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Public Welfare, Artistic Values, and the State Ideology: The Analysis of the 2008 Japanese Supreme Court Obscenity Decision on Robert Mapplethorpe

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PUBLIC WELFARE, ARTISTIC VALUES, AND THE STATE IDEOLOGY: THE ANALYSIS OF THE 2008 JAPANESE SUPREME COURT OBSCENITY DECISION ON ROBERT MAPPLETHORPE

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Abstract: On February 19, 2008, the Japanese Supreme Court delivered a decision declaring that a collection of photographs by the late American photographer Robert Mapplethorpe did not violate obscenity laws in Japan. The fact that the Japanese Supreme Court publicly found close-up and detailed images of male genitalia in Mapplethorpe's work no longer obscene perhaps makes the decision a landmark one since the present-day restriction of sexually explicit expression in Japan respected the obscenity standard from the 1957 precedent, the *Lady Chatterley's Lover* decision, which ruled that the translation of D. H. Lawrence's *Lady Chatterley's Lover* was obscene. However, close reading of the 2008 Mapplethorpe decision reveals the Court's uninterrupted interest in maintaining a boundary between art and obscenity, and also in preserving the doctrine of the public welfare as a fundamental principle regulating obscenity. The new approach to restricting obscenity by the 2008 Mapplethorpe Court is so narrowly constructed that its ability to further deregulate images of genitalia and sexual intercourse is utterly limited. In this study, the 2008 Mapplethorpe case and the court decisions are analyzed, and a brief overview presented of landmark cases of obscenity in Japan. There follows a discussion of two phenomena important to the 2008 Mapplethorpe decision: 1) the public welfare doctrine, and 2) the relation between obscenity and the state ideology of cultural identity. The discussion explores the values and beliefs that support the Court's effort to restrict sexually explicit expression in Japan. Overall, this paper finds that the decision appears innovative but still supports the long-established rationale of the Court for continued regulation of obscenity.

I. INTRODUCTION

In *Asai v. Japan*, the Japanese Supreme Court declared that a collection of photographs by the late American photographer Robert Mapplethorpe did not violate obscenity laws in Japan.[1] As the Court stated, the photo book in question, which included clear and detailed images of male genitalia, possessed artistic value as a whole.[2] Considering the social consensus of current Japanese society regarding sexual morality, the work

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[1] *Supreme Court in Japan Upholds "*Mapplethorpe,*"* N.Y. TIMES, Feb. 20, 2008, at E2.

[2] Asai v. Japan, 62(2) MINSHŪ 69 (Sup. Ct., Feb. 19, 2008), *available at* http://www.courts.go.jp/english/ judgments/text/2008.02.19-2003.-Gyo-Tsu-.No..157%2C.2003.-Gyo-Hi-.No..164-103831.html, pt. III [hereinafter *Asai v. Japan*]. Concerning the reasons for the petition for acceptance of final appeal argued by the appeal counsel Yamashita Yukio (except for those excluded), see para. 2(1).

neither appealed to the prurient interest of the audience nor violated sexual morality.[3]

The present-day restriction of sexually explicit expression in Japan respected the obscenity standard from the 1957 precedent, the *Lady Chatterley's Lover* decision, which ruled that the translation of D. H. Lawrence's *Lady Chatterley's Lover* was obscene.[4] According to the Court, "to be obscene the literature in question must be such that it is harmful to the normal feeling of shame, it excites and stimulates sexual desire, and runs counter to good moral concepts regarding sex."[5] The *Chatterley* Court also asserted that even if the social concept concerning sex was undergoing changes, "it cannot be denied that there still exists in any society a demarcation which cannot be overstepped and that the demarcation is still being honored by the general public."[6]

Since the *Chatterley* decision, some adjustments were made by the Court to modify and improve the way the *Chatterley* standard defined obscenity.[7] In the following decades, the Court ruled that the translation of Marquis de Sade's *Travels of Juliette,* and a museum catalogue that included Mapplethorpe's photographs were obscene.[8] In summary, it has been the rationale of the Court that a clear and detailed depiction of genitalia and/or sexual intercourse constitutes obscenity.[9] Such depiction appeals to the audience's prurient interest, and offends the sense of shame and disgust; thus, the artistic value or any other associating factors of the expression cannot keep the expression from being held obscene.[10]

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[3] *Id*.

[4] Koyama v. Japan, 11(3) KEISHŪ 997 (Sup. Ct., G.B., Mar. 13, 1957), *available at* http://www.courts.go.jp/ english/judgments/text/1957.03.13-1953-A-No.1713-112004.html, pt. I [hereinafter *Koyama v. Japan*]. Translation and publication of *Lady Chatterley's Lover* and Art. 175 of the Penal Code, paras. 3, 5.; *see also,* JOHN M.MAKI, COURT AND CONSTITUTION IN JAPAN-SELECTED SUPREME COURT DECISIONS 1948-1960 3-37 (Ikeda Masaki et al. trans., 1964); James R. Alexander, *Obscenity, Pornography, and Law in Japan: Reconsidering Oshima's in the Realm of the Senses*, 4 ASIAN-PAC. L. & POL'Y J. 155 (2003).

[5] *Koyama v. Japan*, *supra* note 4, para. 5.

[6] *Id*. para. 11.

[7] *See* Sato v. Japan, 34(6) KEISHŪ 433 (Sup. Ct., Feb. 28, 1980), *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 468-71 (David Titus trans., 1996) [hereinafter *Sato v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN].

[8] *See* Ishii et al. v. Japan, 23(10) KEISHŪ 1239 (Sup. Ct., Oct. 15, 1969), *translated in* HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 183-217 (Hiroshi Itoh & Lawrence Ward Beer eds., 1978) [hereinafter *Ishii et al. v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN]; Tsuchiya v. Japan, 1670 HANREI JIHŌ, 3, 3-7 (Sup. Ct., Feb. 23, 1999).

[9] ANNE ALLISON, PERMITTED AND PROHIBITED DESIRES: MOTHERS, COMICS, AND CENSORSHIP IN JAPAN 149 (2000).

[10] LAWRENCE W. BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY 349 (1984).

The reality of society's acceptance and tolerance of sexually explicit images in Japan in the late 2000s are inconsistent with the Court's rulings—translations of *Lady Chatterley's Lover* and *Travels of Juliette*, and the uncensored Mapplethorpe photo book, are in print and available in regular local bookstores.[11] Obviously, the development of computer technology has been influencing the availability of sexually explicit images in Japan, making Hustler, Playboy, and other sexually oriented publications from the United States accessible on the Internet.[12] Also, the openness of the Japanese mass media to the dissemination of sexual images is well known.[13]

The fact that the Supreme Court of Japan publicly found explicit images of male genitalia in Mapplethorpe's work no longer obscene perhaps makes the decision an important one, especially since the Court had been reluctant to scrutinize the *Chatterley* standard[14] for more than fifty years. The plaintiff of the 2008 *Mapplethorpe* case, Takashi Asai, who had sued the Customs Office for seizing and confiscating the Mapplethorpe photo book at Narita International Airport in Tokyo in 1999, said the 2008 decision "could change the obscenity standard used for banning foreign films that depict nudity and for censoring photographs in books."[15]

However, a close reading of the 2008 *Mapplethorpe* decision reveals the Court's uninterrupted interest in maintaining and reinforcing the boundary between art and obscenity, and preserving the doctrine of the public welfare as a fundamental principle regulating obscenity.[16] The new approach to restricting obscenity by the 2008 *Mapplethorpe* Court does not seem to extend its ability to deregulate many of explicit images of genitalia or sexual intercourse. Moreover, it could possibly become a means of strengthening the restriction of such sexually explicit images, similar to the *Miller* standard from *Miller v. California*,[17] which had in fact played a role in strengthening the restrictions on sexually explicit expression in the United States.[18]

This research explores the significance of the 2008 *Mapplethorpe* decision, which provides a new perspective on the development of Japanese obscenity decisions. In this study, the 2008 *Mapplethorpe* decision is analyzed, and a brief overview of landmark cases of obscenity in Japan is

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[11] Tsuchiya v. Japan, 1670 HANREI JIHŌ 3, 7 (Sup. Ct., Feb. 23, 1999).
[12] Asai v. Japan, 1797 HANREI JIHŌ 1, 16 (Tokyo D. Ct., Jan. 29, 2002).
[13] ALLISON, *supra* note 9, at 149-50.
[14] Alexander, *supra* note 4 at 153.
[15] *Supreme Court in Japan Upholds "*Mapplethorpe*," supra* note 1.
[16] Alexander, *supra* note 4, at 156.
[17] Miller v. California, 413 U.S. 15 (1973).
[18] RICHARD F. HIXSON, PORNOGRAPHY AND THE JUSTICES 114 (1996).

presented. There follows a discussion of two aspects important to the 2008 *Mapplethorpe* decision: 1) the constitutionally guaranteed public welfare doctrine, and 2) the relation between obscenity and the state ideology of cultural identity. Within this framework, the values and beliefs that support the Court's effort to restrict sexually explicit expression in Japan are investigated. Overall, the research finds that although the 2008 *Mapplethorpe* decision appears innovative, it still supports the long-established rationale of the Court for continued regulation of obscenity.

