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On May 13, 1957, about three months earlier than the United States Supreme Court decided *Roth v. United States*,[1] the Japanese Supreme Court with a full bench decision[2] squarely decided the constitutional validity of the provision providing for punishment for a publisher of an obscene book.[3] Since the condemned book in the case was the Japanese translation of the Odessy Edition of D. H. Lawrence's *Lady Chatterley's Lover*,[4] there is a basis for comparison of constitutional law.[5] The approach taken by the Supreme Court of Japan to the same constitutional issues raised in the *Roth* case and the standards governing censorship of obscenity are the main areas of comparison.

Article 21 of the New Constitution of Japan provides: "Freedom of speech and all other forms of expression are guar-

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[1] Roth v. United States, 354 U.S. 479 (1957).

[2] The Supreme Court of Japan consists of fifteen justices. The Court conducts hearings and renders decisions through either a full bench court or a petty bench court. The petty benches are three in number and each consists of five justices. Cases are at first heard by a petty bench and in the following occasions they are to be transferred to the full bench court: (1) where the determination of the constitutionality of a low, ordinance, regulation or official act is to be made upon the contention of a litigant, (2) where a petty bench is in opinion that a law, ordinance, regulation or official act is unconstitutional, (3) where the opinion of a petty bench concerning the interpretation and application of the Constitution or any other law or ordinance is contrary to that of a decision previously rendered by the Supreme Court, (4) where the opinion of justices constituting a petty bench is equally divided and (5) where a petty bench is in opinion that it is appropriate to decide a specific case by the full bench court.

[3] Koyama v. State, 11 J. Sup. Ct. Crim. 997 (1957). J. Sup. Ct. Crim. is an abbreviation of the Report of the Japanese Supreme Court Decisions on Criminal Cases.

[4] It must be noted that the Japanese translation of *Lady Chatterley's Lover* was held to be obscene in the *Koyama* case. It is conceivable that the translated edition is obscene although the original edition is not obscene. The Japanese court did not decide the problem of whether the English edition is obscene or not in the *Koyama* case.

[5] In fact, a Note on the *Koyama* case is seen in an issue of Law Quarterly Review. 75 L.Q. Rev. 183 (1959).

anteed. No censorship be maintained. " Differing from the New Constitution, the former Constitution guaranteed only those freedoms described "as those rights which cannot be restricted unless according to the laws established by the Diet."[6] As a result the people could not contest the illegality of any restriction on the freedom of expression as long as the restrictions were imposed by laws enacted by the Diet. While Article 175 of Penal Code making it criminal to publish an obscene publication had been existing since 1908, there had been no way to challenge the constitutional validity of it until the New Constitution became effective.[7]

The primary constitutional question raised in *Koyama v. State* was whether or not Article 175 of Penal Code violates Article 21 of the Constitution. The Supreme Court of Japan, at the threshold of its decision, clearly recognized the difference ebtween "obscene writing" and "critical or ideological obscenity"

> Whether the sex moral and world concept advocated by Lawrence should or should not be accepted is a question which falls within the realm of morality, philosophy, religion and education; and even if it could be concluded that such ideas are immoral and anti-educational, still publication and distribution of his work cannot, *ipso facto*, be penalized under the existing laws. This is a matter which belongs to the realm of constitutionally protected freedom of expression and publication. The issue at hand is whether or not the writing contains elements which would fall within the phrase 'obscene writing as provided in Article 175 of Penal Code.

"To be obscene," the Court declared in the opinion, "a writing in question must be such that it is harmful to the moral feeling of shame and that it excites and stimulates sexual desire and runs counter to good moral concepts regarding sex." And the Court explained this definition by stating to the effect that "a sense of shame possessed by mankind is one of the essential characteristics which distinguishes human beings from the animal"

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[6] Article 29 of the Old Constitution.

[7] The New Constitution was promulgated on Nov. 3, 1946, and became effective May 3, 1947. Article 81 of the New Constitution provides: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."

and "the non-public nature of the sex act is only a natural manifestation of a sense of shame deeply rooted in human nature" and that "obscene literature excites and stimulates sexual desire and causes man clearly to become conscious of the animal side of him and thereby inflames a sense of shame. It is pregnant with the danger of paralyzing man's good conscience regarding sex and releasing it from the control of reason, causing man to behave licentiously and unrestrainedly, and inducing him to defy the established concept of sex morality and order."

