

**2010, Supreme Court, Japan
Case of Mr. Katsuhisa Fujita**

Submission / Legal Opinion

on the aspects of freedom of expression and on the right to distribute leaflets and impart information and ideas, in the case of Mr. Katsuhisa Fujita

By Prof. dr. Dirk Voorhoof (Ghent University, Belgium and Copenhagen University, Denmark)

22 April 2010

Content:

1. Qualifications and expertise

2. Invitation to provide a legal opinion

3. Summary of the case

4. Legal analysis

4.1. Introduction

4.2. Art. 19 ICCPR

4.3. Article 10 of the European Convention of Human Rights

4.3.1. General characteristics

4.3.2. Distributing leaflets, canvassing, expressing an opinion in public and protest actions...

4.3.3. Relevance of Article 19 ICCPR and Article 10 ECHR in the case of Mr. Fujita

5. Conclusion

1. Qualifications and expertise

I'm a professor at Ghent University (Belgium), Faculty of Political and Social Sciences and Faculty of Law, teaching courses in Media Law, Copyright Law and Journalism Ethics. Since 2004 I'm also lecturing Comparative and European Media Law at Copenhagen University (Denmark). Since 2002 I have participated as a lecturer in the Media Lawyers Advocate Programme at Oxford University (PCMLP, Programme for Comparative Media Law and Policy) and IMLA (International Media Lawyers Association). I'm also a member of the advisory committee of the International Media Law Moot Court Competition, Oxford University, PCMLP/IMLA. Since 1992 I have regularly worked as an expert for the Council of Europe, Directorate of Human Rights, in projects on media law, human rights and freedom of expression, *inter alia* in Russia, Ukraine, Moldova, Georgia, Azerbaijan, Serbia/Montenegro, Slovenia, Romania, Czech Republic, Slovakia and Turkey. My expertise and interests include freedom of expression, democracy and human rights; rights and responsibilities of journalists and media; media and restrictions on hate speech, racism and discrimination; censorship and freedom of artistic expression; access to administrative documents; media ethics and self-regulation.

I'm a member of the editorial board of two legal journals specialised in media and communications law (*Auteurs & Media*, Brussels: Larcier and *Mediaforum*, Amsterdam: VMC/IVIR, Otto Cramwinckel Publishers) and I have published contributions and articles in several legal journals and books regarding media and information law. I've been a member of the Belgian Federal Commission on Access to Administrative Documents (1994-2004) and at present I'm a member of the Flemish Media Council (since 1998), the Flemish Regulator for the Media (since 2006) and of the Federal Commission for Film Classification (since 2007). I'm also a member of the Human Rights Centre and

the Centre for Journalism Studies at Ghent University. I've been invited as an expert in several hearings in the Belgian parliaments, including on matters of court reporting, journalistic ethics, protection of journalistic sources and broadcasting law. I have (co)organised academic conferences in Gent, Amsterdam, Brussels and Strasbourg on access to official documents, protection of journalistic sources, broadcasting law, media ethics and developments in the European case law on freedom of expression.

I'm a founding member of *Legal Human Academy* (Copenhagen, Oxford, Gent).

I published a handbook on media law (D. Voorhoof, *Handboek Mediarecht*, Brussels: Larcier, 2003 and 2007, updated 2009), and recently an article on access to official documents (W. Hins and D. Voorhoof, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights", *European Constitutional Law Review* (EuConst) 2007/1, 114-126), I edited a book on protection of journalistic sources (D. Voorhoof (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge: Die Keure, 2008) and I wrote several articles or chapters in books on the impact of Article 10 of the European Convention on Human Rights (e.g. D. Voorhoof, "Vrijheid van meningsuiting", in J. VANDELANOTTE en Y. HAECK (eds.), *Handboek EVRM*, Antwerpen-Oxford: Intersentia, 2004, 837-106). Most recently I wrote an overview of 30 years of case law by the European Court of Human Rights on freedom of expression, media en journalism. This overview will soon be published in the *Latin-American and European Journal for Human Rights*, under the title "Freedom of Expression under the European Human Rights system". I have also published a text book on "*European Media Law*" (Herentals: Knops Publishing, 2009).

In 2008 I organised a conference in the European Court of Human Rights in Strasbourg on recent trends in the Court's case law regarding freedom of expression and information. Since 1995 I regularly report about the European Court's case law in the monthly magazine *Iris*, *Legal Observations of the European Audiovisual Observatory*.

In 2009 I submitted a legal opinion at the request of the defence counsels in the case of Junichi Sato and Toru Suzuki, pending before the Aomori District Court, Japan. On 11 March 2010 I was heard as an expert witness by the Aomori District Court regarding the international human rights' standards on freedom of expression and information, both under the International Covenant of Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR).

For more information see my website www.psw.ugent.be/dv and the Academic Bibliography of Ghent University at <https://biblio.ugent.be/input?func=search> (search on author "Dirk Voorhoof").

2. Invitation to provide a legal opinion

I've been asked in March 2010 by the defence counsels of Mr. Fujita to provide a written opinion on the international human rights aspects related to freedom of expression and the right to distribute leaflets and impart information and to apply these finding on the case of Mr. Fujita. More specifically I was invited to analyse how under the UN Covenant on Civil and Political Rights and under the European Convention of Human Rights and Fundamental Freedoms the right to distribute leaflets and to forward information before the beginning of a ceremonial event, as in the case of Mr. Fujita, is guaranteed and protected.

