

Alternative Report

To the Sixth Periodic Report of Japan
on the International Covenant on Civil and Political Rights

—**Suggested List of Issues to Country Report Task Force on Japan**—

109th Session of the Human Rights Committee, Geneva
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Submitted by

**Support Group for the Case of Itabashi High School
Graduation Ceremony and “Freedom of Expression”**

22 July, 2013

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Freedoms of Opinion and Expression (Article 19) and “Public Welfare”

22 July, 2013

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Support Group for the Case of Itabashi High School Graduation Ceremony and “Freedom of Expression”

We are a group of citizens supporting Mr. Fujita who was convicted for his act of expressing his opinion against forced worship of the national flag and the national anthem at Itabashi High School Graduation Ceremony. Paragraph 6 of the Sixth Periodic Report by the Government of Japan refers to the Supreme Court decision on this case. We believe the decision is impermissible under ICCPR and submit this report to the Human Right Committee to provide information on this issue.

A. Issues

- (1) The Supreme Court decision of 7 July, 2011 (decision on the case of Itabashi High School Graduation Ceremony), quoted in para. 6 of the 6th Periodic Report by the Government of Japan, is a violation of Article 19 of ICCPR, since it imposed criminal punishment on Mr. Fujita’s legitimate act of expressing his opinion.
- (2) It is wrong to justify the above decision on grounds of the concept of “public welfare” explained in paras. 5 and 6 of the 6th Periodic Report by the Government of Japan.
- (3) In this case, Mr. Fujita, a former teacher who had an opinion against forced worship of the national flag and the national anthem at schools (para 1, Article 19), appealed his opinion to the parents before the opening of the high school graduation ceremony (para 2, article 19). He was convicted for his act of expression on the ground that it was against “public welfare” (para 3, Article 19). Clearly, this is a case where the concept of “public welfare” was abused and free speech was suppressed in violation of Article 19, ICCPR.

B. Recommendations and Concerns by UN HRC

1. Regarding “Public Welfare” - Concluding Observations in the past
 - (1) Concluding Observations of HRC to the 3rd Periodic Report(1993), para.8
 - (2) Concluding Observations of HRC to the 4th Periodic Report (1998), para.8
 - (3) Concluding Observations of HRC to the 5th Periodic Report (2008), Para. 10 (*1)
2. Regarding “Freedom of Expression” - Concluding Observations in the past
 - (1) Concluding Observations of HRC to the 3rd Periodic Report (1993), para.14
 - (2) Concluding Observations of HRC to the 4th Periodic Report (1998), para.26

3. Regarding “Freedoms of Opinion and Expression”, General Comment No. 34 Paragraph 38 and others, to be discussed in details in **D-4-(1)** of this report

C. Response of the Government and Statement in Sixth Periodic Report by the Government of Japan

1. No measures have been taken by the Japanese government in response to the previous recommendations cited above.
2. Para. 5 of 6th Periodic Report of Japan presents the interpretation of the government on the concept of “public welfare”. Para. 6 of the same quotes the Supreme Court decision on the case of Itabashi High School Graduation Ceremony as an example justifiable by the concept of “public welfare”.

D. Opinion

D-1 In Restricting the right to “freedom of expression”, para.3 of Article 19 must be applied, *Not* the concept of “public welfare”.

D-1-(1) Importance of “Freedom of Expression”

As stated in the 6th Periodic Report of Japan, this case involves the issue of freedom of expression which is regarded as “a particularly important right in a democratic society”. Therefore, Article 19, para. 3 in particular, must be applied to this case in imposing restrictions on the right. However, the decision was made without examining the specifics in accordance with the provisions prescribed in para. 3 of Article 19.

D-1-(2) Vagueness in the concept of “public welfare”

Secondly, while this decision is based on the concept of “public welfare” in the Constitution of Japan as grounds for restricting human rights, the term “public welfare” is not included in para.3 of Article 19. In addition, HRC has repeatedly expressed concern and made recommendations with regard to this concept. The Concluding Observations in 2008 to the 5th Periodic Report of Japan says in para.10 that this concept “*is vague and open-ended and may permit restrictions exceeding those permissible under the Covenant,*” and recommends that “*the State party should adopt legislation defining the concept of ‘public welfare’ and specifying that any restrictions placed on the rights guaranteed in the Covenant on grounds of ‘public welfare’ may not exceed those permissible under the Covenant.*” (*1)

The 6th Periodic Report of Japan reiterates the former position, applying the vague definition of the concept without responding to any of the above mentioned concern and recommendations. Such an attitude should be considered insincere and disrespectful to the Covenant.

