Preamble with respect to popular sovereignty: “All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.” Following from these preambles with their emphasis on sovereignty, this article will examine how each Constitution deals with fundamental rights. First, however, it is necessary to discuss the concept of duties and responsibilities of the people.

Duties and Responsibilities

Chapter III of the Japan Constitution, which contains its fundamental rights articles, is entitled “Rights and Duties of the People.” Thus, duties seem to have an importance similar to that of rights. “The inclusion of duties...was instigated at the request of the Japanese themselves.”\textsuperscript{83} In particular, there is the duty to work (Article 27), the duty to provide education for minors under one’s protection (Article 26), the duty to ensure children are not exploited (Article 27), and the duty to ensure that marriage is based on mutual consent and maintained through mutual cooperation (Article 24). “Japanese have traditionally perceived social reality in terms of duties rather than rights.”\textsuperscript{84}

Article 12 of Chapter III says that “the people...shall always be responsible for utilizing [the freedoms and rights guaranteed by the Constitution] for the public welfare.” A scholar has said that Article 12 “makes sense only as rhetoric, insisting that the people use their freedom responsibly.”\textsuperscript{85} In comparison, Article II, Section 3, of the Montana Constitution says that “[i]n enjoying these [fundamental or inalienable] rights, all persons recognize corresponding responsibilities.” The nature of these corresponding responsibilities is unknown.

Life, Liberty, Pursuit of Happiness

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

34 INTERNATIONAL LEGAL PERSPECTIVES
“Life, liberty, and the pursuit of happiness” comes directly from the American Declaration of Independence. Professor Takara believes that Article 13, with its emphasis on the people’s “right to life, liberty, and the pursuit of happiness,” is one of the most significant Articles of the Japan Constitution. Two scholars suggest that Articles 12 and 13 guarantee all Japanese constitutional rights and freedoms “insofar as they do not invade others’ rights.” However, another replies: “If other articles do not protect individual rights, it is not clear what Article 13 would add...[I]t seems best to interpret it as an educational statement.”

Article 13 is in some ways similar to Article II, Section 3, of the Montana Constitution:

All persons are born free and have certain inalienable rights. They include the right [to] a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.

The right to welfare might be supported as a subset of the pursuit of “basic necessities.” However, Butte Community Union v. Lewis, 712 P.2d 1309 (Mont. 1986) denied welfare fundamental right status because a constitutional convention delegate said that the right to pursue life’s basic necessities was not intended to create a right to be provided with all of life’s necessities at the expense of the public treasury. In a somewhat similar fashion, the Japan Supreme Court found that the denial of concurrent payment of both a welfare pension and a child support allowance to the same individual is not unconstitutional. “The [Japan] Supreme Court has used the Horiki case as a precedent to dispose of all welfare cases and has taken a hands-off attitude toward welfare cases.”

Montana's guaranteed inalienable right to “a clean and healthful environment” is supplemented by Article IX, Section 1, subsections (2) and (3), which require the legislature to provide adequate remedies for enforcement of the right. The most significant case to interpret this provision concludes that the inalienable right to a clean and healthful environment is a self-executing fundamental right. In Japan, the right to environmental protection stems from Article 13 as well as from Article 25 (the right to wholesome living and the duty of the State to promote public health). In a noise pollution case, the Japan Supreme Court upheld an appeal from the Osaka High Court which recognized the substance of the right to environmental protection by sustaining a district order enjoining nighttime flights on the basis that they disturb the lives of nearby residents. In addition to the right to a healthy environment, the right to privacy, consumer rights, and the right to know are assumed to be implicit in Article 13: “Since the Constitution of Japan has never been amended, a somewhat liberal interpretation has been deemed necessary to rank such new rights among the specifically listed constitutional rights.” Also, because under Articles 13 and 18 (“Involuntary servitude, except as punishment for crime, is prohibited”), military conscription is considered unconstitutional.

**Individual Rights and the Public Welfare**

An overarching concern of any constitution involves the rights of the individual versus the rights of the group. Which takes precedence and when?

The central problem in...Japanese constitutional law...is the dilemma of how to mediate the conflict between individual rights and the public welfare - between Japan’s authoritarian and group-subservient traditional culture and the highly individualist rights...in the...Constitution.

In Japan’s Constitution, the group is represented by the phrase “public welfare,” which appears frequently. “Japanese are...said to be comfortable integrated into...groups, but not used to acting as individuals.” One reason the Constitution has been thought of “as radical is that it placed heavy emphasis upon individual rights.” The Diet appointed a commission in 1957 to consider amendments to the Constitution. After seven years, it reported back that it had no specific amendments to offer although some commission members had proposed amendments to strengthen public and collective rights against individual rights, but the commission did not approve the amendments. “Given these...sentiments it is not surprising that the Supreme Court has interpreted the individual rights provisions of the Constitution narrowly.”

What is the proper balance between individual liberties and the public welfare? One notices a desire for harmony. “Where ugly and otherwise irreconcilable clashes are unavoidable, the jurisprudential tendency is to require that claims of individual liberty or constitutional propriety yield to the needs of the group...[and] give way to the ‘public welfare.’”

Societal restraints seem more important than legal restrictions. In 1950 the Japan Supreme Court defined “public welfare” as “the maintenance of order and respect for the fundamental human rights...” Public welfare has also been defined as “the general good of all the members of the society [which] cannot be interfered with by the unrestricted exercise of a constitutionally guaranteed freedom by an individual or a group.” The individual, in Japan,
must submit to the community.\textsuperscript{105} Nothing is allowed to interfere with the “magic formula” of public welfare.\textsuperscript{106}

The Supreme Court has often referred to the “prevailing ideas in society” in trying to strike a balance between the public interest and individual rights. According to “prevailing ideas,” for example, a municipal government does not violate the separation of the State and religion [provision (Article 20)] when it holds a Shintoist ceremony for the start of constructing a city gymnasium [(Kakunaga v. Sekiguchi, 31 Minshu 533, Beer/Itoh (1996) at 478, 483 (Sup. Ct., July 13, 1977)]...and, the prohibition of sale or distribution of obscene publications is justified because it serves the general interest, and what constitutes obscenity can be judged by the “prevailing ideas of society” [(Oyama v. Japan, 11 Keishu 997, Maki (1964) at 3, (Sup. Ct., 1958)]. Such a way of reasoning seems to lead to setting the limits on individual rights in accordance with majority opinion, which runs counter to the idea that basic rights should be protected even when doing so may reduce the overall general welfare.\textsuperscript{107}

“Public welfare” appears in four different Articles in Chapter III. Articles 12 and 13 use it to negatively adjust conflicting rights and freedoms from the standpoint of a free state. Article 22\textsuperscript{108} and Article 29\textsuperscript{109} use it as means of correcting social inequalities and injustices caused by the disparity of wealth.\textsuperscript{110} In Marushin Industries Inc. v. Japan,\textsuperscript{111} the Supreme Court held that the Diet could, in the interests of public welfare, regulate an individual’s economic activities if the regulation was reasonable. “Most scholars say that the public welfare limits the freedom of economic activities more than it limits civil liberties... because Articles 22 and 29 expressly stipulate the public welfare restriction of economic activities.”\textsuperscript{112} Professor Ford has argued that those rights or Articles with the qualifier “subject to the public welfare” are not self-executing.\textsuperscript{113} Constitutional articles or sections which are not self-executing depend on legislation to be effective. This may be true for Articles 22 and 29, but Articles 12 and 13 are, in fact, educational and inspirational. It would be difficult to implement them with legislation in any meaningful way.

The prevailing approach has been that all Japan constitutional rights contain an implicit “public welfare” qualification.\textsuperscript{114} Constitutional law has tended to focus on the “public welfare” words in Article 12 rather than on the “eternal and inviolate” language of Article 11.\textsuperscript{115} Justice Iriye has said [t]he liberties in the Constitution are not absolutely unlimited; in situations in which there exists sufficient reason recognized as absolutely necessary for the public welfare or for other constitutional requirements, a limitation thereof up to a certain point would not be considered unconstitutional.\textsuperscript{116}

To a large degree, the feeling among most jurists and many scholars seems to be that “the state should respect fundamental human rights to the greatest possible extent, except where the exercise of such rights is in some way harmful to the public welfare.”\textsuperscript{117} Nevertheless, Japanese courts seem to have been somewhat more solicitous of individual freedoms in recent years. They have required stronger showings of “public welfare” necessity before abridging fundamental rights. There have been fewer decisions which have relied on general references to the “public welfare.”\textsuperscript{118}

In jurisprudence in the United States, the term “public policy” is perhaps a rough equivalent to the term “public welfare” used in the Japan Constitution and in Japanese cases. Public policy in the U.S. has to do with those policies which are of fundamental concern to the state and all of society. Thus specific acts or actions which injure the public at large, although benefiting specific individuals, are frowned upon and often treated negatively by the courts. Individual rights, then, are felt to inure to the ultimate benefit of society as a whole. In the Montana Constitution, the Declaration of Rights emphasizes the public rights of the individual, which are divided between the right to know what government is doing and the right to participate in government (encompassing such rights as the right to vote, the freedom of assembly, the freedom of expression, the actual rights of participation, and the right of political association).