The content of this submission and the analysis and statements it contains are based on my independent judgment and on my earlier academic research, expertise and publications referred to in the section above. I have not been instructed by the defence counsels or by anyone else to reach any particular conclusion.

3. Summary of the case

I've been informed that Mr. Fujita has been convicted by judgment of 30 May 2006 of the Tokyo District Court, as acts by the defendant before the beginning of a graduation meeting at Itabashi High School in Tokyo on 11 March 2004 were considered as "obstructing of business by force", a crime punished by Article 234 of the Criminal Code. This criminal conviction has been confirmed by

judgment of 29 May 2008 of the Tokyo High Court (10th Criminal Division). The defendant is imposed a fine of 200,000 yen and in case he is unable to pay the fine, he'll be confined to a work house for the period of time equivalent to the fine at the rate of 5,000 yen per day. I have read both judgments in an (unofficial) English version submitted to me by the defence counsels. I'm informed that this case is actually pending before the Supreme Court.

As regarding the essence of the case, I understand that the defendant was invited as a guest on March 11, 2004 to the graduation ceremony of Tokyo Metropolitan Itabashi High School, at which he had worked as a teacher. At about 9:42 a.m., 18 minutes before the beginning of the ceremony, the defendant started distributing leaflets and appealed to parents who were already in the gymnasium, the place of the graduation ceremony. While addressing to the parents, he said : "Today's graduation ceremony is abnormal. If a teacher does not stand up and sing the national anthem, he or she will be punished. I'll be grateful if you sit down when the national anthem is sung." The defendant referred to an instruction issued the previous year (2003) by the Tokyo Metropolitan Board of Education forcing teachers to obey national flag and anthem coercion at graduation ceremonies and other school events (the Oct. 23 Instruction). He and other teachers had opposed to such an obligation, referring to the constitutional right to freedom of thought and conscience (Article 19 of the Constitution). According to those opposing the new ruling, the national flag (Hinomaru) and the national anthem 'Kimigayao' represent patriotism or even ultranationalism, values that should not be compellingly imposed in the educational environment. The new ruling and its enforcement had already created a controversy, also reported in the press, including in an article in the Sunday Mainichi. The defendant handed over copies of this article to some of the parents waiting in the gym for the students to enter. He explained to the parents that forcing teachers to stand up and sing the national anthem created a serious problem and breached the right to freedom of thought and conscience.

Subsequently, the defendant was ordered by the principal of the school to leave the gymnasium. The defendant, under verbal protest, left the gymnasium at 9:47 a.m. The ceremony started at 10:02 a.m.

The District Court of Tokyo judged on 30 May 2006 that the defendant's behaviour consisting of the above act and his subsequent protest against the expulsion order given by the principal constituted forcible obstruction of business in application of Article 234 of the Criminal Code. While a sentence of eight months imprisonment had been requested by the Public Prosecutor, the District Court decided to convict the defendant to a fine of 200,000 yen. In this regards, the judgment of 30 May 2006 of the Tokyo District Court (reason for sentencing, at the end of the judgment) amongst other arguments stated that "*the obstruction of the graduation ceremony was not the direct purpose of the defendant*" and "*the ceremony was obstructed only for a short time, and the delay of the opening was not so serious as to be regarded problematic*". The District Court judged a fine as an appropriate sanction.

The defendant's appeal was dismissed by judgment of 29 May 2008 of the Tokyo High Court (10th Criminal Division).

4. Legal analysis

4.1. Introduction

This submission will analyse and describe how under the International Covenant on Civil and Political Rights (ICCPR) and under the European Convention on Human Rights (ECHR) interferences by public authorities such as in the case of Mr. Fujita are considered to be violating the right to freedom of expression and information. The general characteristics of Article 19 ICCPR and its interpretation and application will be briefly presented, as well as some relevant 'Views' of the UN Human Rights Committee. In particular the jurisprudence of the European Court of Human Rights will be analysed, as the European Court's case law is highly relevant and instructive in this matter.

4.2. Article 19 ICCPR

Japan signed and ratified the International Covenant on Civil and Political Rights (ICCPR) on 30 May 1978 and 21 June 1979, respectively. Article 2 of the ICCPR obliges Japan to respect, protect and fulfil the human rights recognized in this Covenant, including the right of freedom of expression.

Article 19 (2) ICCPR reads as follows:

“ Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art of art, or through any other media of his choice”.

Since the exercise of the human rights recognized in Article 19 (2) carries with it special duties and responsibilities, Article 19 (3) of the ICCPR permits restrictions on them or sanctions when the following three cumulative conditions are satisfied:

- 1. the restriction or sanction must be provided by law*
- 2. the restriction must address one of the following purposes: respect of the rights or reputation of others, the protection of national security or of public order, or of public health or morals*
- 3. the restriction or sanction must be necessary to achieve the legitimate purpose.*

The Articles 19 (2) and 19 (3) of the ICCPR directly apply to the present litigation in the case of Mr. Fujita before the Supreme Court, as the sanction imposed on the defendant is a reaction on his act of distributing leaflets, forwarding information to others, expressing ideas in front of a public and verbally protesting against an order to leave the premises where an event was to take place.

