Japan Federation of Bar Associations Update Report in response to the *List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of Japan*

I. Information in response to the *List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of Japan*

Constitutional and legal framework within which the Covenant is implemented (art. 2)

1. Please provide information on cases, and their outcome, where provisions of the Covenant have been invoked directly before the courts or administrative authorities of the State party since the examination of the fourth periodic report.

There are numerous cases in which attorneys have invoked the International Covenant on Civil and Political Rights ("the Covenant" or "ICCPR") before the court, and courts do recognize the Covenant as a binding domestic judicial norm. But ultimately, aside from the exceptional lower court precedents mentioned below, there have been no judicial precedents recognizing a violation of the Covenant.

Further, violation of an international treaty, including the Covenant, is not a mandatory ground of appeal in either a civil or a criminal case to the Supreme Court.[1] The Supreme Court may issue a leave to appeal, a kind of certiorari, to hear the case when it considers that the lower court judgment as to the Covenant "includes an important issue in the interpretation of law".[2] But no examples of leave to appeal have been granted thus far by the Supreme Court on the basis of violation of the Covenant. Both appeals and applications for leave to appeal have been summarily rejected on the basis that violations of the Covenant do not constitute mandatory grounds for appeal, or its alleged violations cannot be recognized as a basis for granting leave to appeal.

The grand bench of the Supreme Court found on 4 June 2008 that a provision of the Japanese Nationality Act which allowed a child born out of wedlock to a father with

1 Code of Civil Procedure, Article 312; Code of Criminal Procedure, Article 405.
2 Code of Civil Procedure, Article 318, Code of Criminal Procedure Article 406. The discretion to determine whether or not to issue a leave to appeal belongs to the Supreme Court.

Japanese citizenship and a mother without Japanese citizenship, when recognized by the father only after birth, to obtain Japanese citizenship only when the child's parents were subsequently married, violated the principle of equality before the law set down in Article 14(1) of the Japanese Constitution. However, one of the factors cited in support of this finding of unconstitutionality was the fact that "provisions exist in both the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child to the effect that children should not suffer any discrimination on the basis of birth". The Court found that "in light of the above changes in the domestic and international social environment surrounding Japan", by 2005 at the latest, the abovementioned provision in the Japanese Nationality Act was no longer reasonable. This was not a direct finding of violation of the Covenant, but rather was limited to the Covenant being taken into account as part of the background information to a finding of unconstitutionality. It is still, however, the first majority decision of the Supreme Court to proactively invoke the ICCPR.

There have also been the following lower court cases. In a case where an attorney was prevented by a prison officer from showing his client, the defendant, a video adopted as evidence in court during an attorney-client interview, the Osaka District Court found that the prison officer's actions were unlawful and unconstitutional. The actions were found to breach the relevant provisions of the Constitution from which Article 39(1) of the Code of Criminal Procedure on the right to attorney-client privacy of communication is derived, and the intent of Article 14(3)(b) of the ICCPR. [3] However, while the appellate court upheld the lower court judgment's conclusions, it declared it would not consider the ICCPR, as the matter was sufficiently resolved through interpretation of the Constitution and the Criminal Procedure Code provisions.[4]

There is also a case involving a Korean resident in Japan and former civilian member of the Japanese army who was wounded when consigned to the battle front. A lower court held that the decision by the State not to provide this individual with a disability pension under the nationality clause of the *Law to Assist Wounded Veterans and Surviving Relatives of Casualties of War and Others*, on the grounds that he was not a Japanese national might be in breach of Article 26 of the ICCPR[5], but the court did not ultimately award any compensation to the Korean plaintiff.

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[3] Judgment of the Osaka District Court, 9 March 2004, 1858 *Hanrei Jihō* 79.
[4] Judgment of the Osaka High Court, 25 January 2005, 52(10) *Shōmu Geppō* 3069.
[5] Judgment of the Osaka High Court, 15 October 1999, 1718 *Hanrei Jihō* 30.

As the above demonstrates, the response of Japanese courts to matters involving the ICCPR is extremely weak.

The Tokyo High Court decision of 3 February 1993 is an example of a judgment handed down prior to consideration of Japan's Fourth Periodic Report.[6] In that case, on appeal the Tokyo High Court found that the lower Yokohama District Court's order that the criminal defendant, who was convicted, must bear the costs of his interpretation services was a violation of Article 14(3)(f) of the Covenant. This may be said to be the only court judgment which has made an explicit, outright finding of violation of the Covenant.

Further, no records can be found of other non-judicial government administrative authorities invoking the Covenant.

2. Please provide updated information on the progress achieved and the time frame envisaged with regard to the establishment of an independent national human rights institution, in accordance with the Paris Principles (General Assembly resolution 48/134, annex) (See paragraph 1 of the report).

(1) As outlined in the Japan Federation of Bar Associations' *Alternative Report to the Fifth Periodic Report of Japan on the International Covenant on Civil and Political Rights* (hereafter "JFBA Report") (Chapter 1, Section 4), the Human Rights Protection Bill referred to in the Japanese government's report (para.1) as a bill to establish a national human rights institution ("human rights committee") did not comply with the Paris Principles.

(2) As a result of the Universal Periodic Review (UPR) of Japan, in its resolution of 30 May 2008 the United Nations Human Rights Council adopted the following recommendation on the establishment of a national human rights institution:

Paragraph 2 - "…establish a human rights institution in accordance with the Paris Principles as soon as possible" (Algeria, Canada, Mexico, Qatar)

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6 Judgment of the Tokyo High Court, 3 February 1993, Ministry of Justice Criminal Affairs Bureau Study Group on Cases Involving Foreign Nationals (ed.), *Foreign Nationals Criminal Cases Reporter* [*gaikokujin hanzai saiban hanreishū*], 1994 at 55.

Paragraph 3 - “Set up an independent mechanism for investigating complaints of violations of human rights (Islamic Republic of Iran)”.

The Japanese government responded by accepting these recommendations, and committing to follow up on them.

(3) However, the national human rights institution the Japanese government is now preparing to establish is based on the bill the government drafted in 2002. The JFBA has pointed out that the content of this bill does not meet the requirements of the Paris Principles, but the government has not altered its stance. For example, despite announcing it accepted the outcome of the Human Rights Council’s UPR and the recommendations made, the bill being prepared by the government retains the basic framework of the previous Human Rights Protection Bill without any changes. The new bill is no more than the old Human Rights Protection Bill with one part (the section on harm caused by the media only) revised. As the Asia Pacific Forum (APF) has already pointed out, the content of this bill does not meet the requirements of an independent national human rights institution and is not in compliance with the Paris Principles regarding the institution’s relationship to the Ministry of Justice, financial and personnel restrictions, the structure of its secretariat and the scope of the violations it would address.

(4) While the Japanese government’s move to establish a national human rights institution should be welcomed, the JFBA strongly urges the government to re-examine the issue to ensure its proposals comply with the Paris Principles.

3. Please provide updated information on the State party’s current position concerning its possible accession to the first Optional Protocol to the Covenant (para. 62).

The JFBA established the Ad Hoc Committee to Realize the ICCPR Individual Communication System in May 2007, and continues to campaign for ratification of the first Optional Protocol.

To date the Japanese government, on the other hand, has repeatedly explained that it is concerned ratifying the first Optional Protocol would create problems in connection with the independence of the judiciary. However, at its UPR by the Human Rights Council in June of this year Japan replied that aside from the second Optional Protocol

to the ICCPR, it would “consider concluding the remaining recommended human rights treaties”, including the first Optional Protocol. We would like the Committee to confirm with the Japanese government that this response indicates their position has now shifted to taking a more positive stance towards ratification of the first Optional Protocol.

4. In light of the Committee’s previous concluding observations (CCPR/C/79/Add.102, para. 8), has the State party lifted the restrictions which can be placed on the rights granted in the Covenant on the grounds of “public welfare”?

As described in the JFBA Report, there has been no reform and grounds of public welfare can still be used as a basis to restrict rights granted in the Covenant.

Discrimination and violence against women and domestic violence (arts. 2 (1), 3, 7, 26)

5. Please indicate whether the State party considers repealing discriminatory provisions from its Civil Code, including the prohibition for women to remarry during six months following divorce in the event that it is necessary to determine the paternity of a child and the difference in the minimum age of marriage for women (16) and men (18) (paras. 338-339).