D-1-(3) Response of the Japanese Judiciary

The Japanese courts have never responded to our claim that ICCPR should be applied to the case of Itabashi High School Graduation Ceremony. Specifically, we submitted to the Supreme Court in May, 2010, the legal opinion (“The First Legal Opinion”, hereafter.)(*2) written by Prof. Voorhoof, a Belgian expert on international laws and human rights, especially on freedom of expression and information. He analyzed this case in light of global human rights standards, examining HRC views on the pertinent cases in the individual communications as well as the precedents of the European Court of Human Rights. He concludes as follows: *“The subsequent criminal prosecution however and certainly the criminal conviction of the defendant for having obstructed by force a business in application of Article 234 of the Criminal Code, is in the context of the case as a whole to be considered an unnecessary and disproportionate sanction, in breach with the international human rights standards guaranteed under Article 19 ICCPR and Article 10 ECHR.”* However, the Supreme Court made no reference to this legal opinion in its decision.

D-1-(4) Legal Opinion on the Concept of “Public Welfare”

Prof. Voorhoof has also made comments specifically on para. 6 of the 6th Periodic Report by the Government of Japan (“the Second Legal Opinion” hereafter)(*3). It is titled “Is the protection of ‘public welfare’ an inherent and justified restriction on the right to freedom of expression?”, to be summarized in D-5 of this report. The full text is shown in Annex 1.

D-2 Summary of the Case

D-2-(1) Factual Background

On 11 March 2004 the Itabashi High School graduation Ceremony was held. It was to be started at 10:00a.m. Mr. Fujita, former teacher of the school was invited as a guest. The parents entered the gymnasium, the ceremony hall, and took their seats, waiting for the opening of the ceremony.

“The October 23 directive”(*4) was issued in the previous year, 2003, by Tokyo Board of Education. It requires that all the teachers and staff at public schools in Tokyo must obey the principal’s order to rise facing “Hinomaru” and sing “Kimigayo” at school ceremonies, and those who disobey would be reprimanded without an exception. Mr. Fujita wanted to tell the parents about the serious problem involved in the directive. He distributed a copy of an article of weekly magazine *the Sunday Mainichi*, titled “the Chilling Sight Made by Tokyo Board of Education”.

He stood in front of the parents, spoke briefly in a loud carrying voice; “We’re going to have an abnormal graduation ceremony today. Teachers and staff have to stand up and sing ‘Kimigayo.’ If not, they’ll be punished with a reprimand. I’d ask you to understand this problem and get seated when called to sing Kimigayo.”

Then Vice-Principal came to him and said, “Stop talking, please,” taking him by the arm. “I’ve finished it,” replied Mr. Fujita. Principal and another guest, a member of Tokyo Metropolitan Assembly joined Vice-principal and ordered him to leave the hall. With some words exchanged, Mr. Fujita left there remonstrating against them, and went out of the school gates before 9:50 a.m. without attending the ceremony.

The graduates entered the hall and the ceremony started around 10:02 a.m. All the attendees stood up at a call of the ceremony open, which was followed by the call to sing the national anthem. Then most of the graduates sat down as if the tide was flowing out. Uttering rebukes, the Assembly member took several pictures of them with his mobile phone. “Stand up!” “Stand up!” the Principal and the Vice-Principal demanded, but they remained seated. Afterward the ceremony proceeded smoothly to the end. It was a great success after all.

On 16 March, the same Assembly member who had attended the ceremony addressed a question about the incident in the Assembly. Superintendent of Tokyo Board of Education gave the following answer, “We will take appropriate legal steps toward the former teacher.”

On 3 December, nine months after the incident, the criminal charge of “obstructing business by force” was brought against Mr. Fujita. Newspapers played up the case. Mr. Fujita and his supporters appealed at the press interview; “This charge is a violation of the right to freedoms of speech and expression. We say *No* to coercion of the national flag and the national anthem.”

D-2-(2) Judgments

- On 30 May 2006, “Guilty for Obstructing of business by force” by the Tokyo District Court: A fine of 200,000 yen” (the prosecution demanded eight months imprisonment). The sentence confirms that “the defendant didn’t aim to disturb the ceremony,” and that “the delay of the opening is not so serious as to be regarded problematic.”

- On 29 May 2008, “Dismissal of the intermediate appeal” by the Tokyo High Court.

