

Suppression of Free Speech under the name of “Public Welfare”
~ Fundamental Mistake in Japan’s Replies to the List of Issues,
Paragraphs 184 – 186

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by
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We, Support Group for the Case of Itabashi High School Graduation Ceremony and “Freedom of Expression (IFE)” wish to send the Human Rights Committee our response to the Replies of Japan to the List of Issues, paragraphs 184-186, concerning the concept of “public welfare” and CCPR Article 19 (freedoms of opinion and expression), as a member of Japan NGO Network for the ICCPR.

1. Criticism of Paragraphs 184-186 of the Japanese Government’s Replies to the List of Issues (LOI) and the Idea of Human Rights

(1) Fundamental Mistake in the Government’s Replies to LOI (paras.184 – 186)

1. Although “human rights” and “public welfare” are not essentially conflicting concepts, Japan’s Replies to the List of Issues (the Replies to LOI, hereafter) makes them opposed to each other, and place “human rights” in a position under “public welfare.” The Government of Japan insists that “the guarantee of human rights is not absolutely free from constraints (CCPR/C/JPN/Q/6/Add.1, para. 184),” but it is “public welfare” that is not absolutely free from constraints.

2. In Japan, the relation between “human rights” and “public welfare” is completely reversed, and consequently, “freedom of expression” is subject to “public welfare,” as is apparent in the Supreme Court Judgment on the case of Itabashi High School Graduation Ceremony and four precedents by the Supreme Court we referred to in D3(1) of our alternative report submitted last year.

Contrary to the insistence in the Replies to LOI, the Government’s concept of “public welfare”, **does** “serve as a basis for allowing arbitrary human rights restrictions by the state.”(CCPR/C/JPN/Q/6/Add., para. 185)

3. Human rights derive from “the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.” (Preamble to the Covenant) Japan as a State Party has the obligation “to promote universal respect for, and the observance of, human rights and freedoms.”(Preamble to the Covenant) However, the Japanese Government brings up a self-serving concept of “an inherent restriction” (CCPR/C/JPN/6, para. 6), which does not exist in the Covenant, in contrast to “the inherent dignity” in Preamble to the Covenant. It implies that the Government respects the concept of “public welfare” more than “human rights and freedoms.”

(2) Application of “Public Welfare” against the Idea of Human Rights

4. “Human rights” must be guaranteed, and restrictions on exercising the rights should be made under strictly limited conditions. The Covenant, Article 19, paragraph 3 prescribes that restrictions “shall only be such as are provided by law and necessary for the following purposes: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.” (See also the Universal Declaration of Human Rights, Article 29, para. 2.)

It goes without saying that “a general reservation to the rights” is not permitted because it is incompatible with “the object and purpose of the Covenant,” (General Opinion 34, para. 6) and “the relation between right and restriction, and between norm and exception must not be reversed.”(General Comment 34, para. 21)

5. The Japanese Government uses a “vague and open-ended” concept of “public welfare” which is not included in the Covenant Article 19, paragraph 3 (a)(b), without defining it strictly and without legislation specifying it (CCPR/C/JPN/CO/5, para. 10). What is more, the Government explains that “public welfare” is “an inherent restriction to make adjustments among various human rights.” (CCPR/C/JPN/6, para. 6) As a result, in Japan, “public welfare” is often used for the same meaning as “annoyance to others” and/or “general social norm,” and functions as “a general reservation to rights.”(General Opinion 34, para. 6) As such, application of “public welfare” causes the phenomenon where relation between right and restriction is “reversed,” as warned in General Comment 34, para. 21. In situations where arbitrary applications of “public welfare” easily take away “the equal and inalienable rights of all members of the human family” (Preamble to the Covenant), imposed restrictions obviously “exceed those permissible under the Covenant.” (CCPR/C/JPN/CO/5, para. 10)

2. The Case of Itabashi High School Graduation Ceremony and ICCPR, Article 19

(1) Application of Article 19, Paragraph 1 of the Covenant

6. The ex-teacher in this case had an opinion that the standing for the national flag and the singing of the national anthem should not be forced in public schools. Tokyo Education Board had issued the directive 6 months earlier that all teachers and staff must follow the order to stand for the flag and sing the anthem in school events such as graduation and entrance ceremonies, and that any failure to do so would result in reprimand.

7. Article 19, paragraph 1 of the Covenant states “everyone shall have the right to hold opinions without interference,” and it is explicated in General Comment 34, paragraph 9 that “this is a right to which the Covenant permits no exception or restriction.”

8. “Discussion of topics of public concern is essential to democracy,” and “the discussion regarding the constitutional right to freedom of thought and conscience and the forced greeting of the national flag and singing of the national anthem at school ceremonies and other events is such a matter of public concern.” (First Legal Opinion by Prof. Dirk Voorhoof*¹) submitted in May 2011 to the Supreme Court of Japan) .

(2) Application of Article 19, Paragraph 2 of the Covenant to the Case of Itabashi High School Graduation Ceremony

9. The ex-teacher expressed his opinion (para. 6 of this report) for less than a minute toward the parents waiting for the graduation ceremony to come, more than 15 minutes before the opening of the ceremony.

10. Article 19, paragraph 2 of the Covenant states “everyone shall have the right to freedom of expression,” and General Comment 34, paragraph 12 states that “the paragraph 2 protects all forms of expression and the means of their dissemination.”

