

Stipulations on Programming in the Broadcast Law: The Intersection of Japanese and GHQ Agendas

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Throughout the postwar era, scandals in the broadcasting industry have invariably aroused calls for stricter regulation of the media. In 2007, the occasion was the revelation that the program *Hakkutsu! Aru aru daijiten 2* (known as “Encyclopedia for Living” in English, a program featuring useful lifestyle topics), produced by Kansai Telecasting Corporation, had presented falsified data as evidence of the supposed weight-loss properties of *natto* (made from fermented soybeans). In the wake of the scandal, a bill to amend the Broadcast Law was submitted to the Diet with new provisions aimed at empowering the government to take administrative measures against companies that broadcast fabricated content—specifically, requiring them to submit written plans for preventing recurrence of such wrongdoing. Although the portion of the proposed amendment stipulating such measures was eventually deleted during Diet deliberations, the proposal was part of a consistent trend toward tighter government regulation on broadcasting in recent years. Counting major cases alone, since 1985 there have been 30 instances of “administrative guidance,” or government intervention, concerning the content of broadcast programs by either the Ministry of Posts and Telecommunications or its successor the Ministry of Internal Affairs and Telecommunications.¹

THE STIPULATIONS ON PROGRAMMING

Among the legal grounds for such government intervention are four stipulations on programming set forth in the Broadcast Law in Article 3-2(1), which states that broadcasters (i) shall not disturb public security and good morals and manners (the public security and morals principle); (ii) shall be politically impartial (the political impartiality principle); (iii) shall broadcast news without distorting facts (the veracity principle); and (iv) as regards controversial issues, shall clarify the point of issue from as many angles as possible (the

¹ Shimizu Naoki, “Hoso bangumi no kisei no arikata” [Regulation of Broadcast Programs], *Chosa to joho Issue Brief* 597 (October 2007), p. 5.

multiple-viewpoints principle). These constitute the basic principles of regulation applicable across the board to all broadcast media, whether operating via terrestrial wave (radio and television), broadcast satellite (BS), communications satellite (CS), cable television, or IP multicast.²

Initially, however, there was little consensus that the Broadcast Law would be imbued with these four principles, as is evident from the circumstances of the law's drafting during the Allied Occupation of Japan (1945–52). The process by which the law was formulated and enacted extended over three and a half years, beginning in November 1946 and ending with the enactment of the Three Radio Laws (the Broadcast Law, the Radio Law, and the Law for Establishment of a Radio Regulatory Commission) in April 1950.

Of the four stipulations on compiling broadcasting, the two regarding, respectively, political impartiality and multiple viewpoints—essentially corresponding to the “fairness doctrine” insisted on by the General Headquarters of the Supreme Commander for the Allied Powers (GHQ/SCAP)—were included in the drafts of the legislation at a relatively early stage. The other two came later; in particular, the stipulation on public security was added at the last minute by authorities on the Japanese side who wanted a legal footing for regulating program content. Even in terms of the content—political neutrality and multiple viewpoints on the one hand and public security and veracity on the other—the two pairs of stipulations spring from essentially different kinds of principles. In particular, the stipulation on public security, which strongly suggests government intervention, has frequently been cited as compromising the spirit of the Constitution.

Nonetheless, since the enactment of the Broadcast Law in 1950, these four provisions have been treated as a set, and the scope of their application has been widened, *mutatis mutandis*, with the emergence of each new broadcast media. In their interpretation, furthermore, whereas at first these stipulations were generally regarded as matters of ethics, thereafter they gradually came to be seen more as grounds for government regulation, and have often been invoked in cases of administrative guidance.

In *Masu media hoseisakushi kenkyu* [The History of Legal Policy on the Mass Media], Uchikawa Yoshimi discusses the process by which the four stipulations were formulated in the overall context of the Three Radio Laws. Regarding such principles as that of political impartiality, he suggests that American ideals of fairness influenced the lawmaking process. Other previous research in this area includes a study by Shimizu Mikio that traces the course

² The category “broadcast media” excludes facility-supplying broadcasters (*jutaku hoso jigyoisha*), which do not carry out program production.

of Diet debate about the stipulations on programming³ and numerous studies about their legal status. Nonetheless, given the extended process of the Broadcast Law's drafting (three and a half years), as well as the fact that those deliberations took place under the peculiar circumstances of the Occupation and involved a complex interplay of the different agendas of the Japanese authorities and GHQ, it is fair to say that research in this field has yet to fully elucidate the process that gave rise to these stipulations.

Efforts are currently under way to draft an Information and Communications Law (tentative title) that will unify existing laws on communications and broadcasting. In the process of formulating the new law, and in connection with the current stipulations on programming, considerable attention is expected to focus on what regulations will apply to which media. In anticipation of such deliberations, my aim in the present paper is to review the process by which the current stipulations on programming were established, examine how their principles were molded from quite different kinds of tenets, and consider how legitimate they are.

NO PROVISION ON "PUBLIC SECURITY"

In prewar Japan, government control of the airwaves had been based on the Wireless Telegraphy Law, established in 1915. But the law had covered broadcasting only as part of provisions for the general category of privately owned radiotelephone facilities; for regulation of broadcasting activity the law had given the communications minister wide-ranging discretionary powers. In October 1946, deeming this situation to be inconsistent with the spirit of the new Constitution of Japan, GHQ's Civil Communications Section (CCS) directed the Ministry of Communications to revise communications-related legislation keeping three basic aims in mind: (a) to bring such laws into line with the new Constitution; (b) to fully democratize the communications field and permanently eradicate from it all vestiges of military control and influence; and (c) to revise and modernize outdated regulatory provisions.⁴ Accordingly, in November the ministry established a provisional legislative council chaired by the vice-minister and set about revising the relevant legislation.

³ Shimizu Mikio, "Hoso no jiritsusei no kakuho o megutte: Kokkai ni okeru 'hoso no kokyosei' giron no hensen (Showa 22 nen kara Showa 35 nen made)" [Ensuring Autonomy of Broadcasting: Changes in Discourse on the "Public Nature of Broadcasting" in Diet Debate (1947–1960)], *Hoso kenkyu to chosa* (March 1997), pp. 2–17.