As described in paragraph 361 of the JFBA Report, the government has still not taken any action to submit a bill to repeal these provisions. This is despite the fact it is now nearly 12 years since the government received an outline for a bill to partially amend the Civil Code, including removal of the above discriminatory provisions.

6. Please provide information on the measures taken to achieve equal representation, beyond the current goal of 30 per cent (paras. 80-81 of the report), of women in the National Diet, the cabinet, local assemblies, the judiciary, and leading positions in the public service at national and regional levels (see annexes III-VII of the report).

As described at paragraphs 376-384 of the JFBA Report, the government has merely quoted the abovementioned numerical targets. It has not taken any concrete action (particularly, pro-active affirmative action measures to address discrimination, i.e. positive action).

7. Please provide information on the measures taken to promote the employment of women in management positions in the private sector (paras. 84-85 and annex VIII of the report), including at senior levels. Has the State party considered such measures as special training for women, reviewing the career track based personnel system, facilitating the transfer from clerical to management track, and expanding the definition of, and increasing the sanctions for, indirect discrimination in the Law on Equal Opportunity and Treatment between Men and Women in Employment.

The situation is as described at paragraphs 363-374 of the JFBA Report.
Namely, 1) In the area of pro-active affirmative action measures to address discrimination (positive action) by private enterprise, under provisions of the amended Law on Equal Opportunity and Treatment between Men and Women in Employment (hereinafter "Equal Opportunity Law") which came into effect in April 2007, government action is limited to providing state assistance only to those business owners who disclose or try to disclose their status of implementation of positive action measures (para. 366). Currently, the percentage of companies engaged in pro-active affirmative action measures (positive action) to promote the full utilization of the abilities of women only just reaches 40% when both those companies who "have already been taking positive action" and those who "are planning to take positive action in the future" are combined (para. 370). 2) Regarding indirect discrimination, a provision prohibiting indirect discrimination was established for the first time in the amended Equal Opportunity Law in effect from April 2007. However, the prohibited forms of indirect discrimination do not include differing treatment of employees on the basis of their status as head of the household or based on different forms of employment such as part-time or contract employees (para. 366). 3) Regarding sanctions, there are still no provisions penalizing indirect discrimination.

8. Please indicate whether the State party considers reviewing the definition of rape in article 177 of the Penal Code, with a view to including spousal rape. What measures are being taken to protect and assist victims of gender-based violence, including female detainees, e.g. by strictly applying the rule that female officers must accompany female suspects, detainees and prisoners, introducing mandatory gender-sensitive training for the police, prosecutors, judges and other law enforcement officers, and ensuring counselling and immediate medical treatment, as well as access to mid-term and long-term shelters and rehabilitation programmes, for victims.

Since the 1980's courts in Japan have interpreted the definition of rape in Article 177 of the Penal Code to include spousal rape.

Measures to protect and assist victims of gender-based violence, including female detainees are as outlined in paragraphs 726 and 727 of the JFBA Report. Namely, as a rule the physical inspection of female detainees must be carried out by a woman, and where a female prison officer is not available the inspection can be carried out by a female staff member under the direction of a male prison officer. This is set out in the new Law Concerning Penal Institutions and the Treatment of Inmates (hereinafter "2005 New Law") passed in 2005 and in effect since 24 May 2006. However, there are no provisions prohibiting male prison officers from dealing with female detainees in other situations. There are also no legal provisions requiring the adoption of gender sensitive training for law enforcement officers, and it is no exaggeration to say that as far as measures for victims of gender-based violence go, state policy is non-existent.

9. Please indicate whether the State party intends to introduce minimum sentence requirements for the crime of domestic violence and to treat domestic violence as a criminal offence subject to ex officio prosecution. What measures are being taken to further strengthen the protection of and assistance to victims of domestic violence, i.e. by strengthening legal remedies, strictly enforcing and extending protection orders to include threats by phone and e-mail, increasing the number of shelters providing mid-term and long-term support and rehabilitation to victims, enabling foreign victims to stay in Japan after separation or divorce from their abusive spouses, and enhancing access to employment and cash assistance for single mothers? (See paragraphs 98-109 of the report).

The situation in respect of domestic violence is described at paragraphs 411-420 of the JFBA Report.

That is, excluding instances which constitute criminal assault, battery (inflicting physical injury) etc. under the Penal Code, domestic violence is penalized where there is a violation of a protection order under the Law for the Prevention of Spousal Violence and the Protection of Victims (hereinafter "Spousal Violence Protection Law"). Like the crimes of criminal assault and battery in the Penal Code, the crime of violation of a protection order under the Spousal Violence Protection Law does not require a formal accusation from the victim before it can be prosecuted. However, to date there had been

no research into the actual state of application of the Spousal Violence Protection Law (i.e. whether or not Spousal Violence Protection Law protection order violations are prosecuted ex officio regardless of whether formal accusations is brought by the victim) . It is commendable that under the revised Spousal Violence Prevention Law in effect since 11 January 2008, courts can now issue protection orders prohibiting harassment via email or telephone. But there are still insufficient protective facilities for victims, and no new resident status has been established to enable foreign victims to stay in Japan after separation or divorce from their abusive spouse. There are also no measures to enhance access to employment or increase cash assistance to single mothers etc..

10. Please indicate whether the State party considers amending the Prison Law (2006) to limit the systematic use of the Daiyo Kangoku substitute prison system for the prolonged detention of arrested persons in police stations for 23 days without the possibility of bail (paras. 236-237 of the report), as recommended by the Committee in its previous concluding observations. Please also provide information on the use of alternative measures at the pre-trial stage and on measures to ensure that all suspects have access to court-appointed lawyers from the moment of arrest (paras. 293-296), as well as to all relevant materials in police records after indictment (paras. 297-299)?

(1) The Substitute Prizon (*Daiyo Kangoku*) System

No measures were taken to restrict the use of substitute prisons in the 2006 legal reforms. There are no restrictions whatsoever on the length of time defendants or suspects can be held in substitute prisons, or the type of charge or nature of defendant or suspect who can be held in them.

The government emphasizes that there is already separation between the functions of detention and investigation. However the complete separation of these two functions is not clearly set out even in the Law Concerning Penal and Detention Facilities and the Treatment of Inmates (Prison Law (2006)). In actual fact, this law only prohibits an investigator engaged in investigations regarding a specific detainee from carrying out that detainee's custodial care. Consequently, there is no prohibition on a police officer in charge of investigations being involved in the transfer of detainees or other detention related duties generally.

Grave human rights violations continue to occur due to use of substitute prisons.

In March 2008, the Kokura branch of the Fukuoka District Court acquitted a female defendant of the charges of arson and murder which had formed part of the indictment against her (the "Hiki-noguchi case"). The main matter at issue in this case was the admissibility of trial testimony by the defendant's substitute prison cellmate, that she had heard the (female) defendant "confess" to murdering her brother and then committing arson. The cellmate was detained in the same substitute prison as the defendant (a cell at the **Fukuoka Prefectural Police's *Suijo* Police Station**). After her first indictment, the defendant was transferred to a detention centre. The defendant was later re-arrested for the crime of forcible obstruction of business, and detained in a substitute prison (a cell at the **Fukuoka Prefectural Police's *Yahata-nishi* Police Station**) where her former cellmate, who was also re-arrested, was also detained. The cellmate was subsequently continuously held in the substitute prison rather than being transferred to the detention centre, even after being formally charged. The female detention space at this substitute prison has a holding capacity of 2 persons, and for a period of over two months until the defendant was transferred to the detention centre, the defendant and her cellmate were the only two held in this substitute prison. During this time the cellmate was hardly interrogated at all regarding the alleged facts of her own case, and was subjected to police questioning almost solely regarding what the defendant said in the substitute prison. It was during this time that the cellmate's written statement was drawn up. The judgment criticized this technique by the police, "who could be said to have intentionally used the substitute prison to situate the defendant and her cellmate in the same cell with the aim of obtaining information via the cellmate for their investigations. The court has no choice but to impute that police custody in a substitute prison was used to further investigations." As a result "the defendant can be said to have been put in a position equivalent to undergoing interrogation by criminal investigative authorities, via the medium of her cellmate. The court is forced to conclude that physical detention in a cell, which should by all rights be differentiated from the issue of interrogation, was misused for the purposes of criminal investigation."

