

Is the protection of “public welfare” an inherent and justified restriction on the right to freedom of expression?

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. Katsuhisa Fuijta (criminal conviction because of “forcible obstruction of business” while expressing an opinion on a matter of public interest and distributing leaflets).

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Introduction

At several occasions, the Japanese Government has been criticized by the UN Human Rights Committee for not sufficiently respecting its obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the right of freedom of opinion and the right of freedom of expression. In 2008 the Committee reiterated its concern *“that the concept of “public welfare” is vague and open-ended and may permit restrictions exceeding those permissible under the Covenant”*, more precisely in the light of freedom of expression as guaranteed under Article 19 ICCPR (see Concluding Observations UN Human Rights Committee to Japan, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, par. 10).

In its general comments in the Sixth Periodic Report (April 2012, par. 3-4) the Japanese Government again refers to the concept of *“public welfare”* as a justifying principle to restrict the rights guaranteed by the ICCPR. The Japanese Government argues that the constitutional concept of *“public welfare”* is *“embodied in more concrete terms by court precedents for respective rights based on their inherent nature, and the human rights guaranteed by the Constitution and the restrictions on human rights imposed under the Constitution closely resemble those under the Covenant”*. The Government emphasizes that *“under no circumstance, therefore, the concept of public welfare (could) allow the state power to arbitrarily restrict human rights, or allow any restrictions imposed on the rights guaranteed by the Covenant to exceed the level of restrictions permissible under the Covenant”*.

In order to justify and defend this position, the Government refers to a judgment rendered by the Petty Bench of the Supreme Court on 7 July 2011, a judgment *“worth summarizing”* according to the Sixth Periodic Report. The judgment concerns the case of Mr. Katsuhisa Fuijta, which is situated and explained in what follows.

This legal opinion will analyze whether the reference to the Supreme Court’s judgment of 7 July 2011 can indeed be considered as a valid argument by the Japanese Government that by applying the concept of *“public welfare”* in cases related to freedom of expression, the Japanese judicial authorities are acting in accordance with Article 19 ICCPR.

Factual context and court proceedings

Mr. Katsuhisa Fujita was convicted by the Tokyo District Court, on 30 May 2006 for *“obstructing of business by force”* (Article 234 of the Criminal Code). This conviction pertained to conduct by the defendant before the beginning of a graduation ceremony at Itabashi High School in Tokyo on 11 March 2004. This criminal conviction was upheld by the Tokyo High Court (10th Criminal Division) on 29 May 2008. The defendant was sentenced to pay a fine of 200,000 yen or, in the alternative, detention in a work house for the period of time equivalent to the fine at the rate of 5,000 yen per day. Before the Supreme Court the defense counsels argued that the defendant’s action in this case was an expressive act being protected under the right of freedom of expression, as guaranteed by Article 21, paragraph 1 of the Japanese Constitution. It was argued that the charge and conviction on the basis of Article 234 of the Criminal Code was a violation of Article 21, paragraph 1 of the Constitution. The Supreme Court however dismissed these arguments, by finding that the conviction of the defendant for having committed the criminal offence of *“obstructing a business by force”* did not violate Article 21, paragraph 1 of the Constitution. The Supreme Court also rejected other arguments by the defense counsels as they were to be considered *“unacceptable as reasons for final appeal”* under article 405 of the Code of Criminal Procedure (Supreme Court 7 July 2011).

I have read all judgments in an (unofficial) English version submitted to me by the defense counsels.

The District Court of Tokyo judged on 30 May 2006 that the defendant’s behaviour, namely his actions before the ceremony as outlined above and his subsequent protest against the expulsion order given by the Principal, amounted to *“forcible obstruction of business”*, which is a criminal offence under 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 impose a fine of 200,000 yen. The Tokyo District Court in its judgment of 30 May 2006 considered in the sentencing remarks 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). The Supreme Court in its judgment of 7 July 2011 confirms the finding by the District Court and Tokyo High Court that *“the defendant evidently obstructed the smooth performance of the graduation ceremony to be held by the same high school and the act of the defendant in this case should be considered to have obstructed business of others through the use of force, which fulfills the requirements for charge of forcible obstruction of business”* (Supreme Court, 7 July 2011, First Petty Bench of the Supreme Court, Case No. 1132-2008-(a), defendant : Katsuhisa Fujita).