⁴ Sho Hiroshi, Matsuda Eiichi, and Murai Shuichi, *Denpa Ho, Hoso Ho, Denpa Kanri Inkkai Setchi Ho shokai* [Detailed Commentary on the Radio Law, the Broadcast Law, and the Law for Establishment of a Radio Regulatory Commission], Nisshin Shuppan, 1950, p. 7.

Thus began the process of review and study for Japan's postwar laws on radio communications and broadcasting.

Initial Focus on “Fairness” and “Political Impartiality”

Working to incorporate all provisions for radio communications and broadcasting into a single law, the communications ministry compiled the first draft revision of the Wireless Telegraphy Law in February 1947 and the second draft revision in April the same year. However, after the CCS revealed its intention to give Nippon Hoso Kyokai (NHK; Japan Broadcasting Corporation) a monopoly on medium-wave broadcasting, provisions regarding NHK were formulated separately from the draft revisions and it was decided that two laws would be drawn up, one for radio communications and one specifically for NHK.⁵ The draft law concerning NHK that was formulated in June 1947 was Japan's first bill for a separate law specifically for broadcasting.

As no documentation has survived on the individual articles of the NHK bill, for reference we rely on the outline provided in a secondary source from around that time (see footnote 4). As extracted from that source, the sections of the bill relevant to what would become the stipulations on programming were as follows:

1. The purpose of the Corporation [NHK] shall be to provide, as a public organ of the society and by means of medium-wave radiotelegraphy, broadcasts to a public audience on current events, education and learning, entertainment, and other matters, with comprehensive fairness and at the lowest possible reception fee, and thereby contribute to the national culture.

11. In view of the social significance of broadcasting operations, the Corporation's broadcast programming must be free of bias.

12. To compensate for deficiencies stemming from its monopoly of the broadcasting and radiotelephony services, the Corporation must exert its best efforts in its broadcast programming and take measures to achieve the same results as it would were there competitors in that business.

From an “Outline of the Bill Concerning NHK” (June 24, 1947)⁶

The bill thus included provisions corresponding to elements of the eventual stipulations on programming, such as that NHK must conduct broadcasts

⁵ Sho et al., *Denpa Ho*, p. 11.

⁶ Sho et al., *Denpa Ho*, pp. 14–16.

“with comprehensive fairness” and that its programming “must be free of bias.” On the other hand, at that stage the principles of “public security” and “veracity” seem not to have been explicit or even regarded as important elements.

This bill was formulated on the understanding that NHK would retain its existing form as an incorporated association (*shadan hojin*), but it was subsequently concluded that it was not appropriate for 6,500 members of an incorporated association to own and operate a broadcasting enterprise exerting great influence on the lives of the general public. Accordingly, in July 1947, the month immediately after the NHK bill was drafted, the draft was replaced by a new draft for a broadcasting enterprise that drew from Australia’s Broadcasting Act of 1942, regarded at that time as the most advanced legislation of its kind.⁷ The parts of the new draft that anticipated the stipulations on programming were as follows:

Chapter I. General Provisions

1. The purpose of this law is to put into operation a broadcasting enterprise conducted for the common good of the society and to enable it to fulfill its mission as a public organ of the society.
2. The term “broadcasting enterprise” refers to an enterprise providing broadcasts to the general public on current events, education and learning, entertainment, or other matters by means of radio equipment or fixed-wire telegraphy or telephony.
3. The broadcast programming must be impartial.
4. Employees of the broadcasting enterprise must not broadcast their own opinions concerning the news. . . .

From an “Outline of the Bill for the Broadcasting Enterprise Law”
(July 16, 1947)⁸

This bill aimed at an organizational reform whereby a public agency, to be called the Nippon Hoso Iinkai (Japan Broadcasting Commission), would be established and granted a monopoly on medium-wave broadcasting. In terms of the controls it placed on broadcasting, however, this bill represented little change from the previous one; although it used different expressions, such as “impartiality” and “must not broadcast their own opinions,” in substance these amounted to the same doctrine of fairness as seen earlier.

⁷ Sho et al., *Denpa Ho*, p. 22.

⁸ Sho et al., *Denpa Ho*, pp. 22–25.

GHQ Also Calls for “Freedom of Broadcasting” and “Impartiality”

While the Ministry of Communications was drafting these bills, the CCS conducted its own study on what rules should be incorporated into a new basic law on broadcasting. An account of that review process is given in an internal memorandum compiled from August to September 1947 by Victor Hauge of the CCS Broadcasting Division, titled “Implementation of Policies Relating to Japanese Broadcasting” (hereafter referred to as the Hauge Memorandum, as in previous scholarship).⁹

On October 16, 1947, the CCS prepared the “Memorandum for Record Concerning Conference Outlining SCAP’s General Suggestions with Respect to a Japanese Broadcasting Law” (referred to in records as the Feissner Memorandum), which announced the policy of reforming Japanese broadcasting into a dual system of public and commercial broadcasters. Compiled prior to the Feissner Memorandum, the Hauge Memorandum describes the state of GHQ deliberations concerning operators and supervisory and regulatory bodies in the broadcasting business and also provides insight into CCS thinking on basic rules for broadcast programs. An entry in the Hauge memo from August reveals that at that point the CCS was considering the following six elements as general principles for regulating broadcasting:

- a. Freedom of broadcasting
- b. Impartiality
- c. Fulfillment of public service responsibility
- d. Observance of moral standards
- e. Observance of law and order
- f. Observance of technical standards

“General Principles for the Basic Law on Broadcasting,”
from the Hauge Memorandum (entry of August 27, 1947)¹⁰

In addition to the stipulation on “impartiality,” this memo sets out principles similar to that on public security and morals, expressed here as the need for observance of “moral standards” and “law and order.” It thus indicates that stipulations similar to what would eventually be included in today’s Broadcast

⁹ For detailed discussion of the Hauge Memorandum, see Konda Tsuneo, “GHQ bunsho shogen ni yoru sengo hoso seido no genten” [Origins of the Postwar Broadcasting System as Seen in GHQ Records and Testimony], *Hoso kenkyu to chosa* (August 1994), pp. 28–37; and Kogo Eiki, “GHQ no senryoki hoso seisaku: Denpa Kanri Iinkai no seiritsu kei” [GHQ Broadcasting Policy in the Occupation Era: Background to the Establishment of the Radio Regulatory Commission], *NHK Hoso Bunka Chosa Kenkyujo nenpo* 40 (1995), pp. 103–26.

¹⁰ Konda, “GHQ bunsho,” p. 34.