This case is a classic example of the investigative division and the detention division working as one to obtain a confession from a defendant through use of substitute prisons. There is no way of avoiding these sorts of negative effects as long as suspects are detained in substitute prisons managed by police.

Further, as the example of the Hiki-noguchi case demonstrates, because there is no upper limit on the length of time a suspect can be detained in a substitute prison, the aforementioned cellmate continued to be held in the same room as the defendant even after being charged, and was used hand and foot by the investigator. In addition, through repeated re-arrest and detention, a suspect can be held in a substitute prison for an extended period of time which far exceeds 23 days.

If, for example, the upper limit of time for police detention was set at 2-3days, quite clearly, it would not have been possible to employ the investigative technique used in this case.

(2) Alternative Measures to Custody at the Pre-trial Stage

The government asserts that a system of bail prior to indictment is not required, as the physical detention of suspects is extremely limited and systems are also in place to release suspects who are yet to be charged from detention.

However, if a request of detention is made by a public prosecutor after a suspect is arrested, it is hardly ever rejected by a judge. According to Supreme Court records, the percentage of rejected detention requests was 0.7% in 2006, and 0.99% in 2007. Further, the number of detainees bailed before the end of trial in the court of first instance was 13.5%. The percentage of defendants in detention at the time of their first hearing was 64.6%, of which only 15.0% were granted bail. In 2007 also, the number of defendants in detention was 64.8%, of which 15.8% were bailed. Accordingly, the current status quo is that the majority of defendants remain in custody at the time of trial.

Under the Code of Criminal Procedure, courts must revoke detention warrants where the basis or need for detention no longer exists. But according to the 2006 Annual Report of Judicial Statistics, only four suspects had their detention revoked prior to being charged in 2006. Courts can also suspend the enforcement of detention where deemed appropriate, by entrusting a suspect to the custody of their relatives or placing restrictions on their place of residence. But the number of suspects who had their detention suspended in 2006 was 83. By contrast, in the same year over 147,000 warrants for detention were issued. These numbers demonstrate the fact that the system for revoking or suspending detention

enforcement is almost non-functional prior to indictment.

Despite the fact that it can be up to 23 days between arrest and the laying of charges, there is no pre-indictment bail system and the systems for revoking and suspending detention do not function effectively. As a result, once arrested and detained, there is a high likelihood a suspect in Japan will lose their job and the basis of their livelihood. There is an urgent need, at a minimum, for a pre-indictment bail system.

(3) A System of State-appointed Counsel Immediately Following Arrest

In Japan, the period between arrest and indictment may be as long as 23 days, during which time a suspect can be held under police control (in a substitute prison). In addition, suspects are often arrested and detained on minor misdemeanors, and their custody (in a substitute prison) is used to interrogate them regarding other more serious crimes. As a result, it is extremely important that “all suspects” are guaranteed the right of access to state appointed counsel from the very “moment of arrest”, regardless of the nature of their alleged crime.

However not all cases are covered under the new system of state-appointed defense counsel which began in 2006. This system applies to crimes “punishable by death, or imprisonment for life, or a minimum term of not less than one year”. In addition, the state-appointed counsel can only be accessed once there has been a decision to detain. In most cases arrest is carried out by police, and 3 days pass between the initial arrest and the formal decision to detain. Where a suspect is arrested by a public prosecutor, it is usually 2 days between the arrest and the formal decision to detain. This reality is far from international standards which demand that suspects have access to counsel from “the moment of arrest”.

In the second phase (from 2009), this system will be expanded to also apply to crimes punishable by death, or imprisonment for life, or maximum term of more than 3 years, which include theft, assault, professional negligence resulting in death, fraud, blackmail etc.. But the system will still not apply to all cases where a person can be placed in custody.

After a suspect has been indicted, there is also no systematic guarantee of access to all police records related to their case. While it is true that the system of disclosure of evidence has been improved slightly (see the following section), even these

reforms are far from sufficient.

11. How, if at all, have amendments to the criminal law addressed the previous practice whereby there is no obligation on the prosecution to disclose evidence it may have gathered in the course of the investigation other than that which it intends to produce at the trial, and that the defence has no general right to ask for the disclosure of that material at any stage in the proceedings (CCPR/C/79/Add.102, para. 26)?

Application of the new system of evidence disclosure began with the entry into force of the amended Code of Criminal Procedure in November 2005. While this system is an improvement on the previous status quo, it is far from sufficient.

The right of a defendant or their attorney to petition for disclosure of evidence is recognized only in cases which are subject to pre-trial procedures to consolidate evidence. Even where a case is subject to these procedures, the right to petition for disclosure is limited to that part of the evidence which satisfies the disclosure requirements set out in the Code of Criminal Procedure. There are currently cases in which the views of the defendant's team and those of the public prosecutor differ regarding whether criminal investigation related documents fall under the category of "evidence" recognized by the Code of Criminal Procedure as being subject to petition for disclosure, and if they do fall under this category, whether or not this evidence satisfies the Code's disclosure requirements.

There is an unbridgeable gap between the means of evidence gathering available to criminal investigation authorities and those available to a defendant. From this perspective, in order to ensure the parties are in a position of substantive equality in criminal trial proceedings and to realize guarantees of the defendant's right of defense, a system should be established which provides for the prior disclosure of all evidence created or obtained by criminal investigative authorities in all criminal defense proceedings. Unfortunately however, there are no plans for these kinds of reforms.

<u>Right to life, prohibition of torture and cruel, inhuman or degrading treatment and treatment of prisoners, and right to a fair trial (arts. 6, 7, 9, 10 and 14)</u>

12. In light of article 6, paragraph 2, of the Covenant, what is the position of the State party in relation to the obligation that the sentence of death may be imposed only for

the most serious crimes (para. 129 of the report)? What is the status of the moratorium on the execution of death sentences? Does the State party intend to adopt legislation providing for the commutation of such sentences?

(1) Increasing Application of the Death Penalty

The death penalty should only be applicable to “the most serious crimes”, and the government has been urged to work towards restricting its application. Yet application of the death penalty has radically increased in Japan in recent years.

In the past, it was rare for the death penalty to be imposed where there were not multiple murder victims. In the 1990’s, the death penalty was not handed down in a single case where there was no more than one murder victim and the criminal defendant did not have a past conviction for murder. However in recent years there are an increasing number of cases where death penalty sentences are handed down even where there is a single murder victim and the defendant does not have any prior murder record. For example:

October 2004	Tokyo High Court imposed the death penalty, overturning the lower Maebashi District Court’s sentence of life imprisonment
March 2005	Tokyo High Court imposed the death penalty, overturning the lower Shizuoka District Court Numazu Branch’s sentence of life imprisonment
September 2006	Nara District Court handed down the death sentence in the Nara Schoolgirl Murder Case
April 2007	Tokyo High Court imposed the death penalty, overturning the lower Yokohama District Court’s sentence of life imprisonment.
May 2008	Nagasaki District Court imposes the death penalty

Of the above matters, the case in May 2008 involved a death sentence against an organized mob leader defendant for shooting the incumbent Nagasaki City mayor during an election campaign. Unlike before, there is an increasing likelihood that the death penalty will be imposed in cases with a major social impact, regardless of the number of victims. The range of cases to which the death penalty is applied is currently increasing at an alarming rate.

(2) Regressive Trend Away from a Moratorium

The number of executions has further increased in 2008.

From December 2007 onwards, the former Justice Minister Kunio Hatoyama enforced repeated death sentences at a rate of one every two months, and signed off on the execution orders of 13 people. This is the greatest number of executions carried out by a single Justice Minister since Japan reinstated the death penalty in 1993.

(Table)

Year	Executions		Date of Execution	Justice Minister	No. of convicted death sentences	Death sentences imposed at 1st trial	No. of inmates on death row (at year end).
1999	5	3	Sep. 10		4	8	50
		2	Dec. 17				
2000	3		Nov. 30		6	14	53
2001	2		Dec. 28		5	10	55
2002	2		Sep. 19		3	18	57
2003	1		Sep. 12		2	13	56
2004	2		Sep. 14		14	14	66
2005	1		Sep. 16		11	13	77
2006	4		Dec. 25	Jinen NAGASE	19	13	94
2007	9	3	Apr. 27	Jinen NAGASE	23	14	107
		3	Aug. 23	Jinen NAGASE			
		3	Dec.7	Kunio HATOYAMA			
2008 (as of Sep.1)	10	3	Feb. 1	Kunio HATOYAMA	9	4	105
		4	Apr.10	Kunio HATOYAMA			
		3	June 17	Kunio HATOYAMA			

1996-2006 The Public Prosecutor's Office Annual Report of Statistics (statistics to 2006)
2007-2008 Statistics: JFBA Research

(3) Commuting Death Sentences

In contrast to the increasing number of executions being carried out and death sentences being passed, there are no moves whatsoever towards establishing legal provisions to commute confirmed death sentences. As described in paragraph 529 of the JFBA Report, while an amnesty system for death row inmates does exist in theory, it has not been implemented for 30 years since a single death sentence was commuted to life imprisonment with labor in 1975.