Comments

It is my sincere opinion that by dismissing the arguments of the defense counsels and by finding that the criminal conviction of the defendant did not violate Article 21 of the Constitution, invoking the protection of *“public welfare”* the Japanese authorities have acted in breach of the binding obligations under the UN International Covenant on Civil and

Political Rights. By convicting the defendant and by upholding this conviction, the Japanese judicial authorities have violated Article 19 ICCPR that guarantees the right of freedom of expression.

By merely reaffirming that the facts amounted to a criminal offence and were to be considered as an impermissible act *“in light of general social norms”*, the Supreme Court does not sufficiently nor pertinently justify the necessity in a democratic society of the defendant’s criminal conviction in the light of the case as a whole. The reference by the Supreme Court to its own case law in this matter is neither a pertinent or relevant argument why in this case the criminal conviction of the defendant is a necessary interference with his right of freedom of expression (see the precedents in No.1308-1948-(re), Grand Bench Decision, 18 May 1948, *Criminal Casebook*, Vol. 3, No. 6, p. 839; No. 2591-1949-(re), Grand Bench Decision, 27 September 1950, *Criminal Casebook*, Vol.4, No. 9, p.1799; No.1626-1967-(a), Grand Bench Decision, 17 June 1970, *Criminal Casebook*, Vol.24, No. 6, p. 280 and Supreme Court No. 206-1984-(a), Third Petty Bench Decision on 18 December 1984, *Criminal Casebook*, Vol. 38, No.12, p. 3026).

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 focusses on the need of limiting or restricting that freedom as being *“necessary and reasonable for public welfare”*. Something that is *“reasonable for public welfare”* is however not a sufficient reason to legitimize interferences with the right of freedom of expression. It is only when such an interference is *“necessary”* in a democratic society in the light of Article 19 ICCPR, that a criminal conviction for expressing and imparting information and ideas related to an issue of public debate can eventually be justified.

Indeed, by reiterating that *“the act of the defendant in this case was conducted in an undue manner which did not fit the occasion, and caused a considerable disturbance to the smooth performance of the graduation ceremony, while it should have been performed in a calm atmosphere”*, the Supreme Court does not sufficiently motivate the necessity of a criminal conviction in this case. The Supreme Court considers the action of the defendant as *“an act (that) is impermissible in light of general social norms”* and therefore it *“evidently”* involves an illegal act which is to be sanctioned with criminal punishment.

In other words, the *“impermissible”* and *“illegal act”* is in itself considered as a sufficient justification of the criminal conviction, without considering the context of the right of freedom of expression and without considering the necessity of the application of Article 294 of the Criminal Code in this context. Such an approach and reasoning *as such* neglects the impact and binding character of Article 19 ICCPR.

First of all, from the scope of Article 19 ICCPR (General Comment nr. 34, 2011) restrictions and limitations on freedom of expression must be sufficiently precise and be narrowly interpreted, while a restriction or sanction being *“reasonable for public welfare”* does not meet this condition, being too vague and giving a too wide possibility of arbitrary application.

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*”, especially with regard the canvassing of leaflets¹. In its Concluding Observations of 2008 the UN HRC observed :

10. *While taking note of the State party’s explanation that “public welfare” cannot be relied on as a ground for placing arbitrary restrictions on human rights, the Committee reiterates its concern that the concept of “public welfare” is vague and open-ended and may permit restrictions exceeding those permissible under the Covenant. (art. 2)*

The UN Human Rights Committee recommended :

“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”.

Furthermore, the conviction of Mr. Fujita for expressing his opinion before the ceremony started, even with a loud voice, and for distributing leaflets must be considered as being protected under Article 19 ICCPR (see also UNHRC General Comment nr. 34, 2011) . The content of the ideas and information Mr. Fujita expressed and imparted was criticizing the controversial compulsory salutation to the national flag and singing of the national anthem at graduation ceremonies and other school events, this being a contribution to a discussion of importance for society. It is to be emphasized that Paragraph 1 of Article 19 ICCPR requires protection of the right to hold opinions without interference. This is a right to which the ICCPR permits no exception or restriction. Any form of effort to coerce the holding or not holding of any opinion is prohibited (UNHRC General Comment nr. 34, par. 9). Freedom to express one’s opinion necessarily includes freedom not to express one’s opinion. The instruction of the Tokyo Metropolitan Board of Education forcing teachers to salute the national flag and sing the national anthem at graduation ceremonies and other school events (hereafter ‘the October 23 Instruction’) can be considered however as such a prohibited effort by the authorities to coerce the students and the teachers to hold a certain opinion. According to those opposing the October 23 Obstruction, the national flag (Hinomaru) and the national anthem, ‘Kimigayo’, represent patriotism or even ultra-nationalism, values that should not be forcibly imposed in the educational environment. The defendant’s aim was to inform the parents that forcing teachers and students to stand up and sing the national anthem created a serious problem and breached the right to freedom of thought and conscience as protected by the Japanese Constitution and Article 19 ICCPR.