Law were being considered at that stage of the process. Items d and e in the above list were accompanied by the following elaborations:

d. Observance of moral standards

The law should, of course, state specific prohibitions against dissemination of obscene, profane, libelous or other morally degrading or disgraceful matter.

e. Observance of law and order

Specific prohibitions against dissemination of programs tending to disturb the public peace must also be provided but should be clearly defined and should not extend beyond those normally enforced in a democratic society.¹¹

In another entry by Hauge just two weeks later (September 12), however, these two items were omitted.¹² Likewise, the Feissner Memorandum of October 16 contained only the remaining four stipulations: freedom of broadcasting, impartiality, fulfillment of public service responsibility, and observance of technical standards. In a January 1994 interview, Clinton A. Feissner, the official of the CCS Analysis Division who authored the October memorandum, gave the following explanation as to why the “moral standards” and “law and order” items were dropped:

Interviewer: Of the six general principles, the ones on observance of moral standards and observance of law and order disappeared. Why?

Feissner: There was no need to legislate observance of moral standards or observance of law and order. No one tries to legislate things like kindness or tolerance. The same applies to moral standards and law and order. I don't know why they were included in the draft in the first place.¹³

Thus, although the CCS at one point considered rules on observing moral standards and law and order, it eventually came to the conclusion that rules for such moral matters were for broadcasters to observe on a self-regulating basis and did not need to be written into the letter of the law.

¹¹ GHQ/SCAP Civil Communications Section, “Implementation of Policies Relating to Japanese Broadcasting” (entry of August 27, 1948), GHQ/SCAP Records, Modern Japanese Political History Materials Room, National Diet Library, Tokyo, microfiche no. CCS-00308.

¹² GHQ/SCAP Civil Communications Section, “Implementation of Policies Relating to Japanese Broadcasting” (entry of September 12, 1948), GHQ/SCAP Records, Modern Japanese Political History Materials Room, National Diet Library, Tokyo, microfiche no. CCS-00308.

¹³ This English text of the interview is based on a Japanese-language transcript in Kogo Eiki and Konda Tsuneo, “GHQ no hoso seisaku: C. A. Faisuna-shi no shogen” [GHQ Policy on Broadcasting: Testimony of C. A. Feissner], *Hoso kenkyu to chosa* (March 1995), p. 17.

During the same period as the Occupation of Japan, debate over rules for broadcasters was unfolding in the United States as well. In a 1949 report, the Federal Communications Commission (FCC) established what came to be known as the “fairness doctrine,” requiring broadcasters to present opposing views on controversial issues in a fair and balanced manner. Although it is not known exactly how such debate influenced GHQ’s media policy, it did establish that the focus of concern, at least in the United States, was on how to ensure fairness in broadcasting, not such questions as “observance of law and order.”

In the face of growing criticism that establishing the proposed Japan Broadcasting Commission would institute state-controlled broadcasting, together with GHQ’s October 1947 announcement of its policy shift away from giving NHK a monopoly toward creating a dual system of public and commercial broadcasting, it was decided that the bill for the Broadcasting Enterprise Law would be revised. Nonetheless, as the preceding discussion shows, in regard to stipulations on programming, prevailing opinion in 1947 was that it would be sufficient to provide mainly for “freedom of broadcasting” and “impartiality,” and little effort was made for any tighter controls on broadcasting. This situation would change considerably, however, in the following year.

THE DRIFT TOWARD TIGHTER REGULATION

In response to the GHQ “suggestions” of October 1947, the Ministry of Communications set about overhauling the draft of the law a second time, and in February 1948 it produced a draft for the Broadcast Law and submitted it to the CCS for advice. On the matter of organizational reform, this draft included provisions different from those in the draft for the Broadcasting Enterprise Law, among them provisions to establish a supervisory commission under the aegis of which NHK would carry out actual broadcasting as a special public corporation. On the issue of general rules and principles for broadcasting, however, the new version retained the existing basic framework centering on the principle of political fairness. The draft’s provisions relevant to the stipulations on programming were as follows:

Chapter I. General Provisions

Article 4. (Broadcasting of Candidates)

Any broadcasting enterpriser must, in case he has allowed candidates for the Diet

or any other offices by public election to broadcast their political views for their success, give, on application, the same chance to other candidates in the same election.

Article 5. (News Broadcast)

News broadcast must be true and fair.

Chapter III. Broadcasting Corporation of Japan (B.C.J.)

Article 48. (Matters Prohibited for Broadcasting)

The Corporation must not broadcast its own opinion on current events.

Article 50. (Impartiality of Programming)

The Corporation must be politically impartial in compiling its programs.

From the Bill for the Broadcast Law (February 20, 1948)¹⁴

Adding “Public Security” and “Veracity” and More Penalties

Thus, the provisions relating to the stipulations on programming focused on rules for such matters as maintaining political impartiality and providing equal broadcasting opportunity to election candidates. Significantly, however, in the latter half of the bill, under Article 99 in a chapter headed “Penal Provisions,” provisions were added for imposing fines and prison sentences on any “person who has, through broadcasting facilities, broadcast matters that violate public morals” and any “person who has, through broadcasting facilities, suggested the destruction, by violence, of the Constitution of Japan or the Government organized under it.”

Although the background to the addition of these penal provisions is not known, the first half of 1948 was a time when shifts in GHQ’s occupation policy were beginning to take effect, including matters relating to the media. Around the time of the second labor dispute at the Yomiuri newspaper company in June 1946, GHQ’s Civil Information and Education Section (CIE), fearing a leftist turn in the newspaper industry, had issued a statement to the effect that newspaper editorial policy must be determined by the proprietors, with no interference from labor unions or employees, but it was in early 1948 that this policy was made official. On March 3, 1948, the Labor Division of GHQ’s Economic and Scientific Section (ESS) issued a statement giving

¹⁴ Uryu Tadao, *Hoso sangyo: Sono Nihon ni okeru hatten no tokusei* [The Broadcasting Industry: Peculiarities of Its Development in Japan], Hosei Daigaku Shuppanyoku, 1965, pp. 54–68. Uryu notes that the only surviving copy of this version of the bill is the one in his possession, but an English-language translation survives as “Bill for the Broadcast Law February 20, 1948 MOC.” GHQ/SCAP Records, Modern Japanese Political History Materials Room, National Diet Library, Tokyo, microfiche no. CCS-00689.

media proprietors exclusive authority to determine editorial policy; and on March 16, as if following suit, the Japan Newspaper Publishers and Editors Association (Nippon Shinbun Kyokai; NSK) issued its own statement on editorial rights. Underlying these developments were the intentions of both GHQ and media proprietors to prevent Communist Party-influenced labor unions from gaining control of “editorial rights,” a step deemed necessary for maintaining social order.