13. What steps have been taken to introduce a mandatory appeal system for capital cases, enhance access by death row inmates to legal aid, guarantee the confidentiality of communication with counsel during appeal requesting retrial, and ensure the suspensive effect of re-trial proceedings or requests for pardon?

There has been no progress toward any of the above measures (a mandatory appeal system, accessible legal aid for death row inmates, the right of confidential communication with counsel for retrial appeals and ensuring re-trial proceedings and requests for pardon have a suspensive effect on executions), despite calls by the JFBA for their introduction.

In particular, practices which infringe on confidentiality of communications between death row inmates and their retrial appeal attorneys continue in many detention centers throughout the country, despite the JFBA's repeated demands for this to be remedied. The Ministry of Justice also continues to execute inmates, despite being aware that they are preparing an appeal for retrial, as a matter of normal practice. The execution of death row inmate Tsutomu Miyazaki in June 2008 is one example of this sort of case.

14. What steps, if any, are being taken to limit the frequent use of solitary confinement (para. 224 of the report), *keiheikin* ('minor solitary confinement') and *hogobo* ('protection cells') as punitive measures, to provide for an independent organ to review decisions imposing such measures (paras. 225 and 234), and to relax the rule under which inmates on death row are placed in solitary confinement, often for prolonged periods?

(1) Isolation

While the numbers have decreased, as outlined in paragraphs 708 and 713 of the

JFBA report, there are still prisoners who are subject to extremely long periods of “isolation”. The Law Concerning Penal and Detention Facilities and the Treatment of Inmates has imposed strict requirements on the use of “isolation”, as mentioned in paragraph 706 of the JFBA Report. While this should be assessed as a positive step forward, in addition to the “4 security categories” mentioned in paragraph 707 of the JFBA Report, confinement to a single person cell is used frequently, for example when a prisoner’s sentencing is finalized and they are awaiting transfer to other penal facilities, and for the period between being disciplined and being assigned to a specific workplace for work. JFBA finds it extremely concerning that there is an increasing tendency to employ these cases of effective “isolation”. It is difficult to grasp the true state of affairs on cases of effective isolation as,unlike legally defined isolation, they are not subject to a grievance mechanism (application for review).

(2) Use of Protection Cells

There is no end to the cases of individuals who, although rightfully requiring medical intervention, are placed in protection cells without careful consideration.

For example, a male prisoner in his 50’s who was being held at Tokushima Prison died in a protection cell on 24 June 2007. The previous morning, a patrolling prison officer noticed the man acting strangely, spilling his morning miso soup about on the floor and pacing in his cell, and transferred him to a special protection cell equipped with a surveillance camera. After lunch, a prison officer checking the surveillance cameras noticed the man was sitting motionless on the floor slumped up against the wall. The prison officer had him transported to an external hospital, but he reportedly died one hour later. Regarding the cause of death, the prison stated that “there is a strong suspicion he suffered an acute myocardial infarction (heart attack)”.

The law now proscribes that a doctor shall be involved when a protection cell is used. While it is not a legally required measure, inmates are also video-taped, as described at paragraph 703 of the JFBA Report. Yet, while a doctor’s views must be sought when an inmate is confined to a protective cell, because the doctor is not required to directly examine the inmate, it is possible to envisage a doctor’s views being sought over the phone or by other such means. Under these circumstances, it is not possible to confirm when the inmate’s condition indicates s/he is at risk. The

fact that there have been cases like the one mentioned above where inmates have died demonstrates that these methods of observation are not functioning adequately.

(3) Grievance Mechanisms and Complaints Review Panel

The punishments of isolation and solitary confinement to one's own cell are subject to an application for review, while it is possible to file a "Statement of Facts" as a grievance procedure in the case of confinement to a protection cell. But there are functional limitations to these review procedures. Firstly, the acts subject to review are highly restricted. In the case of disciplinary measures, a petition lodged after the period of disciplinary action is over will be rejected on the ground of failure to comply with the law due to a "lack of standing to challenge".

In cases where the Justice Minister intends to "dismiss" petitions as without merit, the views and advice of **the Review and Investigation Panel on Complaints by Inmates in Penal Institutions ("Complaints Review Panel")** are sought. But a matter does not come before the Complaints Review Panel for consideration if the petition itself is "rejected" outright for failure to comply with the law. The Panel, comprised of five experts who are doctors, lawyers, legal academics etc., is however actively engaged in activities within its purview.

Of the 593 complaints considered between when the Complaints Review Panel system began in January 2006 and May 2008, the proposed disposal of complaints was deemed appropriate in 574 cases, 43 matters were found to require re-investigation, and 11 proposed complaint disposals were found to be inappropriate. Total numbers do not add up to 593 as some matters appear repeatedly due to being re-investigated more than once.

While it is commendable that those serving on this Complaints Review Panel function independently of the Correction Bureau, it is difficult in practical terms for the Panel to conduct its own investigations as it does not have a separate secretariat under its direct control. There have also been 2 cases to date in which the Justice Minister has not respected the views of the Complaints Review Panel. This system must be re-formulated as a system with formal legal grounding, where the Panel gives advice the Justice Minister is obliged to comply with, is equipped with its own secretariat and has greater independence of personnel, and as an institution.

(4) Solitary Confinement of Death Row Inmates

As mentioned at paragraphs 541 and 541 of the JFBA Report, all death row inmates are held in single person cells, and there are no signs of this situation being remedied. There is also no information indicating that under the **New Law**, the individual separation of death row inmates has been reformed to allow for group interaction.

Cases Examined by the Review and Investigation Panel on Complaints by Inmates in Penal Institutions

No. of meetings	New cases considered	Proposed disposal of complaint deemed appropriate	Matters requiring re-investigation	Proposed disposal of complaint deemed inappropriate	Other
TOTAL (2-51 times)	593	574	43	11	7 (5 matters on hold)

15. Please provide information on measures taken, if any, to establish independent external mechanisms to inspect police detention facilities and penal institutions and to investigate complaints about torture and ill-treatment of inmates and detainees (paras. 175 and 228-235 of the report). Please also provide statistical data for the last three years on the number of complaints received under existing mechanisms, the number of investigations, the number and severity of sentences or disciplinary sanctions imposed on perpetrators, and any compensation provided to victims.

(1) Boards of Visitors for Inspection of Penal Institutions

The Boards of Visitors for Inspection of Penal Institutions (“Board of Visitors”) system launched in 2006 ensures that Bar Association recommended attorneys are always appointed as members of the Boards of Visitors. However, while there are few such cases, some boards’ work is conducted under the leadership of prison staff, meaning that the board does not function as an external inspection mechanism. There is still a need to ensure these boards are truly independent of penal institutions, and are provided with the infrastructure to allow them to carry out their activities effectively.

(2) Boards of Visitors for Inspection of Police Custody

By contrast, the government is yet to establish a system for the Boards of Visitors for Inspection of Police Custody, launched in 2007, that ensures Bar Association recommended attorneys are appointed to these boards.

During the system's first year in 2007, 33 boards from a total of 51 appointed attorneys recommended by Bar Associations. Of the remaining boards, some rejected the Bar Association's recommended board member and had their local Public Safety Commission separately recommend an attorney, or in the case of two boards, no attorney-at-law was appointed at all. In many cases where a Bar Association recommended attorney was not appointed, the alternative appointee was a former judge or public prosecutor who had later gone on to be admitted as an attorney at law. There is a trend toward further improvement in appointments for 2008, but the situation is still yet to reach the stage where Bar Association recommended candidates are systematically appointed to these boards. There are also numerous remaining problems with the system's operation. However, as the Committee against Torture pointed out in its 2007 recommendations, the first concern is to ensure a system where all boards accept board members recommended by Bar Associations.