That this point of view deserves its place in a public debate and is to be protected under Article 19 ICCPR, can also be derived from the dissenting opinion of judge Koji Miyakawa in the case No. 951-2010. In that dissenting opinion judge Koji Miyakawa expressed the believe that the directive by Superintendent of Tokyo Metropolitan Board of Education as

¹ See Concluding Observations UN Human Rights Committee to Japan, UN Doc. CCPR/C/79/Add. 128, 5 November 1993, par. 14. See also Concluding Observations UN Human Rights Committee to Japan, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, par. 10.

well as the orders to teachers and staff given by principals based on this directive “may possibly lead to forcing the teachers and staff to act against the core of their thought and conscience, which violates Article 19 of the Constitution” (freedom of thought and conscience)(dissenting opinion, Supreme Court No.951-2010- (o), 6 June 2012, First Petty Bench Decision, *Court Times*, No. 1533, p. 3).

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 : also robust speech or the expression of ideas that might disturb the appearance of peace are covered by the protection of Article 19 ICCPR. 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. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions (UNHRC General Comment nr. 34, par. 2 and par. 11). The protection guaranteed by Article 19 ICCPR includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. 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. Indeed any demonstration in a public place or any action at an event or canvassing leaflets at a meeting inevitably causes a certain level of disruption to ordinary life. It is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings and peaceful forms of protest if the freedom of expression and freedom of peaceful protest guaranteed by Article 19 ICCPR is not to be deprived of all substance. From this perspective 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). The criminal conviction of the defendant exercising his right to express and impart information and ideas in such a context is to be considered as a repressive and disproportionate intervention by the public authorities, not showing a sufficient degree of tolerance towards this peaceful form of protest. Such a practice has a ***chilling effect*** that may unduly restrict the exercise of freedom of expression of the person concerned and others (See also on the notion of ‘*chilling effect*’ the UNHRC General Comment nr. 34, par. 47). From the perspective of international human rights standards on freedom of expression and information, it is indeed to be considered that the 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 others who oppose the obligatory nature of the October 23 Instruction, namely, compelling all teachers and staff at public schools in Tokyo to stand up towards the national flag (Hinomaru) and sing the national anthem 'Kimigayo'.

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. From the files of the case and the judgments of the District Court and the Tokyo High Court, 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. The qualifications by the Japanese courts that the action of Mr. Fujita 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*" (see also Supreme Court, 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.

One can consider that the Principal of Itabashi High School, being responsible for 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 while the defendant was distributing leaflets criticising a specific aspect of the ceremony to come, the organisers can be considered to 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 can be considered as a sufficient and justifiable action by the Principal, restricting the freedom of expression by the defendant in a proportionate and necessary way. Eventually the same applies to the action taken by the Principal to make the defendant leave the gymnasium hall where the ceremony was to take place. However, the subsequent and additional criminal prosecution and certainly the criminal conviction of the defendant for obstruction by force a business in accordance with 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 of the international human rights standards guaranteed under Article 19 ICCPR.

Summary

It is to be emphasized that in the case of Mr. Fuijta :

- 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 taking 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 may have a 'chilling effect' on the defendant and on those taking part in public debate in this matters.

It has indeed been recognised in the judgment of 30 May 2006 of the Tokyo District Court, that *"the obstruction of the graduation ceremony was not the direct purpose of the defendant"* and that *"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 give evidence that there were no relevant and sufficient reasons to charge, prosecute and convict the defendant in application of Article 234 of the Criminal Code.

The argument invoked by the Japanese authorities that the criminal conviction of the defendant in this case was applied as an *"inherent"* restriction of his right to freedom of expression in order to protect *"social welfare"*, cannot be regarded as a pertinent and sufficient motivation for justifying the necessity of that criminal conviction in the light of Article 19 ICCPR.

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. Fuijta 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. Instead of legitimizing its practice under the ICCPR, the reference to the Supreme Court judgment of 7 July 2011 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.