

Preliminary observations by the United Nations Special Rapporteur on the right to freedom of opinion and expression, Mr. David Kaye at the end of his visit to Japan (12-19 April, 2016)

Tokyo (19 April 2016) – Ladies and Gentlemen,

I would like to start by expressing my sincere solidarity with the Japanese who were affected by the two recent earthquakes and are struggling to recover from this recent tragedy.

At the invitation of the Government, I spent the past week in Japan to explore key components of the freedom of expression under international human rights law. During my visit, I met with high representatives of the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry for Internal Affairs and Communications, the Committee on Judicial Affairs of the House of Councillors. I also met representatives from the Cabinet Intelligence and Research Office, the Supreme Court, the National Police Agency, the Coast Guard, the National Center for Incident Readiness and Strategy for Cybersecurity, Public Security Intelligence Agency, and the Ministry of Education, Culture, Sports, Science and Technology. I am grateful for the work of the Ministry of Foreign Affairs in arranging official meetings and wish to thank all those officials with whom I met for their time and consideration, and I underline my desire to continue the dialogue initiated during this visit.

I also met with representatives of the Japan Broadcasting Corporation (NHK), as well as from the Japan Commercial Broadcasters Association, the Japan Newspaper Publishers & Editors Association, the Japan Magazine Publisher Association and the Japan Internet Providers Association. I also met individuals from civil society, including multiple non-governmental organizations, journalists, and lawyers. I am grateful to all of those who shared their perspectives and experiences with me over the past week, including the majority of journalists I met who requested anonymity out of concern for retaliation for sharing sensitive information.

I will present today only my preliminary remarks. I will prepare a fuller Mission Report to present to the Human Rights Council in 2017.

Introduction

Article 21 of the Constitution of Japan guarantees freedom of "speech, press and all other forms of expression" and prohibits censorship. That guarantee aligns with Article 19 of the International Covenant on Civil and Political Rights, which Japan ratified in 1979 and which protects everyone's right to seek, receive and impart information and ideas of all kinds. The importance of the right to freedom of opinion and expression is evident across Japanese society - in the richness of the arts, the breadth and depth of freedom on the internet and the regular protests one observes on the streets around government buildings. Indeed, Japan has real reason to be proud of the fact that it has one of the freest online environments in the world.

Yet across a range of areas, I learned of deep and genuine concern that trends are moving sharply and alarmingly in the wrong direction. This is especially acute in the context of ~~media independence~~. Japan has well-earned pride in a Constitution that expressly protects the freedom of the press. Yet ~~the independence of the press is facing serious threats: a~~ weak system of legal protection, persistent Government exploitation of a media lacking in professional solidarity, and the recent adoption of the Specially Designated Secrets Act are all combining to impose what I perceive to be significant challenges, especially to the mainstream media, where the vast majority of Japanese citizens get their news. Numerous journalists, many agreeing to meet with me only on condition of anonymity to protect their livelihoods, highlighted the pressure to avoid sensitive areas of public interest. Many claimed to have been sidelined or silenced following indirect pressure from leading politicians. A country with such strong democratic foundations should resist and protect against such interference. But my concerns are not limited to media independence, and I address these issues below.

In this statement, I highlight several areas of concern and identify some preliminary recommendations that I believe are essential to protect the independence of the media, promote access to information, and ensure the continuing vitality of the protections found in Article 21 of the Constitution and Article 19 of the ICCPR.

Media Independence

Japan enjoys a vibrant media with a diversity of voices. Article 3 of the Broadcast Act emphasizes the independence of the broadcast media, with which I will begin. The Broadcasting Ethics and Program Improvement Organization (BPO) seeks to implement a program of self-regulation. Despite these formal protections, a significant number of journalists I met feel intense pressure from the government, abetted by management, to conform their reporting to official policy preferences.

The Broadcast Act regulates both the public Japan Broadcasting Corporation (NHK) and commercial broadcasters, but rather than lodging authority over them in an independent third party, it is the Ministry of Internal Affairs and Communications that enjoys regulatory authority. The problems with this formal role are compounded by two factors: first, the Broadcast Act mixes elements of ethical obligation with government power, and second, current Government officials have repeatedly taken steps that are perceived by many in the broadcast media as intimidation. This view is not universally expressed; representatives from private media associations, in contrast to working journalists with whom I met, shared the belief that they are not under any pressure from the Government.