- On 7 July 2011, “Dismissal of the final appeal” by the Supreme Court.

The defense counsels argued that the defendant’s action in this case was an expressive act to be protected under the right to freedom of expression, as guaranteed by Article 21, paragraph 1 of the Constitution, and that the charge and conviction was the violation of the same provision. The Supreme Court however rejected these arguments saying, “against general social norms”. Further, the Supreme Court completely ignored the defense argument that the defendant’s prosecution and conviction also violated Article 19 of ICCPR.

D-3 Precedents Using the Concept of “Public Welfare” to Justify Restrictions on Human Rights

D-3-(1) Four final and binding judgments quoted in the main text of the Supreme Court ruling concerning the case of the Itabashi High School Graduation Ceremony

Four precedents are quoted in the Supreme Court's ruling on this case. All of them are worth reviewing briefly, because the piling up of them for over sixty years constitutes a major part of Japanese judicial standards, which is characterized by its rather old-fashioned and undemocratic features.

- (a) Violation of the Emergency Food Supply Order (18/5/1949 Grand Bench of the Supreme Court) ---A leader of a farmers' union gave a speech and recommended the audience not to obey the order to sell their rice crops to the national government. --- Imprisonment for six months

- (b) Violation of Education Board Election Penal Code (27/9/1950 Grand Bench of the Supreme Court) ---A candidate for education board membership made door-to-door canvassing, which was prohibited by law. --- Fine

- (c) Violations of the Minor Offences Act and Others (17/6/1970 Grand Bench of the Supreme Court) --- A member of an organization working for the banning of nuclear weapons pasted a handbill informing of "the World Conference Against Atomic and Hydrogen Bombs" on a telephone pole. --- Detention for ten days

- (d) Violation of the Railway Operation Act and Trespassing into Building (18/12/1984) Supreme Court Grand Bench) --- An organization appealing for a retrial of a false accusation case engaged in publicity campaign in a station yard. --- Fine

These four cases have the following in common:

- (i) The issue was the restrictions on "the right to freedom of expression" guaranteed by the Constitution.
- (ii) All those who suffered from restrictions on their rights were engaged in activities to publicize their critical comments on the Establishment.
- (iii) Subordinate laws, normally irrelevant to "speech and expression" but regulating external acts, were invoked in restricting the right to freedom of speech and expression.
- (iv) The concept of "public welfare" was the ground for prioritizing subordinate laws over the Constitution.
- (v) Restrictions on human rights are legitimized according to moderate, instead of strict, tests of being "necessary and reasonable".
- (vi) The authorities prosecuted the case on grounds of "public welfare", although there were no

victims.

(vii) Criminal punishment was imposed on all of the defendants.

These features demonstrate that the authorities have always made use of the concept of “public welfare” to restrict the way criticism of the government is conveyed, without officially regulating its content. In other words, “for public welfare” has been used as a synonym “for keeping public order.” In our judicial system “public order” has always overridden human rights and consequently, the right to freedom of expression has been treated very poorly.

In conclusion, those dated precedents have been followed for more than sixty years without review. The case of Itabashi High School Graduation Ceremony was a typical example of suppression of free speech by the authorities under this outdated, authoritarian judicial system.

**D-3-(2) Cases of leaflets distribution HRC was concerned about in CCPR/C/JPN/CO/5,
para. 26**

Concluding Observations by HRC on the 5th Periodic Report by the Japanese Government (*1) refers to the concept of “public welfare” in para. 10, and “freedom of expression” in para. 26. In para. 26, they expressed their concern about unreasonable restrictions placed on human rights according to three domestic laws, the Public Officers Election Law, the National Civil Service Law, and Laws on Trespassing.

In response, the Japanese government has commented in their 6th Periodic Report, on restrictions on “freedom of expression” under the Public Offices Election Act in paras. 261-265, and under the National Civil Service Law in paras. 266-267. However, they do not make any mention of the two cases in which the citizens were convicted on grounds of trespassing for putting leaflets critical of the government into residents’ mailboxes.

- (a) The Case of Distributing Anti-War Leaflets in Tachikawa (11/4/2008 Second Petit Bench of the Supreme Court)
- (b) The Case of Distributing Opposition Party Report in Katsushika (30/11/2009 Second Petit Bench of the Supreme Court)

Both cases have all the six characteristics (i) through (vii), with the exception of (vi), in common with those mentioned above in D-3-(1). In short, “public welfare” is used again as a pretext to suppress “freedom of expression” in these two cases. The people who had distributed the leaflets critical of the government were criminalized, *not* on grounds of the content of the handouts, but of the way they were publicized, which would never have been questioned in ordinary circumstances. The same legal framework was used in the case of Itabashi High School Graduation Ceremony.