(3) Review of Complaints

No structure similar to the abovementioned Complaints Review Panel for penal institutions set up by the Minister of Justice has been established for police detention facilities. On this point, the government has asserted that the review of complaints in respect of police detention facilities is carried out by prefectural Public Safety Commissions and that there is no issue with the independence of these commissions.

Yet, some of the actual jurisdictional powers of prefectural Public Safety Commissions are as follows:

- Approving the appointment and dismissal of senior members of the local police (those above police superintendent level)
- Proscribing the particulars of the Police Department's organizational structure.
- Make assistance requests to the National Police Agency and other prefectural police forces.

- Traffic control and issuing drivers licenses
- Licensing for food and entertainment, antique and secondhand and pawnshop businesses.

(taken from the Metropolitan Police Department website)

All of the above areas have nothing to do with the management and operation of police detention facilities. Furthermore, the actual clerical work of the prefectural Public Safety Commission is carried out by a secretariat which is housed within the prefectural police.

In other words, there are problems with the institutional independence of Public Safety Commissions. Furthermore, Public Safety Commissions are not familiar with the situation in police detention facilities. Accordingly, these organizations are not suited to the task of properly disposing of formal complaints, from a position independent of the government's public administration.

There is a need for a new independent institution comprised of external experts including attorneys, doctors and legal academics to be established, similar to the Review and Investigation Panel on Complaints by Inmates in Penal Institutions (Complaints Review Panel).

(4) Examples of Disciplinary Sanctions Against Staff for Torture or Ill Treatment

There are no documents made generally available to the public which provide statistics on the criminal sanctions or disciplinary measures imposed on perpetrators of torture or ill treatment. The JFBA anticipates the government's good faith response to this question.

There are no statistics on the application of the crime of Assault and Cruelty by Special Public Officers in the Annual Report of Judicial Statistics published by the judiciary. This may be thought to indicate that staff at penal facilities and police detention facilities are hardly ever charged under this offence.

16. Please indicate whether the State party considers introducing strict time limits for the duration of interrogations of detainees in police custody and ensuring systematic surveillance (para. 167 of the report) of, and the presence of counsel during, such interrogations (para. 166), as well as prompt access to medical services in police

detention facilities. Is it still the case that a large number of convictions in criminal trials are based on confessions (see CCPR/C/79/Add.102, para. 25)?

(1) Regulation of Police Interrogation Procedures

A large number of convictions in criminal trials are indeed still based on confessions. Case after case has revealed false charges being laid against the accused based on interrogations made while they were in substitute prisons. Examples include the Shibushi Case, the Kitagata Case and the Toyama Himi Case, which are described in footnotes 72-74 of the JFBA Report (paragraph 559), as well as the Hiki-noguchi Case, which is described in Item 10 of this report. Nevertheless, no efforts have been made towards introducing effective policies to supervise interrogations, for example by limiting the period that the detainee is in police custody or setting strict time limits on the duration of interrogations.

The JFBA has produced a documentary film based on the Shibushi Case entitled "Presumed Guilty -- Creating False Confessions" to call for transparency in interrogations and the abolishment of the substitute prison system. The JFBA has added English subtitles to the film so that a broader audience, including officials of the United Nations, can view it.

Currently, oversight is conducted by an internal police body, a situation that is completely inadequate. This policy of internal supervision rests on the same phony logic, as explained in Item 10 of this report, that argues that human rights violations do not arise in substitute prisons because there is separation between the police investigative division and the detention division.

On July 14, 2008, the Tokyo High Court rejected the public prosecutor’s appeal in the Fukawa Case (see description below) and supported opening of a retrial. In this case, two suspects had been forced to confess at a substitute prison, but after being sent to a detention center they retracted their confessions, after which they were again sent to the substitute prison. The court said that “there was a problem in placing them in a situation that made it easy to extract a false confession,” and harshly criticized the use of the substitute prison system as a method for obtaining false confessions. Failure of the public prosecutor to disclose evidence favorable to the accused was another serious problem with this case. The Public Prosecutor's Office, however, has objected to this decision and lodged a special appeal to the

Supreme Court, showing that Japan's investigative bodies are not sincerely reflecting upon the structures that give rise to false convictions.

Note: In August 1967 in Fukawa, Tone Town, Ibaraki Prefecture, two suspects were suspected of a burglary and murder. They were apprehended on a separate charge and forced to confess during interrogations at a substitute prison. Since the day the case was first tried, they have continued to plead their innocence. Their final appeal was dismissed in 1978, confirming their life sentence, but there was absolutely no physical evidence tying them to the crime. The basis for their conviction was weak, being vague eyewitness testimony and confessions that were noticeably inconsistent and changing. The Tokyo High Court supported the decision for a retrial handed down by the Tsuchiura branch of the Mito District Court on September 21, 2005, and dismissed the public prosecutor's immediate appeal.

(2) Medical Treatment in Police Detention Facilities

Cases of detainees dying in police cells are still common, with notable instances in 2007 involving detainees apprehended for driving under the influence of alcohol (see chart below). These cases raise doubts about whether the detainees were provided with appropriate and prompt medical treatment, as well as whether they could even endure such detention.

February 9, 2007 Nishi Police Station, Fukuoka Prefectural Police	The suspect (52) was apprehended by the Fukuoka police under suspicion for driving under the influence of alcohol. While at the Nishi police station detention facilities, on the evening of the 8th, his condition took a turn for the worse. He died in the early hours of the 9th at the hospital to which he had been moved. It was explained by the police that at around 11:55pm on the 8th, a police officer surveilling the facility via monitor noticed the resting suspect vomit. He was not breathing, so the officer tried to resuscitate him. After about 10 minutes, emergency workers transferred him to the hospital. The suspect had been off work since February 2005 due to alcohol dependency, and had been hospitalized from January 18 to February 1 that year for chronic pancreatitis. After apprehending him on the afternoon of the 8th, the police had made the suspect undergo a checkup at the same hospital he had been admitted to before, where it was determined that he was suffering from dehydration and impaired consciousness, but that if he replenished his liquids, it would not be a problem to detain him. At 6:30pm, he returned to the station, drank an isotonic drink, did not take any food, then lay down.	Asahi Shimbun and Nippon Television
February 12, 2007 Choshi Police Station, Chiba Prefectural Police	At about 6:30pm on the 12th, a police officer at the Choshi Police Station detention facility in Choshi City in Chiba prefecture discovered the suspect (64) passed out and not breathing. He had been apprehended on the 8th on suspicion of professional negligence resulting in injury and traffic law violations (driving under the influence of alcohol). An emergency worker rushed to the scene about 30 minutes later, but the suspect was already dead. After being apprehended, the suspect had continuously shouted and was unable to sleep, and hardly ate anything, so he had been sent to the hospital for a checkup on the 11th.	The Yomiuri Shimbun

November 6, 2007 Otaru Police Station, Hokkaido Prefectural Police	At about 10:15pm on the 5th, a car crossed a lane divider and collided directly with a minivan traveling in the opposite direction. Just after 1am on the 6th, the Otaru police apprehended the suspect (57) on the spot under suspicion for unsafe driving resulting in death and traffic law violations (driving under the influence of alcohol). The suspect was detained at a police station facility. At around 3am, a patrolling police officer noticed that he wasn't breathing and sent him to the hospital, where it was confirmed that he was dead. The police officer said that the suspect had complained of back pain at both the scene of the accident and at the police station. He was taken to a local hospital where he was x-rayed, but both times resulted in a diagnosis that nothing was abnormal. The police said that the suspect told them that he "suffered from a chronic slipped disk," but they apprehended him because he did not appear to have any external injuries. They said that "they are investigating the cause of death but there is no issue regarding the way this was handled."	The Yomiuri Shimbun

17. Please indicate whether the State party considers amending the Immigration Control and Refugee Recognition Act (2006) which currently does not explicitly prohibit deportation to countries where the deported person faces a substantial risk of torture or cruel, inhuman or degrading treatment or punishment.

Because treaties to which Japan is party have domestic legal force, and prevail over Japanese laws, any deportation of foreigners which violates Article 3 of the Convention against Torture should not be allowed. It is not explicitly clear however whether the application of Article 3 or other articles are examined as part of the deportation and applications for asylum procedures under the Immigration Control and Refugee Recognition Act.