**Equal Protection of the Laws**

Until the entry into force of the new Constitution in 1947, Japanese law did not recognize the principle of equal protection of the laws.\textsuperscript{119}

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

No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. Mont. Const., art. II, 4.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor
deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. xiv

Both the Japan and Montana Constitutions give more concrete expression of equality than does the U.S. Constitution. Both the Japan and Montana provisions are rather similar in that they prohibit political discrimination because of sex, race, creed (religion), or social origin or condition (social status or family origin). Japan’s Article 14 also prohibits discrimination in the areas of economic or social relations; Montana’s Section 4 prohibits discrimination in the area of civil rights (which shades into economic or social relations).

However, leading scholarly theory, and cases as well, prohibit the Diet from making a law which is discriminatorily in content, whatever the reason may be. This view regards the features enumerated in the latter part of Article 14... e.g., “race, creed, sex,” etc., as examples. Therefore, it will be unconstitutional to make a discriminatory law, whatever the ground of discrimination may be.120

In any case, it is clear that both the Montana and Japan Constitutions have very inclusive schemes of “equal rights.” For example, the term “culture” in Montana’s Section 4 is intended to cover groups that are culturally distinct such as Native Americans.121

Both the Japan Supreme Court and the Montana Supreme Court have dealt, in the equal rights context, with disparate sentencing for the same crime. In the case of Aizawa v. Japan,122 defendant-appellant Aizawa, after being subjected to ten years of sexual abuse, murdered her father. Article 200 of the Japan Criminal Code provided for a minimum sentence of life in prison for patricide. Article 199 of the Criminal Code provides for a minimum sentence of three years for murdering a non-family member. The issue in the case was whether, under Article 14 of the Constitution, such discrimination in terms of sentencing violated the Constitution. The Japan Supreme Court said the answer depended on whether there are reasonable grounds for Article 200.123 “[I]t is not...unreasonable to regard the killing of an ascendant as generally deserving of more severe social and moral denunciation than an ordinary homicide...”124 Thus, the Court found reasonable grounds for the statute. However, the Court went on to say that if the sentencing discrepancy is too severe, it could be unreasonable.125 In fact, the Court found that the minimum of life imprisonment under Article 22 was too severe and “unreasonably discriminates.”126 Aizawa exemplifies the conflict between the moral value of filial piety (the respect and obedience owed by lineal descendants to their ascendants) and the equality-under-the-law provision of the Constitution.127

The Montana Supreme Court has had its own equal protection issues with respect to sentencing. For example, the Court in In re C.S.128, held that a sentence that was more severe than what would have been imposed on an adult for having committed the same act did not deny equal justice to a juvenile. This decision was in apparent violation of Article II, Section 4 of the Montana Constitution and in conflict with the specific command of Article II, Section 15, that provides that “persons under 18 years of age shall [have] all the fundamental rights of [Article II, Declaration of Rights] unless specifically precluded by laws which enhance the protection of such persons.” The Court emphasized the difference between adults and minors in matters of sentencing, stating that the physical liberty interests of minors and adults are qualitatively different.129 The Court also noted that the purpose of detention is not the same for adult and juvenile offenders.130 In addition, in State v. Herrera,131 the Montana Supreme Court held that disparate sentences for co-defendants (20 years versus suspended sentence) did not violate equal protection because of different characteristics and personal histories.

The Montana Supreme Court also addressed the problem of equal protection relative to the imposition of capital punishment and determined that the Constitution of Montana provides no additional equal protection beyond that required by the 14th Amendment to the U.S. Constitution,132 as interpreted by the U.S. Supreme Court. The Japan Supreme Court in Murakami v. Japan,133 also found the death penalty to be constitutional but in accord with the more usual analysis that it is not, per se, a constitutionally-prohibited “cruel punishment.” (Article 36 of the Japan Constitution: “The infliction of torture by any public officer and cruel punishments are absolutely forbidden.”)134

In the area of economic classifications, both the Japan Supreme Court and the Montana Supreme Court have been reasonably consistent in relying on the rational basis test, requiring that the classification be rationally related to a legitimate government objective. In Makino v. Japan135, Makino’s pension was reduced because his wife was already receiving a full pension. The Tokyo District Court stated that it could not find any reasonable basis for this discrimination, noting that the law seemed to be based on the assumption that an old married couple would need a smaller pension than two single people. The Japan Supreme Court, in Horiki v. Governor, Hyogo Prefecture136, stated that alleged violations of the equal protection principle can be used as the basis for bringing welfare suits even though the Court deferred to the Diet’s classification as rational in that particular case. In Arneson v. Montana137, the Montana Supreme Court held
that while a post-retirement increase in pensions of beneficiaries of the Teachers’ Retirement System fulfilled a legitimate government purpose, a classification of teacher retiree beneficiaries that excluded non-disability beneficiaries under age 55 was not rationally related to the legitimate government purpose. However, in another case decided in the same year, the Montana Supreme Court stated: “The purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive.”

In Japan, discrimination against the Burakumin, the descendants of a class of people known traditionally as social outcasts, remains. The government provides grants to aid Burakumin communities, a modified version of America’s affirmative action programs. There remains the problem of psychological discrimination and how to eliminate it from Japanese society. The Ainu people living on the island of Hokkaido are similar to Native Americans. Both were deprived of their means of livelihood and their ethnic cultures. In the United States, the policy of Native American assimilation was abandoned decades ago. This has not occurred in Japan so the Ainu have been facing the danger of loss of identity as an ethnic group. The modern concept of property rights denied the Ainu their traditional right to gather fruits, the right to hunt, and the right to fish. The Hokkaido Farmer Aborigines Protection Act of 1899 granted land to them and imposed broad restrictions on its disposal because they had no concept of private property. However, there have been no Supreme Court cases dealing with discrimination on an equal protection basis for Native Americans in Montana or for the Bunraku or Ainu in Japan.

The Tokyo High Court affirmed a lower court ruling allowing a homosexual group access to a public facility. The group had sought to reserve a youth house for two days and one night. The director initially refused the reservation, which, the court said, was prejudicial treatment.

In 1945 SCAP ordered the Japanese government to give women the vote. “Woman’s suffrage was a wildly popular reform.” The polling percentages for women voters have consistently been higher than for men since the 1960’s, but participation by women as elected officials has been sluggish – both the percentage of women candidates and that of successful women candidates. Under Article 14 of the 1947 Japan Constitution (prohibiting sex discrimination) women’s right to vote was firmly established. In addition to Article 14, Article 25 (“All people shall have the right to...wholesome and cultured living.”), Article 26 (“All people shall have the right to receive an equal education correspondent to their ability...”), and 27 (“All people shall have the right...to work.”) helped achieve substantial gender equality. The American drafters included these rights 25 years before a similar amendment to the United States Constitution was even proposed. “The most important unit in human relations...was the family, and within the family the most important element was the equality of men and women.”

One Japanese scholar has observed, however, that Japanese believe that men and women are equal in their ability to cope with life, but this sense of equality is much closer to equality of responsibility than equality of rights. “Individual dignity and equality of the sexes grow naturally out of the American concept of the self, but do not fit well with the Japanese sense of self.” In fact, when Japanese women have opted to enter the business world, they have suffered considerable discrimination in compensation and advancement opportunities. In , women, including Ms. Nakamoto, were required by Nissan to retire at age 55 whereas men were not required to retire until age 60. The Court said: “There is no basis for judging that a female employee contributes less to the...company than a male counterpart...” This was an example of “irrational discrimination.”

However, there are other examples of sexual discrimination which have been upheld. Article 731 of the Japan Civil Code allows men to marry at age 18 but allows women to marry at age 16. A commentator notes that the rationale is that males and females have different rates of physical maturity, but in fact individuals mature at different times. Thus it should be age 18 for both. Article 733 prohibits women, but not men, from marrying for six months after a divorce. This was sustained by the Japan Supreme Court with the rationale that otherwise paternity of new-born babies might be unknown. This, however, appears to be illogical: “No rational reason seems to exist between the purpose and the means...[M]edical evidence of paternity is readily obtainable today, making it easier to avoid any confusion over paternity and responsibility.”

In Montana, classifications based on sex, as an explicitly protected class in Section 4, Article II, of the Montana Constitution, would presumptively be subject to the compelling state interest test. However, no state cases have raised the issue. One commentator has argued: “The starting point for sex discrimination analysis in Montana should always be the sweeping ‘dignity clause’...[t]he dignity of the human being is inviolable...[which] inextricably binds freedom from sex discrimination with equality and inviolable human dignity.”