The Supreme Court’s decision on each of these three cases includes exactly the same wording, in its main text, which reads: “*While the freedom of expression must be respected as a particularly*

important right in a democratic society, article 21, paragraph 1 of the Constitution does not guarantee the freedom of expression absolutely without any reservation, but allows such restrictions that are necessary and reasonable for public welfare. When it comes to the means to announce one's opinions outside, no means would be allowed should they unreasonably harm the rights of others."

D-4-(1) Examination of the Case of Itabashi High School Graduation Ceremony in Light of General Comment No. 34

General Comment No. 34 (abbreviated as GC34, hereafter) (*5) is provided by HRC on Article 19. We would like to apply GC34 to the case of Itabashi High School Graduation Ceremony.

D-4-(1)-① Regarding para. 1, Article 19 ~ the right to freedom of opinion

A) "Freedoms of opinion and expression" are both important (GC34, para. 2)

Mr. Fujita, a retired teacher had an opinion that worship of the national flag "Hinomaru" and the national anthem "Kimigayo" should not be forced at school ceremonies. This itself is an important right, and must be respected.

As explained briefly in D-2-(1), Tokyo Board of Education issued so called "the 10.23 directive" (*4) in 2003 that teachers and staff members would be reprimanded without any exception if they didn't obey the principle's order to stand up for "Hinomaru" and sing "Kimigayo". This issue became a subject of much social concern among not only teachers but also people in general. "Hinomaru and Kimigayo" had been the symbols of the Emperor system and the Imperial wars of aggression till the end of WW2. For this reason, there has been a strong tendency among Japanese citizens to have feelings of resistance toward the coercion of "Hinomaru and Kimigayo" at public schools. Such dissenting opinions should also fall under the protection of ICCPR. Therefore, the "10.23 directive" is considered as a violation of Article 18, ICCPR, the right to freedom of thought, conscience and religion.(*6)

B) Any persecution for holding an opinion is prohibited (GC 34, paras. 9 and 10).

The criminal conviction of Mr. Fujita was based on the manner in expressing his opinion, and *not on the content* of his opinion. Similarly, many teachers who did not stand up to sing "Kimigayo" at school ceremonies have been reprimanded and given various kinds of unfair treatment. Since the 10.23 directive was issued in 2003, the cumulative number of the punished teachers has reached 450, as of April 2013. Several law suits have been filed against Tokyo Board of Education for violations of Article 19 of the Constitution and Article 18 of ICCPR. (*6).

A series of penalties imposed on these teachers and Mr. Fujita who oppose the coercion of "Hinomaru & Kimigayo" would imply a virtual persecution of their opinions under the pretense that their acts, *not the contents of their opinions* were considered illegal. Such a situation is equal to

suppression of free speech, which is impermissible under ICCPR.

C)“Disrespect for flags and symbols” is one of the matters for which penalties are not appropriate. (GC 34, para. 38).

In para. 38 of GC 34, HRC expresses concern about laws regarding “disrespect for flags and symbols” as one of the examples under “limitative scope of restrictions on freedom of expression in certain areas”. It is clear that penalties should not be imposed on the teachers’ act of not rising to sing the anthem on the basis of their opinions against coercion of the “Hinomaru” flag and the “Kimigayo” song.

D-4-(1)-② Regarding para 2, Article 19 ~ the right to freedom of expressing opinions ~ protection of all forms of expression and the means of their dissemination (GC34, paras. 11&12)

Mr. Fujita appealed his opinion to the parents, first handing out copies of a weekly magazine article critical of the 10.23 directive, and then speaking to the parents in front of them for about one minute, asking calmly for their co-operation to remain seated. He neither went up to the stage, nor used a microphone, nor resorted to violence against anyone, nor destroyed their property.

Emphasizing his reaction to the principal’s demand to leave the hall as “shouting out” would be regarded as a deliberate attempt to shift the focus onto something that has nothing to do with the content of his appeal. No specific influences on the ceremony itself were proved in the courts with the exception that the opening of the ceremony had been delayed about two minutes. The ceremony was a great success, praised by most participants as an exceptionally moving one in the past several years. Thus, Mr. Fujita’s act of distributing leaflets and calling for the parents’ co-operation falls within the forms of expression protected under the Covenant.