The United Nations Human Rights Council in its Universal Periodic Review of Japan in May 2008 recommended that Japan harmonize its procedures for reviewing asylum decisions with the Convention against Torture and other relevant human rights treaties (A/HRC/8/44, No. 60(20). The Japanese government committed to follow up on this recommendation (A/HRC/8/44/Add.2), but as of this writing, it has not released a

concrete timetable for revising the Immigration Control and Refugee Recognition Act to remedy the abovementioned point.

18. What steps, if any, such as the establishment of independent inspection and complaint mechanisms, are being taken to improve the conditions in immigration detention and landing prevention facilities (paras. 7-9 of the report), where foreign nationals awaiting deportation have allegedly been abused, harassed and deprived of access to medical services? Please indicate how the State party ensures that these persons are not detained for prolonged periods (para. 172) and, unlike criminal suspects or convicts, are accommodated without separating families, preferably in open regime units, or released into the community pending their removal.

(1) Preventing Abuse/Harassment and Providing Medical Services

Since May 2006, the Boards of Visitors for Inspection of Penal Institutions, which are comprised of external members, have been able to directly receive and assess complaints from detainees in prisons and police custody, but no such body exists for immigration detention centers, which are also under the jurisdiction of the Ministry of Justice.

There have even been many reports of violence perpetrated by employees of the West Japan Immigration Detention Center in Ibaraki City, Osaka Prefecture. In May 1, 2001, five of the center's staff dropped their knees on the back of a Ugandan detainee who had been protesting of sexual harassment by one of the staff and beat him. In April 8, 2002 a Chinese detainee protested the fact that he wasn't allowed to make a phone call for his provisional release and was assaulted by several of the staff, resulting in broken bones in three places. The Osaka District Court ruled on January 21, 2003 on the former case and the Osaka High Court in May 29, 2008 on the latter case that damages were to be paid to the victim. Both these verdicts are final. In both these cases, the detainee, who resisted, was dragged from their cell by a number of the staff and suffered gang violence that seemed to serve as a sanction. The same staff were involved in the two incidents, indicating that they were not random events, and that the problem is systemic. Despite this, there is no indication that the center is providing training for or punishing the staff for their actions.

The Ministry of Justice has installed video cameras to prevent violence in immigration detention facilities. Indeed, in the two cases above, images taken using stationary and hand-held cameras were provided. However, in the case of the

Chinese detainee, for example, there were for some reason no images submitted showing the cause of the “staff’s suppressive behavior”, nor of the detainee being violent, as was asserted by the detention center. There are also no regulations regarding the taking of this video footage or the preservation of data. It cannot be said that installing video cameras is serving to prevent violence.

The above-mentioned detainee visited the doctor stationed in the center directly after the incident, complaining of severe pain. The doctor, without taking an x-ray, overlooked that there were bones broken in three places. Despite there being a doctor in the facility, the proper medical care, or the care required by the patient, the detainee, was not provided. There was a period when the West Japan Immigration Detention Center did not employ a long-term, full-time doctor. There is nothing being done to improve the situation in airport landing prevention facilities.

(2) Detention of Foreigners Prior to Deportation

If a decision to deport is made, in principle, the subject will remain in detention. This also applies in cases where the decision is contested. According to Japanese government guidelines, the general rule is that foreign nationals who are waiting to be deported are to be detained, but the concerned authorities have discretionary powers regarding whether to grant provisional release. The period of detention for foreign nationals awaiting deportation is not limited by law, nor have any rules regarding restriction of periods of detention been made public. In practice, there appears to be a trend toward shorter detentions, but about eight months of continuous detention is usual. There is no such thing as detention in an open-door facility in Japan, and we have no information regarding any future plans for such. If there is a deportation order for an entire family, it is not uncommon for only the male breadwinner to be detained and for family members to be separated. There are also cases of both members of a married couple being detained, in which case they are kept in separate rooms and not allowed to see each other. There have been cases of couples with babies being detained, in which the Immigration Control Bureau placed the baby in the care of a shelter for children without guardians.

19. What measures are being taken to remedy the problems of overcrowding and lack of personnel in penitentiary institutions in the State party (paras. 192-194 of the report)?

(1) To deal with overcrowding, penal institutions are being expanded, but the fact that staffing is not being increased to correspond with the higher number of detainees is a serious problem. This means that apart from overburdening the employees, detainees cannot be given adequate attention. On the other hand, there are no measures being taken to re-evaluate and reduce unnecessary detentions, which is more important. The parole system is not being effectively utilized, and the 2005 parole rate was only 54.7%. If we look at the sentence enforcement rates of those with fixed-term sentences who were granted parole, over half served more than 80% of their sentences.

(2) Currently, debate on the measures to counter overcrowding is underway in the Committee of Legislative Council of Ministry of Justice that deals with measures to achieve a proper level of prison population. The focus of this committee is to introduce community sanctions and measures, such as community service, a pre-indictment bail system, and for drug-related offenses, drug treatment programs that can be attended in lieu of imprisonment. However, many committee members are cautious in their views, and it not likely that they will reach a decision any time soon.

Elimination of slavery and servitude (art. 8)

20. Please provide updated statistical data on the number of women and children trafficked into the State Party for sexual exploitation, as well as through it to other destinations. Please also provide information on the measures taken to protect and de-criminalize victims of trafficking, i.e. by effectively prosecuting and sentencing traffickers, strengthening witness protection, granting special permission to stay under article 50 of the Immigration and Refugee Recognition Act to victims who have stayed in Japan for long periods, and ensuring that the risk that victims may face upon return to their country of origin is assessed by an independent body. What measures have been taken to enhance victims' access to effective remedies, shelters, rehabilitation, legal assistance, interpreters, social security and medical services (paras. 110-115 of the report)?

Such statistical data does not exist.

Further, as described in paragraphs 394-410 of the JFBA Report, when Japan was in the

process of ratifying the Convention against Transnational Organized Crime's Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, a series of amendments to laws were made to crack down mainly on the trafficking of women and children. These amendments focused on the punishment of perpetrators, and measures to protect victims and help them become independent were given insufficient consideration. The only concrete measure taken by the government to enhance victims' access to effective remedies, shelters, rehabilitation, legal assistance, interpreters, social security and medical services is that since April 2005, the Japanese government and prefectural governments pay private shelters a fee of 6,500 yen per day for each victim that comes to them through Women's Consulting Offices, for the service of offering temporary protection.

21. Please indicate whether the State party considers assuming any legal responsibility for the "comfort women" system of military sexual slavery under the former Japanese military regime before 1945, and whether it intends to investigate and prosecute perpetrators who are still alive, educate the general public on this issue, and provide compensation to victims as a matter of right, including in countries that were not covered by the Asian Women's Fund (1995-2007).

The Japanese government is not considering assuming legal responsibility in any way for the system of sexual slavery under the former Japanese military regime before 1945. It is also showing no intent whatsoever to investigate and prosecute perpetrators who are still alive, educate the general public on the issue, or provide compensation to victims as a matter of right.

The Japanese government's stance is clear from paragraph 19 of the addendum to the Report of the Working Group on the Universal Periodic Review of the Human Rights Council that was submitted to the UN General Assembly on June 17, 2008, where it states that it "continues to promote understanding in the international community with regard to the sympathy of the Japanese people represented by the Asian Women's Fund (AWF)." This may be what the Japanese government says in its public comments to international society, but comments regarding the "comfort women" system that are made by ruling party politicians, including the prime minister who came to power after that statement was made, show the opposite, tending to deny government responsibility under the former Japanese military regime.

Expulsion of aliens (art. 13)

22. Please clarify whether rejected asylum-seekers have access to effective remedies before an independent body for submitting the reasons against their expulsion and having their case reviewed (paras. 170, 281-282 and 286-287 of the report). Please also clarify whether such proceedings stay the execution of a deportation order and whether asylum-seekers have access to counsel, legal aid and certified interpreters throughout the asylum proceedings (paras. 283-285 and 294-296).