HeinOnline -- 14 Int'l Legal Persp. 38 2004
A principal purpose of Article II, Section 4, of the Montana Constitution and of Article 14 of the Japan Constitution is to ensure that persons are not subject to arbitrary and discriminatory governmental action. Japan has two levels of analysis; Montana has three. The Japan Supreme Court recognizes that some governmental questions remain within the discretion of the Diet. “Such questions are subject to the most lenient judicial scrutiny or are found to lie completely outside the scope of judicial review.” These are “matters of legislative discussion” or “political questions”; e.g., “legislation concerning crime and punishment, family relations, elections, social welfare...” The Court in *Marushin Industries, Inc. v. Japan* stated that it was using a two-tiered test: (1) strict scrutiny “presumes that statutes that regulate freedom of expressions or freedom of mental activities are unconstitutional”; and (2) rational relation, “which involved a lower standard of scrutiny [for] statutes restricting freedom of economic activities...” which allows the Diet more discretion. However, some scholars argue that the two-tiered analytical scheme should not apply because the concept of “fundamental human rights” in Article 11 of Japan’s Constitution, which says “[t]hese fundamental human rights” surely refers to all the articles in Chapter III, including Article 14. That is, all the rights discussed in Chapter III are fundamental and therefore are subject to strict scrutiny. Nevertheless, *Marushin Industries* says otherwise.

Article 900 of the Civil Code provided that the share in succession of an illegitimate child was half that of a legitimate child. In *Kono v. Otsuyama*, the question presented was whether this Article unconstitutionally discriminated against the illegitimate child. “The Court stated that the purpose of the provision was to balance the need to respect legal marriage while protecting the needs of the illegitimate child [and this] was a reasonable means of achieving this goal.” Two commentators have criticized the Court’s decision stating that such a classification with respect to illegitimate children should be subject to a stricter standard of judicial review than the rational basis test. They argued for an intermediate level of scrutiny which would require a “substantial relationship between the means employed and the legislative ends” and noted that the respect for marriage must be reconciled with the protection of an illegitimate child who has no responsibility for his or her birth.

In contrast to Japan’s two-tiered test, the Montana Supreme Court has three levels of scrutiny; (1) “strict scrutiny in which the Court refuses to defer to other branches of government and requires a showing that the challenged law has as its objective a compelling government purpose, and the means used is either necessary or narrowly tailored to achieve the compelling government purpose;” (2) “intermediate scrutiny” in which a benefit lodged in the State Constitution, outside of Article II, is an interest whose abridgement requires something more than a rational relationship to a government objective.” The State has to demonstrate that its interest in the particular classification is more important than the interests of the persons disadvantaged by the classification and (3) “rational basis” in which the court defers to other branches of government and asks only if it is conceivable that the particular classification is rationally related to a legitimate government purpose. In Montana, rational basis does not always mean deference to the state legislature and strict scrutiny is not necessarily fatal.

In the context of equal protection, the two constitutions differ with respect for the need for state action. Section 4 of the Montana Constitution creates a right to equality within the realm of private activity, eliminating the state action requirement attached to the comparable requirement of the U.S. Constitution. The private anti-discrimination equal protection guarantee is limited to the exercise of civil and political rights. In *Mitsubishi Resin, Inc. v. Takano*, the Japan Supreme Court reasoned differently. Takano was dismissed after his probationary period because Mitsubishi Resin discovered that he was involved in political protests during his student days which he had not disclosed on his employment application. The question was whether he was discriminated against because of his political views. The Court said that the Constitution deals only with state action and was “not intended to regulate directly the relations between private parties.” However, in *Nissan Motors, Inc. v. Nakamoto*, the Court applied its so-called “indirect action” theory and held invalid a company regulation that required female workers to retire five years earlier than male workers.

**Freedom of Thought and Conscience**

Article 19 of the Japan Constitution says: “Freedom of thought and conscience shall not be violated.” This is different from freedom of speech, which is guaranteed in Article 21. The Montana Constitution contains no direct equivalent to Article 19, although Article II, Section IV, which states that “the dignity of the human being is inviolable” is perhaps close. In Article 19, “thought...includes systematic thinking or belief based on a sense of value, such as political or religious belief or opinion...” “Conscience” is broader than religion (freedom of religion is provided for in Article 20) and is an “ethical aspect of thought.” Once a thought is expressed, it is constitutionally protected as a part of speech or form of expression in accord with Article 21.
Conscience and thought can be involved with political convictions and in how one sees his or her country and its history. In Chiyoda Ward, Tokyo v. Hosaka, the defendant engaged in political activities while in junior high school. When he applied to several senior high schools, he was rejected by all. Only years later did he learn that his junior high principal had submitted unfavorable reports about him based on his political activities. Although Hosaka argued that his Article 19 constitutional rights were violated, the Tokyo High Court found against him, holding that a sufficient causal relation between the principal's actions and Hosaka's rejection by the various schools did not exist. In Mitsubishi Resin, Inc. v. Takano, Takano was dismissed after his probationary period because Mitsubishi Resin discovered he was involved in political protests during his student days which he had not disclosed on his employment application. The Court found that, with no state action involved, "...if an enterprise should refuse to hire someone based on his particular beliefs or ideas, we cannot say that this is per se illegal." The Court, ruling for Mitsubishi Resin, stated further that when an employee is let go after his probationary period, it must be due to poor performance during that period, but Takano's failure to accurately report his pre-employment activities did have a bearing on his trustworthiness.

Freedom of thought has a bearing on how Japanese history is taught in the public schools and also on the administration of schools. "Students learn little about Japan's Second World War history at school, in part, because university entrance exam questions focus on earlier history." Since school textbooks may convey to students the most authoritative version of the nation's history they encounter, the choice of textbook and its contents is significant. Japanese government guidelines, promulgated in 1958, provided that "when a school ceremony is held on national holidays...it is advisable to make children understand the meaning of those holidays and to hoist the national flag and to make [the students] sing [the National Anthem]." Many Japanese associate the flag and the National Anthem with Japan's militaristic, nationalistic past — the required singing of the anthem is seen by some as "a violation of the freedom of thought and conscience." So what is a convention in American schools, with respect to the flag and the anthem, is controversial in Japan. However, in a Supreme Court decision, the Court upheld the government guidelines. In 1992, a Kyoto District Court also sided with the government and said the words and melody do not defame the Constitution. In 1999, a high school principal in Hiroshima committed suicide. "He was reported to have been torn between the order of the [government] Board of Education and the teachers opposed to the [singing of the anthem and the flag ceremony.]" Using video equipment, schools have kept watch on teachers to see that they are having their students sing the national anthem. This has been severely criticized. "...[N]o official can force citizens to confess their faith." With respect to the flag and the anthem, "...teachers should explain various standpoints..." and let students make up their own minds.

Freedom of Religion
Article 20 of Japan's Constitution says:

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

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

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

It is supplemented by Article 89 (in Chapter VII, Finance) of the Constitution: "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational, or benevolent enterprises not under the control of public authority."

Article II, Section 5, of the Montana Constitution says: The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

It is supplemented by Section 6 of Article X (Education and Public Lands) of the Constitution:

The Legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Before the Second World War, Shinto was less a religion than an ideology symbolizing statism and very strong nationalism. The Shinto system combines long-established social customs and folk beliefs with the ancient monarchy grounded in a sun myth. With the new Japan
Constitution, Shinto members could shed their official affiliation and become independent.200 “Any movement claiming to be religious could register with the government as a ‘religious judicial person’ and become exempt from paying taxes on religious income.”201 Two new religious groups with roots in the tradition of Buddhism have about 10 million members.202 A little more than one million Japanese are Christian. The enactment of complete religious freedom and the enactment of land reform were perhaps the two most significant events for religious groups during the allied occupation of Japan.203 Land reform deprived many temples and some shrines of the farmlands which they rented to tenant farmers. As a result, many Shinto and Buddhist priests needed to take second jobs or run businesses to support themselves, “a process which has contributed to weakening the religious character of Shinto and Buddhist institutions.”204

The government has been charged with being more accommodating toward Shinto and less accommodating towards other religions not historically related to the Japanese state.205 In addition, the constitutional ban on public support of various good works not under government “control” (Article 89) has been ignored, which, to American observers, would seem to be a significant problem; e.g., substantial aid has been given to private schools, including religious ones.206 In Kakunaga v. Sekiguchi207 Shinto priests were paid by the city to conduct a groundbreaking ceremony for a city gymnasium. The Supreme Court ruled that the ceremony did not violate the constitutional separation of religion and state.

[T]o attempt total separation would inevitably lead to anomalous situations such as, for example, questioning the propriety of extending to religiously affiliated schools the financial assistance given to private schools and of the assistance provided for the maintenance of architectural or artistic treasures owned by religious groups.208

This would result in “invidious discrimination because of religion.”209 While the groundbreaking in question was connected with religion, the purpose of the ceremony was to ensure a stable foundation and construction, and thus safe and thus “chiefly secular.”210 It [did] not have the effect of “promoting or encouraging Shinto...” and should therefore not be prohibited.211 Whether a certain act constitutes religious activity depends on the place of the act, the public’s reaction, the intent and religious consciousness of those who act, and its effect and influence on the general public.212 “The justices disassociated the commemoration of Japan’s war dead from its association with Shinto and Buddhist ritual and belief.”213

However, in 1997 the full Supreme Court said that the donation of public funds to shrines violated the constitutional principle of separation of church and state.214 “[The] principle of separation only applies as far as government exceeds the reasonable boundary in terms of purpose and effect of the act...and in light of social/cultural conditions.”215 The Court said the entanglement of the local government with the shrine transcended a reasonable boundary.216 The Court adopted the U.S. Supreme Court’s Lemon test217 which was summarized as follows: “...a governmental practice must (1) have a secular purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) [does] not foster excessive entanglement with religion...”218 It was the entanglement between the government and the Shinto religion that was primarily challenged.219 Since this decision, many mayors react cautiously in supporting even relatively minor ceremonial celebrations, at least in communities where opposition is possible.220 With the Anzai case, the Japan Supreme Court has moved closer to the Montana and U. S. Supreme Court positions of separation between church and state although challenges in both countries will continue.221

The Montana Constitution’s Section 6 of Article X, is an absolute prohibition against public support of private religious schools, something which is permitted in Japan despite its constitutional provisions. The language of Section 6 states that public funds shall not be spent for any religious purpose, which is a clear and forceful commitment to separation of church and state. In 1926, the Montana Supreme Court decided that religious freedom did not restrict the State of Montana from prohibiting the possession of peyote for sacramental purposes.222 The Japan Supreme Court also decided that the constitutional grant of religious freedom is not absolute and unlimited when deciding a faith healing case in which the victim was held down and injured.223 However, the Japan Supreme Court did affirm a lower court’s nullification of a school’s expulsion of a Jehovah’s Witness student who refused to participate in kendo training.224

Free Speech

Article 21, of the Japan Constitution states: “Freedom of Assembly and Association as well as speech, press, and all other forms of expression are guaranteed.”