All branches of the government of Japan, including the judiciary, may engage the responsibility of Japan for violation of a human right recognised and protected by the ICCPR, such as the right to seek, receive and impart information and ideas of all kinds. Consequently, the domestic courts' ruling in applying Japanese law, including judgments applying provisions of Criminal law, should be in accordance with the ICCPR¹. This can be achieved either by interpreting the domestic law in such a way that it is compatible with the ICCPR, or deciding not to initiate proceedings, not to prosecute or not to sanction on the basis of domestic law because of the imminent or inherent conflict with the ICCPR.

In earlier concluding observations the UN Human Rights Committee has critically observed that Japan appears to take a “restrictive approach in certain laws and decisions as to the respect of the right to freedom of expression”.²

The Observations and the ‘Views’ of the UN Human Rights Committee deliver persuasive legal authority for the application and interpretation of Articles 19 (2) - (3) by the Japanese judicial authorities. Also the jurisprudence of other international courts, including the European Court of Human Rights under Article 10 of the European Convention on Human Rights, is a relevant authoritative legal authority in this perspective.

As there is not much ‘jurisprudence’ on Article 19 ICCPR, Article 10 ECHR is to be regarded as an influential source of interpretation for Article 19 ICCPR. Moreover, there have been cases in the UN Human Rights Committee (UN HRC), filed by non-Europeans against non-European States, in which both sides relied on the jurisprudence of the European Court of Human Rights in their arguments, or in which the UN HRC showed a strikingly similar approach to both Article 19 ICCPR and Article 10 ECHR.

A clear example of this is the case of *Albert Womah Mukong v. Cameroon* (Nr. 458/1991) and also the case of *Coleman v. Australia* (Nr. 1157/2003).

In *Coleman v. Australia*, the UN HRC decided that the applicant's arrest, conviction and sentence for delivering a speech in a shopping mall without the required permit amounted to a restriction of his freedom of expression that was disproportionate and not compatible with Article 19 (3) ICCPR. On many occasions the UN HRC referred to the paramount importance in a democratic society of the right

¹ See also, Yuji Iwasawa, *International Law, Human Rights and Japanese Law*, Oxford: Clarendon Press, 1998.

² See Concluding Observations UN Human Rights Committee (UN HRC) to Japan, UN Doc. CCPR/C/79/Add. 128, 5 November 1993, par. 14. See also Concluding Observations UN HRC to Japan, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, par. 10.

to freedom of expression, and it emphasised that in circumstances of public debate in a democratic society the value placed by the ICCPR upon uninhibited expression is particularly high. These findings,³ and especially the UN HRC's reasoning and the wording, echo the jurisprudence of the ECtHR³.

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 goals of Article 19 (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. The jurisprudence of the UN HRC shows several examples of this approach.

In *Marques de Moraes v. Angola* (Nr. 1128/2002) e.g. the UN HRC considered that although the applicant's conviction for defamation was based on Article 410 of the Criminal Code of Angola and pursued a legitimate aim (the protection of the rights and reputation of others), in this case the application of that provision of the criminal code was not necessary. The UN HRC found a violation of Article 19 ICCPR⁴.

Another relevant view of the UN HRC was delivered in the case of *Leonid Svetik v. Belarus* (Nr. 927/2000), in which the UN HRC found that the application of a provision of criminal law did not after all relevantly contribute to one of the legitimate aims referred to in Article 19 (3) ICCPR. The applicant in this case was a teacher in a high school, who considered him self a victim of an interference in his freedom of expression in breach of Article 19 ICCPR. He had published a declaration, criticizing the policy of the authorities in power. The declaration more particularly contained an appeal not to take part in the forthcoming local elections as a protest against the electoral law he believed was incompatible with the Belarusian Constitution and the international norms. The applicant was imposed an administrative sanction for public appeals calling for the boycott of elections, in application of Article 167-3, of the Code of Administrative Offences.

The author claimed that his right under article 19 ICCPR had been violated, as he was subjected to an administrative penalty for the sole expression of his political opinion. The UN HRC observed that the State party only objected that the author was sentenced in compliance with the applicable law, and that, pursuant to paragraph 3 of article 19, the rights protected by paragraph 2 are subject to limitations. The Committee recalled that article 19 ICCPR allows restrictions only to the extent that they are provided by law and only if they are *necessary* (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals.

The Committee thus had to decide whether or not punishing a call to boycott a particular election was a permissible and necessary limitation of the freedom of expression.

The UN HRC observed that that the declaration signed by the applicant did not affect the possibility of voters to freely decide whether or not to participate in the particular election. The declaration was not to be considered as a form of intimidation or coercion of voters. The Committee concluded that in the circumstances of the present case the limitation of the liberty of expression did not legitimately serve one of the reasons enumerated in article 19, paragraph 3, of the Covenant and that the applicant's rights under article 19, paragraph 2, of the Covenant had been violated⁵.