Based on deliberations with the CIE and the Government Section (GS)—both of which were in charge of media policy—as well as with the ESS, on May 29, 1948 the CCS presented its recommendations for revision of the February 20 version of the bill for the Broadcast Law. The Ministry of Communications revised the draft in line with those recommendations, and on June 18 the revised bill was submitted to the second session of the Diet. Although the precise content of the GHQ-proposed changes is not known, GHQ records confirm that the revisions requested by the CIE, the GS, and the ESS were incorporated into the revised draft,¹⁵ implying that the bill now reflected the consensus opinion of all GHQ departments involved in media policy.

One salient feature of this version of the bill is that Article 4 incorporated virtually word for word the Press Code for Japan (and the essentially identical Radio Code for Japan), issued by the Occupation authorities soon after the end of the Pacific War in September 1945 to regulate news coverage. Another is that the penal provisions for offenses against public morals and so on were also retained, with some changes in expression, in Article 88.

Chapter I. General Provisions

Article 4.

(1) The following rules must be observed in news broadcasts.

- (i) News must adhere strictly to the truth.
- (ii) Nothing should be broadcast which might, whether directly or indirectly, disturb public security.
- (iii) News stories must be based on fact and completely devoid of editorial opinion.
- (iv) News stories shall not be colored to conform with any propaganda line.
- (v) Minor details of a news story must not be over-emphasized to stress or develop any propaganda line.

¹⁵ GHQ/SCAP Civil Communications Section, “Recommended Revision of Japanese Broadcast Law Proposed by Japanese Ministry of Communications” (May 29, 1948), GHQ/SCAP Records, Modern Japanese Political History Materials Room, National Diet Library, Tokyo, microfiche no. CCS-01415.

- (vi) No news story shall be distorted by the omission of pertinent facts or details.
- (vii) In news editing, no news story shall be given undue prominence for the purpose of establishing or developing any propaganda line.

Article 4.

(2) Critique, analysis, and commentary on current events must also observe all of the rules set forth in the preceding items.

Chapter III. The Japan Broadcasting Corporation (NHK)

Article 46.

(2) In compiling broadcast programs, the Corporation shall observe what is stipulated in the following items.

- (i) For the general public the Corporation shall broadcast news on matters of public debate as comprehensively as possible, without adding the opinions of its editorial staff.
- (ii) Regarding controversial issues, the Corporation shall clarify the points of issue from all angles through representatives of each of the contending opinions.
- (iii) The Corporation shall contribute to the advancement of social education and school education.
- (iv) The Corporation shall constantly maintain the highest standards of cultural content in the areas of music, literature, entertainment, and so on.

Article 47.

(1) The compilation of the Corporation's broadcast programs must be politically impartial.

(2) If the Corporation has allowed a candidate for an elective office to broadcast the candidate's political views or other campaign-related material, the Corporation shall, on application, give other candidates in the same election use of the same broadcast facilities under the same conditions of broadcast time and length.

From the "Bill for the Broadcast Law"
(as submitted to the Diet on June 18, 1948)¹⁶

In the chapter on NHK, this draft of the bill showed little change from the February 1948 version: although the rule to "clarify the points of issue from as many angles as possible" had been added, the fairness doctrine was still the main thrust of the provisions. In the Article 4 general provisions, however, this draft incorporated regulations completely different from anything that had

¹⁶ Hosō Hosei Rippo Katei Kenkyūkai (Research Group on the Process of Establishment of Broadcast Law), ed., *Shiryō: Senryōka no hōso rippo* [Occupation-era Legislation on Broadcasting], Tokyo Daigaku Shuppankai, 1980, pp. 163–200.

been seen before. It also had problems of legal consistency—the stipulation that news stories be “devoid of editorial opinion,” for example, overlapped with part of Article 46—giving the impression that Article 4 had been cobbled onto the bill rather abruptly.

The Press Code used as the template for Article 4 consisted of ten stipulations—“News must adhere strictly to the truth,” “Nothing should be printed which might, directly or indirectly, disturb the public tranquility,” and so on—with a strong flavor of control in keeping with the conditions of a military occupation. With the exception of the three items aimed at regulating press coverage of the Allied Powers (e.g., “There shall be no false or destructive criticism of the Allied Powers”), all seven of the remaining Press Code stipulations had now been transposed virtually verbatim to the revised bill on broadcasting.

It has been suggested that the inclusion of such provisions into the bill was the result of hardline demands from the CIE.¹⁷ From the summer of 1946 on, effective power in the CIE was in the hands of two men regarded as conservatives: CIE chief Donald R. Nugent and Press and Publications Division head Daniel C. Imboden, who had considerable sway over media policy. In other words, the CIE establishment at that time was different from what it had been in the early days of the Occupation, when the so-called New Dealers had had more influence. Although my examination of GHQ records uncovered no evidence of direct CIE involvement in the addition of the Press Code provisions to the revised bill, the fact that the CIE accepted the draft during the May round of recommendations for revision implies that it at least gave its tacit approval to the inclusion of those provisions.

Meanwhile, the response of the Japanese side to these regulatory measures was far from negative; on the contrary, the tendency was to take the opportunity to institute even tighter control over broadcasting. At a Cabinet meeting, Prime Minister Ashida Hitoshi, noting that penal provisions had been incorporated into Article 88 of the bill, called for similar penalties to be stipulated in the news-related provisions as well.¹⁸ Similarly, debate in the House of Councillors Standing Committee on Communications addressed the apparent discrepancy that, whereas Article 88 included penal provisions against broadcasts that “offend public morals,” there were no penal provisions against broadcasts that “disturb public security,” even though such broadcasts were proscribed in Article 4:

¹⁷ Chubu-Nippon Broadcasting, *Minkan hoso shi* [History of Commercial Broadcasting], Shikisha, 1959, p. 61.

¹⁸ Chubu-Nippon Broadcasting, *Minkan hoso shi*, p. 61.