“The First Amendment has proved to be one of the United States’ most successful legal exports.”225 “The Japan Supreme Court has...endorsed the proposition that freedom of speech is a necessary condition for democratic government.”226 Freedom of speech also includes picket-
ing and demonstrations.\textsuperscript{227} However, the Court takes a somewhat restricted view of free speech: it has never held unconstitutional any regulations on freedom of expression although it has twice declared economic regulations unconstitutional.\textsuperscript{228}

In fact, whether the ordinary citizen enjoys the right to freedom of expression in everyday life depends more on society than on government and law.\textsuperscript{229} In Japan, in particular, the ideal of “consensus rather than majority rule, governs.”\textsuperscript{230} In this context, there are two competing theories of free speech: the Meiklejohn theory and the marketplace theory. Meiklejohn argues that everything worth saying shall be said but not all opinions are required to be heard under the First Amendment. Thus, free speech is not an end in itself but a means to some other end.\textsuperscript{231} The marketplace theory says that all voiced ideas compete with other voiced ideas in the marketplace, and those that are most persuasive will attract the most adherents. “[T]he Meiklejohn theory...better accommodates a communitarian social ethic, whereas the marketplace metaphor presupposes a more individualistic legal and cultural milieu.”\textsuperscript{232}

“The Japanese Supreme Court’s apparent rejection of the marketplace of ideas paradigm may in part reflect cultural values that emphasize community over individualism.”\textsuperscript{233} A problem with the marketplace of ideas theory is that the marketplace “potentially belongs to those with the deepest lungs or the fattest wallets.”\textsuperscript{234} To some degree, of course, freedom of speech is limited by normal social behavior. Thus the free exercise of expression in Japan is limited “inside private corporations and organizations [because of a] Japanese sense of submission related to the Confucian concept of hierarchy.”\textsuperscript{235} Japan, then, embraces freedom of speech insofar as it relates to self-governance, but it has refused to protect other kinds of expression to the same extent. “If a person behaves in a rude, obnoxious, or obscene fashion during a town hall meeting, the person is escorted from the chamber...”\textsuperscript{236} Japan does have “demonstrations...regarding tax and trade issues, environmental pollution, airport expansion, working conditions, and [the war with Iraq which]...enliven national discourse...[and] reaffirm [the] freedom to act...”\textsuperscript{237} The denial of parade and demonstration permits almost never occurs, but the permit often includes time, place, and manner restrictions.\textsuperscript{238}

“[T]he Japanese Supreme Court views freedom of speech as an essential corollary of democratic self-government [but] draw[s] clear lines between protected and unprotected speech activity.”\textsuperscript{239} The goals of the Supreme Court are to protect and enforce “freedom of expression without upsetting harmonious relations between the judicial and legislative branches.”\textsuperscript{240} In Takatsu v. Japan,\textsuperscript{241} the Court said the ban on door-to-door political canvassing during political campaigns does not violate freedom of expression. “The Election Law reflects a desire to minimize the disruptive impact of elections, even at the cost of squelching speech and limiting the channels through which candidates can reach the voters.”\textsuperscript{242} In addition to the prohibitions on door-to-door canvassing, the Election Law places strict limits on the candidates’ purchase of radio and television time.\textsuperscript{243} In Ionamine v. Fukuyama, the Court ruled that the disciplinary dismissal of two officials of the Japan Self Defense Force (JSDF) who, while in uniform, had read a document allegedly slanderous of the JSDF at a political assembly did not violate Article 21 of the Constitution. Specifically, the Court determined that “[t]he restriction of the officials’ freedom of expression...was a necessary and reasonable action for the protection of the public benefit.”\textsuperscript{244}

In Repeta v. Japan,\textsuperscript{245} the question was whether an observer, who was not a certified media reporter, could take notes while observing an ordinary trial. The Supreme Court said that the “taking [of] notes should be respected in light of the spirit of Article 21.”\textsuperscript{246} Certified media reporters may take notes since a democratic society needs to be informed.\textsuperscript{247} However, this freedom is subject to reasonable restrictions.\textsuperscript{248} The taking of notes by spectators could create an inappropriate atmosphere and therefore could be prohibited if “special circumstances” exist.\textsuperscript{249} Although the Court could find no such “special circumstances” that would prohibit Repeta’s taking notes “the presiding judge’s determinations in exercising the courtroom policing power must be given the utmost respect...absent an unlawful exercise of public power...”\textsuperscript{250}

“[F]reedom of speech does not imply an unqualified right of access to public or private property for use incidental to speech activities.”\textsuperscript{251} Yamagishi v. Japan\textsuperscript{252} involved the use of public utility poles for posters promoting a conference supporting a nuclear weapons ban. The protestors were charged with, and convicted of, a misdemeanor for hanging the posters without obtaining permission from the owners. The protestors argued that their convictions violated their Article 21 right to free expression. The Court upheld the convictions, saying that, “a means for outwardly expressing one’s ideas has never been permissible if that means is such as to do unfair damage to the property rights of other persons...”\textsuperscript{253} However, in Japan v. Kanemoto,\textsuperscript{254} the Court said that mere advocacy of insurrection against the government is not a criminal act.\textsuperscript{255} The distribution of
politically inflammatory pamphlets is not an instigation to insurrection.266

The Meiklejohn theory states that “the central purpose of the First Amendment is to facilitate democratic self-governance [and ]...necessarily presupposes general social consensus regarding the proper modalities of free expression.”257 Political demonstrations, then, are particularly protected since free speech is central to the democratic process as long as private property is not infringed upon.

“[O]ne common theme [of Japan Supreme Court decisions] is a concern for the tranquility of the community and the protection of its values.”258 Matsue v. Hakodate Customs Director59 upheld the constitutionality of customs officials inspecting and seizing magazines featuring nude women: obscene materials fall outside the scope of Article 21.260 The Court in Sato v. Japan261 upheld the constitutionality of a ban on domestic obscene material.262 The Court said obscenity depended on whether the work appeals primarily to the prurient interests of readers; the relevant weight given to the portrayal of sex; and the extent to which sexual stimulation is mitigated by artistry and intellectuality.264

“Synthesizing these elements...[can it be said to be something that wantonly excites and/or stimulates sexual desires [or] affronts an ordinary person’s normal sense of shame...”264 In Tsuchiya v. Japan, the Court applied these factors in affirming a

“lower court’s dismissal of the plaintiff’s claims against the Tokyo Tax Bureau. The plaintiff had purchased a collection of works by Robert Maplethorpe, the American photographer, in the United States and sent it to Japan as a gift. The collection contained collages of photographs depicting faces, nude figures, flowers and landscapes as well as photographs of male and female genitalia.”265

The Tax Bureau prohibited the import of the collection into Japan as “injurious to public morals.”266

In the mid-1980’s, a poll showed that close to 90 percent of all respondents complained about the public sale of pornography in vending machines.267 Although pornography “does not trigger [the] deeply rooted conflicts between religious beliefs and secular values” that it does in the United States,268 it still does not have community approval and is not protected by Article 21.

The Japan Supreme Court has largely rejected the marketplace of ideas metaphor in freedom of speech cases except for cases concerned with direct political activity. However, “[p]rior to the adoption of the Constitution of 1947, Japanese citizens did not [even] enjoy an effective generalized right of freedom of expression.”269 An American scholar theorized that the Supreme Court may not have enforced Article 21 more aggressively for the following reasons: strong judicial review has not traditionally been part of Japan’s civil law system;270 the selection process for Justices contributes to the Court’s institutional conservatism;271 “the Japanese Supreme Court does not perceive itself to be a powerful institution vis-a-vis the Diet or [administrative agencies]”;272 “conflict avoidance is an Japanese cultural norm.”273

The first sentence of Section 7 of Article II of the Montana Constitution274 is probably more protective of the right of speech than its federal counterpart, prohibiting “abridgement.”275 Japan’s Article 21 simply says that the freedom of speech, press, and all other forms of expression are guaranteed. The second sentence of Montana’s Section 7 is theoretically less protective since a requirement of responsibility, not found in the U.S. Constitution, modifies freedom of speech and the press. Article 12 of Japan’s Constitution does something similar to Japan’s Article 21 because Article 12 says the people shall always be responsible for utilizing the granted rights, which would logically include Article 21, for the public welfare.