II. ROBERT MAPPLETHORPE DECISION OF 2008

A. History of the Case

The material in question in the present case was a photo-book by the late American photographer, Robert Mapplethorpe, which included nineteen explicit images of male genitalia and homoeroticism.[19] The plaintiff in the case, Takashi Asai, president of the film distribution company Uplink,[20] purchased the copyright of the photo-book, *Mapplethorpe*, from the American publisher, Random House, in order to publish a Japanese edition in 1994.[21] The translated Japanese edition received positive reviews,[22] and sold over 900 copies despite the fact that it was priced at the equivalent of $150.[23] A copy of this publication was also purchased by the National Diet Library of Japan, which placed it in regular circulation, not requiring any special permission to view the sexually explicit content.[24]

Previously, in 1993, Asai had learned about a case in which a Mapplethorpe photo catalogue published for the Whitney Museum in New York had been seized by the Customs Office in Tokyo, and the individual who tried to import this catalogue filed a lawsuit against the director of the

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[19] *Asai v. Japan*, *supra* note 2.

[20] In 1987, previous to his purchase of the copyright of the book, Takashi Asai, as a film distributor, imported British director Derek Jarman's film, *Last of England*. When this film had been previously screened at the Tokyo International Film festival, the sexually explicit sections were shown without censorship by the Customs Office. But when Asai tried to import the film to distribute to regular movie theaters, the Customs Office required that such sections be cut or obscured. When importing other foreign films, as Asai states, he was repeatedly required to modify the sexually explicit sections of the films in accordance with the Customs Law. *See* Takashi Asai, *Meipurusōpu Shashinshū Saiban, Saikōsai Waisetsu no Kijun Minaoshi! Eigakara Bokashi ga Nakunaru?* [*Mapplethorpe Photo Decision, Revision of the Supreme Court Obscenity Decision! No More Censorship of Films?*], Feb. 19, 2008, http://www.webdice.jp/dice/detail/27/ (last visited May 4, 2010).

[21] Asai v. Japan, 1797 HANREI JIHŌ 1, 16 (Tokyo D. Ct., Jan. 29, 2002).

[22] *Id.*

[23] *Id.*

[24] *Id.*

Customs Office.[25] Asai thought that if he created a similar opportunity to challenge the Customs Office, it might lessen the censorship of imported films in the future, and help moderate the Customs Law.[26] Soon after, he purchased the copyright of *Mapplethorpe*, which contained images of male genitalia similar to those included in the museum catalogue.[27] Although Article 175 of the Penal Code[28] could restrict the sale or distribution of this publication, it was released in 1994, and was continuously sold for the next five years without any official interference.[29]

In February 1999, the Supreme Court found the Mapplethorpe museum catalogue obscene.[30] Subsequently in September 1999, seven months after the decision on the museum catalogue, Asai was at Narita International Airport, preparing to go through the custom's inspection with the Japanese edition of *Mapplethorpe*.[31] He showed the copy to the custom's inspector, and it was seized as he wished.[32] A few weeks later, he received a notice from the Customs Office that the seized material fell into the category of goods prohibited for import.[33] He filed a complaint with the director of the Customs Office, but it was dismissed in March 2000.[34] As a next step, he requested due process by the Minister of Finance in April 2000; but in return, in May 2000, the Tokyo Metropolitan Police Force issued him a warning about the sale of *Mapplethorpe*, which led him to suspend further sale of the publication.[35] In a few months, the Minister of Finance rejected Asai's request for due process. Asai filed a lawsuit against the director of the Customs Office in September 2000, arguing that the Customs Law which restricted the import of *Mapplethorpe* was precisely the kind of censorship prohibited by Article 21 of the Constitution.[36]

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[25] Takashi Asai, *supra* note 20.

[26] *Id*.

[27] *Id*.

[28] KEIHŌ [Penal Code], Law No. 45 of 1907, as amended at Act No. 54, 2007, art. 175, *translated in* CRIMINAL STATUTES 40 (Ministry of Justice, Japan, 1970): "A person who distributes or sells an obscene writing, picture, or other object or who publicly displays the same, shall be punished with imprisonment at forced labor for not more than two years or a fine of not more than 2.5 million yen or a minor fine. The same applies to a person who possesses the same for the purpose of sale."

[29] Tsuchiya v. Japan, 1670 HANREI JIHŌ 3 (Sup. Ct., Feb. 23, 1999).

[30] Takashi Asai, *supra* note 20.

[31] *Id*.

[32] *Id*.

[33] *See, e.g*., Japan Customs, Yushutsunyu Kinshi Kisei Hinmoku [Goods prohibited from export and import], http://www.customs.go.jp/mizugiwa/kinshi.htm (last visited Feb. 19, 2010).

[34] Takashi Asai, *supra* note 20.

[35] *Id*.

[36] *Id*.

1. Trial Court Decision

In 2002, Tokyo District Court stated that although the consequences of enforcing the Customs Law may result in the denial of an opportunity for an individual to express himself freely, the Law was merely a means of categorizing imported materials for the purpose of collecting taxes.[37] Interpretation and practice of the Law required careful attention and consideration, but the Customs Office did not essentially act to prohibit individual expression or thought; therefore, the Customs Law was neither censorship as defined by Article 21 of the Constitution nor unconstitutional.[38]

The court also rejected the plaintiff's argument that the phrase in the Customs Law, "materials that violate *fūzoku*" was too vague and unconstitutionally restricted freedom of speech when the law was exercised.[39] According to the court, the word, *fūzoku*, in the realm of law, indicated only sexual morality, not other morality such as sociopolitical or religious.[40] Therefore, the phrase was read to restrict only those materials that violated sexual morality.[41]

However, the court ruled that Mapplethorpe's photographs did not fall into the category of goods prohibited from import under the Customs Law.[42] It accepted the plaintiff's argument, and affirmed the fact that the book, once it was published, was never regulated by law enforcement for five years in Japan, thus proving the work's artistic value as an expression acceptable in society.[43] Also, the court noted that the book had received positive reviews, and had been displayed in public institutions, such as the National Diet Library.[44] The Court stated that it was not a mere coincidence that the obscenity regulation was never applied to the book, but rather it was a fact that the material was understood and accepted as an artistic expression that did not violate the healthy sexual morality of Japanese society.[45]

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[37] Asai v. Japan, 1797 HANREI JIHŌ 1,19 (Tokyo D. Ct., Jan. 29, 2002).
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*. at 26.
[43] Asai v. Japan, 1797 HANREI JIHŌ 1, 19 (Tokyo D. Ct., Jan. 29, 2002).
[44] *Id*.
[45] *Id*.

2. Appeals Court Decision

After the district court decided the case, the Director of the Customs Office appealed to the Tokyo High Court.[46] The high court's decision was made in 2003, which overturned the original decision.[47] The court stated that freedom of speech was not absolute, and restricting obscene materials in order to maintain a minimum degree of sexual morality and protect sexual order in society was acceptable as a matter of public welfare.[48] Restricting the flow of obscene materials from overseas through the exercise of the Customs Law corresponded to the purpose of protecting the public welfare guaranteed in the Constitution; therefore, restricting freedom of speech in order to maintain healthy sexual order was constitutional.[49]

The Court claimed that when material was brought to Japan, even if it had been originally published there, it had to be inspected by the Customs Office because the Customs Law is intended to require inspection of any materials that arrive in Japan.[50] Even if a copy of the book had been available in Japan before its re-entry, such a fact would not prevent its seizure by the Customs Office if the book fell into the category of goods prohibited for import.[51]

The Court continued that the book included photographs of male genitalia, and the composition of these photographs emphasized homoerotic sexual acts in an explicit, direct and detailed manner.[52] These facts suggested that the photographs appealed to the audience's prurient interest—they wantonly aroused and stimulated sexual desire, offended the normal sense of shame and ran counter to proper norms of sexual morality.[53] When these photographs were compiled as a book, the book fell into the category of goods that violated sexual morality as described in the Customs Law.[54]

The Court stated that although there were representations of genitalia and pubic hair available in contemporary Japan through mass media, the mere availability of such expression did not justify the social acceptance of

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[46] Japan v. Asai (Tokyo High Ct., Mar. 27, 2003), http://www.uplink.co.jp/news/log/h15kousai.pdf (last visited Apr. 29, 2010).