Shintani Torasaburo, member of the House of Councillors: Why did you not add penal provisions against acts which, while not offensive to public morals, do disturb public security? Do you suppose that such things are not possible?

Torii Hiroshi, chairman of the Ministry of Communications Provisional Legislative Council: Article 4 is itself a moral provision to ensure the veracity of news stories . . . As for some kind of guide to maintaining public security, in the past there were such laws as the Peace Preservation Law, and the concept of public security was very clear-cut. In today's Japan there are no legal provisions for public security in that sense. For this reason, we limited the penal provisions to the conceptually well-defined subject of offenses against public morals.¹⁹

This exchange confirms that even the officials of the regulatory authorities concerned were troubled by the fact that the Press Code-derived elements in Article 4 had been added to the bill in a rather high-handed fashion. For the time being, the communications ministry tried to uphold the bill's internal consistency by interpreting the Press Code-based article as no more than a "moral provision."

GHQ is also thought to have rejected the proposal for adding penal provisions as debated in the Diet,²⁰ and at that stage no such additions were included in the bill's revisions. However, some Diet members continued to push a hard line on the issue, and on October 9 the scope of Article 4(2) was broadened with the addition of the following: "The same shall apply to broadcasts of criticism, entertainment, or other material that include news stories, news analysis, or news commentary."²¹ However, the Ashida Hitoshi Cabinet resigned en masse in October 1948, and with the launch of the succeeding Cabinet led by Prime Minister Yoshida Shigeru, the communications ministry withdrew this version of the Broadcast Law bill from the Diet.

GHQ Legal Section Recommends Deleting the Press Code Provisions

The preceding discussion shows that in 1948 the drafting of the bill for the Broadcast Law had clearly deviated from the original principle of conforming broadcasting legislation to the new Constitution. Crucially, moreover, the

¹⁹ Sangiin Tsushin Inkaikai (House of Councillors Standing Committee on Communications) preliminary meeting of July 28, 1948, Diet Records, National Diet Library, Tokyo.

²⁰ Okudaira Yasuhiro, "Hoso hosei no saihensei: Sono junbi katei" [Reform of Broadcasting Legislation: Preparatory Process], in Sengo Kaikaku Kenkyukai (Study Group on Postwar Reforms), Institute of Social Science, University of Tokyo, *Seiji katei* [Political Process], volume 3 of the Institute of Social Science, University of Tokyo, ed., *Sengo kaikaku* [Postwar Reforms], Tokyo Daigaku Shuppankai, 1974, p. 434.

²¹ Hosoi Hosei Rippo Katei Kenkyukai, ed., *Shiryō*, p. 200.

effort of reining in this deviation came not from the Japanese side but rather from GHQ's Legal Section (LS). Studies such as the aforementioned one by Uchikawa Yoshimi have already elucidated the fact that LS recommendations for revising the bill had a major impact in shaping the regulation of broadcasting in the postwar era. In view of the importance of the LS recommendations, let us look at their relevant elements pertaining to the stipulations on programming.

The LS recommendations, issued in December 1948, after the bill had been temporarily withdrawn from the Diet process, called on the communications ministry to delete the Press Code-based provisions and the penal provisions against broadcasts that offend public morals. The LS document contained the following remarks relating to the stipulations on programming:

Article 4

A

This article is strongly objected to as irreconcilable with the guarantee of freedom of expression, provided for in Article 21 of the Constitution of Japan. It would be impossible to conduct a radio station without continuous violation of this article, as presently written, and conversely the article could be used to suppress any type of realistic reporting, or criticism, if the government chose to do so. . . .

C

Because of the sweeping prohibition of freedom of speech, Legal Section recommends the complete deletion of this article, in as much as the reasonable objectives of broadcasting, including impartiality, are covered by the standards expressed in Chapter III, Article 46 and 47.

From the Legal Section's "Remarks on the Broadcasting Bill"
(December 2, 1948)²²

Insofar as the Broadcast Law related to freedom of speech and expression, the LS thus strongly recommended conforming it to the Constitution. The LS was concerned that, should the law retain such provisions as then in Article 4, the government could, if it chose, use those provisions to suppress factual reporting or criticism. In light of the actual situation today, in which there are frequent cases of administrative guidance concerning the veracity of news reporting, the LS concerns were arguably an accurate forecast of the effects of such provisions. They also prompted reevaluation of the tendency to assume that recommendations identical to GHQ directives could be simply transposed to Japan's domestic laws.

²² Hosoi Hosei Rippo Katei Kenkyukai, ed., *Shiryō*, pp. 207–15.

The LS document also addressed the Article 88 provisions on penalties for broadcasts that suggest violent destruction of the Constitution or government or that go against public morals. Regarding the former, the LS pointed out that the current wording was too broad and recommended that such matters be left to the revision of the Criminal Code; regarding the latter, it recommended deleting the entire paragraph because of the ambiguity of the term “public morals.”

Accepting the LS recommendations, the Japanese authorities deleted Article 4, noting that its “misapplication could recreate the apparatus of thought control and make broadcasting a medium of propaganda for those in power.”²³ Uchikawa underscores the importance of this development:

Such provisions restricting freedom of expression in broadcast programs were deleted from subsequent drafts of the bill. The penal provisions were also eventually eliminated from the bill for the Broadcast Law. In essence, it is fair to say that these LS recommendations held tremendous significance in determining the institutional framework for freedom of speech and expression in Japanese broadcasting from that time forward.²⁴

In fact, however, “provisions restricting freedom of expression in broadcast programs” had not disappeared completely, and were to make a comeback to the bill at a later stage of its drafting.

SCRAPPED PROVISIONS REINSTATED

Following GHQ advice, the communications ministry revised the bill for the Broadcast Law once more, producing the draft of March 1949. In this draft, the Article 4 provisions of the previous version were all deleted and the portions corresponding to what would become the stipulations on programming were as follows.

Chapter III. The Japan Broadcasting Corporation (NHK)

Article 46.

(3) In compiling broadcast programs, the Corporation shall observe what is stipulated in the following items.

(i) The Corporation shall broadcast news on matters of public concern as comprehensively as possible, without adding the opinions of its editorial staff.

²³ Sho et al., *Denpa Ho*, p. 38.

²⁴ Uchikawa Yoshimi, *Masu media hoseisaku shi kenkyu* [History of Legal Policy on Mass Media], Yuhikaku, 1989, p. 357.