Clearly, freedom of expression is fundamental to a government based on representational democracy.276 The Bill of Rights Committee of the Montana Constitutional Convention stressed the importance of the freedom of speech “guarantees in the hope that their enforcement [would] not continue merely in the wake of federal case law.”277 The addition of the words “or expression” in the Japan and Montana Constitutions also expands the protection for speech, in theory, if not in fact.

Montana v. Lance278 held that the crime of intimidation, which punishes threats of physical confinement and physical restraint, is not an unconstitutional violation of free speech. Several Montana cases have supported regulations on speech. In Montana v. Lewery,279 the Court held that the necessity of orderly conduct justifies the use of force to physically remove disorderly persons from a public meeting and is not a violation of the freedom of speech. In Montana v. Woods,280 the Court found that a statute prohibiting solicitation of false testimony does not violate the freedom of speech because the right is not absolute and may be regulated if the statutes are narrowly and precisely drawn. Other speech which may be regulated includes soliciting signatures for initiatives in school (Dorn v. Board of Trustees of Billings School Dist. No. 2281); licensing adult movie video booths via high licensing fees
Censorship

In addition to dealing with free speech, Article 21 of the Japan Constitution says: “No censorship shall be maintained....” In a sense, this is the flip side of the right to free speech and expression. In the 1930’s, “the shadows of censorship and rigid orthodoxy overspread [Japanese] political life.”284 “Political expression was tightly and harshly monitored.”285 Soon after the war ended, SCAP outlawed Japanese institutions of censorship286 and the Constitution solidified this ban.

Censorship has arisen in two contexts: what material should be allowed in history textbooks and what materials are subject to seizure by the customs inspectors. In Japan, the Ministry of Education must approve all textbooks used in the public schools. “Textbooks in social studies have tended to be checked especially strictly, and from an ideological as well as an educational viewpoint.”287 “The famous Ienaga Textbook Review cases...heightened public awareness of government efforts to gloss over Japan’s wartime...behavior....288 Professor Ienaga, author of a widely-used high school history textbook, was involved in a lengthy dispute with the Ministry of Education about the handling of Shinto, the emperor institution, and Japan’s wartime behavior, and appealed the Ministry’s ruling against him through the courts.289 In Ministry of Education v. Ienaga289, the Supreme Court held that a textbook author might have standing to sue the Ministry of Education. However, in a subsequent judgment of the Supreme Court290 the Ministry’s textbook inspections system was held not to violate constitutional prohibitions against censorship in Article 21 on several grounds. There was no censorship because “[t]he screening in the present case...does not prevent the publication of the manuscript as a general book....” In addition, the constitutional “freedom of expression...is not guaranteed without any restriction...[and] may be restricted on the ground of public welfare within a reasonable and necessary scope.”291 The Court held that the standards and goals of the Ministry of Education’s textbook screening process were within reasonable and necessary limits.292 “[T]he Japanese government does not maintain active and ongoing censorial efforts – with the possible exception of aggressive customs inspectors bent on ferreting out the latest copy of Hustler.”293 The Supreme Court, in the curiously-reasoned opinion Matsue v. Hakodate Customs Director,294 said that “censorship” refers to “exhaustive and general examina-

That pornography is more strictly regulated in Japan than in the West has to do with the paternalistic character of Japanese society; thus, customs censorship is not actually censorship.295 Professor Krotoszynski comments that the Court’s approach is that the Japanese can safely be exposed to foreign political ideas but that foreign ideas about sex are too upsetting,296 which in this age of international travel and international exchange of all kinds of materials seems a bit peculiar.

Censorship is not addressed under the Montana Constitution, although some local communities do get involved in the issue with respect to whether evolution or creationism should be taught in the schools and whether the local library should use filters on its Internet terminals.297 While the Montana Constitution prohibits laws impairing the freedom of speech or expression, it does not ban censorship as such.

The Right to Know

Professors Hata and Nakagawa make the point that the right to know is the premise of Article 21 of the Japan Constitution in its guarantee of freedom of speech, press and all other forms of expression.298 Thus Article 21 supports the media’s right to collect and edit information.299 The Supreme Court in Kaneko v. Japan300 noted that the media’s right to gather and report news is deserving of constitutional protection.301 “Freedom of information is at the foundation of democracy”.302 In Japan, “the national newspapers and television news programs enjoy much more public trust – particularly among the college-educated – than any sector of government except the Supreme Court.”303 In Repeta v. Japan,304 the Court stated that media reporters can take notes at a trial because a demo-
cratic society needs to be informed, and that observers, even though not media reporters, also have the right to take notes, and hence the right to know, absent special circumstances.310

In fact, there has been increasing openness in Japanese government. The Diet passed a Freedom of Information Act in 1999311 whose purpose is “to strive for greater disclosure of information held by administrative organs...”312 This is intended to lead to “the people’s accurate understanding and criticism.”313 The Freedom of Information Act should increase government accountability.314 The Diet also passed an Administrative Procedure Act in 1994315 seeking to add “clarity in the public understanding in the contents and processes of administrative determinations...”316 However, in Osaka Election Admin. Comm’ v. Nomura plaintiffs sought publication of financial information relating to Osaka municipal elections provided by political parties in response to a questionnaire prepared by the Ministry of Internal Affairs. The Supreme Court reinstated the district court decision denying plaintiffs access to such information as the information was related to the “functional operation of government clearly designated as not to be disclosed by the responsible governmental minister” under the Osaka Information Disclosure Act.317

The Montana Constitution has made explicit the people’s right to know.318 Section 9 is premised on the idea that government should be open and subject to public scrutiny. The only possible exception to the right involves individual privacy. The people have a right to obtain information about government activities. Montana is only one of four states that have explicit constitutional right-to-know provisions.319 The section is self-executing and legislation is not required to give it effect (In re Lacy320). In Bryan v. Yellowstone County Elementary Sch. Dist. No. 2,321 the school board hosted a public forum and disseminated budget information to Bryan and the general public, which included a version of a budget spreadsheet but which did not reference the rating system or otherwise indicate any prioritizing scheme regarding the schools in the district. After a request for the comparison of the schools listed on the spreadsheet, the superintendent of schools claimed that she did not have such a comparison.322 The Supreme Court said the Plaintiff had the right to see the spreadsheet.323 Quoting from Becky v. Butte-Silver Bow Sch. Dist. I,324 the Court said that a review of the right to know provision requires three steps:

First, ...whether the provision applies to the particular political subdivision against whom enforcement is sought. Second,...whether the documents in question are “documents of public bodies” subject to public inspection. Finally, ...whether a privacy interest is present, and, if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.325

The Court said that when the Constitutional Convention delegates adopted the right to know provision, “they essentially declared a constitutional presumption that every document within the possession of public officials is subject to inspection.”326 A number of cases have relied on this provision to open access to government operations.327

Academic Freedom

Another unique provision of Japan’s Constitution is Article 23: “academic freedom is guaranteed.” This short but interesting article was the inspiration of Bette Sirota,328 the only woman on the Constitution-drafting Civil Rights Committee. Academic freedom includes the freedom to research, the freedom to publish the results of the research, and the freedom to teach.329

However, these freedoms do not extend to students’ political activities on campus. In Tokyo Public Prosecutor v. Senda,330 the Court said that if a student gathering at a university is not for academic study but is instead concerned with political activities outside the university, then those students do not have the special academic freedom normally found at a university.331

In Fukumori v. Showa Women’s College,332 Fukumori and other students violated university rules by joining a political organization that urged students not to attend classes. One of the students also wrote an article critical of the university’s actions towards the students for these rules violations. The university then expelled the students. The students sued, claiming a violation of their academic freedom. The Court said that a university has discretion to set rules to foster its educational mission and that such disciplinary actions are permissible.333 The Court also ruled that such discretionary acts do not amount to political discrimination (Article 14), nor do they violate the students’ freedom of speech (Article 21).334

The Court said that Article 23 does not grant to teachers the right “to decide educational content utterly free from the control and involvement of public authority.”335 “[T]he Constitution protects teachers from coercion by public
Thus one of the parties has to change his or her name.

Article 750 of the Civil Code requires that “the surname of either the husband or wife be assumed by marriage.”

Therefore, in Japan, the woman has to change her name, which is contrary to Article 24. The rationale that the sense of togetherness is enhanced by having the husband and wife have the same family name is unconvincing.

There is no similar provision in the Montana Constitution other than the equal protection of the laws guarantee with respect to sex (Article II, Section 4) already discussed, supra.

The Right to Wholesome and Cultured Living

Article 25 of the Japan Constitution is perhaps the most curiously phrased of all the fundamental rights; in particular the adjectives “wholesome and cultured” living. (“All people shall have the right to maintain the minimum standards of wholesome and cultured living.”)