[47] *Id*.

[48] *Id*. at 12-13.

[49] *Id*. at 13.

[50] *Id*. at 10-11.

[51] *Id*. at 11.

[52] Japan v. Asai, at 12 (Tokyo High Ct., Mar. 27, 2003), http://www.uplink.co.jp/news/log/h15kousai.pdf (last visited Apr. 29, 2010).

[53] *Id*. (quoting Koyama v. Japan, 11(3) KEISHŪ 997(Sup. Ct., G.B., Mar. 13, 1957)).

[54] *Id*. at 13.

it.[55] Neither the artistic qualities of the book nor Mapplethorpe's status as a highly acclaimed artist compensated for the obscene nature of the work.[56] In addition, the fact that the book was not regulated after its publication in Japan was not sufficient reason to claim that its artistic value overrode its obscene nature.[57]

3. Supreme Court Decision

The Supreme Court decided the case on February 19, 2008.[58] Four out of five justices on the 3rd bench of the Supreme Court voted to declare the book not obscene.[59] The majority opinion stated that as a highly acclaimed contemporary artist, Robert Mapplethorpe had produced photographs focused on the essence of human existence through the depictions of the body, sexuality and nudity.[60] The disputed book was a collection of his major works, and the photographs assembled in the book were Mapplethorpe's most important and recognized work; therefore, the publication was aimed at providing the audience with an opportunity to examine the artistic qualities of Mapplethorpe's work as a whole.[61]

The Court continued that photographs in the book captured a wide variety of themes, including self-portrait, flowers, still objects, and male and female nudity.[62] Among the 384 pages there were only nineteen sexually explicit photographs; therefore, the quantity of such images contained in the book was quite small.[63] In addition, these images were in black and white, and did not directly depict sexual intercourse.[64] Considering the artistic values of the work, the weight of sexually explicit images within the book as a whole, and the technique and skills needed to deliver the artistic values, the Court found that they all contributed to moderate the work's appeal to the prurient interest.[65] Thus, as the Court stated, it was difficult to accept the argument that the book in question mainly appeals "primarily to the sexual interest of people who see it."[66]

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[55] *Id.*at 12.
[56] *Id.*at 13.
[57] *Id.* at 13-14.
[58] *Asai v. Japan*, *supra* note 2, pts. I-IV.
[59] *Id.* pt. IV, para. 2.
[60] *Id.* pt. III. Concerning the reasons for the petition for acceptance of final appeal argued by the appeal counsel Yamashita Yukio (except for those excluded), see para. 2(1).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Asai v. Japan*, *supra* note 2.
[65] *Id.*
[66] *Id.*

Consequently, respecting the "healthy social conscience" at the time of the Customs Office's confiscation of the book in 1999, the Court decided that it no longer fell into the category of materials that violated society's healthy sexual morality as defined in the Customs Law.[67] Although the Supreme Court had decided in 1999 that Mapplethorpe's similar photographs violated society's healthy sexual morality at that time, the 2008 Mapplethorpe Court asserted that its decision did not contradict the 1999 Mapplethorpe decision since the arguments were made in regard to different publications during different time periods.[68] On the other hand, the Court continued to assert that the Customs Law did not violate Article 21 of the Constitution, and rationalized that the customs inspectors were aware of the 1999 decision, and their judgment to confiscate a similar book should not be considered unjust.[69]

Justice Yukio Horigome wrote a dissenting opinion, stating that in the past, courts had established the understanding that explicit depictions of genitalia constituted obscene expression; therefore, the disputed book should fall into the category of materials that violate society's healthy sexual morality.[70] He argued that the majority opinion did not correspond to the rationale of the precedent since the *Chatterley* standard did not heavily value the author's social status, artistic recognition, or creative intent as decisive factors.[71] In addition, precedent clearly suggested that the artistic values of an expression do not override its obscene nature.[72] Justice Horigome contended that the majority opinion nevertheless significantly emphasized the artistic values of the work and Mapplethorpe's reputation in order to counter the obscene nature of the work.[73] As a result, the majority opinion deviated in its rationale from precedent, using a problematic method in deciding the case.[74]

B. A Brief History of Japanese Obscenity Decisions

Although the 2008 Mapplethorpe decision may look innovative, present patterns of Japanese court decisions bear traces of the historical past

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[67] *Id*.
[68] *Id*.
[69] *Id*. para 2(2).
[70] *Asai v. Japan*, *supra* note 2, pt. IV, paras. 3, 1(1)-(2).
[71] *Id*. pt. IV, paras. 4, 2(1).
[72] *Id*. pt. IV, para. (2).
[73] *Id*. pt. IV, paras. (3)–(4).
[74] *Id*. pt. IV, paras., 4, 3(3).

and, as Lawrence W. Beer[75] notes, political or judicial tendencies found in past cases still affect the current understanding of rights in Japan.[76] Certain principles established throughout the history of obscenity decisions, such as the doctrine of the welfare of the public, have been continuously affirmed by the Courts to suppress free-speech rights related to sexually explicit expression.[77] This is why the 2008 Mapplethorpe decision may not be so innovative in changing future obscenity decisions in Japan. In order to further explore this point, this section introduces a brief examination of the constitutions, obscenity laws and past obscenity decisions.

1. Free Speech and Two Constitutions

Since the beginning of its modernization in the mid 19th century, Japan has issued two constitutions: Dai-Nippon Teikoku Kenpo[78] (the Constitution of the Empire of Japan, or the Meiji Constitution) and Nihonkoku Kenpo[79] (the Constitution of Japan, or the Showa Constitution). The Meiji Constitution was enacted in 1889 and was in force until 1945,[80] and the Showa Constitution was issued in 1947 and remains in effect today.[81]

Under the Meiji Constitution, the individual's right to free speech did not exist.[82] The idea of individual duty had been central to the system, and all rights, except that of property, were constrained by phrases in the Constitution, such as "according to law" or "within the limits of the law."[83] In the Showa Constitution, Article 21 explicitly declares protection of the freedom of speech,[84] but the courts interpret the public welfare clauses in

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[76] BEER, *supra* note 10, at 101.

[77] Alexander, *supra* note 4, at 156.

[78] MEIJI KENPŌ (1890).

[79] KENPŌ (1947).

[80] LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889-2002 17, 77 (2002).

[81] *Id*. at 77.

[82] *Id*. at 24, 29. Chapter II of the Meiji Constitution included the "Rights and Duties of the People," which may be seen as symbolic of the broad changes that accompanied Japan's transition from feudalism to modernity. The idea of individual duty had been central to the system, and all rights, except that of property, were restricted by phrases such as "according to law" or "within the limits of the law." Beer and Maki indicate that rights bestowed by the sovereign could be withdrawn by the sovereign.

[83] *Id*.

[84] KENPŌ [CONSTITUTION OF JAPAN], art. 21., *translated at* http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=01 (Ministry of Justice, Japan) (last visited Apr. 22, 2010). Article 21 states: "Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."