At several occasions the UN HRC has recalled "*that the right to freedom of expression is of paramount importance in any society, and any restrictions to the exercise of must meet a strict test of justification*"⁶. In cases of a lack of sufficient justification or because the punishment or sanctions at issue were not considered necessary, the UN HRC came to the conclusion that the interferences or sanctions complained of amounted to a violation of the right to freedom of expression guaranteed by

³ See e.g. also on a punishment related to the distribution of leaflets and the finding of a violation of Article 19 ICCPR, *Keun-Tae Kim v. the Republic of Korea*, Nr. 574/1994.

⁴ See also *Hak-Chul Shin v. Republic of Korea*, Nr. 926/2000.

⁵ *Leonid Svetik v. Belarus*, Nr. 927/2000.

⁶ See *Kim v. the Republic of Korea*, Nr. 574/1994; *Park v. the Republic of Korea*, Nr. 628/1995 and *Rakhim Mavlonov and Shansiy Sa'di v. Uzbekistan*, Nr. 1334/2004.

Article 19 ICCPR⁷. It is this perspective and this approach that should be kept in mind in applying the provision of Article 234 of the Japanese Criminal Code in the case of Mr. Fujita. The jurisprudence of the European Court of Human Rights will give further guidance how to integrate and apply the international standards on the right to freedom of expression in the case at issue.

4.3. Article 10 of the European Convention of Human Rights

4.3.1. General characteristics

Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms guarantees freedom of expression “*without interference by public authority*” as a basic principle⁸.

Article 10 of the European Convention reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

Applying its established case law the European Court at many occasions has reiterated that “*freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment*”. Freedom of expression is there to contribute to “*pluralism, tolerance and broadmindedness, without which there is no democratic society*”. The necessity of any restriction or sanction related to the use of freedom of expression must be established convincingly, as this freedom is subject only “*to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly*”. The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “*pressing social need*”. The Court's jurisprudence manifestly demonstrates that “*there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest*”⁹.

The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision embracing both the legislation and the decisions applying it. When carrying out that supervision the Court must ascertain whether the impugned measures are “proportionate to the legitimate aim pursued”, due regard being had to the importance of freedom of expression in a democratic society.

The Court's practice over a period of 30 years illustrates how the case law Article 10 of the Convention has manifestly helped to create an added value for the protection of freedom of expression in democratic states and for the right of the public to be properly informed on matters of public interest. Applying Article 10 of the Convention as a living and dynamic instrument the European Court of Human Rights has succeeded to help to develop freedom of expression and information as a fundamental, effective and functional right in a democracy.

⁷ Jakob Th. Möller and Alfred de Zayas, United Nations Human Rights Committee, Case Law 1977-2008, A Handbook, Publ, Kehl-am-Rhein: NP Engel, 2009.

⁸ For more information about the Convention, see www.echr.coe.int

⁹ See ECtHR 26 April 1979, Sunday Times v. United Kingdom. See also more recently some Grand Chamber judgments of the ECtHR confirming this approach: ECtHR 10 December 2007, Stoll v. Switzerland and ECtHR 12 February 2008, Guja v. Moldova.

Already in its judgment in the Sunday Times case (26 April 1979) the European Court has emphasised that freedom of expression "*is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*"¹⁰.

National law sanctioning persons involved in expressing information and ideas may only be applied if the interference by the authorities is based on a sufficiently precise and accessible law, is pertinently justified by a legitimate aim and especially is to be considered as "*necessary in a democratic society*", these being the conditions of Article 10 § 2 for any interference by public authorities in one's freedom of expression.

Violations of Article 10 ECHR found by the European Court concerned criminal convictions of journalists, editors, publishers, broadcasters but also of activists or individual citizens taking part in public debate. Many applicants brought their case before the European Court of Human Rights alleging that the convictions for eventually minor offences they had committed or had been involved in (defamation, breach of the right of privacy, breach of confidence, disturbance of public order...) were in fact unacceptable interferences in their right to freedom of expression. Although these convictions were prescribed by law at national level and served a legitimate interest, the European Court in many of its judgments came to the conclusion that the sanctions in application of national provisions in criminal law were not "*necessary in a democratic society*". In deciding so the European Court gave priority to the right to freedom of expression and to genuinely contributing to public debate over the other rights and interests involved in these cases. The European Court did so at many occasions, each time "*in the light of the case as a whole*" and after balancing the interests related to the rights of others or the prevention of disorder or crime, with the interest related to freedom of expression in a democracy. The European Court of Human Rights considers that apart from the press and NGOs, also individuals or citizens actively taking part in public debate enjoy a strong protection of freedom of expression and information. Article 10 ECHR indeed guarantees freedom of expression and information to "everyone", and this right is also enjoyed by NGOs or individuals being "watchdogs of society", just like the press or the media in general¹¹.

In a number of cases the interferences by public authorities were not directed indeed against journalists or (mainstream) media, but against NGOs or activists campaigning for environment protection, human rights, women's rights, minority rights or social justice¹². In each of the cases referred to, the Court came to the conclusion that the interferences or sanctions against activists or individual citizens violated freedom of expression of the applicants, as in essence their speech, actions, campaigns, publications or leaflets contributed to relevant or important debates in society.