“Wholesome” normally means something that is healthy and good for a person, mostly in a physical sense. “Cultured” would seem to do with the mind—those things that refine and add to one's life in a cerebral or aesthetic sense. This is all rather nebulous so it clearly seems to be not self-executing and must be given effect by statutes.

The Supreme Court in Nagano v. Japan said the right to a decent life does not constitute a legal right — not a concrete and judicially enforceable right.

Many theorists agree that Article 25 has the legal effect of guaranteeing a negative right; i.e., the state is not allowed to interfere with people’s efforts to better their standard of living. A second theory says that “to deny completely the legal effect of the provision for the right to a decent life is to infringe upon the principles of social justice....” This theory is, however, rather abstract without means of enforcement. “The right to a decent life becomes concrete only when it is transformed into an actual claim of right by means of legislative enactment” One could also argue that if the Diet does not enact laws giving content to Article 25, “the people have a right to obtain a judicial declaration that such legislative omissions and deficiencies are unconstitutional.” However, such a theory is supported by almost no one.

Japan’s pursuit of economic growth has also spawned environmental pollution that has endangered a “life worthy of human beings.” Thus, pollution would affect wholesome living. Even though there is no fundamental right to a clean environment in the Japan Constitution, Article 25 could be a vehicle for environmental protection.

Another area in which Article 25 may apply is in the area of economic assistance. Mrs. Horiki, a blind woman living on disability payments, sought further public assistance in

Gender Equality: Marriage and the Family

Beate Sirota drafted Article 24 of the Japan Constitution based on the idea that: “The most important unit in human relations, it seemed to me, was the family, and within the family the most important element was the equality of men and women.” It is generally true that marriage in Japan is now based on the mutual consent of the man and woman. Article 24 expressed an aspiration for social change; it was a pledge by the Japanese to bring about marriages in which the partners are equal.

Of the thirty-one articles included in Chapter 3 of the new Constitution ...Article 24 was the most controversial at the constitutional hearings of the National Diet....While the Japanese recognized the need for democratizing their traditional household system, they were also afraid that the new...[Article 24] would destroy it....Most Diet members did not appear to understand the idea of individual dignity, or its relation to the idea of equality of the sexes.

The Japanese representatives on the final committee to consider the final draft of the Constitution argued against the article guaranteeing women’s rights but gave up after Col. Harry Kades, who ran the constitution-drafting steering committee, backed Betty Sirota and noted that she had her heart set on this article.

Article 750 of the Civil Code requires that “the surname of either the husband or wife be assumed by marriage.” Thus one of the parties has to change his or her name which, in Japan, really means the woman has to change her name, which is contrary to Article 24. The rationale that the sense of togetherness is enhanced by having the husband and wife have the same family name is unconvincing.

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the form of child support for raising her son. The government rejected her request, noting that the law forbade concurrent payments of child support to a disability pensioner. Mrs. Horiki contested the ban, partly basing her argument on Article 25. The Court said that Article 25 “does not oblige the State to assume any concrete and actual obligations toward individual citizens.” Instead, the right to such a life is realized through creative and expansive social legislation:

[T]he concept of “minimum standards of wholesome and cultural living”...is extremely abstract and relative....When considering implementation of the about provisions through legislation, the State must not overlook the nation’s financial conditions....Selection of specific concrete legislative measures...is left to the legislature’s broad discretion and is not suitable for judicial review except in cases of gross unreasonableness and clear abuse of discretion.

In fact, Japan has achieved a standard that is more than the minimum with respect to wholesome and cultural living. The government has assured low-cost, good quality medical care for its people as well as pensions for its elderly. Life expectancy in Japan is among the longest in the world.

Montana Constitution’s Article II, Section 3, (the people have a right to seek “...safety, health and happiness in all lawful ways”) is the closest equivalent to Article 25 of the Japan Constitution. To some degree, I have already discussed this section. The achievement of safety, health, and happiness is not guaranteed. All of these aspirations need concrete help from the legislature to be realized. However, the phrase “in all lawful ways” compromises the rights of autonomy, meaning that the government is not prohibited from placing limits on individual autonomy.

**Dignity**

While the Japan Constitution has no articles dealing specifically with dignity and privacy, the Montana Constitution does. Because the concepts are integral to modern constitutions and because various sections of the Japan Constitution implicitly refer to the concepts, it is worth taking a closer look at them.

Dignity connotes individual self-respect and worthiness. It may be an element that separates women and men from unthinking beasts. Human rights constitutionalism recognizes the inherent human dignity of all people. Individual dignity is associated with rights in the United States, Chapter III of the Japan Constitution, with its complete set of human rights provisions, including equal rights provisions, are indispensable guarantees of human dignity. These Rights and Duties of the People (Articles 10-40) are necessary to safeguard the dignity of all.

Article 13 (“all of the people shall be respected” and guarantees right to “life, liberty, and the pursuit of happiness”) guarantees rights which are not explicitly found in the constitution but that are indispensable to human dignity; e.g., the right of privacy and the right to environmental protection.

Article 24 specifically says that laws with respect to the family “...shall be enacted from the standpoint of individual dignity...” and is implemented under Article 1-2 of the Civil Code, “The Dignity of Individuals and the Essential Equality of the Sexes.” Article 25 (Right to Wholesome and Cultured Living) and Article 26 (Right to an Equal Education correspondent to one’s ability) also “create substantive equality for all people and...protect human dignity.”

Supreme Court cases stress the importance of dignity in the constitutional context. Nishiyama v. Japan dealt with the constitutionality of punishing news-gathering that involves illegal inducement of a public employee. Nishiyama, a reporter, induced a government employee, through a feigned relationship that included sex, to obtain secret government documents for him. He was found guilty of the crime of inducement, and the Court said he was not protected by the Constitution because he infringed on her dignity. Aizawa v. Japan dealt with the constitutionality of a criminal code provision which gave a much harsher penalty for patricide than for other kinds of murder. The Court said there could be reasonable grounds for such a provision, given the importance of the family, but that any sentencing discrepancy could not be too severe. One scholar noted with respect to this case: “(the very purpose of the lineal- ascendent murder provision conflicts with the...Constitution’s principle of equality of every individual’s value and dignity.”

The first sentence of Article II, Section 4, of the Montana Constitution says “the dignity of the human being is inviolable.” The whole section, which deals with equal protection of the laws, has come to be known as the dignity clause. The Montana Supreme Court has not interpreted the dignity clause to mean anything in particular. However, “The language is unique to the extent it recognizes human dignity as a dimension of, or corollary to, the concept of equal protection of the law.” One commentator has noted that the clause should be the starting point for sex discrimination analysis in Montana.
The protection of private information in electronic data systems became effective in Japan in 1989: "Thus...Japan has...[a] protection scheme similar to that of the United States Privacy Act of 1974."

The right to privacy, which comes from case law, derives from Article 13: "All the people shall be respected as individuals." The Tokyo District Court first recognized the tort of invasion of privacy in 1964 and gave legal protection. In Hasegawa v. Japan, the Court endorsed an individual’s right not to have his picture taken, relying on the spirit of Article 13. In Takatsu v. Japan, the Court upheld a statute prohibiting door-to-door political campaigning, in part to protect the privacy of the home from unwelcome visitors. In Sasaki v. The Hokkaido News, Inc., a reporter refused to divulge his sources in a story naming child-care worker Sasaki as an abuser of children. His refusal was based on information he claimed as an "occupational secret," protected by the Civil Code. The district court distinguished between a civil action and a criminal prosecution and recognized the newsman’s occupational privilege to refuse to reveal several sources. The reporter was allowed to protect the privacy of his source.

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(2) the Court has tried to mitigate disadvantageous effects caused by a rule;\cite{410} (3) the Court will hold rules constitutional even if it finds some degree of arbitrariness.\cite{411}

Most cases illustrate the third approach. The Japan Supreme Court is reluctant to interfere with matters of legislative discretion unless the judgment of the Diet is "grossly unreasonable." "Under the Japanese Constitution, the equity power is given to the Diet, not to the Court."\cite{412}

Due to its prewar history, the Japan Constitution has some unique provisions relating to freedom of speech which the Montana Constitution does not have: Freedom of thought and conscience (Article 19); Freedom from censorship (Article 21); The right to academic freedom (Article 23).\cite{413}

Both constitutions are very progressive with respect to the protection of specific groups under equal protection of the laws. Both prohibit sexual discrimination. In addition, Japan's Constitution includes equality in marriage (Article 24), a correction of the prewar view that men were morally superior to women.\cite{414} Yet even now, the Japan Constitution temporizes individual rights by the need to protect the public welfare. However, the realization of equality in the political process is one of the major accomplishments of the Japan Constitution.\cite{415}

Three of the great achievements of the Montana Constitution are the explicit guaranties of the right to participate (Section 8), the right to know (Section 9), and the right of privacy (Section 10). The first two involve the citizen's relationship with the government; the last declares that government cannot pry. Japan, by case interpretation, is moving along the same road. Japan is also recognizing the need for a clean and healthy environment, which Montana's Constitution, with a Supreme Court interpretation, has made explicit.\cite{416}

In Japan, judicial decisions have vindicated victims of industrial pollution and economic discrimination (women), and prevented interference with aspects of freedom of expression. On the other hand, decisions have allowed Customs Bureau censorship and a ban on election canvassing.\cite{417}

For over 55 years, Japan has not had a person killed in a war, nor has it suffered a serious constitutional crisis. No serious defect has been revealed in its constitutional order. "The proof" is that there has been no constitutional amendment although many have been proposed.\cite{418}

Amendments to the Japan Constitution are arguably not needed because the "public welfare" polestar and guide allows for a broad interpretation.\cite{419} In addition, there is a reluctance to alter the constitution in any way. "Any suggested amendment has been met with the response that the next step will be redrafting of Article 9 [the renunciation of war article] to permit a return to the dark days of military rule."\cite{420} Given Japan's terrible suffering from the war, its present Constitution is widely respected and trusted by the Japanese people.\cite{421} Tampering with any one of its three elements — a powerless emperor, pacifism, and fundamental human rights — is often seen as a dangerous attempt to alter the whole Constitution.\cite{422}

In contrast, the Montana Constitution has been amended 27 times in 31 years. It is fair to say, however, that amendments have in no way altered the fundamental rights that are the heart of the Montana Constitution. In fact, it has proven to be popular, despite, or perhaps partly because of, its amendments. In 1990 the question of calling a new constitutional convention was submitted to the voters and 84 percent voted no.