(1) Review of Objection by an Independent Body

At Japan's Universal Periodic Review, it was recommended that it "establish an independent body to review asylum applications" (A/HRC/8/44para 60 22), to which the Japanese government's only response was that "refugee examination counselors are appointed from among experts specialized in a broad range of fields and operate as a neutral, third-party institution to inspect refugee applications on a secondary basis" (A/HRC/8/44/Add.1para16). According to the 2004 amendments to the Immigration Control and Refugee Recognition Act (ICRRA), the Minister of Justice is required to consult with refugee examination counselors in deciding on objections filed regarding the rejection of an application for refugee status (ICRRA, Article 61-2-9 para. 3). Refugee examination counselors do not have decision-making powers. Further, their appointment is made by the Minister of Justice in a process that is not transparent. There is also no separate office to assist refugee examination councilors with their investigations. It cannot be denied that there have been improvements since the introduction of the refugee examination counselor system, but there is still no independent body in Japan to address grievances.

(2) Stay of Deportation Order during Grievance Process

In the case of refugee status being denied, deportation procedures are suspended until filing procedures for an objection are completed (ICRRA, Article 61-2-9 para. 3), but this is merely a deferment of the execution period, and does not require a reconsideration of the deportation decision.

(3) Legal Aid for Asylum Application Procedures

State-funded civil legal aid by the Japan Legal Support Center is not provided in most cases where an asylum seeker seeks a lawyer to assist with an asylum

application. This is because asylum applications are a pre-judicial procedure, and because even if the case goes to court, many asylum seekers do not posses residential status.

The Office of the United Nations High Commissioner for Refugees (UNHCR) and the JFBA have used their own funds to set up a system that provides asylum seekers with interpreters and lawyers by outsourcing this work to the Japan Legal Support Center. UNHCR funds, however, can only support a maximum of about 15 cases per year, strictly limiting the number of asylum seekers who can receive legal assistance. At the above-mentioned Universal Periodic Review, it was recommended that Japan provide legal aid for migrants who so require, which the State said that it would follow up on, but no concrete measures or timetable to improve assistance to asylum seekers have been provided.

(4) Using Certified Interpreters for Asylum Application Procedures

There is no public certification system for interpreters in Japan. In asylum application procedures, interpreters are provided by the authority processing the application. If, however, the asylum seeker can speak rudimentary Japanese or English, it is not uncommon for them not to be provided with an interpreter in their native language. Further, there is often also a problem with the quality of interpretation, even if an interpreter in their native language is provided. The records are written in Japanese, and because the words heard by the asylum seeker through the interpreter are not documented, even if he/she disputes the accuracy of the interpreting later, there is no record of it. Except in the case of detainees, translations are required to be attached to all paperwork submitted, including application forms, and the asylum seeker must bear the expense.

Freedom of expression; right to form and join trade unions (arts. 19 and 22)

23. In light of the Committee's previous concluding observations (CCPR/C/79/Add.102, para. 28), please indicate why, if it is not the case, the Central Labour Relations Commission is not willing to hear an application of unfair labour practices if the workers wear armbands indicating their affiliation to a trade union. (para. 333 of the report)

We are not aware of the reason of this practice, but the situation has improved slightly as a result of the Committee's recommendations.

In the event that workers wear armbands indicating their affiliation with trade unions, the Central Labor Relations Commission continues to require their removal. However, even if the worker does not remove the armband, application procedures are not suspended and investigations and inquiries still proceed.

Incitement to racial hatred (art. 20)

24. Please indicate whether the State party intends to adopt criminal law provisions specifically criminalizing incitement to national, racial or religious hatred or treating racist motivation of such offences as an aggravating factor.

We are not aware of any such intentions.

Rights of the child (art. 24)

25. What measures are being taken to combat child abuse (paras. 355-368 of the report), including sexual abuse of children, such as adoption of a comprehensive strategy for the prevention of child abuse, ensuring that reports on child abuse are effectively investigated, and perpetrators prosecuted and sentenced, providing adequate funding and qualified personnel to meet the increasing demand for recovery and counselling services, and raising the minimum age of sexual consent from its current level of 13 years?

The Japanese government enacted the Child Abuse Prevention Law in November 2000, whose amendment came into effect in October 2004; also, amended Child Welfare Law, enacted in November 2004, came into effect. Apart from these steps, however, it has not adopted a comprehensive strategy for the prevention of child abuse, ensured that reports on child abuse are effectively investigated, and perpetrators prosecuted and sentenced, or provided adequate funding and qualified personnel to meet the increasing demand for health recovery and counseling services. There has been no revision to the Criminal Code itself to raise the minimum age of sexual consent (in other words, the minimum age whereby the crime of rape requires a formal complaint from the victim for prosecution) from the current level of 13 years, but most prefectural governments in Japan have youth protection and education ordinances, so that in reality, one can be accused of violating these ordinances by having sexual relations with a girl under the age of 18 years, unless it can be proven that the act is the result of a serious romantic

relationship.

Equality before the law and equal protection of the law (arts. 2 (1) and 26)

26. Has the State party changed its position with regard to the concept of "reasonable discrimination", in light of the Committee's previous concluding observations (CCPR/C/79/Add.102, para. 11)?

As described in the JFBA Report, there has been no change in Japan's position regarding the concept of "reasonable discrimination."

27. Please indicate whether the State party intends to amend its legislation with a view to eliminating any discrimination against children born out of wedlock in particular with regard to nationality and inheritance rights (see paragraph 370 of the report) and to remove the concept of "illegitimate children" from legislation and practice.

Under the current Nationality Law, in the case of a child of a father with Japanese nationality and mother with foreign nationality if the child was recognized by the father after birth, Japanese nationality was not granted. In June 2008, however, the Supreme Court has held that the said provision of the Nationality Law was unconstitutional, and the Japanese government is now working on amending the law so that such children can obtain Japanese nationality.

Further, under the current Civil Code of Japan, if a child is born within 300 days of their mother obtaining a divorce, they are once assumed to be the child of the mother's previous husband, regardless of actual blood relations, and this is not limited to children born out of wedlock. (If the birth is registered, the child's parentage is also recorded as such in the family register.) To avert this, mothers would not register their child's birth, causing the societal problem of children without family registries, but recently the government has advised municipalities to at least allow residence registration, despite the lack of a family register. (As a result, one can have a residence registry without a family registry.) From the perspective of doing away with discrimination against "illegitimate children," this can be commended to some extent. This, however, does not indicate that the Japanese government intends to make the necessary legal revisions to eliminate the concept of "illegitimate children."

Rights of persons belonging to minorities (arts. 24 and 27)

28. Please provide detailed information on measures taken to ensure adequate opportunities for minority children to receive instruction in or of their language and about their culture, in particular as regards the Korean and Ainu minorities (paras. 378-383 of the report). What measures have been taken towards officially recognizing Korean and other minority schools, making available subsidies to such schools on a non-discriminatory basis, and recognizing their school leaving certificates as university entrance qualifications?

(1) Mother Tongue Education etc.

There is no instruction for minority children in or of their language or about their culture in the regular curriculum and compulsory classes of public schools. There are very few cases of minority children being instructed in their language at public schools, even in classes outside of the regular curriculum. There are also considerable reports of cases where the children of foreigners stop attending school because they cannot understand classes taught in Japanese. There are almost no measures to guarantee minority children have the opportunity to receive instruction in their language, or to receive instruction of their language and about their culture.

(2) Ethnic Minority Schools

There are no ethnic schools for the Ainu people. The situation in respect of North Korean schools and the attendant problems are highlighted in the JFBA Report.

In March 2008, the JFBA made a recommendation to the Japanese government. Donations to Chinese and North Korean schools by parents are not tax deductible, in contrast to Western international schools, where such donations are treated as tax deductable. In its recommendation, the JFBA pointed out that this discriminatory treatment has a serious effect on the operation of Chinese and North Korean schools, which rely upon donations for a large part of their working capital. The JFBA accordingly recommended that this discriminatory treatment be rectified.

Further, in respect of qualifying for university entrance, graduates of North Korean schools are the only students whose graduation does not automatically qualify them to sit university and technical college entrance examinations. Whether or not they qualify to sit entrance exams is determined by screening processes at each

individual university or technical college. The JFBA pointed out that as a result, a number of universities did not recognize graduates of North Korean schools as qualified to sit their entrance exams. The JFBA recommended that the government rectify this discriminatory treatment by certifying all North Korean school graduates as qualified to sit university entrance examinations.

The government is however yet to implement the above reforms.

(3) Resolution calling for Recognition of Ainu People as Indigenous Peoples

(i) UPR Recommendations

The following recommendations were made in Japan's UPR by the Human Rights Council in May of this year.