D-4-(1)-③ Regarding para. 3, Article 19 ~ Conditions required for restricting the right

A) Restrictions of the right are allowed only in the two limitative areas specified in para. 3, (a), (b) of Article 19. (GC 34, para. 21)

(i) (a) respect of the rights or reputations of others (GC 34, para. 28)

In Mr. Fujita’s case, “others” would mean the principal, the formal guests, and the parents. First, the principal has the authority to conduct a ceremony smoothly, but it is the exercise of public authority, and *not* the right of an individual. Next, some of the parents and formal guests may have felt uncomfortable with Mr. Fujita’s opinion, but he did not interfere with their act to rise and sing “Kimigayo”. Accordingly, there were no incidents where the rights of others were violated.

(ii) (b) protection of national security (GC 34, para. 30)

It would be highly difficult to consider that “national security” might have been endangered by Mr. Fujita’s expression of his opposition to forced worship of “Hinomaru and

Kimigayo”.

(iii) (b) public order (GC 34, para. 31)

Close examination should be required when imposing restrictions on the rights for the protection of public order. The footnote 68 in para.31 of GC 34, refers to the case of Coleman vs. Australia in the individual communications. In this precedent, HRC presents the view that a restriction on his address was “a violation of Article 19, para. 2. Please see **D-4-(2)-①** for discussion of this case and its implication to the case of Itabashi High School Graduation Ceremony.

(iv) (b) protection of morals (GC 34, para. 32)

Para. 32 of GC 34 reiterates the observation in General Comment No. 22 that “*the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition*”. In light of this statement, expressing respect for the national flag and the anthem by rising and singing may be regarded as one of the old, traditional “ceremonial manners” in our country, but forcing a single tradition on everyone without an exception is not permitted under ICCPR.

In conclusion, there is nothing that suggests the right of Mr. Fujita to expressing his opinion should be restricted for the reason stipulated in subparagraphs. (a) and (b), para. 3, of Article 19.

D-4-(1)-③ B) Three Conditions which permit restrictions by the public authorities (GC34, para. 22)

(i) The first condition is that any restriction must be provided by law. (GC34 paras. 24 and 25)

Japan has no such laws providing specific conditions for restricting “freedom of expression”, as those stated in GC34, para. 24. Instead, the concept of “public welfare” is used as the almighty which allows restrictions on human rights. This is one of the biggest problems in Japan, as pointed out in details in D-3 of this report, as well as in para. 10, Concluding Observations 2008.

(ii) The second condition is “the legitimate purpose” (GC34, paras. 26 ~ 32)

As discussed above, the restriction on Mr. Fujita’s right was not based on any of the grounds set out in subparagraphs (a) and (b), para. 3 of Article 19. Even if “the smooth performance of the ceremony” can be regarded as one of the legitimate purposes, it alone cannot rationalize imposing restrictions on human rights. The courts in charge of this case neither applied the strict requirements prescribed in para. 3 of Article 19, nor considered balancing of the purposes and means of restricting the right to free speech.

(iii) The third condition is “conformity to the strict tests of “necessity and proportionality”.

(GC34 paras33, 34, 35, and 36)

The condition for “necessity” in para.33 of GC 34 is not met in Mr. Fujita’s case. In the first place, he walked out of the gymnasium, the ceremony hall, before the ceremony began. There were no direct influences on the ceremony and its progress. There was no trace of the

administrative authorities taking into consideration either “the least restrictive alternative” (GC34, para.34), or “establishing a direct and immediate connection between the expression and the threat” (GC34, para.35). Criminal prosecution cannot be considered to be “*the least intrusive instrument proportionate to the interest to be protected*” (GC34, para 34). The criminal punishment for causing the 2-minute delay in opening the graduation implies as if respect for “the flags and the symbols” were sacred, and more important than freedom of expression. What the Constitution of Japan holds inalienable is “fundamental human rights” only, *not* “the national flag and the anthem”(the Constitution of Japan, Articles 11 and 97) The absence of strict tests in the Supreme Court judgment on this case is made clear by President of Japan Federation of Bar Associations in his statement: “*the Supreme Court didn’t pursue a strict review on balancing of interests between the constitutional importance of the former teacher’s act of expression and the criminal punishment*”>(*7)

In conclusion, the restriction placed on Mr. Fujita’s act of expression satisfies none of the three conditions regarding para. 3, Article 19. The criminal prosecution and the guilty verdict thereafter were an unnecessary and excessive sanction. They are in violation of the Covenant (GC 34, para. 47).