The Broadcast Act, in Article 4, lays down basic professional norms, providing that broadcasters "not harm public safety or good morals," "be politically fair," "not distort the facts," and "clarify the points at issue from as many angles as possible." These are fair expectations. But who should judge compliance with these broad and highly subjective concepts? I believe ~~the Government, any government, should not be in the position of determining what is fair. This is a matter for public debate and Japan already has a body responsible for self-regulation, the BPO.~~

The Government takes a contrary view -- expressed in February by the Minister of Internal Affairs and Communications, and confirmed by her subordinates -- that, under Article 174 of the Broadcast Act, it may order the suspension of a broadcaster's license if it determines a violation of Article 4 of the Act. Officials insisted that these remarks were merely a statement of law, not a threat, but I believe that, first, this legal view is not dictated by the Broadcast Act itself, and second, the statement has reasonably been perceived as a threat to restrict the media. I myself was asked repeatedly to comment on the Minister's remarks.

If the Minister's comments were isolated, I may be able to discount them in light of other factors. For instance, the Government has never suspended a broadcast license on the basis of programming content. However, other instances suggest genuine Government concern with the substance and tone of reporting. For instance, on 20 November 2014, the ruling Liberal Democratic Party leadership sent to broadcast networks a letter entitled "request for assurance of impartiality, neutrality and fairness of media reporting during the election." The letter asked for "neutrality and fairness" with respect to, for example, the number, speaking time and selection of guest speakers. The LDP wrote to TV Asahi less than a week later, criticizing a 24 November report on Abenomics on "Hodo Station" and demanding "fair and neutral programs." The letter mentioned that the program did not take into sufficient consideration the standard in Article 4(4) of the Broadcast Act.

I have also received reports that media, especially broadcast journalists, feel pressured through comments made by government officials in off-the-record sessions with media, the transcripts of which are widely circulated among journalists. For example, in an alleged off-the-record meeting with the press on 24 February 2015, Chief Cabinet Secretary Yoshihide Suga, while not naming names, reportedly criticized a television program for not being in compliance with his interpretation of the Broadcast Act.

Well-known broadcasters and commentators with reputations for tough questions have left long-term positions, allegedly because of an environment hostile to or fearing the consequences of criticism of the Government. This is surprising in an industry in which employees stay with companies for decades. One well-known commentator, Shigeaki Koga, alleged that, due to government pressure, he is no longer invited to appear on television programs.

Some interlocutors also expressed concern about pressures on NHK. The fact that the Diet appoints the members of NHK's Board of Governors, as well as approves the budget of the NHK, particularly when the Diet is so significantly controlled by one coalition, raises a perception that the broadcaster lacks independence. For example, at his inaugural press conference, Katsuto Momii, chairman of NHK, said: "It would not do for us to say 'left' when the government is saying 'right' [in international broadcasts]." This statement, later withdrawn by Mr. Momii, was taken by many as suggesting that the network's role is to advocate for government policies. The network's professional management team denied any such pressure, but widespread belief in it raises concerns and is said to influence programming and reporting choices.

Considering these concerns, I suggest a review of the current legal framework and, in particular, recommend the Government to repeal Article 4 and get itself out of the media regulation business.

The print media experiences similar problems. I have also received first-hand reports of newspapers delaying or cancelling the publication of articles, or demoting or transferring reporters after writing articles critical of the government. Several journalists told me that media outlets avoid covering topics that may lead to criticism by the government, such as the Fukushima disaster and historical issues such as "comfort women". A reporter was demoted and salary reduced after writing an article regarding the Fukushima plant manager's testimony.

The media bears a significant share of responsibility for its vulnerability. Indeed, if journalists in Japan had professional media-wide institutions of independence, solidarity and self-regulation, they would likely be able to resist with ease attempts at Government influence. But they don't. The so-called "kisha club" system or press clubs value access and exclusion, to the detriment of freelance and online journalism.

Media management develop close relationships with senior government officials, in which the regulator and regulated dine together at Tokyo restaurants. And yet no broad union of journalists brings together mainstream and freelance reporters, limiting the possibility of solidarity and advocacy and shared purpose. Nor does any press council independently self-regulate across all areas of journalism. Instead, journalists feel compelled to speak with me on conditions of anonymity, fearful that management will retaliate against them for raising their voices and lacking any independent body to protect them.

Compounding these concerns is something that often gets overlooked: the constitutional amendment reforms reportedly supported by the Liberal Democratic Party include revision of Article 21 to state that "engaging in activities with the purpose of damaging the public interest or public order, or associating with others for such purposes, shall not be recognized." This broadly-worded proviso is inconsistent with ICCPR Article 19 and suggests discomfort with the freedom of expression. Those in the media believe reasonably that it is directed toward them.