In a recent judgment the Court was of the opinion that the action by a member of a union revealing alleged misconduct and misusing of public property and funds by a school director, was protected under Article 10 of the Convention. The Court states that "*the signalling of illegal conduct or wrongdoing in the public sector must be protected, in particular as only a small group of persons was aware of what was happening*". The applicant as an employee and union leader was thus best placed to act in the public interest by alerting the public¹³. The expression of statements, opinions or value judgments "*in the immediate context of a heated discussion between teachers, pupils and parents*" as well is protected under Article 10 of the Convention¹⁴.

¹⁰ See also ECtHR 7 December 1976, Handyside v. United Kingdom.

¹¹ ECtHR 15 February 2005, Steel and Morris v. United Kingdom. See also ECtHR 27 May 2004, Vides Aizsardzības Klubs (VAK) v. Latvia

¹² ECtHR 29 October 1992, Open Door and Dublin Well Women v. Ireland; ECtHR 19 December 1992, Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria; ECtHR 9 February 1995, Vereniging Weekblad 'Bluf!' v. the Netherlands; ECtHR 25 August 1998, Hertel v. Switzerland; ECtHR 7 February 2002, E.K. v. Turkey; ECtHR 28 June 2001, Verein gegen Tierfabriken VGT v. Switzerland ECtHR 27 May 2004, Vides Aizsardzības Klubs (VAK) v. Latvia; ECtHR 15 February 2005, Steel and Morris v. United Kingdom; ECtHR 7 November 2006, Mamère v. France; ECtHR 4 October 2007, Verein gegen Tierfabriken Schweiz VGT v. Switzerland; ECtHR 8 July 2008, Vajnai v. Hungary; ECtHR 17 July 2008, Riolo v. Italy; ECtHR 21 October 2008, Salihoğlu v. Turkey; ECtHR 6 November 2008, Kandzhov v. Bulgaria; ECtHR 20 January 2009, Csánics t. Hungary; ECtHR 3 February 2009, Women on Waves a.o. v. Portugal and ECtHR 10 February 2009, Güçlü v. Turkey.

¹³ ECtHR 19 February 2009, Marchenko v. Ukraine. See also ECtHR 12 February 2002, Guja v. Moldova.

¹⁴ ECtHR 1 February 2007, Ferihumer v. Austria, § 25-27.

The Court at many occasions has emphasised that there is not only a right to express information and ideas, but that *“the public also has a right to receive them”*¹⁵. The Court has regularly recalled *“the key importance of freedom of expression as one of the preconditions for a functioning democracy”*¹⁶.

4.3.2. Distributing leaflets, canvassing, expressing an opinion in public and protest actions...

Distributing leaflets, protesting against an event to take place or taking part in a demonstration, have been unambiguously recognised by the European Court as constituting the expression of an opinion within the meaning of Article 10 ECHR. At many occasions the European Court has recognised that interferences by public authorities prohibiting or sanctioning forms of active, non-violent protest need to fulfil the conditions of Article 10 § 2 ECHR. Restrictions on conduct may indeed constitute and interference with the freedom of expression under Article 10 of the Convention¹⁷.

The European Court of Human Rights has considered that in a democratic society, apart from the press, also NGOs or individual citizens *“must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest (..)”*¹⁸.

Even in cases where it was admitted that the canvassing of leaflets or protest actions by the applicants did effectively disturb or even hinder an event to take place, the European Court did consider the interferences by public authorities under Article 10 ECHR.

In *Harshman and Harrup v. United Kingdom* the European Court recalled *“that proceedings were brought against the applicants in respect of their behaviour while protesting against fox hunting by disrupting the hunt. It is true that the protest took the form of impeding the activities of which they disapproved, but the Court considers nonetheless that it constituted an expression of opinion within the meaning of Article 10 (..). The measures taken against the applicants were, therefore, an interference with their right to freedom of expression”*¹⁹.

Similarly in *Steel and others v. United Kingdom* the Court acknowledged that the applicants *“were arrested while protesting against a grouse shoot and the extension of a motorway respectively. It is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers nonetheless that they constituted expressions of opinion within the meaning of Article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression”*²⁰.

In both judgments the Court found a violation of the applicants' rights under Article 10 ECHR, as the interferences by the public authorities in the non-violent protest activities of the applicants were not considered to be in accordance with Article 10 § 2 of the Convention.

In *Hashman and Harrup v. United Kingdom* the Court found that the order by which the applicants were bound over to keep the peace and not to behave *contra bonos mores* did not comply with the requirement of Article 10 § 2 of the Convention that it be “prescribed by law”, given the lack of precision of the law the interference by the public authorities was based on (§ 40-41).

¹⁵ ECtHR 29 March 2005, *Ukrainian Media Group v. Ukraine*. See also ECtHR 24 February 1997, *De Haes en Gijssels v. Belgium*; ECtHR 20 May 1999, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, *Thoma v. Luxembourg* and ECtHR 25 June 2002, *Colombani a.o. v. France*.

¹⁶ ECtHR 24 September 2003, *Appleby a.o. v. United Kingdom*.