On the "audience problem," the Court adopted a "readers in general" test and employed "the common concept of the community" as the touchstone for obscenity. The Court stated "this common concept is not a conglomeration of individual perceptions, nor is it an average standard, but it is a collective conscience of the community which transcends the individual perceptions; and this collective conscience cannot be negated by the fact that some persons as individuals happen to maintain contrary opinion." Thus the most difficult task of determining what constitutes the common concept of the community is left to the judges under the present judicial system.[8] On what constitutes the common concept of the community concerning obscenity, the Court more concretely stated: "While the common concept regarding sex is not the same depending on time and place, there still exists in any society a demarcation which cannot be overstepped and that demarcation is still being honoured by the general public; this limitation is the non-public nature of sex acts."

Since the Court recognized that the "ideological obscenity" itself is constitutionally protected speech, we have to understand that the opinion suggests that a book may be found to be obscene, quite apart from the objectionable ideas it asserts, upon the ground that it contains portrayals which disclose sex acts so plainly as to shock the sense of shame of the general public.

The Supreme Court of Japan, while admitting that "the book in question as a whole is a work of art" and "that its artistic literary quality has been manifested not only throughout the book but can also be perceived even in the descriptions of

[8] Under the present judicial system of Japan there is no jury at all. Both the problems of fact and law are decided by a judge.

the sex acts at twelve places as indicated by the prosecutor," strictly drew a line between a concept of art and that of obscenity with the following statement:

> Art and obscenity are concepts which belong to two separate, distinct dimentions: and it cannot be said that they cannot exist side by side. [T]he obscene nature of the work cannot be denied solely for the reason that the work in question is artistic literature. No matter how supreme the quality of art may be, it does not necessarily wipe out the stigma of obscenity Art, 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

Very contrasting phrases are involved in the opinion of the *Roth* case. The Supreme Court of the United States stated per Justice Brennan: "All ideas having even the slightest redeeming social importance have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[9] And "in its later decisions" it is said, "the Supreme Court of the United States has found material of even minor redeeming social importance not obscene, thus indicating that it probably will assign great, perhaps even overwhelming importance, to the aesthetic and other social values of material caught up in obscenity charges."[10] Under this holding of the United States Supreme Court, a hard-core pornography can be suppressed, but such materials as Henry Miller s *Tropic of Cancer* or *Tropic of Capricorn*[11] that fall somewhere between *Lady Chatterley's Lover*[12] and a hard-core pornography, would not be.[13] However, it is unimaginable that the

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[9] Roth v. United States, 354 U.S. 479, 484 (1957).

[10] Lockhart & McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. 5, 96 (1960).

[11] Japanese translations of *Tropic of Cancer* and *Tropic of Capricorn* were published in Japan several years ago. While objectionable parts were left in English, the publisher was indicted under Article 175 of Penal Code. He admitted his guilt and was tried in a summary proceeding.

[12] Unexpurgated edition of *Lady Chatterley s Lover* was held not to be obscene; Grove Press, Inc. v. Christenberry, 276 F 2d 433 (2d Cir. 1960).

[13] Lockhart & McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. 5, 83 n. 450.

material that is obscene, though not hard-core pornography, cannot be suppressed.

Although the Japanese Supreme Court explicitly stated that "the obscene nature of the work cannot be denied solely for the reason that the work in question is artistical literature," the Court in the same opinion recognized the propriety and necessity of admitting and considering experts' opinions as to the standing of the author in literary circles and the literary value of the writing. To admit and to consider experts' opinions seems to be effective not only for distinguishnig material which has literary value from pornography, which has no social value, but also for deciding the relevancy of the specific objectionable portrayals to the development of the dominant theme of the material as a whole. If the specific objectionable portrayals are not relevant to the development of the dominant theme of a novel, the novel, even if it has some literary value, should be protected no more than pornography. If the specific objectionable portrayals are relevant to the development of the dominant theme of a novel, should the novel be protected constitutionally? As above mentioned, the Supreme Court took the view that "no matter how supreme the quality of art may be, it does not necessarily wipe out the stigma of obscenity." However, in the light of its recognition of the propriety and necessity of admitting and considering experts' opinions as to the standing of the author in literary circles and the literary value of the writing, it seems not to be impossible to read this phrase as implying that there is some area where the supreme quality of art wipes out the stigma of obscenity. In fact, the Tokyo District Court, in *State v. Ishii* decided last year,[14] followed the holding of the Supreme Court that "art and obscenity are concepts which belongs to two separate, distinct dimentions." The court, however, pointed out the following:

> However, quality of art or philosophical quality of a literature cannot be said to be absolutely irrelevant in considering the issue of whether a literary work is an obscene one or not. A literary work involving bare portrayals of sex act may be decided not to be obscene on the ground that its literary quality or philosophical quality mitigates

[14] In State v. Ishii, the Japanese translation of Marquis de Sade's *Histore de Julitte* was held not to be obscene.