Articles 12 and 13 to prohibit the individual right of free speech when it interferes with the public welfare.[85] In other words, although the current constitution guarantees freedom of speech, the Japanese courts obtained constitutional permission to restrict speech based on its tendency to violate social order and morality. Japanese courts view freedom of speech as never an absolute right, and obscenity as outside constitutional protection.[86]

2. Obscenity Decisions Under the Meiji Constitution

During the 56 years that the Meiji Constitution was in effect, approximately thirty-five obscenity cases were brought before Taishin-in, the Supreme Court at that time.[87] Under the Meiji Constitution, the government imposed a restriction on speech through pre-publication control and post-publication censorship in order to prohibit the sale and distribution of offensive materials.[88] The regulations such as the Publication Law, the Newspaper Law, and the Penal Code regulated sexually oriented expression.[89] Among these, the Publication and Newspaper Laws regulated publications that were in mass circulation, while the Penal Code regulated secretly produced pornographic materials, including literature, pictures and films.[90]

The Supreme Court occasionally found defendants not guilty,[91] but most of the obscenity cases were ruled in favor of the government, restricting sexual expression as a moral offense that would harm *Dōgi-teki Ryōshin*, morally good intentions in society.[92] News reports, privately made films, and photographs, as well as scientific writings and novelettes were

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[85] KENPŌ [CONSTITUTION OF JAPAN], arts. 12, 13, 29, *translated at* http://www.japaneselawtranslation.go.jp/law/detail/?id=174&vm=04&re=01 (Ministry of Justice, Japan) (last visited Apr. 22, 2010). Article 12 states: "The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare." Article 13 states: "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." Also, the issue of public welfare is mentioned in Article 29: "The right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare. Private property may be taken for public use upon which just compensation therefore." *See also* BEER & MAKI, *supra* note 80, at 195, 197.

[86] *See Koyama v. Japan*, *supra* note 4, pt. II. Article 175 of the Penal Code and Article 21 of the Constitution. *See id.* paras. 1-2.

[87] Author's count.

[88] RICHARD H. MITCHELL, CENSORSHIP IN IMPERIAL JAPAN x (1983).

[89] KEN'ICHI NAKAYAMA, WAISETSU ZAI NO KABATSUSEI [POSSIBLE PUNISHMENT FOR OBSCENITY CRIMES] 88 (Seibundō 1994).

[90] *Id.*

[91] *See* 20 DAIHAN KEIROKU 142 (Great Ct. Judicature, Feb. 14, 1914).

[92] *See* 10 DAIHAN KEIROKU 1304 (Great Ct. Judicature, June 10, 1904).

found obscene when they contained sexual expression that was thought to be morally offensive.[93] According to the Court, phrases in a news report, such as "ephemeral exposure to the smell of flesh," and "the woman became a victim of bestial lust," were deemed provocations of the basest lust.[94] The phrase, "heightened desire and passion," violated the Publication Law, according to the Court, when it appeared in a translation of a scientific work written by an American medical researcher.[95]

The Japanese government's priority, since the mid-19th century, following the adoption of European notions of inherent state administrative rights, had been to build a politically, economically, and technologically strong system to modernize a nation.[96] As part of this purpose, it aimed to make Japan appear as civilized and sophisticated as the West.[97] Japan needed to construct a positive image so that it would not be seen as inferior to the West.[98] The government saw a need to monitor and educate society in a more Westernized manner, forcing individuals to conform to the nation's new social standards, morality, and code of behavior.[99]

Government officials were expected to control and maintain social stability, and to protect society's welfare by enforcing a social morality that restricted individual behavior and encouraged public dignity, for the purpose of respecting national institutions and their orders.[100] Controlling the public representations of sex was a crucial facet of modernization. Public discussion or portrayal of topics considered integral to social stability and the maintenance of national values was considered appropriate only if the works were respectful and reinforced cultural and political ideological norms.[101] As a result, the Supreme Court was eager to ban sexual expression when it was not consistent with society's ideal morality, and without the constitutional guarantee of free speech, sexual expression was viewed as synonymous with obscenity.

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[93] *See* 16 DAIHAN KEIROKU 711 (Great Ct. Judicature, Apr. 22, 1910); 2 DAIHAN KEIROKU 193 (Great Ct. Judicature, Mar. 14, 1923).

[94] 21 DAIHAN KEIROKU 2137 (Great Ct. Judicature, Dec. 17, 1915). Author translated case phrases.

[95] 2 DAIHAN KEIROKU 193, 194 (Great Ct. Judicature, Mar. 14, 1923).

[96] *See* Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 4-5 (1996).

[97] *See* ALLISON, *supra* note 9, at 163.

[98] *Id*.

[99] *See id*.

[100] Alexander, *supra* note 4, at 153 (referring to GREGORY KASZA, THE STATE AND THE MASS MEDIA IN JAPAN 1918-1945 59-71 (1988)); *see also* KYOKO HIRANO, MR. SMITH GOES TO TOKYO UNDER THE AMERICAN OCCUPATION 1945-1952 47-103 (1992).

[101] Alexander, *supra* note 4, at 153. In Alexander's view, the topics that respect public policy, family, and religious values are considered appropriate.

3. Obscenity Regulations and Postwar Cases

After the end of the World War II, kasutori zasshi (pulp magazines) that featured cheaply-rendered nude images and pornographic stories flourished in Japan between the late 1940s and the late 1950s.[102] Striptease parlors also emerged as a new site for the adult entertainment in the early postwar period.[103] After 1945, the public sphere had become a place where representations of sexuality were being mass-marketed as part of a booming industry.[104] Quite a few trials held during this period dealt with the indecent pulp magazines and striptease.[105]

In postwar Japan, the Newspaper and Publication Laws were no longer effective under the Showa Constitution, but Article 175 of the Penal Code still regulates obscenity.[106] In addition, Article 69, section 11 of the Customs Law[107] also prohibits the import of materials that offend public safety and morality.[108] Local ordinances, ministry and industry standards, and self-regulating agencies have also played significant roles in restricting materials considered detrimental to healthy sexual morality and manners.[109]

Since 1945 an important self-regulating agency monitoring speech is Eiga Rinri Kitei Kanri Iinkai (Eirin),[110] the Administration Commission of the Motion Picture Code of Ethics.[111] This is a private agency that began operation in 1957.[112] After the establishment of the Motion Picture Ethics Code in 1949, the committee was composed of five representatives of the Japanese film industry, which included producers of feature length and short films, importers and distributors of foreign films and the Motion Picture Export Association of America.[113] Eirin's assessment of whether a film violated obscenity laws was generally based on consideration of storyline content and visual explicitness.[114] An imported film passed by the Customs Bureau was automatically licensed for public showing without Eirin's

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[102] *See* AKIRA YAMAMOTO, KASUTORI ZASSHI KENKYU: SINBORU NI MIRU FUZOKUSHI [RESEARCH ON KASUTORI MAGAZINE: HISTORY OF SEXUAL MORES THROUGH SYMBOLS] 18 (1998).

[103] *Id*. at 91.

[104] ALLISON, *supra* note 9, at 154.

[105] *See, e.g.,* Tamura, 4(11) KEISHŪ 2355 (Sup.Ct., Nov. 21, 1950); Inada, 5(12) KŌKEISHŪ 2314 (1952) (Tokyo High Ct., Dec. 18, 1952).

[106] KEN'ICHI NAKAYAMA, *supra* note 89, at 2.

[107] This regulation was Article 21 of the Customs Standard Law of 1910 before the revision in 2006.

[108] This regulation permits the Japanese Customs Bureau to seize printed materials the bureau contends may be harmful to public order and public morals. *See* Japan Customs, *supra* note 33.

[109] BEER, *supra* note 10, at 336-37.

[110] *Id*. at 340-43.

[111] *Id*.

[112] *Id*. at 341.

[113] *Id*.

[114] Alexander, *supra* note 4, at 158.

consideration.[115] Films without Eirin's approval are not shown in theaters that belong to the Theater Owners Association, which means that such films are not shown before general audiences.[116] More recently, Sofurin (Ethics Organization of Computer Software) [117] and CERO [118] (Computer Entertainment Rating Organization) have been organized to monitor and provide ratings of other media formats, such as videos, DVDs, and computer software.

a. The Chatterley *Decision*

The precedent for obscenity in Japan is the *Lady Chatterley's Lover* decision of 1957.[119] In 1950, two individuals involved in the translation and publication of D. H. Lawrence's *Lady Chatterley's Lover* were charged with a violation of the Penal Code for selling two-volume, unabridged copies.[120] In 1957, the Grand Bench of the Supreme Court decided the case, stating that twelve passages of *Chatterley* were not entirely without literary characteristics, but still "all too bold, detailed, and realistic."[121] The Court defined obscenity as expression that wantonly arouses and stimulates sexual desire, offends the normal sense of shame and runs counter to proper concepts of sexual morality.[122] For that reason, the Court stated that obscenity "runs counter to good moral concepts regarding sex."[123]

According to the Court, "sexual desire is not evil in itself," but the sense of shame is a characteristic feature of mankind in any society, differentiating it from other animals.[124] The sense of shame is more pronounced when sex is discussed publicly.[125] Even in an uncivilized society, it is rare for people to publicly expose their genitalia.[126] Therefore, "the non-public nature of the sex act is only a natural manifestation of a sense of shame deeply rooted in human nature."[127]

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[115] *Id*.
[116] BEER, *supra* note 10, at 343.
[117] Ethics Organization of Computer Software, http://www.sofurin.org/(last visited Feb. 19, 2010).
[118] Computer Entertainment Rating Organization, http://www.cero.gr.jp/ (last visited May 4, 2010).
[119] BEER, *supra* note 10, at 348.
[120] *Id*.
[121] *Koyama v. Japan*, *supra* note 4, pt. I. For a translation and publication of *Lady Chatterley's Lover* and Art. 175 of the Penal Code, see. pt. I, para. 12.
[122] *Id*. pt. I, paras. 4-5.
[123] *Id*., pt. I, para. 5.
[124] *Id*. pt. I, para. 7.
[125] *Id*.
[126] *Id*.
[127] *Koyama v. Japan*, *supra* note 4, pt. I, para. 7.