The fundamental human rights that are protected in the Japan and Montana Constitutions are those that deserve to be eternal and inviolate. They are concerned with the dignity of people and, as such, know no borders or boundaries. These rights are at the heart of democracy and allow the people of Japan and Montana to have liberty and lives worth living. The people can then, in their own ways, pursue happiness.
I wish to thank Professor Tetsumi Takara, University of the Ryukyus, Okinawa, Japan, for allowing me to attend his Constitutional Law course, which he taught in English, and for his insights into the Japanese Constitution. I also wish to thank Professor Mark Kende, University of Montana School of Law, for his valuable comments and suggestions about my article. In addition, I want to express my appreciation to Wendy Owens, Faculty Secretary, University of Montana School of Law, for her valuable assistance in typing my article.


3 Id. at 64.

4 The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights [emphasis added]. Japan Const. Ch. III, art. 11.

5 The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free.... [emphasis added]. Japan Const. Ch. X, art. 97.


12 Okudaira, supra note 8, at 48.

13 Id. at 24.


18 Id. at 8.

19 Id. at 6.

20 Id. at 6-7.

21 Id. at 7. "For example, Montana had a restrictive constitutional limit on property taxes that resulted in exceedingly disparate per-student educational expenditures. Also, Montana provided limited state aid for highways and public welfare and was one of only four states providing no general local government aid."

22 Id. at 8.

23 Id. at 9.

24 Id. at 10.

25 Id. at 11.


29 Constitutional articles or sections pertaining to criminal justice are outside the scope of this article.

30 LAURENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY JAPAN’S TWO CONSTITUTIONS, 1889 - 2002 17 (Univ Press of Colorado 2002).


32 INDOE, supra note 10, at 31.

33 Id. at 70. Some scholars do say, however, that the Constitution was established by the Japanese. See, e.g., Urabe, supra note 1, at 63.

34 Otake, supra note 15, at 66.


36 INDOE, supra note 8, at 80.

37 GORDON, supra note 14, at 231.

38 Maki, supra note 6, at 84.

39 Gordon, supra note 14 at 231.

40 Maki, supra note 6 at 82.

41 Okudaira, supra note 8, at 45.

42 INalienable Rights. All persons are born free and have certain INalienable Rights. They include the right to a clean and healthful environment and the rights of pursuing life’s necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. Mont. Cont. of 1972, art. 11, sec. 3 (second emphasis added).

43 Supra note 3.

44 In re C.H., 683 P2d 931, 940 (Mont. 1984).

45 Otake, supra note 15, at 70.


49 Ito, supra note 7, at 144.

50 Beer, supra note 46 at 20.

51 Beer & Maki, supra note 29, at 21.

52 Marbury v. Madison, 5 U.S. 137 (1803).


55 SUZUKI v. JAPAN, 6 Minshu 783, Maki (1964) at 363 (Sup. Ct., October 8, 1952).

"Keishu" is the Japan Supreme Court case reporter for criminal cases (in Japanese); "Minshu" is the Japan Supreme Court case reporter for civil cases (in Japanese).

English translations of important selected cases appear in:

JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-1960 (Univ. of Washington Press 1964); designated "Maki (1964)" in this article.

Press 1978); designated "Itoh/Beer (1978)" in this article.


For citation purposes, I have treated cites to cases in these three books as parallel citations.

56 Hideo Chikusa, Japanese Supreme Court — Its Institution and Background, 52 SMU L. REV. 1719, 1729 (1999).
58 Ford, supra note 30, at 41.
59 Ito, supra note 7, at 160.
60 HATA & NAKAGAWA, supra note 56, at 73-74.
61 Lawrence W. Beer, The Present Constitutional System of Japan in Constitutional Systems in Late Twentieth Century Asia, 175, 202 [Lawrence W. Beer ed., Univ. of Washington Press 1992] [hereinafter Beer, Present Constitutional System]. It is planned, however, to make this exam easier to pass (now, only about one percent of all exam takers pass) so as to have at least 4,000 successful exam takers, who will have graduated from postgraduate law schools around the country. Now, legal education is treated as an undergraduate major in Japan.
62 Id. at 201.
63 Chikusa, supra note 55, at 1720.
64 Id. at 1721. The overworked Montana Supreme Court might consider a similar arrangement. Instead of adding a new court of appeals, perhaps it should seek two more justices, to give it a total of nine, with most appeals heard by three-justices “petty benches.” This would be far less expensive than adding a new court of appeals, which the legislature has been resisting.
66 Id. at 1727, n.14.
67 HALEY, supra note 53, at 178.
69 Id. at 154.
70 HALEY, supra note 53, at 92.
71 Okudaira, supra note 8, at 31.
72 Id. at 42.
74 HATA & NAKAGAWA, supra note 56, at 36.
75 Krotoszynski, supra note 72, at 939.
79 Ford, supra note 30, at 35.
80 HALEY, supra note 53, at 164.
81 Interview with Professor Takara, Professor of Law, Faculty of Law and Letters, University of the Ryukyus, Nishihara, Okinawa Prefecture, Japan (February 18, 2003). (Transcript of interview on file with author.)
82 NOEL WILLIAMS, THE RIGHT TO LIFE IN JAPAN 12 (Routledge 1997).
84 INOUE, supra note 10, at 79.
85 Takara, supra note 80.
86 HATA & NAKAGAWA, supra note 56, at 109.
87 HALEY, supra note 10, at 78-79.
91 Montana Constitution, Article IX, Section 1:
(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
(2) The Legislature shall provide for the administration and enforcement of this duty.
(3) The Legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.
94 HATA & NAKAGAWA, supra note 56, at 25.
96 Ford, supra note 30 at 26.
98 Bolz, supra note 82, at 117 (1980).
99 Id. at 118.
100 Id.
101 Ford, supra note 30, at 60.
102 Id. at 61.
104 Maki (1964), supra note 54, at xii.
105 HALEY, supra note 45, at 200.
107 Hasebe, supra note 96, at 79-80.
108 “Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.”
109 “Property rights shall be defined by law, in conformity with the public welfare.”