> or diminishes the effect of the objectionable portrayals. On the contrary, there would be cases where literary quality or philosophical quality of a literary work strengthens the effect of the objectionable portrayals of exciting or stimulating sexual desire. In a word, literary quality or philosophical quality of a literary work is relevant in deciding the issue of whether the work is obscene or not and the quality may be taken into account either in favor of or against it.

As in the *Roth* case, the appellant in *Koyama v. State* contended that "the phrasing of Article 21 of the Constitution guaranteeing the freedom of expression is unconstitutional" and that "the freedom is an absolute one and cannot be curtailed even in the name of public welfare." On this issue, the Supreme Court of Japan held:

> Regardless of whether the constitutional provisions dealing with various phases of the basic rights contain conditional phrasing or not, none of the basic human rights guaranteed by the Constitution are absolute and abuses of them are not permissible and they may be curtailed under Articles of 12 and 13 of the Constitution,[15] if enjoyment of them interfere with the public welfare. Applying this principle to the freedom of publication and other types of the freedom of expression, it must be admitted that they may be restricted for the public welfare, while we recognize the great importance of these freedoms. There is no doubt that preserving social order of sex and keeping minimum standards of morals on sex are involved in a concept of public welfare.

While the Supreme Court of the United States in *Roth* avoided the issue behind the phrase "clear and present danger" by limiting the obscene materials to those which are utterly without redeeming social importance, the Supreme Court of Japan, as above mentioned, did not so limit obscene materials, and took the view that "art and obscenity are concepts which belong to two separate, distinct dimensions." The Court justi-

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[15] Article 12—"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—"The 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 government affairs."

fied the curtailment of the freedom of expression upon the factual proposition that "obscene literature is pregnant with the danger of paralyzing man's good conscience regarding sex and releasing it from the control of reason, causing man to behave licentiously and unrestainely, and inducing him to defy the established concept of sex morality and order." This danger seems clearly to fall short of "clear and present." However, the clear and present danger test has not been completely foreign to the Japanese Supreme Court. The Court explicitly or impliedly adopted the test in deciding the constitutional validity of statutes regulating certain political utterance[16] or expression of political opinion by demonstration.[17] So, it seems that the Court distinguishes political utterances or expressions of political opinion from other kinds of expression and applies the "clear and present danger" test in deciding the constitutional validity of statutes curtailing the former, and relies on the "dangerous tendency" test in deciding the constitutionality of statutes regulating the latter.

Since the readers of the Japanese translation of *Lady Chatterley's Lover* were not limited to a specific class of people, there was no possibility for the Court to consider the appropriateness of adopting the "Variable Obscenity" test. Also, in the above mentioned *Ishii* case, the "Variable Obscenity" test was not adopted, although it was alleged by the defendant publisher; it seems that the rejection of the test was based upon the fact that the readers of the involved book were not limited to a specific class of people. So that, it would be safe to say that the question of whether the Japanese courts will adopt the "Varitable Obscienity" test or not is still open.

In Japan, there has been no statute comparable to the Michigan statute invalidated in *Butler v. Michigan*[18] and the Los Angeles ordinance invalidated in *Smith v. California*.[19] Also, there has been no statute comparable to the New York statute validated in *Kingsley Books, Inc. v. Brown*.[20] There exist several municipal ordinances quite similar to the statute of Rhode

[16] Takahashi v. State, 6 J. Sup. Ct. Crim. 1052 (1952).
[17] State v. Ito, 14 J. Sup. Ct. Crim. 1243 (1960); Yamaoka v. State, 8 J. Sup. Ct. Crim. 1866 (1954).
[18] Butler v. Michigan, 352 U.S. 380 (1957).
[19] Smith v. California, 361 U.S. 147 (1959).
[20] Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

Island which was very recently invalidated in *Bantam Books, Inc. v. Sullivan.*[21] However, the effect of the action of the Commission for the Protection of Youth under these ordinances is solely to prevent the distributor of objectionable books from selling them to youth who are under eighteen years of age. The constitutional validity of these ordinances has not yet been challenged.

An application of criminal sanctions is the only means adopted by the National Diet for the suppression of obscene publication in Japan. In Japan, as well as in the United States, whether "constitutionally protected expression which is often separated from obscenity only by a dim and uncertain line"[22] can really be protected or not depends on whether the criminal statute prohibiting obscene publication is applied according to the proper standard for judging obscenity. The above mentioned standard for judging obscenity established by the Japanese Supreme Court in *Koyama* case, I hope, would cast a light from a different angle to the contemporary problem of obscenity and the Constitution.

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[21] Bantam Books, Inc. v. Sullivan, 31 U.S.L. Week 4192 (1963).
[22] *Id.* at 4194.