11. It should also be reminded that “the scope of paragraph 2 embraces even expression that may be regarded as deeply offensive.”(General Comment 34, para. 11)

12. “Most importantly, there wasn’t any indication that the conduct of the applicant, while addressing himself to the waiting parents in the gymnasium hall, risked resulting in disorder or violence. The qualifications by the Japanese courts that the action of the ex-teacher has ‘obstructed business of others through the use of force’ and that his action ‘caused a considerable disturbance to the smooth performance of the graduation ceremony’ (Supreme Court Judgment, 7 July 2011) are obviously exaggerating the factual elements and characteristics of his verbal, peaceful protest, coming up for his opinion and canvassing leaflets to the parents, more than 15 minutes before the start of the ceremony. ”(Second Legal Opinion by Prof. Dirk Voorhoof*²), March, 2013)

(3) Application of Article 19, Paragraph 3 of the Covenant

13. The restrictions on the ex-teacher’s right to expressing his opinion and the application of the Criminal Law does not satisfy the conditions listed in Article 19, paragraph 3 of the Covenant.

14. The restriction on his act of expression was based on “public welfare” which is “vague and open-ended”, and needs “legislation defining the concept” (CCPR/C/JPN/CO/5, para. 10). In addition, it is not included in “two limitative areas of restrictions on the right that are permitted” under the paragraph 3. (General Comment 34, para. 21)

15. The concept of “public welfare” applied as the grounds for restricting his right to free speech does not satisfy any of the specific conditions laid down by Article 19, paragraph 3 that “restrictions must be provided by law;” and that they “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.” (General Comment 34, para. 22)

16. In our opinion, the guilty verdict of forceful obstruction of business was an unnecessary and excessive sanction based on grounds other than the official reason given as “the manner of expression.” (Supreme Court Judgment on 7 July 2011) The concept of “public welfare” was used as an “attack aimed at silencing” the ex-teacher, “as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.” (General Comment 34, para. 23)

17. As stated in General Comment 34, para. 38, “[r]estrictions must be provided by law.” (General Comment 34, para. 24) However, no legal provisions are found concerning how graduation ceremony should be conducted, although the Supreme Court Ruling on this case states “it should have been performed in a calm atmosphere.”(cited in CCPR/C/JPN/6, para. 6). It is precisely because of the absence of legal provision that the concept of “public welfare” was brought up as the grounds for restricting the right to free speech.

18. “Public welfare” is not a legal norm “formulated with sufficient precision.” As a result, it “confers unfettered discretion for the restriction of freedom of expression on those charged with its execution.” (General Comment 34, para. 25)

19. The opinion expressed by the ex-teacher was an objection to the forced worship of the national flag and the national anthem in schools. General Comment 34, para. 38 expresses concerns about laws punishing “disrespect for flags and symbols.” To the authorities, the graduation ceremony was an occasion when “**respect** for the flag and the symbol” could be forced on every participant. That is why they prohibited the act of expressing an opinion against the coercion of the national flag and the anthem, and imposed the “severe penalt[y]” (General Comment 34, para. 38), on the grounds that the ex-teacher disturbed “a calm atmosphere”, which does not meet the restricting conditions prescribed by the Covenant.

20. The criminal sanction against the ex-teacher deviates substantially from the principle that “the application of the criminal law should only be countenanced in the most serious of cases.”(General Comment 34, para. 47) It has brought about “a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others” (General Comment 34, para. 47) who hold feelings of apprehension and resistance against the forced worship of the national flag and the national anthem in schools.

3. SUMMARY

(1) Actual situation of Human Rights Restrictions in Japan

21. The Supreme Court ruling for the case of Itabashi High School Graduation Ceremony is the typical example where the concept of “public welfare” **did** “allow the state power to arbitrarily restrict human rights,” “exceed[ing] the level of restrictions permissible under the Covenant” (CCPR/C/JPN/6), in spite of the complete denial in the 6th Report by the Government of Japan.

22. As shown in the above case, the State Party of Japan has made a serious mistake of depriving its people of “the equal and inalienable rights of all members of the human family” (ICCPR, Preamble) such as freedom of expression, simply on the premise that an abstract, “inherent restriction” is included in the concept of “public welfare”, and continues to interpret and apply the concept to their advantages without limitations, in order to “keep society as a whole in harmony and order,” while leaving ambiguous the question of what “public welfare” is (CCPR/C/JPN/Q/6/Add.1) .

(2) Suggested Recommendations

23. We sincerely ask the Human Rights Committee to make the following recommendations to the government of Japan:

23-1. The State Party of Japan should recognize the existence of “a situation in which any restrictions exceeding those permissible under the Covenant are placed on grounds of ‘public welfare’” (CCPR/C/JPN/Q/6/Add.1, para. 186), and stop applying the concept of “public welfare” which does not correspond to Article 19, paragraph 3 as grounds for placing restrictions on human rights.

23-2. The State Party should accept the recommendation on “public welfare” made in the Concluding Observations by the HRC and take speedy actions necessary for “adopting legislation defining the concept of ‘public welfare’” (CCPR/C/JPN/CO/5, para. 10) in accordance with the paragraph 3 of Article 19 of the ICCPR.

23-3. The State Party should promptly approve an appeal for re-trial, if any, with regard to cases concerning rights to freedom of thought and its expression, in which criminal punishments were unjustly imposed under the name of “public welfare” as the grounds for restricting their human rights.

Notes: Please refer the following cites.

*1) <http://wind.ap.teacup.com/people/html/20100420voorhoof.fujita.legalopinion.pdf>

*2) <http://wind.ap.teacup.com/people/html/20130328voorhoof.japan.fujita.pdf>