INTERNATIONAL LEGAL PERSPECTIVES

119 Tomatsu, supra note 10, at 226.
120 Tsujima, supra note 34, at 161.
123 Id. at 144.
124 Id. at 146.
125 Id.
126 Id. at 147. Immediately after the Aizawa decision, the Supreme Public Prosecutor's Office sent a notice to all prosecutors in Japan, directing them to use Article 199 when prosecuting someone for the killing of a lineal ascendants. In addition, the Ministry of Justice requested that all pertinent government offices consider grants reducing or remitting the sentence of all those serving time in prison as a result of being convicted under Article 200. Ashibe, supra note 65, at 241. The Diet deleted Article 200 from the Japanese Criminal Code in 1992.
127 Williams, supra note 81, at 66.
128 687 P.2d 57 (Mont. 1984).
129 Id. at 59.
130 Id.
131 643 P.2d 588 (Mont. 1982).
133 2 Keishu 191, Maki (1964) at 156 (Sup. Ct., Mar. 12, 1948).
134 Justifications for its retention are that it serves as a deterrence and that it is a means of retribution. Williams, supra note 71, at 47. A 1993 Yomiuri Shimbun newspaper poll found that 64 percent of the public believed capital punishment should be retained. Williams, supra note 71, at 44. In fact, there have been relatively few executions in Japan: just 23 in the 16-year period, 1978-1993. Williams, supra note 81, at 128, n.150.
137 864 P.2d 1245 (Mont. 1993).
139 Okudaira, supra note 8, at 29.
140 Id.
141 Hata & Nakagawa, supra note 56, at 115-116.
143 Id.
144 Id.
146 Id.
147 Gordon, supra note 14, at 236.
148 Tsujimura, supra note 34, at 158. The House of Counselors, unlike the House of Representatives, has proportional representation by party; i.e., if the Liberal Democratic Party gets 45 percent of the total vote, it gets to appoint 45 percent of the counselors. Thus, women compose about 15 percent of the membership of the House of Counselors. Id. in the individually-elected House of Representatives, women compose only about five percent of the membership.
149 Inouye, supra note 10, at 226.
150 Sirota Gordon, supra note 13, at 108.
151 Inouye, supra note 10, at 235.
152 Id.
155 Id. at 181.
156 Id.
158 Tsujima, supra note 34, at 161.
161 Tsujima, supra note 34, at 162.
162 Wendy A. Fitzgerald, Toward Dignity in the Workplace: Miller-Wohl and Beyond, 49 Mont. L. Rev. 147, 147 (1988). In Albinger v. Harris, 48 P.3d 711, 719 (Mont. 2002), the Court did say: "Article II, Section 4 of the Montana Constitution recognizes and guarantees the individual dignity of each human being without regard to gender." The Court noted that the passage of Mont. Code Ann. 27-1-602 in 1963, which barred all actions sounding in contract law that arise from mutual promise to marry, absent fraud or deceit, prevent would-be plaintiffs, mostly women, from recovering any share of expenses incurred in planning a wedding, which is a kind of gender bias. Albinger, at 720.
164 Id.
165 26 Keishu 566, supra note 110, at 183.
166 Noted and discussed by Nakamura, supra note 111, at 256.
167 Okudaira, supra note 8, at 25.
168 26 Keishu 566, supra note 110 at 185-186.
170 Id.
172 Id. at 49.
173 Elson & Snyder, supra note 16, at 36.
175 Id.
176 Elson & Snyder, supra note 15, at 36.
177 Arnason v. Montana, 864 P.2d 1245 (Mont. 1993)(statute excluding beneficiaries under age 55 from pension fund benefits failed rational basis test); In re C.H., 883 P.2d 931 (Mont. 1984) (Youth Court's sending delinquent youth to juvenile detention facility for evaluation did not deprive her of substantive due process even though physical liberty is a fundamental right); Meech v.
Amendment by placing a monument engraved with the Ten Commandments in the Alabama State Judicial Building.
222 State v. Big Sheep, 243 P. 1067, 1073 (Mont. 1926); Employment Division v. Smith, 494 U.S. 872, 890 (1990) denrying the Native American Church religious sacramental use of peyote.
225 Krotoszynski, supra note 72, at 905.
226 Id. at 940.
227 Hata & Nakagawa, supra note 56, at 128.
228 Okudaira, supra note 8, at 38.
229 Beer, Freedom of Expression, supra note 47, at 224.
230 Id. at 225.
231 Krotoszynski, supra note 72, at 916-18.
232 Id. at 947.
233 Krotoszynski, supra note 72, at 987.
234 Id. at 962.
235 Okudaira, supra note 8, at 26.
236 Krotoszynski, supra note 72, at 961.
238 Id. at 227. I vividly recall sitting in an Internet café in the town of Nago, Okinawa, Japan, as an orderly parade marched by outside protesting the U.S. war with Iraq, March 27, 2003. It was in the evening, and the demonstrators, holding candles, took up the whole street. They were escorted by the police.
239 Krotoszynski, supra note 72, at 961.
240 Id. at 954.
242 Krotoszynski, supra note 72, at 942.
246 Id. at 629.
247 Id. at 631 - 632.
248 Id. at 629.
249 Id. at 630.
250 Id. at 633.
251 Krotoszynski, supra note 72, at 953.
252 24 Keishu 280, Itoh/Beer (1978) at 244 (Sup. Ct., June 17, 1970).
253 Id. at 245.
255 Id. at 243.
256 Id.
257 Krotoszynski, supra note 72, at 911.
258 Id. at 964.
260 Id. at 460.
261 34 Keishu 433, Beer/Itoh (1996) at 468 (Sup. Ct., Nov. 28 1980).
262 Id. at 469.
263 Id. at 470.
264 Id.
266 Id.
267 In Nago, Okinawa Prefecture, Japan, where I lived for five months in 2003, I saw hundreds of vending machines but in only one building did I see
machines with magazines with nude women, and these were inside the building and could not be seen from the street.

266 Haley, supra note 53, at 184-185.

267 Krotoszynski, supra note 72, at 906.

270 Id. at 976-977.

271 Id. at 979.

272 Id. at 980.

273 Id. at 983.

274 No law shall be passed impairing the freedoms of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. Mont. Const. art. 6811, §7.

275 Congress shall make no law . . . abridging the freedom of speech, or of the press . . . U. S. Const. amend. I.


278 Lancos, 721 P.2d 1258 (Mont. 1986).


281 Dorn, 661 P.2d 426 (Mont. 1983).

282 Great Falls, 732 P.2d 413 (Mont. 1987).

283 Tipco Corp., 642 P.2d 1074 (Mont. 1982).

284 Gordon, supra note 14, at 199.

285 Id. at 217.

286 Id. at 231.


289 Beer and Itoh, supra note 39, at 48-49.


292 Id. at Part II, Sections 2 and 3.

293 Id. at Part II, Section 3.

294 Krotoszynski, supra note 72 at 974. The best English-language bookstore in Okinawa Prefecture, Tuttle's in Okinawa City, sells Penthouse magazine.


296 Id. at 458.

297 Id.

298 Id. at 459.

299 Okudaira, supra note 8, at 26-27.

300 Krotoszynski, supra note 72, at 969.


303 Hata & Nakagawa, supra note 56, at 129.

304 Id.

Freedom of academic teaching, study, and lawful research are guaranteed to all adults. Any person who misuses his academic freedom and authority shall be subject to discipline or dismissal only upon the recommendation of the national professional organization to which he belongs or in which he has a right to membership. Id. at 117.

329 Hata & Nakagawa, supra note 56, at 127-128. Most scholars think that the freedom to teach only pertains to universities.


331 Id. at 229.


333 Id. at 571-572.

334 Id. at 574.

335 Id. at 236.
336 Id. at 237.
337 ELISON & SNYDER, supra note 16, at 185.
339 Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of a husband and wife as a basis.

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

340 SIROTA GORDON, supra note 13, at 108.
341 Tsujimura, supra note 34, at 160.
342 INOUE, supra note 10, at 79.
343 Id. at 221.
344 SIROTA GORDON, supra note 13, at 123. In addition, Sirotta Gordon wanted rights for expectant and nursing mothers, for their entitlement to public assistance, the right of illegitimate children to be brought into the family, and for free medical and dental care for all children. Id. at 117-118. However, these proposals were left out because they were considered too specific and better suited to being provisions in the Civil Code. Id. at 115.
345 Tsujimura, supra note 34 at 162.
346 Id. at 163.
347 Supra, text accompanying note 161.
348 HATA & NAKAGAWA, supra note 56, at 40-41.
349 2 Keishu 1235, Maki (1964) at 253 (Sup. Ct., Sept. 29, 1948).
351 Id. at 275.
352 Id.
353 Id. at 276.
354 Id.
355 Id. at 285.
356 Horiki v. Governor, Hyogo Prefecture, 36 Minshu 1236, supra note 88 at 323.
357 Id. at 324.
358 Id. at 325.
360 Supra, text accompanying notes 43 and 87.
361 Beer, supra note 46, at 7.
362 INOUE, supra note 10, at 222.
363 HATA & NAKAGAWA, supra note 56, at 105.
364 Id. at 102.
365 Id. at 118.
366 Beer, Present Constitutional System, supra note at 190. But see, text accompanying notes 344 and 345 supra.
367 See text accompanying notes 347-358, supra.
368 HATA & NAKAGAWA, supra note 56, at 151.
370 Id. at 547.
372 Id. at 146-147.
373 Tomatsu, supra note 89, at 191.
374 See text accompanying notes 126-131, 136-137, and 161.
375 ELISON & SNYDER, supra note 16, at 35.
376 Fitzgerald, supra note 161, at 147.
378 ELISON & SNYDER, supra note 16, at 43.
379 Id. at 51. See also Armstrong v. Montana, 998 P.2d 364, 375 (Mont. 1999).
381 Id. at 171.
382 Id. at 164.
383 Id. at 165.
384 WILLIAMS, supra note 81, at 12.
387 Id. at 181.
390 Id.
392 Rosen, supra note 379, at 145.
393 Id.
395 5 MONT. LEGISLATURE, supra note 87 at 1681 (statement of delegate Robert J. Campbell), 1684 (statement of delegate Mae Nan Robinson).
399 Gryczan supra note 396 at 1210.
401 Gryczan, at 122.
402 Gryczan, at 119.
405 Maki, supra note 6, at 81.
407 Ito, supra note 7, at 163.
408 Kamata, supra note 162, at 196-198.
410 E.g., Horuchi v. Japan, 36 Minshu 432 (Sup. Ct., 1982), cited in Kamata, supra note 182, at 197 n.65 (statute of limitations begins to run at discovery).
at 575 (canvassing in election campaigns).
412 Kamata, supra note 162, at 196-198.
413 See discussions supra Part IV. F, I, K.
415 Tomatsu, supra note 89, at 194.
417 Beer, supra note 46, at 24.
418 Maki, supra note 6, at 73.
419 Ford, supra note 30, at 57.
420 Bolz, supra note 82, at 119.
421 Beer, Peace in Theory, supra note 94, at 818.
422 Id.
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