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Media and the Courts

It was a clumsy way to resolve the eternal tension between privacy and freedom of the press. Last Tuesday the Tokyo District Court granted a temporary injunction, or ban, on Shukan Bunshun's March 25 issue, calling an article about Tanaka Makiko's daughter's divorce an "invasion of the privacy of a purely private citizen." Since 740,000—the great majority—of the copies published had already gone out to retailers, by the end of last week most of Japan knew about the facts supposed to be hushed up by the court order. The events caused bewilderment among international observers. "An injunction looks like lunacy if the court couldn't stop the copies going out anyway--instead it fanned interest in the very article it sought to hush up," says Michael Dodd, attorney and deputy editor of the UK Press Association publication *Media Lawyer*. "I find it absolutely inexplicable."

Lunacy it may appear from far off, but some observers in Japan see the injunction as part of a concerted attack in recent years on Japan's weekly magazines. Often-cheeky publications such as *Bunshun* are constantly the subject of lawsuits brought by politicians and celebrities, and have many detractors among the elites of Japanese society. The new privacy laws passed last May by the Diet were widely seen in the media as a strike against weeklies, as although other forms of journalism were specifically exempted, Japan's some 1,200 weekly magazines were pointedly not. Amid the wave of criticism, *Bunshun* hasn't had much support from broader society against this latest slap on the wrist, according to Professor Hattori Takaaki, who teaches media law in the social science department of Rikkyo University. But the decision has grave consequences. "Reporting should be a constant

balance between press freedom and privacy. This decision took them off the balance scales, without any prior national debate, and placed privacy way above the freedom of the press," he says.

The extreme measures taken by the Tokyo District Court may be sending Japan in the opposite direction to many other democratic countries, where the most an aggrieved individual can hope for against a zealous media is damages after the fact. Even in the UK, where a man's home is his castle, there's no clear privacy law binding the media; when injunctions against tabloids and paparazzi have been requested in the past, courts have noted that it's not up to them to pre-judge what's publishable. In Australia, home to some of the world's strictest libel laws, protection of privacy in the media nevertheless remains a matter of journalistic self-regulation. And even courts in the lawsuit-proud United States would draw a line at granting injunctions like the one the Tokyo District court issued Tuesday. "We'd call that censorship," says US constitutional lawyer Robert J. Scott.

In the US, media freedom is usually held to be above almost anything else. "If journalists know that they can be punished even for writing something that is true, that chills free speech. It's bad for society, because people need all sorts of information in order to participate fully in social life," says LA attorney Theodore Boutrous who's currently representing media organizations covering the Michael Jackson criminal case. Most Americans, young and old, will readily refer to "the First Amendment" of the Constitution, which protects free speech. "It stems from our history; the Framers of the Constitution were escaping censorship in Europe, and their reaction to that is the foundation of our society," says attorney Scott. Although Article 21 of Japan's Constitution of 1946

protects the freedom of Japan's press, such "socialization" of the sanctity of free speech is just about non-existent in Japan, says Professor Hattori. "An American judge once confided in me that the press often 'disturbs' his juries, but that because free speech was so important, he'd never bring himself to issue an injunction against the media. I doubt the Japanese judges this time agonized over their decision in that way," he says.

It's not that the press in countries like the US trample over politicians and celebrities' privacy. If one can prove that material "extremely offensive to the reasonable person" has been published in the press, one can be granted damages for invasion of privacy in British and American courts. But even the most wary privacy vigilantes confess to being concerned about the kind of injunction that was passed down in Tokyo last week. "I happen to think spouses and children of politicians should not be treated as public figures," says American Robert Ellis Smith, privacy advocate, attorney, and publisher of the monthly Privacy Journal. "But I have to say it's a strength of our system that it is almost impossible to get a prior restraint order against the media. Freedom of speech is just too important."

Bunshun would agree. They say they were aware all along that the article touched on Manako's privacy, but that they were justified in bringing news of her divorce (though not of its details) to the reading public. "Divorce was something to be hidden thirty years ago in Japan, but surely no longer," says Uratani Takahei, head of the president's office at Bunshun's publisher, Bungei Shunju. The divorce, in their eyes, made Manako more of a likely candidate to take over the Tanaka political and business dynasty, despite her previous protests to the contrary. And, further, they say, if Manako was not a public figure, why did she not

object when they wrote about her wedding a year ago?
“The Tanakas never complained before,” says Uratani.

The Tanakas have certainly made their complaints heard this time, and set off a frisson in the media in the process. This week’s issue of Bunshun jumped to the defense, carrying a total of thirty-seven pages on the issue, with comments from writers and celebrities backing their case. Meanwhile, less than a week after Bunshun was banned, one of Tanaka's lawyers sent a different threatening letter to the magazine Shukan Shincho on behalf of baseball coach Shigeo Nagashima’s son, mimicking the language used in the Tanaka case. It could be the beginning of a flood of such attempts to silence the brash weeklies, and the eventual deterioration of Japanese press reporting in general, says David McNeill, Tokyo correspondent of the UK newspaper The Independent. “If the weeklies are cowed, I despair about who will take on the politicians, as newspapers are too lily-livered,” he says. Others look past the repercussions for the press to the implications for wider society. “It's worrying, because attacks on the free press are one of the first hallmarks of a non-democratic society,” says attorney Scott. Of course, with Bunshun’s appeal of the injunction still to be decided by the Tokyo High Court, the issue may just be warming up in Japan. But given the age-old nature of the debate, many journalists around the world will be attentive to the outcome.

By Deborah Hodgson in Tokyo
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