As a result, the sense of shame needs to be respected. The sense of shame in combination with rationality keeps our sexual life "from falling into licentiousness,"[128] and "contributes to the maintenance of sexual morality and discipline,"[129] which exists even in the least civilized society. Because sexual acts have a nonpublic nature, the publication and distribution of representations of sexual acts offends the people's sense of modesty.[130] The law is not responsible for maintaining all social order and morality, but it is expected to punish acts that violate the minimum degree of morality in society. For this reason, the penal code punishes the distribution and sale of obscene publications.[131]

The Court examined the expression solely on whether it fell into the category of obscenity under the Penal Code; thus, any factors that enhanced the social perception and acceptance of the expression were perceived as unnecessary in deciding the case.[132] However, the decision still needed to reflect the conscience of society—common sense and generally accepted values.[133] Otherwise, the Court's decision would be not only a mere appropriation of the ideological assessment of society's values and beliefs on sexuality, but also the imposition of the authority's moral ideals.

Thus, when interpreting the Penal Code, the Court made a decision to apply the concept of *shakai tsunen*, society's conscience, as a criterion to determine the obscene nature of the expression. Society's conscience is, according to the Court, not a sum of individuals' perceptions or an average standard, but "a collective conscience of society which transcends far above the individual perceptions" of what is obscene.[134] The social conscience may undergo changes through time and space; nevertheless, there still exists, in any society, a moral boundary between what is acceptable and what is not.[135] This boundary, established by society's conscience, cannot be overstepped but must be honored by the general public.[136] The Court stated that for the conscience of society, "the limitation is the nonpublic nature of sex,"[137] suggesting that changes in society had not yet made this boundary an invalid concept.

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[128] *Id*.
[129] *Id*.
[130] BEER, *supra* note 10, at 348-49.
[131] *Koyama v. Japan*, *supra* note 4, pt. I. For a translation and publication of *Lady Chatterley's Lover* and Art. 175 of the Penal Code, see pt. I, para. 8.
[132] *Id*. pt. I, para. 10.
[133] *Id*.
[134] *Id*.
[135] *Id*. pt. I, para. 11.
[136] *Id*.
[137] *Koyama v. Japan*, *supra* note 4, pt. I, para. 11.

In the *Chatterley* decision, scrutinizing the literary or artistic value of expression was an important step toward building a standard of obscenity. The Court concluded that *Chatterley's* literary values did not override the obscene nature of the expression.[138] Therefore, even the finest work of art could be evaluated as being obscene from an ethical and legal point of view.[139] The Court stated:

> No matter how supreme the quality of art it does not necessarily wipe out the stigma of obscenity. Even art does not have the special privilege of presenting obscene matters to the public. Be he an artist or a literary man, he may not violate the duty imposed upon the general public, the duty of respecting the feeling of shame and humility and the law predicated upon morality.[140]

In the Court's view, neither the artistic or literary value nor the scientific or educational value could make obscenity acceptable.[141] But when the work is obscene, artistic or literary value alone could be more problematic than other values because scientific or educational works are more objectively written. Artistic and literary works appeal to emotions and feelings; thus, these values may serve not to nullify but to intensify the degree of stimulation and excitement.[142]

In dismissing the privilege of values, the Supreme Court said that Articles 12 and 13 of the Constitution stipulated the promotion of the public welfare. When the concept of public welfare is applied in obscenity cases, it can be articulated as a necessary principle for the maintenance of "the minimum morality" regarding society's idea of sexuality.[143] The preservation of the minimum morality could not be compensated by the delivery of artistic value. Otherwise, free speech rights would encourage "the type of acts which are considered to be in contravention of the minimum standard of morality" through the sale or distribution of obscene materials.[144]

Overall, the Court assumed that the legislature and the judiciary had a duty to protect society's morals from the harm that would be caused by

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[138] BEER, *supra* note 10, at 349.
[139] *Koyama v. Japan*, *supra* note 4, pt. I. For a translation and publication of *Lady Chatterley's Lover* and Art. 175 of the Penal Code, see pt. I, para. 14.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] *Id*. pt. I, para. 8.
[144] *Id*.

obscenity. Even if people's sense of ethical order became paralyzed and prevented them from recognizing what was obscene, the Court was invested with the duty of protecting society from moral degeneration, and its criterion was set forth by the social consensus, which the Court phrased as an "ideal of humanity possessed of wholesome and virtuous minds."[145]

b. The De Sade *Decision*

Following the *Chatterley* decision, an abridged translation of the Marquis de Sade's *In Praise of Vice* was published in Japan.[146] Its second volume, *Travels of Juliette*, was brought before the Court in Japan's "second literature trial," which became a landmark case for further discussion of the relationship between art and obscenity.[147]

The Tokyo District Court found *Juliette* not obscene on grounds that the brutality and unrealistic portrayal of sex prevented the fulfillment of the wanton appeal to the prurient interests, even though the work offended the normal sense of shame and ran counter to proper concepts of sexual morality.[148] In 1963, the Tokyo High Court reversed the original decision, ruling that all three conditions determining obscenity were met in this case.[149]

In 1969, the Supreme Court stated there might be cases in which the artistic value of a work diminish or moderate the sexual stimulation caused by its portrayal of sex, but the fourteen passages in *Juliette* were too boldly explicit in depicting sexual conduct.[150] The Court reaffirmed the *Chatterley* decision by stating that even expression with artistic value cannot escape from being found to be obscene.[151]

In its opinion, the Court asserted that its mission was to determine the presence or absence of obscenity in legal and moral dimensions within the expression in question.[152] While penalizing obscene materials may indirectly affect the development of artistic or intellectual works, the

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[145] *Id*. pt. I, para. 11.

[146] *Ishii et al. v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 8, at 183-17.

[147] BEER, *supra* note 10, at 349. In October, 1962, the Tokyo district court applied the *Chatterley* decision as a precedent that established three conditions of obscenity under Article 175: "(1) wanton appeal to sexual passion, (2) offense to the average man's sense of shame, (3) opposition to proper concepts of sexual morality." *See Ishii et al. v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 8, at 183.

[148] *Ishii et al. v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 8, at 186.

[149] *Id*.

[150] *Id*.

[151] *Id*. at 184.

[152] *Id*.

freedom of expression fundamental to democracy is not absolute under the Constitution's public welfare provision.[153] Therefore, the Court found that imposing a restriction on the distribution and sale of artistic but obscene expression could endorse the positive sexual order and social morality without contradicting the Constitution. Moreover, the Penal Code merely prohibits the distribution, sale, public display and possession for the purpose of sale of obscene materials; therefore, finding an expression obscene does not necessarily indicate that the expression is to be removed without trace from society, or to be considered valueless.[154]

The Court also considered that although it might not be reasonable to find an entire work obscene based on a single passage, there was no reason why an isolated passage could not contribute to the obscene nature of the entire publication.[155] In addition, the Court acknowledged that the judges were obliged to be accountable for making decisions based on their understanding of society's conscience.[156]

c. The Yojohan *Decision*

In July 1972, the editors of the magazine *Omoshiro Hanbun* (*Half in Jest*) were indicted for violation of Article 175 of the Penal Code for printing an obscene novel, *Yojohan Fusuma no Shitabari* (*Behind the Screen Door of a Small Room*).[157] The Tokyo District Court found the work obscene, and the Tokyo High Court upheld the conviction of the editor and the publisher.[158] In 1980, the Supreme Court Second Petty Bench unanimously upheld obscenity convictions, further developing the *Chatterley* and *De Sade* standards for determining what constituted obscenity under Article 175 of the Penal Code.[159]