On the interference in history teaching and reporting

The perception of Government influence over media content extends to historical issues. During my visit, I learned of two situations related to the "comfort women" crimes of World War II. International human rights mechanisms have repeatedly called upon Japan to deal with the issue forthrightly, including the Human Rights Committee in 2014. The issue is among other things one of freedom of expression - both media freedom and the right to know.

First is the harassment of Mr. Takashi Uemura, one of the earliest Japanese journalists to interview "comfort women" in Korea. Mr. Uemura left his position as a journalist with Asahi Shimbun, which was facing attack for a series of reports by other authors to which

Uemura did not contribute (and that Asahi later retracted; Mr. Uemura's reporting stands). The university to which he moved faced pressures to remove him, and outside individuals threatened him and even his daughter with violence, including sexual violence and death. While Mr. Uemura received police protection, and some authorities supported the position of the University, this sort of case deserves a far stronger reproach by the authorities in support of the right of Mr. Uemura to carry out his essential work as a journalist.

The "comfort women" issue is also subjected to Government influence by authorities in the preparation of school textbooks. I met with officials in the Ministry of Education's textbook division, where I learned about the Textbook Investigation Council, a body whose members are ultimately appointed by the Minister of Education and which has the authority to evaluate textbooks based on specified standards. The Ministry noted that there is some reference to comfort women in several high school *world history* textbooks. Outside experts presented me with reports that references to comfort women are being edited out from junior high school textbooks, where the teaching of *Japanese history* is compulsory. In one instance, despite a reference to "comfort women," a disclaimer indicates the Government's contrary view that there was no forcible taking of women.

~~Government interference with how textbooks treat the reality of the crimes committed during the Second World War undermines the public's right to know and its ability to grapple with and understand its past.~~ The Government should not only refrain from interfering in the interpretation of historical events but also support efforts to inform the public on these serious crimes. One step might involve reconsidering how the Textbook Investigation Council itself could be insulated from government influence.

The Specially Designated Secrets Act

Every government must ensure the protection of information vital to national security and public safety while also providing mechanisms to guarantee the right of access to information. Japanese law includes mechanisms to protect the public's right to know, including the Act on Access to Information Held by Administrative Organs. But the Specially Designated Secrets Act ("SDS") goes further than necessary in protecting information from disclosure, putting in peril the public's right to know in areas of immense public interest, such as nuclear power, national security and disaster preparedness. My predecessor as well as the Human Rights Committee raised concerns about the process by which the Act was adopted and the ways in which it deals with the public's right to know. I raised the following areas as questions in meetings with officials who were very generous with their time and sincere in their belief in the Act, but I regret that concerns remain.

First, as the Human Rights Committee noted in its 2014 periodic review, the SDS does not in my view adequately define the matters that can be designated secret or the preconditions for classification. The Government's implementation standards have sought to clarify the four specific categories (defense, diplomacy, prevention of specified harmful activities, prevention of terrorist activities) under which information may be designated as secret, and I appreciate this effort. But the specific subcategories remain overly broad, and I

would urge continued work and vigilance to avoid the possibility that information may be designated as secret even if its disclosure would not jeopardize Japan's national security.

Second, the SDS puts journalists and their sources at risk of facing penalties. I recognize that Article 22 of the Act acknowledges the freedom of expression, a provision that one interlocutor called "better than nothing." It remains likely to concern journalists, who are after all not lawyers. Though officials explained that Article 22's use of the term "solely" should be understood to mean "mainly," I remain concerned about the way in which Article 22 would be interpreted by the Government in a case involving unauthorized disclosure. The Act further provides that a reporter's attempt to gain access to secret information will be protected if not deemed to have employed "extremely unjustifiable means," which are left undefined.

I was pleased to hear from officials that the Government does not intend to apply Article 25's harsh penalties to journalists, but the law should be so amended to eliminate any chilling effect on them. I also understand from our exchange that the unknowing disclosure of information by journalists will not be punished as long as the information is in the public interest and is acquired in the good faith and lawful pursuit of journalism. However, in keeping with the suggestion of the Human Rights Committee, I encourage the government to include an exception to guarantee that no individual - neither journalists nor government employees - is punished for disclosing information of public interest that does not harm national security.

Third, apart from protections available for improper designations, whistleblower protections more generally appear weak. This remains an area of some uncertainty, particularly the interaction of the general Whistleblower Protection Act and the SDS, but at a minimum, the provisions penalizing disclosures by those authorized to have access to designated secrets should include an exception for individuals who leak information with the good faith belief that the release of the information would be in the public interest and would not jeopardize Japan's national security.