¹⁷ See ECtHR 4 May 2000, *G. Drieman and Others v. Norway* (Decision, Appl. nr. 33678/96). See also ECtHR 6 May 2003, *Appleby a.o. v. UK*, in which the applicants were stopped from setting up a stand and distributing leaflets, this being considered an interference in the right of the applicants. In this case however the Court did not find a violation of Article 10, as the interference amounted only to a restriction to set up a stand and distribute leaflets in a privately owned shopping centre and regard must also be had to the property rights of the owner of the shopping centre under Article 1 of Protocol No. 1. In this particular case the applicants have not been prosecuted and hence not convicted at all.

¹⁸ ECtHR 15 February 2005, *Steel and Morris v. UK*. See also ECtHR 27 May 2004, *Vides Aizsardzības Klubs (VAK) v. Latvia*.

¹⁹ ECtHR 25 November 1999, *Hashman and Harrup v. UK*, § 28.

²⁰ ECtHR 23 September 1998, *Steel and others v. UK*, § 92.

For three of the applicants in *Steel and others v. United Kingdom* the Court was of the opinion that the interference with the exercise of their right to freedom of expression was disproportionate to the aims of preventing disorder and protecting the rights of others, and was not, therefore, “necessary in a democratic society” (§ 110). The Court based its finding on the consideration that it saw “no reason to regard their protest as other than entirely peaceful. It does not find any indication that they significantly obstructed or attempted to obstruct those attending the conference, or took any other action likely to provoke these others to violence. Indeed, it would not appear that there was anything in their behaviour which could have justified the police in fearing that a breach of the peace was likely to be caused” (§ 64).

On the other hand, the interferences by the public authorities against two other applicants in *Steel and others v. United Kingdom* were not considered as violating their right to freedom of expression, as their conduct risked to culminate in disorder or violence. Regarding one of the applicants, the Court referred to “the dangers inherent in the applicant’s particular form of protest activity and the risk of disorder arising from the persistent obstruction by the demonstrators of the members of the grouse shoot as they attempted to carry out their lawful pastime” and it recalled that “Ms Steel’s behaviour prior to her arrest had created a danger of serious physical injury to herself and others and had formed part of a protest against grouse shooting which risked culminating in disorder and violence” (§ 103-105). Regarding the other applicant the Court in *Steel and other v. United Kingdom* concluded that taking into account “the interest in maintaining public order and protecting the rights of others, and also the need to maintain the authority of the judiciary, the measures taken against the second applicant were not disproportionate” (§ 108-109).

Interferences by the authorities in other words are only justifiable when non-excessive measures are taken strictly to ensure that demonstrations or events could pass off peacefully. Such measures are only acceptable if they have been intended and have effectively been taken to prevent breach of public order or prevent violent actions, and not to frustrate the expression of an opinion²¹. At many occasions the European Court has also stated that the dominant position which the Government and its members occupy makes it necessary for them, and for the authorities in general, “to display restraint in resorting to criminal proceedings”²².

This approach is also reflected in the European Court’s judgment in *Kandzhov v. Bulgaria*, in which the applicant complained of the interference by public authorities while he was preparing a protest action at the town hall in Pleven, criticizing the policy of the Minister of Justice. In this judgment the Court considered that “furthermore, assuming that the measures taken against the applicant may be taken to pursue the legitimate aims of preventing disorder and protecting the rights of others (see *Steel and Others*, cited above, § 96), they were clearly disproportionate to these aims. The events must be seen in the context of a political debate which, although, critical of the Government, was not violent. Thus, (..) the applicant’s actions on 10 July 2000 were entirely peaceful, did not obstruct any passers-by and were hardly likely to provoke others to violence (see paragraphs **Fout! Verwijzingsbron niet gevonden.** and **Fout! Verwijzingsbron niet gevonden.** above, and *Steel and Others*, cited above, § 110). However, the authorities in Pleven chose to react vigorously and on the spot in order to silence the applicant and shield the Minister of Justice from any public expression of criticism”²³.

The Court at several occasions has reiterated that “one of the aims of freedom of assembly is to secure a forum for public debate and the open expression of protest. The protection of the expression of personal opinions, secured by Article 10, is one of the objectives of the freedom of peaceful assembly enshrined in Article 11”²⁴. In the case *Samüt Karabulut v. Turkey* the Court recalled “that, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance”²⁵.

²¹ ECtHR 25 August 1993, *Chorherr v. Austria*, § 32. See also ECtHR 3 February 2009, *Women on Waves a.o. v. Portugal*.

²² ECtHR 23 April 1992, *Castells v. Spain*, § 46.

²³ ECtHR 6 November 2008, *Kandzhov v. Bulgaria*, § 73-74.

²⁴ ECtHR 15 November 2007, *Galstyan v. Armenia*; ECtHR 17 July 2008, *Ashughyan v. Armenia* and ECtHR 7 October 2008, *Éva Molnár v. Hungary*.

²⁵ ECtHR 27 January 2009, *Samüt Karabulut v. Turkey*.

In the case of *Sergey Kuznetsov v. Russia* the European Court reiterated that “any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance”²⁶. The Court emphasised that “any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it” (§ 45). In this case the Court found a violation of Article 11 of the Convention “interpreted in the light of Article 10 of the Convention”²⁷.