D-4-(2) One of the Precedents of the Individual Communications on Freedom of Expression, and the Comparison with the Case of Itabashi High School Graduation Ceremony

In his “First Legal Opinion”(*2), Prof. Voorhoof quotes a number of precedents of the individual communications on freedom of expression which bear close similarities to the case of Itabashi High School Graduation Ceremony. Shown below are a brief summary of one of the most representative cases, and its comparison with the case of Itabashi High School Graduation Ceremony.

D-4-(2)-① The Case of Coleman vs. Australia (*8)

A) Summary of Factual background

On 20 December 1998, Mr. Coleman delivered a public address loudly for 15 to 20 minutes on a range of subjects including bills of rights, freedom of speech and so on, at the Mall without a permit. He was charged with violation of a Queensland city act, and was convicted for delivery of an unlawful address. On 26 June 2002, the High Court denied his further application for special leave to appeal.

B) Human Rights Committee’s View

Mr. Coleman made a public address on issues of public interest. Based on the evidence of the material before the Committee, there was no suggestion that the author’s address was either

threatening, unduly disruptive or otherwise likely to jeopardise public order in the mall; indeed, police officers present, rather than seeking to curtail Mr. Coleman's address, allowed him to proceed while videotaping him.

The Committee considers that the State party's reaction in response to Mr. Coleman's conduct was disproportionate and amounted to a restriction of his freedom of speech which was not compatible with Article 19, paragraph 3, of the Covenant. It follows that there was a violation of Article 19, paragraph 2, of the Covenant.

C) The First Legal Opinion by Prof. Voorhoof (*2)

In his First Legal Opinion, Prof. Voorhoof states: *"the essence of the impact of Article 19 ICCPR is that an application of a provision of national criminal law, although provided by law and in accordance with one of the legitimate purposes of Article 19, para.3, still can be considered as a violation of the right to freedom of expression when the interference by the public authorities is considered disproportionate and/or not necessary."*

D) Comparison between the two cases

There are two points in common between the cases of Mr. Coleman and Mr. Fujita. One is that they spoke about issues of "public interests." The other is that their acts included nothing "threatening" to others or "unduly destructive." In the case of Mr. Coleman, police officers present continued videotaping without curtailing his speech. In Mr. Fujita's case, a supervisor sent by the Education Board as a monitor was recording the scene on the voice recorder without curtailing him while he was distributing leaflets and addressing the parents.

D-4-(2)-② The Case of Itabashi High School

Including the above example, Prof. Voorhoof cites 12 precedents in violation of Article 19, ICCPR, as well as 17 in violation of Article 10, European Convention on Human Right, in his "First Legal Opinion" (*2). His conclusions on the case of Itabashi High School Graduation Ceremony are summarized as follows: "the Japanese judicial authorities..... has failed to strike a fair balance between competing interests at issue." It is clear that there was no "urgent social necessity" to justify the prosecution and conviction of Mr. Fujita. Therefore the criminal punishment is unnecessary and disproportionate. This excessive sanctioning not only violates Mr. Fujita's right to freedom of expression guaranteed under Article 19 ICCPR and Article 10 ECHR, but also has a serious "chilling effect" on others who take part in public debate at issue, and "does a disservice to democracy and even endangers it."

D-5 "Comment on the Sixth Periodic Report by the Japanese Government -Is the protection of 'public welfare' an inherent and justified restriction on the right to freedom of expression?" by Prof. dr. Dirk Voorhoof, Ghent University, Belgium and Copenhagen University,

Denmark, also Member of Human Rights Center, Ghent University ----- Digest (*3)

D-5-(1) Introduction

The Japanese Government refers to a judgment rendered by the Supreme Court on 7 July 2011, and argues that the Japanese judicial authorities are acting in accordance with Article 19 ICCPR by applying the concept of “public welfare” in cases related to freedom of expression. This legal opinion will analyze whether the reference can indeed be valid. (I have read all the judgments in an unofficial English version submitted to me by the defense counsels.)

D-5-(2) Factual Context and Court Proceedings

Please refer to D-2-(2).

D-5-(3) Comments

Although the Supreme Court recognizes that “freedom of expression must be respected as a right of particular importance in a democratic society”, in its judgment of 7 July 2011, it solely focuses on the need of limiting or restricting that freedom as being “necessary and reasonable for public welfare”. The Supreme Court considers the action of the defendant as “an act that is impermissible in light of general societal norms” and therefore it “evidently” involves an illegal act which is to be sanctioned with criminal punishment.