- (ii) Regarding controversial issues, the Corporation shall clarify the points of issue from all angles through representatives of each of the contending opinions.
- (iii) The Corporation shall contribute to the advancement of social education and school education.
- (iv) The Corporation shall constantly maintain the highest standards of cultural content in the areas of music, literature, entertainment, and so on.

Article 47

(1) The compilation of the Corporation's broadcast programs must be politically impartial.

(2) If the Corporation has allowed a candidate for an elective office to broadcast the candidate's political views or other campaign-related material, the Corporation shall, on application, give other candidates in the same election use of the same broadcast facilities under the same conditions of broadcast time and length.

From the "Bill for the Broadcast Law"
(compiled March 1, 1949)²⁵

Deletion of the Press Code Provisions

Thus, the Press Code-based provisions had been completely scrapped from the regulations for broadcasting, which, furthermore, now applied only to NHK. Meanwhile, the penal provisions had been retained (Article 94 in this draft), with only a slight change in wording from "against public morals" to "obscene" in the description of content subject to penal treatment.

Although no issues arose from this bill in connection with the stipulations on programming, opinion was divided within both GHQ and the Japanese side on the question of administrative jurisdiction over broadcasting, and the bill's submission to the Diet was postponed. Opposition between GHQ and the Japanese authorities over that issue continued to smolder even after the June 1949 reorganization of the Ministry of Communications into two new ministries—the Ministry of Posts and the Ministry of Telecommunications—and the launch of the Radio Regulatory Agency as an extra-ministerial organ of the latter ministry. The Radio Regulatory Agency then exacerbated the conflict by submitting to the CCS an outline for the Broadcast Law bill that proposed scrapping the plan for a supervisory broadcasting commission and transferring the same authority to the minister for telecommunications.

The GHQ side rejected this idea, feeling it would be wrong to give the minister powers relating to regulatory control of radio communications. Instead, Brigadier General George I. Back of the CCS recommended establishing a Radio Regulatory Commission independent of any specific government min-

²⁵ Hosoi Hosei Rippo Katei Kenkyukai, ed., *Shiryō*, pp. 224–65.

istry or agency. On the regulatory provisions for broadcasting, furthermore, he advised that the law recognize freedom of programming. The bill for the Broadcast Law then underwent further deliberation and revision in line with these recommendations and was finally approved by the Cabinet in October 1949.

Chapter II. The Japan Broadcasting Corporation (NHK)

Article 44.

(3) In compiling broadcast programs, the Corporation shall observe what is stipulated in the following items.

- (i) Regarding matters of public concern, the Corporation shall broadcast news without distorting facts.
- (ii) Regarding controversial issues, the Corporation shall clarify the points of issue from as many angles as possible.
- (iii) The Corporation shall maintain the highest standards of content in the areas of music, literature, performing arts, entertainment, and so on.

Article 45

(1) The compilation of the Corporation's broadcast programs must be politically impartial.

(2) In case the Corporation has allowed a candidate for an elective office to broadcast the candidate's political views or other campaign-related material, the Corporation shall, when so requested by other candidates in the same election, allow those candidates to broadcast with the same broadcast facilities under the same conditions of broadcast time and for the same length of time.

From the "Bill for the Broadcast Law"
(as approved by Cabinet October 12, 1949)²⁶

With the addition of the provision on presenting news "without distorting facts," at this point the bill included three of the four passages comprising today's stipulations on programming: on political impartiality, veracity, and multiple viewpoints. However, these stipulations still applied only to NHK; only the provision on giving equal broadcast time to election candidates applied to commercial broadcasters as well (under Article 52, which was essentially identical to Article 45(2)). Meanwhile, the penal provisions against "obscene" broadcasts and so on had been removed.

This version of the bill was not submitted to the Diet right away, however, due to opposition between the Japanese authorities and GHQ over a key element in one of the other Three Radio Laws, the Law for Establishment of a

²⁶ Hosoi Hosei Rippo Katei Kenkyukai, ed., *Shiryō*, pp. 269–89.

Radio Regulatory Commission. Whereas the Japanese side wanted the Radio Regulatory Commission to be chaired by a Cabinet minister, thereby placing administrative authority for broadcasting under Cabinet control, the GS wanted to give the Commission a robust independence. The issue was eventually settled at the highest level: on December 5, 1949, General Douglas MacArthur, Supreme Commander for the Allied Powers, sent a letter to Prime Minister Yoshida advising that provisions for appointing a Cabinet minister as Commission chairperson be deleted from the bill for the Law for Establishment of a Radio Regulatory Commission, and the Japanese government consented. After the relevant sections of that bill were duly revised, on December 22 the bills for the Three Radio Laws were submitted to the seventh session of the Diet.

Revisions in the Diet Reinstate the Public Security Rule

Diet deliberations on the Three Radio Laws began in January 1950, but the principle of freedom of expression was not always the pivot of debate regarding the stipulations on programming. Responding to questions in the January 27 session of the House of Representatives Standing Committee on Electrical Communications, Minister for Posts Ozawa Saeki appeared to argue for legislation covering the whole field of public expression: “Some say that, since no constraints are placed on newspapers, then none need be imposed on broadcasting either, but I think that, within certain bounds, and for the good of the general public, it would be desirable to have something like a newspaper law.”²⁷ The view that the stipulations on programming should apply to commercial broadcasters as well as NHK was also put forward, even by businesspeople preparing to enter into the new field of commercial broadcasting: “At the very least,” suggested one, “the Article 44 provisions on compiling broadcast programs and the Article 45 provisions on political impartiality should be brought together under the general provisions in Chapter I.”²⁸

On the other hand, Amishima Tsuyoshi, then chairman of the Radio Wave Control Committee, made the following remarks in response to questions in the Diet:

²⁷ Shugiin Denki Tsushin Inkai (House of Representatives Standing Committee on Electrical Communications), January 27, 1950, Diet Records, National Diet Library, Tokyo.

²⁸ Sugiyama Katsumi, member of the preparatory committee for the establishment of Asahi Hoso Co., Ltd., speaking at the House of Representatives Standing Committee on Electrical Communications public hearing of February 7, 1950, Diet Records, National Diet Library, Tokyo.