The circumstance that an applicant is ‘only’ convicted to a moderate criminal sanction or a fine does not take away the unjustifiable character of an interference by public authorities disrespecting the above mentioned standards. Sentences to a minor penalty or a fine at many occasions have been considered by the European Court as having essentially a detrimental chilling effect on the freedom of expression and information in a democratic society. Hence also such minor sanctions can be regarded as violating Article 10 of the European Convention. In its assessment whether an interference complained of is necessary in a democratic society, the Court integrates the *proportionality principle* : the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10. The Court indeed exercises the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the applicants (or the press or the public in general) from taking part in the discussion of matters of legitimate public concern. The Court in this regards often refers to the *risk of a “chilling effect”*. Not only prior restraint but also *ex post* sanctions and especially criminal convictions must meet the proportionality test²⁸. It is to be emphasised that also a light or lenient sanction can be a breach of Article 10²⁹. The Court does not accept that the limited nature of the fine is decisive as regards the issue of necessity. What is of greater importance is that the applicant was convicted.³⁰

4.3.3. Relevance of Article 19 ICCPR and Article 10 ECHR in the case of Mr. Fujita

Applying Article 19 ICCPR and the European Court’s case law regarding Article 10 ECHR on the case of Mr. Fujita, it becomes obvious that the criminal prosecution and conviction of Mr. Fujita because obstructing business by force is in the context of the case as a whole an unjustified, disproportionate and unnecessary action by the public authorities and cannot be considered as necessary in a democratic society. From the perspective of international human rights standards on freedom of expression, it is to be considered that a criminal conviction and sanction of Mr. Fujita has undoubtedly a “chilling effect” on the right to freedom of expression of the defendant but also on other persons who are opposing the compelling character of the 10.23 Directive, ordering all teachers and staff at public schools in Tokyo to stand up towards the national flag (Hinomaru) and sing the national anthem ‘Kimigayao’.

²⁶ ECtHR 23 October 2008, *Sergey Kuznetsov v. Russia*, § 44. See also ECtHR 9 November 2006, *Düzgören v. Turkey*; ECtHR 15 November 2007, *Galstyan v. Armenia*; ECtHR 17 July 2008, *Ashughyan v. Armenia*; ECtHR 7 October 2008, *Patyi a.o. v. Hungary* and ECtHR 13 January 2009, *Açik a.o. v. Turkey*.

²⁷ ECtHR 23 October 2008, *Sergey Kuznetsov v. Russia*, § 49. See also ECtHR 8 January 2008, *Yurdatapan v. Turkey*; ECtHR 13 January 2009, *Açik a.o. v. Turkey*; ECtHR 7 April 2009, *Karapete a.o. v. Turkey*; ECtHR 30 June 2009, *Kara v. Turkey*. For a proportionate and justifiable action by the authorities, because of the disorder or risk of violence created by the applicants, see ECtHR 25 August 1993, *Chorherr v. Austria*; ECtHR 6 March 2007, *Çiloğlu v. Turkey* and ECtHR 7 October 2008, *Éva Molnár v. Hungary*.

²⁸ ECtHR 13 July 1995, *Tolstoy Miloslavsky v. U.K.*; ECtHR (Grand Chamber) 17 December 2004, *Cumpănă and Mazăre v. Romania*; ECtHR 18 December 2008, *Mahmudov and Agazade v. Azerbaijan* and ECtHR 24 February 2009, *Długolecki v. Poland*. See also ECtHR 27 May 2003, *Skalka v. Poland*; ECtHR 30 March 2006, *Saday v. Turkey*; ECtHR 10 August 2006, *Lyaskho v. Ukraine*; ECtHR 26 June 2007, *Artun and Güvener v. Turkey*; ECtHR 13 January 2009, *Mehmet Cevher İlhan v. Turkey* and ECtHR 19 February 2009, *Marchenko v. Ukraine* 2009.

²⁹ ECtHR 24 February 1997, *De Haes and Gijssels v. Belgium*; ECtHR 16 November 2004, *Selistö v. Finland*; ECtHR 19 May 2005, *Turhan v. Turkey*; ECtHR 12 July 2007, *A.S. Diena and Ozoliņš v. Latvia* and ECtHR 20 January 2009, *Csánics v. Hungary*.

³⁰ ECtHR 16 November 2004, *Selistö v. Finland*. See also ECtHR 24 February 1997, *De Haes and Gijssels v. Belgium*.

The removing of the applicant from the gym and certainly the criminal prosecution and conviction of the defendant is a far-reaching measure, which requires particular justification regarding a manifest disturbance of an imminent or ongoing event or the incitement to violence³¹. In the case of Mr. Fujita such particular justification is not available, as the applicant essentially wished to protest against the compulsory greeting of the national flag and anthem coercion at graduation ceremonies and other school events, and hence to express his opinion on an issue of public interest, without preventing the ceremony to take place nor causing any direct or substantial disturbance of the ceremony itself. Certainly there wasn't any indication that the conduct of the applicant, while addressing himself to the waiting parents in the gym, risked to culminate in disorder or violence³². In line with *Steel and others v. United Kingdom*, *Kandzhov v. Bulgaria* and *Sergey Kuznetsov v. Russia* it can be recalled that there was no reason to regard the protest of Mr. Fujita as other than entirely peaceful and that there is no indication that he significantly obstructed or attempted to obstruct those attending the ceremony, or took any other action likely to provoke these others to violence, disturbance of peace or breach of public order.