The Court presented five criteria for measuring the obscene nature of the work: 1) the relative boldness, detail and general style of its depictions of sexual acts; 2) the proportion of the work comprised of sexual descriptions; 3) the relationship in a literary work between sexual descriptions and the intellectual content of the story; 4) the degree to which

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[153] *Id*. at 185-86.
[154] *Ishii et al. v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 8, at 185.
[155] *Id*. at 185-86.
[156] *Id*. at 188.
[157] The novel was written by Sanjin Kinpu but said to be an original work released in 1917 by a famous writer, Kafu Nagai. The novel was in a pseudo-classical style, written in outmoded literary Japanese, and contained explicit sexual depictions. *See Sato v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 7, at 468-71
[158] *Id*. at 468-69.
[159] *Id*. at 469.

artistry and thought content mitigate the sexual excitement induced by the writing; and 5) the relationship of sexual portrayals to the structure and unfolding of the story.[160] Overall, the work should be classified as obscene if it wantonly excites and/or stimulates sexual desires, affronts the ordinary person's normal sense of shame, and violates proper concepts of sexual morality.[161]

The Court's approach may seem innovative since until the *Yojohan* decision it had never provided a list of criteria for balancing the artistic value and prurient quality of an expression.[162] However, the improved approach to define obscenity employed in the *Yojohan* case seems insufficient to establish a new standard for defining obscenity. The Court continued to accept the idea that sexual stimuli in expression could be moderated by the obviously present artistic value, but the presence of artistic value would not prevent a sexually explicit expression from being considered obscene. Hence, a fine work of art could still be obscene, as established by the *Chatterley* decision.[163]

As a result, the Court's decision was consistent with the essential moral principles of the *Chatterley* decision, and still held that the novel was obscene.[164] According to the Court, the portions portraying sexual intercourse in the *Yojohan* novel were explicit in detail, and such depictions constituted the core of the work.[165] Even if the portrayals of sex were necessary for the fulfillment of the artistry of the material in question, the work still appealed primarily to the audience's prurient interests. Thus, although there may be cases in which artistic value diminishes or moderates the degree of perceived obscenity, such value did not appear in *Yojohan*.[166]

4. The 1999 Mapplethorpe *Decision*

In 1992, a Japanese individual tried to import a catalogue of Robert Mapplethorpe's photographs published for an exhibition held at the Whitney Museum in New York.[167] The catalogue contained photographs explicitly

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[160] *Id*. at 470.

[161] *Id*. The Court cited the obscenity test from the *Chatterley* decision. *See Koyama v. Japan*, *supra* note 4, pt. I. For a translation and publication of *Lady Chatterley's Lover* and Art. 175 of the Penal Code, see pt. I, para. 5.

[162] BEER, *supra* note 10, at 353.

[163] *Id*.

[164] *Sato v. Japan*, *translated in* CONSTITUTIONAL CASE LAW OF JAPAN, *supra* note 7, at 470.

[165] *Id*.

[166] *Id*.

[167] Tsuchiya v. Japan, 1670 HANREI JIHŌ 3 (Sup. Ct., Feb. 23, 1999). The plaintiff claimed that the Customs Law violated Article 21 of the Constitution, and Mapplethorpe's catalogue did not fall under the category of materials that violated public morality. He also argued that the sexual morals in society change

depicting male genitalia and female pubic hair.[168] The Tokyo Customs Office notified the importer that the catalogue was prohibited from import under the Customs Law.[169] The individual sued the director of the Customs Bureau for revocation of the notification, and challenged the constitutionality of the Customs Law as a means of censorship.[170]

The Tokyo District Court found that the photographs heavily emphasized explicit depiction of genitals and sexual acts.[171] The artistic value of the work was taken into consideration, but the Court determined that the photographs appealed to the audience's prurient interest, thus violating healthy sexual morality.[172] In addition, the Court upheld the constitutionality of the Customs Law.[173] The upper Court upheld the original decision.[174]

In 1999, the Supreme Court affirmed the lower courts' decision that Mapplethorpe's photographs heavily emphasized the depiction of genitalia; thus, when these pictures were compiled as a book, the work fell under the definition of morally harmful publications found in Customs Law.[175] Even though Mapplethorpe's works that include similar sexually explicit photographs had been available in bookstores in Tokyo, the Court said such a fact did not prove the material in question was not obscene.[176] As long as the photographs elicited senses of lust and shame, the mere availability of similar materials did not negate the obscene nature existing within the material in question.[177] It also stated that the Customs Law was constitutional since its purpose was not the restriction of communication.[178] After the materials were recognized as prohibited by the customs inspectors, due process was guaranteed for further examination of the situation and the final decision would be made in the courts.[179]

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from time to time, and in contemporary Japanese society, depictions of genitals and pubic hair are publicly distributed, sold, and displayed. Thus, according to the social consensus, Mapplethorpe's work is not obscene. In addition, he also pointed out that similar photographs by Mapplethorpe were already available in bookstores in Tokyo.

[168] *Id*. at 3.

[169] *Id*.

[170] *Id*.

[171] *Id*.

[172] *Id*.

[173] Tsuchiya v. Japan, 1670 HANREI JIHŌ 3-4.

[174] *Id*. at 3.

[175] *Id*. at 4-5.

[176] *Id*. at 7.

[177] *Id*.

[178] *Id*. at 6.

[179] Tsuchiya v. Japan, 1670 HANREI JIHŌ 6. Justice Itsuo Sonobe wrote a concurring opinion stating that the importation of sexually explicit artistic publications, pictures, and sculptures should not be restricted by law if these materials are publicly exhibited, or their catalogues are sold in domestic or

III. ANALYSIS

Despite the significant political, social and technological changes that influence sexual order and the availability of sexual expression in society, the approach of not legalizing explicit images of genitalia and sexual intercourse had been strictly practiced by the Supreme Court of Japan until the 2008 *Mapplethorpe* decision. As the landmark cases[180] suggest, the maintenance of sexual morality over the individual's right of free speech has been traditionally prioritized in Japan.[181] Christopher A. Ford states that the Japanese judicial system has its own unique way of adapting and altering constitutional ideas and models from the West,[182] and that such an approach by the Japanese courts seems inevitable when it tries to restrict sexual expression through the moral-based rationale that is presumably guided by the social conscience. As a result, the Court's continuous application of the public welfare doctrine as well as the Customs Law to obscenity cases seems to continuously reflect its underlying ideological commitment to the national identity and the stability of the society.[183]

A. The Public Welfare Doctrine

As Beer notes, the public welfare clauses, Articles 12 and 13 of the Constitution, have been very important as a basis for restraining freedom of expression in the Japanese courts.[184] The public welfare clauses, according to Beer, "have been tools in judicial hands susceptible to use for or against freedom of expression and other constitutional rights, whether the public welfare notion has been left abstract or has been refined with clear specificity."[185] According to Masato Ichikawa, the way in which the Japanese Supreme Court has argued the rationale of the public welfare theory is that the individual's rights are not absolute; thus, such rights may

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internationally famous museums, providing the work has already been recognized for its artistic value. However, it is not easy to distinguish the purpose of the import under Japan's current administrative process for customs inspection. Therefore, at this point, it is necessary to stop the flow of sexually explicit materials despite the purpose of the import.

[180] *See* Koyama v. Japan, 11(3) KEISHŪ 997 (Sup. Ct., Mar. 13, 1957); *see also* Ishii et al v. Japan, 23(10) KEISHŪ 1239 (Sup. Ct. Oct. 15, 1969); *see also* Sato v. Japan, 34(6) KEISHŪ433 (Sup. Ct., Feb. 28, 1980).

[181] *See* Ronald J. Krotoszynski, Jr., *The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression*, 1998 WIS. L. REV. 905, 952 (1998).

[182] Ford, *supra* note 96, at 3.

[183] Krotoszynski, *supra* note 181, at 952.

[184] BEER, *supra* note 10, at 152.