Fourth, the oversight mechanisms established by the SDS are not sufficiently independent and are not guaranteed access to the information in order to determine the appropriateness of its designation as secret. The standing committees in the Diet are the only mechanism outside of the administrative branch with oversight ability (and my efforts to meet with their members were unsuccessful). The Government has discretion over whether to grant the Diet committees access to specially designated state secrets. Therefore, the committees appear left without sufficiently specific information to determine whether the designation of information as secret was appropriate. Further, the committees' recommendations are not binding in nature. The Lower House has called on the government to improve its accountability, and I encourage the Government to pursue this goal by establishing independent oversight boards equipped with experts.

Discrimination and Hate Speech

In recent years, Japan has been faced with an upsurge in hateful expression directed toward minorities. Discriminatory acts remain the root of the problem, and yet Japan does not have comprehensive legislation to combat discrimination. Both the Committee on the Elimination of Racial Discrimination in 2014 and the Committee on the Elimination of Discrimination against Women in March of this year recommended that Japan adopt anti-discrimination laws. Such legislation is the critical first step toward dealing with hateful expression: Japan must adopt a broadly applicable anti-discrimination law. The first answer to hate speech is to have a law that prohibits acts of discrimination. Once that is in place, broad Government action against hateful expression -- such as educational and public statements against hatred -- can have a real impact on the fight against discrimination.

I met with the Committee of Judicial Affairs at the National Diet and had the opportunity to learn about proposed legislation to combat hate speech against minorities. I commend the Committee members for their collaboration and for acknowledging the careful balance between discouraging speech that is harmful to vulnerable groups and respecting the right to freedom of expression. It is my understanding that the proposed legislation would be a step in creating a culture in which hate speech is not acceptable, while not criminalizing expression. When it comes to the prevention and elimination of hate speech, I encourage efforts focusing on education and counter speech.

Restrictions on Election Campaigns

I heard repeated concerns over longstanding restrictions imposed on political campaign activities. The Government does not apply the restrictions on internet campaigning, which is obviously vital to increase the public's ability to access candidate information and participate fully in political life.

However, the Public Office Election Act continues to impose restrictions on regular campaign activities. The Human Rights Committee has called Japan's attention to the need to repeal legislation imposing unreasonable restrictions on political campaigning, particularly as they are premised on the idea of protecting public welfare, as they undermine the right to freedom of expression and the right to take part in the conduct of public affairs. Campaign regulation may be permitted, in particular to ensure an open space in electoral process, but current restrictions appear unnecessary and disproportionate.

Digital Rights

I want to emphasize how important a model Japan presents in the area of freedom on the Internet. The country has a high level of internet penetration, and the government does not engage in content restrictions. The very low level of interference with digital freedoms illustrates the Government's commitment to freedom of expression.

As the Government considers legislation related to wiretaps and new approaches to cybersecurity, I hope that the spirit of freedom, communication security and innovation online is kept at the forefront of regulatory efforts. It is important that the Diet engage in

open debate regarding such efforts, and that the law respect standards for protecting the rights to privacy and freedom of expression. Legislation must stipulate that State surveillance of communications must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority. In particular, ~~the law should adhere to basic principles that ensure that any electronic or digital~~ surveillance not be applied on any discriminatory basis, such as to target or monitor minority groups.

The right to expression through public demonstrations

Japan enjoys a strong and admirable culture of public demonstration, sometimes involving quiet protests at street corners and sometimes marches whose small size is belied by the blaring of megaphones. Tens of thousands have been known to protest at the Diet. Nonetheless, some activists shared concerns about unnecessary restrictions on protest, recording of protesters, failure to deal with those who interfere with protests from the right-wing of the political spectrum, allegations of surveillance of the Muslim community, and other issues. I shared these concerns with members of the National Police Agency, who engaged in an open discussion with me. I remain committed to following these issues and continuing a dialogue about Japan's commitment to allowing full space for public protest.

I also shared my concerns about public protest in particular in Okinawa with the Coast Guard. I communicated to the authorities last year my concern regarding allegations of disproportionate restrictions on protest activity taking place in Okinawa. ~~I have heard credible reports of excessive use of force and multiple arrests. I was especially concerned by reports on the use of force against journalists filming the protests.~~ As much as the protection of national security provides for the implementation of restrictions in certain areas, careful review processes must be in place to avoid abuses. Here as well I intend to follow the situation in Okinawa carefully and express my concerns as necessary to encourage space for peaceful protest there.