In commercial broadcasting, business should be conducted in a completely free and unfettered manner. That is absolutely essential for the future development of commercial broadcasting in our country, and furthermore it is as things should be. Accordingly, considering the development of commercial broadcasting, we purposely refrained from going into too much detail in drafting the provisions.²⁹

Thus, not all the key officials involved in drafting the legislation were intent on tightening controls on broadcasting; some preferred a system of self-regulation, particularly in regard to commercial broadcasting. But this was not enough to ensure that the original Cabinet-approved bill for the Broadcast Law passed through the Diet unchanged. In April 1950, just weeks before the bill was enacted into law, revisions by Diet members included the addition of the public security stipulation and the widening of the application of such stipulations to commercial broadcasting as well.

Chapter II. The Japan Broadcasting Corporation (NHK)

Amend Article 44(3) to read as follows:

Article 44.

(3) In compiling broadcast programs, the Corporation shall follow what is laid down in the following items.

(i) Shall not disturb public security.

(ii) Shall be politically impartial.

(iii) Shall broadcast news without distorting facts.

(iv) Regarding controversial issues, shall clarify the points of issue from as many angles as possible.

Chapter III. Private Broadcasters

Article 53.

The provisions of Article 44(3) shall apply *mutatis mutandis* to private broadcasters.

Proposed Amendments to the Bill for the Broadcast Law
(April 7, 1950)³⁰

Why it was deemed necessary to add the stipulation on public security was never clarified in the Diet deliberations. In his explanation of the amendment proposal, its sponsor remarked only that it represented “the necessary amendments to the original bill made on the understanding that regulation by means of these four stipulations would be the most appropriate.”³¹

²⁹ Shugiin Denki Tsushin Monbu Inkai Rengo Shinsakai (House of Representatives Joint Committee on Electrical Communications and Education), March 8, 1950, Diet Records, National Diet Library, Tokyo.

³⁰ Hoso Hosei Rippo Katei Kenkyukai, ed., *Shiryō*, pp. 340–43.

³¹ Takashio Saburo, House of Representatives Standing Committee on Electrical Communications, April 7, 1950, Diet Records, National Diet Library, Tokyo.

Naturally, the amendment proposal aroused vigorous objections from mass media organizations. Just after the House of Representatives passed the bill, including the proposed amendments, on April 8, the weekly newspaper *Shinbun Kyokai ho* (published by NSK) ran a front-page article with the headline “Bills for Broadcast Law and others Passed by Lower House: Resurgence of Censorship Feared.” The article warned that “these amendments are almost devoid of the viewpoint of freedom of speech and in fact even include revisions that threaten a return to a censorship system”; and stated that “for legislating elements that even in the original Cabinet-approved bill allowed a degree of suppression of free speech and raised the risk of censorship; for also legislating the Radio Code; and furthermore for making these the standards of regulation, the amendments have attracted sharp criticism from some quarters of the press as limiting freedom of speech.”³²

Nonetheless, there was no discussion of the stipulations on programming in subsequent deliberations in the House of Councillors, and after amendments were made to other sections of the bill for the Broadcast Law, it was returned to the House of Representatives, where, at the plenary session of April 26, it was passed and enacted into law. The Three Radio Laws, including the Broadcast Law, came into force on June 1, 1950.

My examination of the relevant records uncovered no reaction by GHQ (e.g., the LS) to the fact that the provision on public security, which essentially revived part of the Press Code, had been added to the legislation at the last minute. It should be noted, however, that in the first half of 1950, just as deliberations on the bill for the Broadcast Law were under way, Cold War tensions were mounting rapidly, creating a political climate far from conducive to forthright GHQ efforts to consolidate democratic principles in Japan’s mass media. On June 25, only a few weeks after the Broadcast Law went into effect, the Korean War broke out, and on July 24 GHQ initiated what came to be known as the Red Purge by ordering the dismissal of Japan Communist Party members from newspaper-, communications-, and broadcasting-related organizations.

CHANGING INTERPRETATIONS

The stipulations on programming in the Broadcast Law were adjusted in 1959 when, in response to criticism of programs considered vulgar, item (i) “Shall not disturb public security” was amended to “Shall not disturb public security and good morals and manners.” Another change was made in 1988: the provi-

³² *Shinbun Kyokai ho*, April 10, 1950, p. 1.

sions of Article 44 (in the chapter on NHK) were moved to Article 3-2 (the chapter on general provisions), making the stipulations on programming applicable to commercial broadcasters directly rather than *mutatis mutandis*.

Regarding the legal character of the stipulations on programming, the following are the three main interpretations given since its formulation: (a) the view that does not recognize any legality in the stipulations and regards them instead as a set of ethical rules; (b) the view that, while rejecting intervention by any government authority into specific program content, allows that the stipulations could be granted legality backed by some kind of legal sanction; and (c) the view that gives unqualified recognition to the stipulations' legality and holds that their violation can be dealt with by applying Article 76 of the Radio Law (which empowers the competent minister to order the cessation of a radio station's operations or to revoke its license).³³

Views (b) and (c) are more recent than (a); for the early part of the postwar era, most opinions on the issue supported the accepted view of the stipulations as a matter of ethics. The following passage, for example, is from a 1964 Ministry of Posts and Telecommunications report titled "Hoso kankei hosei ni kansuru kentojo no mondaiten to sono bunseki" (Review and Analysis of Issues in the Drafting of Broadcasting-related Legislation): "The rules for the kind of broadcast programming that the law expects of broadcasters are in reality just goals; the law's practical effect is largely confined to the limits of a moral provision. Essentially, there is no option but to rely on broadcasters' self-regulation."³⁴ This was consistent with the view that had been put forward in 1950 by Radio Wave Control Committee chairman Amishima Tsuyoshi, who had said in response to questions in the Diet that he expected broadcasters "to strive to fulfill the objectives of the Broadcast Law in accordance with self-imposed requirements."³⁵ Looking back on the process of the Broadcast Law's drafting during the Occupation, it seems fair to say that interpreting the stipulations on programming as moral provisions was only a natural extension of that process.

³³ Aoki Sadanobu et al., "Kyodo hokoku: Terebi o shimin ni torimodoso: Jiyu de kosei na hoso seido no tame no ju no teigen" [Joint Report: Giving Television Back to the People: Ten Proposals for a Free and Fair Broadcasting System], *Sekai* (October 1994), p. 44.