[185] *Id*.

be constitutionally limited for the purpose of preserving public welfare.[186] The Court's interpretation of the public welfare clauses in the Showa Constitution presupposes the prioritization of the public welfare over the individual's right of free speech, suggesting that the private life gives way to the public life.[187] Beer's and Ichikawa's analyses of the public welfare doctrine may be applied more specifically to obscenity decisions in order to suggest that individual consumption of sexual expression for the purpose of either self-enrichment or self-indulgence does not contribute to the welfare of the public. Furthermore, the individual consumption of such expression may contradict the positive promotion of one's rights or individual responsibility. In other words, as Anne Allison[188] states, the hedonistic pursuit of pleasure is antithetical to individual responsibility both at home and at work because, especially for middle-class and white-collar males, work and productivity are supposedly the main focus of their energy, identity, and responsibility.[189]

An interesting aspect stemming from such individual responsibility is that society, until recently, tended to view whatever is public as naturally authoritative, sacred, and morally superior to what is private.[190] Under the Meiji Constitution, an individual was a subject, not a citizen of the state,[191] and the emperor had sovereignty as protector for the good of the people.[192] As a result, the interest of society as a whole was considered more important than the interest of each individual.[193] Making a distinction between the public and private spheres of an individual's life was to recognize the differences between obligation and personal concern, and fulfilling one's role as a responsible member of society was considered more important than self-fulfillment.[194]

Such a distinction between the public and private spheres was essential to the government's maintenance of the status quo, social peace, and public order.[195] When an individual feels an obligation to his superior,

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[186] MASATO ICHIKAWA, HYOGEN NO JIYU NO HORI [FREEDOM OF EXPRESSION AND COURTS] 282 (2003).
[187] *Id*.
[188] Anne Allison is Professor of cultural anthropology at Duke University, specializing in Japanese culture.
[189] ALLISON, *supra* note 9, at 153-55.
[190] BEER, *supra* note 10, at 104.
[191] RICHARD H. MINEAR, JAPANESE TRADITION & WESTERN LAW: EMPEROR, STATE, AND LAW IN THE THOUGHT OF HOZUMI YATSUKA 79 (1970).
[192] *Id*. at 81.
[193] *Id*.
[194] *See id*. at 103-04.
[195] *Id*. at 103.

personal wishes or feelings clearly become less significant; thus, individuality is repressed in order to fulfill the need under the system of obligation.[196] *Kokutai no Hongi* (*The Essence of National Polity)*, published in 1937, placed the emphasis on the relationship between the emperor and his subjects as the fundamental canon of the nation, so that one's duty must be prioritized to produce an orderly and harmonious society.[197]

This pre-World War II ideological environment does not suggest that the postwar Japanese courts have been eager to suppress sexual expression solely to protect the government's interest in stabilizing the moral order of society. The political structure in Japan was altered after World War II; the government now also has an interest in promoting corporate success, which does not necessarily exclude the marketing of sexually explicit materials.[198] But the courts invite both benefits and dangers by permitting the marketing of sexual expression,[199] because although the commoditization of sex can generate various financial assets, it can also bring changes in sexual order, family structure, and gender roles, which are components of established social morality.

For instance, Ronald J. Krotoszynski[200] noted that the Japanese courts never attempted to utilize the public welfare doctrine to invoke women's equality nor to avoid the degradation of women.[201] Rather, the treatment of obscenity in Japanese courts reflects a strong concern for maintaining the practicality of cultural values related to sexuality and gender relations.[202] Krotoszynski argues that the commoditization of sex is a *fait accompli* in Japan, unlike in Canada, for instance, where the courts have made a conscious decision to elevate gender equality above freedom of expression by making the definition of obscenity include violent hardcore pornography which degrades and humiliates women.[203] In other words, the application of the public welfare doctrine by the Japanese courts is ad hoc so as to balance the values and beliefs that ought to be protected for the purpose of maintaining the stability of society, and various other sociopolitical and economic interests.

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[196] *Id*.

[197] MAKOTO TAKAHASHI, NIHONTEKI HOUISHIKIRON SAIKOU [RECONSIDERATION OF JAPANESE CONSCIOUSNESS TOWARD LAW] 33 (2002).

[198] ALLISON, *supra* note 9, at 154-55.

[199] *Id*. at 155.

[200] Ronald Krotoszynski is Professor of Law at Washington and Lee University School of Law.

[201] Krotoszynski, *supra* note 181, at 964.

[202] *Id*.

[203] *Id*. at 968. *See also* Regina v. Butler, [1992] S.C.R. 452 (Can.); *see also* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 113-23 (1995); *see also* CATHERINE A. MACKINNON, ONLY WORDS 100-05 (1993).

B. Sexually Explicit Images and the State Ideology of National Identity

Allison argues that banning explicit images of genitalia and sexual intercourse indicates that the law protects one region of the social body from the sexualization of mass culture.[204] The law shelters this region from realism, and the realism of genitalia and sexual intercourse matches the state's definition of obscenity.[205] In her view, the threat posed by the realistic portrayal of genitalia is "too important and too central to the social realities of national reproduction"[206] because the representation of genitalia and sexual intercourse (associated with the ideas of reproduction, the reproductive mother, and the stable family), is symbolically central to the ideological values supported by Japan's modernization.[207] A representation of genitalia and sexual intercourse constitutes, as a focus of the state prohibition, an affront to what is considered "most sacred and central to the state ideology of national identity."[208] Sexualization of an image that symbolizes the state ideology of national identity is an offense to the state's beliefs about the sacredness of the nation's culture and ethnic origin.[209]

A 1906 article by Junjiro Takakusu[210] explained the Japanese idea of the family system and its sacredness, which are important for the construction of the ideology of national identity.[211] He sees the family in Japan as a primary unit which leads to mutual support and cooperation among those who are connected; thus, the honor and sanctity of the family becomes everybody's first concern.[212] This system of socialization multiplies to create communal groups, villages and in the end, the nation.[213] This theorization of family becomes a basis of the framework of the "family state," which fosters a spirit of interdependency, and makes it possible and easy to form a sense of devotion and patriotism.[214]

The idea of the "family state" was also confirmed by the myth of the Japanese race.[215] In this mythical belief, all the "pure" Japanese are said to belong to the *Yamato* race, and this racial origin is shared with the emperor,

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[204] ALLISON, *supra* note 9, at 151.
[205] *Id*. at 150.
[206] *Id*. at 151.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] Buddhist scholar and a former President of the Tokyo Imperial University.
[211] Junjiro Takakusu, *The Social and Ethical Value of the Family System in Japan*, 17 INT'L J. OF ETHICS 100, 102-03 (1906).
[212] *Id*.
[213] *Id*. at 103.
[214] *Id*.
[215] *See* Ford, *supra* note 96, at 10.

who was believed to be the direct descendant of *Amaterasu Omikami*, the Sun Goddess of ancestor worship.[216] This mythical genealogy reinforces the belief that all Japanese belong to one big family.[217] As Takakusu stated, by looking back 120 generations to the founder of the nation, the Japanese see themselves as one people.[218] In his view, the principle of the "family state," which has endured in Japanese culture for 2,000 years, must be maintained even as Japan incorporates new ideas, such as individualism, from the West.[219]

Under the ideology of the "family state," foreign ideas could challenge society's conceptions of morality, responsibility, and duty. The continuous application of the public welfare doctrine to the Court's obscenity decisions can perhaps contribute not only to the maintenance of the social order and healthy sexual morality as the Court suggests, but also to reinforcement of traditional values and beliefs, such as individuals' senses of responsibility and duty, which are essential aspects of the preservation of cultural identity.

According to Krotoszynski, the government's efforts to preserve Japanese cultural norms are constitutionally permissible.[220] In his analysis, the intent of the Japanese courts in restricting images of genitalia and sexual intercourse is not only to protect society from the violation of sexual order and social morality, but also to protect the public from the influences and forces of non-Japanese views that may change the values and beliefs of the society.[221] This is similar to what Allison called "contamination" from the outside world that jeopardizes the sacredness of the cultural core.[222]

If the sexual images do not violate the state ideology of cultural identity, they are not necessarily seen as obscene, since they do not threaten social morality.[223] Rather, these images are seen as a fantasy that provide their viewers with a sense of escape from "an everydayness of duty and responsibility," and are constructed as "the other" to "the relationships of production, home, school, and citizenship that are otherwise so central in the

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[216] *Id*.; MINEAR, *supra* note 191, at 2.
[217] *See* Ford, *supra* note 96, at 10.
[218] Junjiro Takakusu, *supra* note 211, at 103.
[219] *Id*. at 105.
[220] Krotoszynski, *supra* note 181, at 974.
[221] *See generally* Krotoszynski, *supra* note 181.
[222] ALLISON, *supra* note 9, at 164.
[223] Allison states that the reason Japanese society tolerates images of sexual perversion, such as voyeurism, sadism, anal penetration, and sexualized children, is that these images do not offend the state ideology of Japanese cultural identity. *See id*. at 151.

lives of at least middle-class Japanese."[224] This concept is especially valuable for further analyzing the 2008 *Mapplethorpe* decision.