It is also important to emphasize that the right to freedom of expression includes the right to express ideas and opinions that can be offensive or disturbing. This is precisely the essence of the right Article 19 ICCPR aims to protect. Freedom of opinion and freedom of expression are indeed indispensable conditions for the full development of every person and they are essential for a free and democratic society. It includes especially political discourse, commentary on public affairs, canvassing and discussion of human rights (UNHRC General Comment nr. 34, par. 2 and par. 11).

The expression of offending or disturbing ideas and information in public debate on matters of importance for society has very often a disruptive character. Considering an act of protest by expressing an unpleasant, critical opinion and distributing leaflets, without use of any violence against persons, nor demolitions against property as a criminal offence neglects the protection guaranteed by Article 19 ICCPR. From this perspective it is impermissible for a State party to prosecute and convict a person merely for expressing his opinion in public “in an undue manner which did not fit the occasion”, and causing disturbance to “the smooth performance of the graduation ceremony, while it should have been performed in a calm atmosphere” (Supreme Court, 7 July 2011). Such a practice has a “chilling effect” that may unduly restrict the exercise of freedom of expression of the person concerned and others (On the notion of ‘chilling effect’, see also UNHRC General Comment nr. 34, par. 47).

Most importantly, there is no reason to regard the protest of Mr. Fujita as other than entirely

peaceful and there is no indication that he significantly obstructed or attempted to obstruct those attending the ceremony, or took any other action likely to provoke the participants at the ceremony to violence, disturbance of peace or breach of public order.

D-5-(4) Conclusion

The reference made by the Japanese Government in its Sixth Periodic Report under Article 40 of the ICCPR (April 2012) to the Supreme Court judgment of 7 July 2011 in the case of Mr. Fujita cannot be considered as a valid argument to legitimize the use of the concept of “public welfare” in cases related to and restricting freedom of expression. The findings by the Japanese judicial authorities in this case, including the Supreme Court’s judgment of 7 July 2011 give evidence and confirm that the concept of “public welfare” is in practice applied in a manner that is not in accordance with the right of freedom of expression as guaranteed by Article 19 ICCPR.

The reference to the Supreme Court’s judgment is a clear illustration of how the concept of “public welfare” and its application by the Japanese judicial authorities in cases related to freedom of expression disrespects the fundamental guarantees of the right of freedom of expression under Article 19 ICCPR.

E Our suggestions

We propose the following questions to be included in the List of Issues, and the recommendations to be made by HRC to the State party, Japan, so as to ensure that everyone in the country can enjoy human rights of global standards.

E-1 Suggested Questions for the List of Issues:

- (1) Article 19 paragraph 3 provides a list of legitimate purposes for which restrictions on the right to freedom of expression are permitted. Which purpose does “public welfare” come under?
- (2) Please clarify the definition of the concept of “public welfare” as recommended in CCPR/C/JPN/CO/5, para.10. If it is impossible, what are the reasons?
- (3) Has the State party made any preparation for adopting legislation recommended in the same document (CCPR/C/JPN/CO/5, para. 10) ? If not, what are the reasons?
- (4) The International Covenant on Civil and Political Rights is self-executing (*9). Has the State party acknowledged it explicitly or implicitly? Or does it have any plans to do so in the future?
- (5) HRC has been informed that, regarding the case of the Supreme Court Decision of 7 July 2011 quoted in para. 6 of the 6th Periodic Report of Japan, the Supreme Court made no response to the defendant’s claim for violation of Article 19, ICCPR. Please report on the total number of cases where the defendants’ claims for violation of the Covenant have been ignored by the courts, as well as on the reasons, since Concluding Observations 2008 up to the present.

- (6) Why has the subject of “International Human Rights Laws” been excluded from those required for the Bar Examination since 2011? What influences does the State party expect it would have on judges, prosecutors and defense counselors invoking ICCPR in courts as a binding judicial norm?