The authorities' response was therefore disproportionate to the aims of preventing public disorder or protecting the rights of others. The conviction of Mr. Fujita to a fine is therefore not 'necessary in a democratic society'.

5. Conclusion

In the light of the above analysed standards of international human rights' protection, the basic finding of this submission is that the prosecution and the conviction of Mr. Fujita is to be considered as an unjustifiable interference with his right to freedom of expression and information. The action of distributing leaflets and expressing his opinions and ideas regarding a controversial school issue short before the beginning of the graduation ceremony on 11 March 2004 constituted no pertinent or sufficient reason for justifying the criminal prosecution and a criminal sanction.

Neither Article 19 ICCPR, nor Article 10 ECHR (and neither Article 21 of the Japanese Constitution) absolutely and unrestrictedly guarantee freedom of expression, as it is admitted that that freedom of expression can be limited under certain circumstances and conditions when this is provided by law and is necessary (in a democratic society). Indeed, even if a person uses a method of expression in order to announce his thoughts or ideas to the outside, this method might not be permitted when it is unlawfully or unjustly impairing or damaging other's rights. However, this does not justify any kind of interference or sanction imposed by public authorities. Any interference by public authorities restricting or sanctioning one's freedom of expression must not only be prescribed by law and justified by a legitimate aim, it must also be proportionate and necessary to the legitimate aim pursued.

One can consider that for this reasons the principal of Itabashi High School, being responsible for the preparation of the graduation ceremony and who engaged himself in the execution of the graduation ceremony, had the right to take appropriate action in order to secure the smooth progress of the event. As the defendant was talking to parents, who were waiting for the opening of the graduation ceremony and as the defendant was distributing leaflets criticising a specific aspect of the ceremony to come, the organisers might have been in a position to assume that the defendant's action could hamper smooth execution of the graduation ceremony. Inviting the defendant to sit down, stop distributing leaflets and discontinue talking to the already arrived parents could have been a sufficient and justifiable action by the principal. Only when demonstrated that this attempt had failed and in as far as there were clear indications that the defendant had the intention to disturb or hinder the ceremony (*quod non*), the principal was in a position to take action to make the defendant leave the gymnasium hall where the ceremony was to take place. Such action could eventually have been considered as a legitimate interference with the right to freedom of expression of the defendant. This action by the authorities of the Itabashi High School however is, was or had been sufficient in order to protect the rights of others, being the right of the organisers, the students and the parents to a smooth progress of the graduation ceremony at Itabashi High School on 11 March 2004.

³¹ See also ECtHR 6 May 2003, *Appleby a.o. v. UK*.

³² ECtHR 23 September 1998, *Steel and others v. UK*. See also ECtHR 29 June 2006, *Öllinger v. Austria*, § 48-50.

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.

There is obviously no sufficient “*pressing social need*” to justify in the context of this case the prosecution and conviction of Mr. Fujita. Taking into account the importance of the right to freedom of expression and the international human rights standards at issue, the prosecution and criminal conviction of Mr. Fujita amounts to a violation of the right to freedom to expression guaranteed by Article 19 ICCPR.

It is essentially to be emphasized that:

- the defendant had no intention to obstruct the event;
- the aim of the defendant was to inform the parents about an issue that was of interest for the school community and had already given rise to a heated debate amongst politicians and teachers, and in the press;
- in practice, the action of the defendant did not prevent the event to take place;
- the eventual delay of two minutes of the beginning of the ceremony due to the defendant's action is not a sufficient or relevant reason to justify the prosecution and criminal conviction of the defendant;
- the criminal conviction of the defendant, although restricted to the payment of a fine, is an unnecessary and disproportionate interference in his right of freedom of expression, as the prosecution and conviction might have a ‘chilling effect’ on the defendant and on those taking part in public debate in this matters.

As it has indeed been recognised in the judgment of 30 May 2006 of the Tokyo District Court (reason for sentencing, at the end of the judgment), “*the obstruction of the graduation ceremony was not the direct purpose of the defendant*” and “*the ceremony was obstructed only for a short time, and the delay of the opening was not so serious as to be regarded problematic*”. In the light of the defendant's right to freedom of expression these considerations are precisely decisive arguments not to convict the defendant in application of Article 234 of the Criminal Code.

In the light of Article 19 ICCPR and Article 10 ECHR the conclusion can not be else than that the Japanese judicial authorities, namely the Tokyo District Court and the Tokyo High Court in their respective judgments of 30 May 2006 and 29 May 2008, have failed to strike a fair balance between the competing interests at issue.

Prosecuting and sanctioning a person who contributed to making information available to the public in the circumstances at issue is to be considered in breach with Article 19 ICCPR and Article 10 ECHR, precisely because open discussion of topics of public concern is essential to democracy. 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.

The criminal punishment of Mr. Fujita is to be considered to have a serious chilling effect on the defendant and others to take part in the public debate at issue and in public or political debate in general. Therefore such a measure is not to be considered necessary in the light of Article 19 ICCPR. In the words of the European Court's case law such an interference in the defendant's right to freedom of expression does “*a disservice to democracy and even endangers it*”³³.

³³ ECtHR 23 October 2008, Sergey Kuznetsov v. Russia, § 49.