C. Values and Unrealism in Mapplethorpe's Photographs

The Court's view that the artistic value of expression does not override its obscene nature was inherited from the prewar obscenity decisions,[225] and confirmed in the *Chatterley* decision and following cases. But neither in *Chatterley* nor in the later cases did the Court condemn sexual expression as a valueless expression undeserving of constitutional protection. As a matter of fact, the *Chatterley* decision stated that *Chatterley* was an artistic and ideological work of quality, even in the twelve passages in question.[226] Nevertheless, the Court has also determined that the possibility for sexual expression to be a positive contribution to the development of thought and life neither allows free exchange of sexual expression, nor the exploitation of people's curiosity about sex.[227] It seems that the Court's perception is that if sexual expression contributes anything, it should be positive, without inciting shame or disgust, and without the commercialization of such negative aspects of sexual expression.

What is significantly remarkable in the 2008 *Mapplethorpe* decision is the Court's acceptance of the sexually explicit images created by one of the most controversial contemporary artists[228] whose themes are sometimes associated with homosexuality and sexual deviance. As Kerstin Mey[229] describes, the artistic contribution of Mapplethorpe was to introduce outright pornographic content into the territory of aesthetic arts, interlacing fetishism and sadomasochism.[230] It may be possible to say that the Japanese Supreme Court approved the artistic value of Mapplethorpe's work because these images do not threaten society's healthy morality and sexual order. Since the Court's perception of society's healthy sexual morality and social order tends to be more focused on the approval of heterosexual moral order as a

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[224] *Id*. at 171.

[225] *See e.g*., 2 DAIHAN KEIROKU 193 (Great Ct. Judicature, Mar. 14, 1922).

[226] *See Koyama v. Japan*, *supra* note 4, pt. I. For a translation and publication of *Lady Chatterley's Lover* and Art. 175 of the Penal Code, see pt. I, para. 14.

[227] *Id*. pt. I, paras. 14, 16.

[228] As a result, in 1990, Mapplethorpe's work brought about a controversy in the U.S. in regard to funding by the National Endowment for the Arts when the Republican Senator Jesse Helms proposed amending the law to prohibit the public funding of art works that are obscene or indecent. *See* KERSTIN MEY, ART & OBSCENITY 90 (2007); *see also* EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND AN ASSAULT ON GENIUS 622-88 (1993).

[229] Kerstin Mey's input is valuable here since she explains the artistic contribution of Mapplethorpe, and defines his values in contrast to what Japanese courts say about them.

[230] MEY, *supra* note 228, at 88.

means for reproduction based on the patriarchal values that traditionally prioritize the family as the primary unit necessary to the functioning of society, it is rather noteworthy that the Court has upheld the constitutionality of the sexually explicit homoerotic and sadomasochist images.

Besides the Court's interpretation of Mapplethorpe's photographs, including the composition, color, the book as a whole, the process of solicitation, and the reputation of the author, there are specific traits that may have prevented the Court from finding the expression obscene. The book did not contain any clear and detailed photos of female genitals, or of heterosexual intercourse, and the nineteen disputed black and white photographs were either close-ups of male genitals or images of homosexual acts by foreign males.[231] These facts possibly indicate that the explicit homoerotic images represented in Mapplethorpe's photographs may be viewed by the Court as foreign and fantasized images, and therefore outside of the Court's concern since they have a less offending impact on the state ideology of cultural identity.

The Japanese courts have consistently tried to protect the exploitation of the female body, since the female body represents the state's ideologies of reproduction and patriarchy. The images that depict homoeroticism or masculine sadomasochism do not threaten these state ideologies. After all, the sexual images by Mapplethorpe may suggest to the Court nothing but mere fantasy associated with sexual deviance, or what Allison calls "something other than 'obscene' and other than 'real.'"[232] The sexually explicit photographs in the Mapplethorpe book do not deliver the realism of female genitalia, which could vividly express the idea of reproduction, motherhood, and birth, which are important components of the state ideology of Japanese cultural identity.[233] And when sexual fantasy is constructed as "the other," "it must be played out in a realm away from where normative identity is moored."[234] In other words, for the Court, the images of genitalia in Mapplethorpe's work are not realistic enough to be a threat to the cultural identity of the Japanese.

In sum, the Court's rationale in legalizing Mapplethorpe's work was based not only on the way the expression was presented and the established artistic status that the work had achieved, but also because the work lacked any relation to the state ideology of protecting traditional Japanese views on

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[231] *Asai v. Japan*, *supra* note 2, pt. III. Concerning the reasons for the petition for acceptance of final appeal argued by the appeal counsel Yamashita Yukio (except for those excluded), see pt. III, para. 2(1).

[232] ALLISON, *supra* note 9, at 150.

[233] *Id.*

[234] *Id.* at 174.

sexual order and social morality. Images of female genitals and heterosexual intercourse could have more impact on threatening the state ideology; thus, perhaps, such images would still be seen objectionable even after the 2008 *Mapplethorpe* decision.

IV. CONCLUSION

This research has tried to show that the 2008 *Mapplethorpe* decision does not necessarily foretell the deregulation of sexually explicit expression in the near future in Japan. The Court upheld the constitutionality of the public welfare doctrine and application of the Customs Law, and only suggests that foreign art is not obscene.

In comparison, in the U.S., after the "golden age of pornography" between 1957 and 1973,[235] the opportunity for the pornography industry to profit from the *Roth,*[236] *Jacobellis*,[237] and *Memoirs*[238] decisions was clear:[239] more explicit sexual representations became available in the United States during this period. As a result of the *Roth* decision, a wider variety of sexual expression no longer fell into the category of obscenity, and the cases that followed *Roth*, such as *Jacobellis* and *Memoirs*, further continued the deregulation of sexual expression.[240]

Between *Roth* and *Memoirs*, the application of morality as an evaluative criterion for obscenity decisions was less detectable; yet in *Miller*, the Court was eager to bring back the concept of morality as an interest important to society. By describing obscenity more narrowly in *Miller* and requiring the state to define unlawful expression in more detail, the Court held that only hardcore pornography, i.e., commercially produced sexually explicit materials, would be subject to obscenity prosecutions.[241] As a result,

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[235] FREDERICK S. LANE III, OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE xvii (2000).

[236] Roth v. U.S., 354 U.S. 476 (1957).

[237] Jacobellis v. Ohio, 378 U.S. 184 (1964).

[238] Memoirs v. Massachusetts, 383 U.S. 413 (1966).

[239] By the 1970s, the number of adult film theaters in the U.S. grew to more than 750, and Hollywood also began benefiting from more sexual explicitness by producing a number of X-rated films, such as *Midnight Cowboy*, *A Clockwork Orange*, and *Last Tango in Paris*. Hardcore pornographic films, such as *Deep Throat* and *The Devil in Miss Jones*, became the first mainstream features which achieved the status of mass entertainment, and "normal people," including large numbers of women, went to see them at the movie theaters. In the publishing industry, although Hugh Hefner's *Playboy* had already been established in 1953, Bob Guccione launched *Penthouse* in 1969 and Larry Flynt's *Hustler* was introduced in the 1970s. *Id*. at 29; HIXSON, *supra* note 18, at 82-83; BRIAN MCNAIR, MEDIATED SEX: PORNOGRAPHY & POSTMODERN CULTURE 113-14, 128 (1996).

[240] FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 41 (1976).

[241] *See id*. at 27.

the *Miller* standard began to regulate materials that had been found permissible under the previous standards.[242]

It is plausible to think that the Japanese Supreme Court's intent to legalize Mapplethorpe's work was to draw a more systematic boundary between acceptable and unacceptable sexual images, as the *Miller* decision did in the U.S. The legalization of artistic images would allow courts to set a framework for regulating undesirable expression, and provide the authorities with a better guideline. The 2008 *Mapplethorpe* decision does not suggest a liberalized approach to deregulating sexually explicit expression in the near future in Japan. Rather, it provides a narrower guideline for expression that falls within the specific category of speech that is perceived to impact the state's ideologies of maintaining and protecting cultural values and beliefs of Japanese society.

[242] HIXSON, *supra* note 18, at 114.