E-2 Suggested recommendations:

- (1) HRC considers that the State party’s argument in the 6th Periodic Report on the concept of “public welfare” referring to the Supreme Court judgment of 7 July 2011 is inappropriate. Acknowledging this, the State party should take all necessary measures as early as possible to protect the right to freedom of expression guaranteed by Article 19 of ICCPR.
- (2) Imposing criminal punishment arbitrarily on the exercise of the right to freedom of expression endangers a free and democratic society. In order to prevent such situations from being repeated, the State party should, as a first step, ratify the First Optional Protocol, which is the minimum responsibility of a State party, so that every citizen is guaranteed protection of human rights based on global standards.
- (3) HRC requests the State party to respect Article 18 ICCPR and para. 38 of General Comment No.34, and to take full measures on the national as well as local levels to ensure that the act of worship of “the national flag” and “the national anthem” must not be forced upon anyone at school events such as graduation or entrance ceremonies at all public schools in the country.

Notes:

- *1 Concluding Observations UN HRC to Japan, CCOR/C/JPN/CO/5, 18 December 2008
- *2 “The First Legal Opinion” is an abbreviation used in this report for the legal opinion written by Prof. Voorhoof. The original title is “On the Aspects of Freedom of Expression and on the Right to Distribute Leaflets and Impart Information and Ideas, in the Case of Mr. Fujita”. It was submitted to the Supreme Court in May 2010 on the Case of Itabashi High School Graduation Ceremony at the request of the defense team for Mr. Fujita. Dr. Dirk Voorhoof is a professor of Ghent University, Belgium and of Copenhagen University, Denmark, and member of Human Rights Center at Ghent University. The full text of the opinion is shown at:
<http://wind.ap.teacup.com/people/html/20100420voorhoof.fujita.legalopinion.pdf>
- *3 “The Second Legal Opinion” is also an abbreviation. It was also written by Prof. dr. Voorhoof at the request of NGO Support Group for the Case of Itabashi High School Graduation Ceremony and “Freedom of Expression” as “Comment on the 6th Periodic Report by the Government of Japan”. The full text is shown in Annex 1, and is also available at:
<http://wind.ap.teacup.com/people/html/20130328voorhoof.japan.fujita.pdf>
- *4 “With regard to the practice of raising the national flag and singing the national anthem at entrance,

graduation and other ceremonies (Directive)". It is called "the October 23 directive" or "the 10.23 directive" for short. Tokyo Board of Education issued this directive on 23 October 2003 to all the public schools. It orders the teachers and other staff of all Tokyo Metropolitan schools to rise facing the national flag "Hinomaru" and sing the national anthem "Kimigayo", or accompany the anthem on the piano (in case of music teachers) at school events such as graduation or entrance ceremonies. Any failure to obey the order is to be punished. Since the issuance of the directive in 2003, those who disobeyed have been reprimanded each year. The cumulative number of punished teachers and staff reached 450 as of April 2013, and the number is still increasing.

- *5 General Comment No. 34, CCPR/C/GC/34
- *6 See NGO report titled "Forced Worship of the National Flag ("Hinomaru") and the National Anthem ("Kimigayo") at Public Schools in Tokyo (Articles 18 & 19 of the Covenant)" by Organization to Support Lawsuits for Freedom of Education in Tokyo, compiled in Joint Report submitted by THE JAPANESE WORKERS' COMMITTEE FOR HUMAN RIGHTS - JWCHR, NGO in Special Consultative Status with ECOSOC
- *7 See the full text shown in Annex 2, "Japan Federation of Bar Associations, The President's Statement on the Supreme Court Judgment which Upheld the Guilty Verdict for the Act of Calling for Remaining Seated at the Singing of the National Anthem as Forcible Obstruction of Business".
English (translation-in formal)
<http://wind.ap.teacup.com/people/html/20110806nichibenrenseimei.doc>
Original (in Japanese)
http://www.nichibenren.or.jp/activity/document/statement/year/2011/110805_2.html
- *8 UN Human Rights Committee: Coleman v. Australia, Nr. 1157/2003.
It is quoted in footnote 68, para. 31 as well as in footnote 72, para. 34 of General Comment No. 34.
- *9 Yuji Iwasawa, *International Law, Human Rights and Japanese Law*, Oxford: Clarendon Press, 1998

[ANNEX]

1. The Second Legal Opinion "Comment on the Sixth Periodic Report by the Japanese Government under Article 40 ICCPR (April 2012) , referring to the Supreme Court judgment of 7 July 2011 in the case of Mr. Fujita (criminal conviction because of "forcible obstruction of business" while expressing an opinion on a matter of public interest and distributing leaflets).
2. Japan Federation of Bar Associations: The President's Statement on the Supreme Court Judgment which Upheld the Guilty Verdict for the Act of Calling for Remaining Seated at the Singing of the National Anthem as Forcible Obstruction of Business. (English translation - informal)