³⁴ Ministry of Posts and Telecommunications, "Hoso kankei hosei ni kansuru kentojo no mondaiten to sono bunseki" [Review and Analysis of Issues in the Drafting of Broadcasting-related Legislation], in Rinji Hoso Kankei Hosei Chosakai (Special Investigative Committee on Broadcasting-related Legislation), *Toshinsho shiryohen* [Reports and Data], 1964, p. 362.

³⁵ Shugiin Denki Tsushin Monbu Iinkai Rengo Shinsakai (House of Representatives Joint Committee on Electrical Communications and Education), March 8, 1950, Diet Records, National Diet Library, Tokyo.

Later, however, this view would lose its dominance. One turning point was the so-called Tsubaki Affair of 1993, a scandal sparked by reports that Asahi National Broadcasting (TV Asahi) news bureau chief Tsubaki Sadayoshi had deliberately slanted TV Asahi election coverage against the Liberal Democratic Party. In connection with this incident, the government expressed the view that it was legally possible to take administrative measures against violations of the stipulations on programming on the basis of Article 76 of the Radio Law.

But criticism of that stance has remained strong, and even in regard to the stipulations on programming themselves, experts on constitutional and media law have repeatedly suggested that the public security and morals rule be deleted from the law. In 1976, for instance, leading constitutional scholar Ashibe Nobuyoshi asserted the following:

On the basis of the theory of the public's "right to know," if one adopts the view that Article 44 (3) of the Broadcast Law is a prescription backed by a certain measure of legal sanction, then this raises the problem of the constitutionality particularly of the rule "shall not disturb public security and good morals and manners." Not only is this rule lacking in positive grounds by which to satisfy the right to know, it is such a vague and broad rule that serious constitutional questions arise in connection with regulation of violent or sexually explicit programs, which has aroused much controversy recently.³⁶

Specialist in media law Shimizu Hideo has expressed a similar opinion:

In my view, the "shall not disturb public security and good morals and manners" provision is exceedingly ambiguous and broad in its wording and, unlike the principle of fairness, for example, which calls for proper balance in program content, entails the risk of direct infringement on freedom of expression, and as such it should be deleted immediately.³⁷

Considering the circumstances of this stipulation's last-minute inclusion into the Broadcast Law, it is not surprising that many people take the view that it should be the first to be eliminated.

Regarding the political impartiality rule, diversification of broadcast media

³⁶ Ashibe Nobuyoshi, "Hoso bangumi no henshu kijun to genron hyogen no jiyu: Amerika ni okeru rongi o sozai toshite" [Programming Standards for Broadcasting and Freedom of Speech and Expression], in Ito Masami, ed., *Hoso seido: Sono genjo to tenbo 1* [The Broadcasting System: Present Status and Future Prospects, Part I], Nippon Hoso Shuppan Kyokai, 1976), p. 55.

³⁷ Shimizu Hideo, *Terebi to kenryoku* [TV and Power], Sanseido, 1995, pp. 57–58.

has prompted calls for reassessing the appropriateness of applying this rule uniformly to all broadcast media. With the emergence of multichannel broadcasting, for instance, some observers claim there is little need to extend the application of this rule to CS broadcasting.

But while some thus call for reevaluation of the stipulations on programming, others, conversely, seek to clarify more sharply the grounds for precisely such regulation. One example of the latter trend is the Broadcast Law amendment bill considered in the wake of the *Hakkutsu! Aru aru daijiten 2* fabrication scandal mentioned at the beginning of this article. The bill for a revised Broadcast Law that was submitted to the Diet in April 2007 originally included a provision stipulating that, in case a broadcaster conducts a “broadcast that by false representation may mislead viewers into believing nonfactual matters to be fact,” and thus threatens to adversely affect people’s lives, the Ministry of Internal Affairs and Telecommunications (MIC) would be empowered to demand from the broadcaster a written plan for preventing recurrence of such broadcasts. This proposed provision was eventually deleted from the bill; nonetheless, pressure to tighten control over broadcast media has been applied frequently throughout the postwar era, notably in such efforts to revise laws and in administrative guidance based on the existing stipulations on programming.

Although various interpretations have thus been made regarding the rationale behind the stipulations on programming, the current text is expected to be essentially retained in future revisions to the legislation. As for the Broadcast Law as a whole, in December 2007 a MIC study group formulated a plan to unify all broadcasting- and communications-related laws into a single, comprehensive Information and Communications Law, a bill for which the study group is now drafting with the aim of submitting it to the ordinary Diet session of 2010. The study group’s report recommended that, for key media such as terrestrial television, “rules for content . . . in accordance with the existing rules for broadcasting should be applied.”

According to the report, the envisioned Information and Communications Law would distinguish, on the basis of degree of social impact, three categories of media content regarded as open to the general public: that of “special media services,” mainly terrestrial TV broadcasting; that of “general media services,” such as CS broadcasting; and “open media content.” For special media services, the current stipulations on programming would be maintained, and for general media services, although studies would be carried out with a view to deregulation, they would also continue to apply.³⁸ Thus, on the

³⁸ Tsushin Hoso no Sogoteki na Hotaikai ni Kansuru Kenkyukai (Study Group on a Comprehensive Legal System for Broadcasting), *Hokokusho* [Report], December 6, 2007, pp.

question of content rules, while much concern is expressed over the prospect of stricter controls on information distributed via the Internet, another key consideration is the degree to which the current stipulations on programming will be retained for “media services” centered around the existing field of “broadcasting.”

The process by which the Broadcast Law was drafted and enacted during the Occupation involved various opinions regarding what came to be the stipulations on programming, and while certain adjustments have since been made to the stipulations, essentially they remain today as they were when they were finalized for enactment in April 1950. The hasty manner in which the passage on public security was added just before the law’s enactment also suggests that the current stipulations on programming did not take shape within an entirely consistent framework of thought. At one point in the process, as we saw, a key regulatory authority stated in the Diet that his office deliberately avoided writing too much detail into the provisions of the law on the understanding that commercial broadcasting should be completely free from constraint. In formulating the proposed Information and Communications Law, it behooves legislators to take into account the circumstances of the Broadcast Law’s creation as described above, and to carefully consider the appropriateness in such a law of the stipulations on programming in their current form.

(Translated by Dean Robson)

16–20. (For the English version of the report, see http://www.soumu.go.jp/joho_tsusin/eng/pdf/071206_1_report.pdf.) The report does state, however, that there is “room for study” regarding the content of rules applicable to CS broadcasting.