(a) Review the land rights and other rights of the Ainu population to harmonize them with the UN Declaration on the Rights of Indigenous Peoples

(b) Urge Japan to seek ways to initiate a dialogue with its indigenous peoples so that it can implement the UN Declaration on the Rights of Indigenous Peoples

(ii) The Japanese Government's Response

On 6 June 2008 a "Resolution Calling for Recognition of the Ainu People as an Indigenous Peoples" was adopted in the plenary session of the Japanese House of Representatives and House of Councilors. The content of that resolution is as follows:

(a) The government should, taking into account the *United Nations Declaration on the Rights of Indigenous Peoples*, recognize Ainu persons as an indigenous people, first inhabitants of the northern part of the Japanese archipelago and surrounds and Hokkaido in particular, who possess their own language, religion and distinct culture.

(b) The government should seize the opportunity presented by adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* and seeking the views of high level experts, make reference to the provisions of that Declaration to work towards establishing a comprehensive Ainu policy which further advances Ainu policy to date.

In the UPR, the Japanese government responded that it will plan policies in accordance with the Chief Cabinet Secretary's Statement, issued in response to the above resolution (UN Doc. A/HRC/8/44/Add.1, para.17)

(iii) Problems

Australia and Canada have made formal apologies to their indigenous peoples. Prior to the adoption of the above resolution, the Ainu Association of Hokkaido (*Utari Kyōkai*) submitted a petition calling for an apology from the Japanese government, but no apology has been made. The following sentence from the original draft of the above resolution was also deleted "the exploitation of Ainu persons as forced labor advanced their social and cultural destruction, and they suffered devastating impacts as a result of having their traditional practices restricted and prohibited under so-called 'assimilation policies'…" The resolution also fails to make any concrete reference to the nature of future Ainu policy. The Chief Cabinet Secretary's statement indicated that "we will consider establishing an 'Expert Meeting' in the Prime Minister's Office to hear the views of experts." But the actual method by which the government will "seek the views of high level experts" has not been clarified, and no provision has been made for hearing the views of Ainu persons themselves. It is completely unclear what sort of policy the Japanese government is planning to implement based on the above resolution and statement.

Dissemination of information relating to the Covenant and the Optional Protocol (art.2)

29. Please provide more detailed information on the steps taken to disseminate information on the Covenant and on the submission of the present report, as well as on the involvement of representatives of civil society and of minority groups in the preparatory process (paras. 28 and 35 of the report).

JFBA does not have information to submit on this matter.

II. Additional Points to those Raised in the *List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of Japan*

1. Medical Care in Penal Institutions

Recommendations Sought:

(1) The Committee is concerned about undue delays in the provision of medical assistance to inmates as well as the lack of independent medical staff within the prison system.

(2) A system should be promptly put in place to make copies of medical records available to inmates if they so require.

(3) The State Party should ensure that adequate, independent and prompt medical assistance be provided to all inmates at all times. It should also consider placing medical facilities and staff under the jurisdiction of the Ministry of Health.

Why These Recommendations are Sought:

(1) Outline of problems with the medical system in prisons

The biggest reform issue surrounding the criminal detention system in Japan is without doubt the prison medical system. Above all, the most serious problem is that in-house medical care is subordinate to the prison security system, so that appropriate and prompt treatment is not provided, and situations where the lives of prisoners are in question are common. This problem has become even more sharply defined in the course of the work of the Boards of Visitors for Inspection of Penal Institutions. In the recommendations issued by boards from each region, together with highlighting the shortage of personnel that has resulted from overcrowding, more than half of the boards have pointed out that appropriate medical care is not being provided.

The most common observation made is the lack of medical staff, particularly full-time doctors. A related issue is that before an inmate is diagnosed by a doctor, he/she first undergoes a screening with a prison officer, who is not medically trained, thus prompt medical care is not being provided. Further, the system for after-hours care is especially lacking, and the inability to deal with sudden ailments is a serious problem.

Regarding medical care, the board has pointed out the need to build an internal and external medical network and take measures to deal with cases whereby inmate must be taken to an outside hospital for urgent medical treatment The board also highlighted the issue of improving the adequacy of all medical staff, including nurses and pharmacists.

(2) Grave problems with the prison medical system, as symbolized by the Tokushima Prison Riot

The Tokushima Prison Riot symbolizes the serious issues that exist in Japan's medical system in penal institutions. In November 2007, these problems escalated into a prison riot whose main aim was to protest the lack of appropriate medical care.

A certain Tokushima Prison doctor (Dr. M) fully admitted that he did not treat prisoners like patients, and tended to use medical acts to cause pain and add to their punishment. Medical care was not provided and unnecessary rectal examinations and tests to check pain were carried out, resulting in deaths and serious injuries. Before this ended in a riot, the Board of Visitors for Inspection of Penal Institutions had made strong recommendations for the said doctor to undergo human rights training or be discharged from service, but the prison authorities did not do anything effective in response.

Fukuoka Prison was the same in that prisoners were not treated like patients, and the board pointed out that there were doctors who seemed to be using treatment to "make them suffer pain."

(3) Recommendations of the Committee against Torture regarding direction for reform

In May 2007, the Committee against Torture recommended the Japanese government to improve its medical system in penal institutions as follows: "The Committee is concerned at allegations of undue delays in the provision of medical assistance to inmates as well as the lack of independent medical staff within the prison system." "The State party should ensure that adequate, independent and prompt medical assistance be provided to all inmates at all times. The State party should consider placing medical facilities and staff under the jurisdiction of the Ministry of Health." (Recommendation 17)

The Committee thus recommended that Japan consider placing medical facilities and staff under the jurisdiction of the Ministry of Health, Labor and Welfare. It can be said that the serious challenges for medical reform in Criminal institutions can only be met if medical treatment in prisons is separated from the Ministry of Justice and transferred to the Ministry of Health, so that it becomes integrated with general medical care.

(4) Progress of government deliberations and requests to the Human Rights Committee
Unfortunately, this is not reflected in the government report submitted to the Human Rights Committee for review. However, the Japanese government is continuing to make efforts to reform the medical system in penal institutions. In some facilities established through the private finance initiative method and in part of regular public prisons, the government is looking into commissioning external medical institutions with all or part of medical care.

To date, this method has used the “Special Reform Zone” system as part of deregulation. At the Center to Support Social Rehabilitation in Mine City, Yamaguchi Prefecture, the municipal hospital is located within the prison grounds and aims to meet the needs of both prisoners and the local community.

Problems with the medical system in Japanese penal institutions can be seen through tragedies such as the Tokushima Prison Riot, but the direction for reform sought by both the JFBA and the government are generally the same, and we await policy decisions to be made at high levels of government.

In addition to highlighting problems in prison medical care, the JFBA strongly hopes that the Committee issues the similar recommendations as the Committee against Torture that were mentioned previously, which provide a clear direction for reform.

2. The Need for Reform in the Life Sentencing System

<u>Recommendations Sought:</u>

(1) Grant prisoners the right to request a parole review after the required period has been served
Once the parole requirement period set under Article 28 of the Criminal Code has

passed (10 years), inmates serving life sentences should be granted the right to have their case for parole reviewed regularly (we envisage once every two years).

(2) Make regional parole boards quasi-judicial bodies

Members of regional parole boards, which review applications for parole, are mainly appointed from among former employees of the Ministry of Justice. The boards should become a quasi-judicial bodies run mainly by judges and lawyers sent by the courts, with a high degree of independence from the Ministry of Justice.

(3) Grant prisoners serving life sentences the right to appoint counsel for parole procedures

Once the parole requirement period set under Article 28 of the Criminal Code has passed (10 years), inmates serving life sentences should be ensured the right to appoint lawyers for the parole procedure. If the inmate lacks the funds to this so, then he/she should be able to appoint a lawyer at the expense of the state.

(4) Hold parole review hearings

The prisoner and his/her lawyer should be able to request that the regional parole board hold a parole review that they can be present at, and ensure the right of the prisoner to make his/her views heard.

(5) Make parole review standards objective

At the parole review, rather than subjectively interpreting whether the prisoner "demonstrates repentance," primary consideration must be given to his/her behavior while serving the sentence. Whether or not the prisoner admits to the convicted crime should not be a factor in determining whether he/she can be released. Otherwise, those claiming they have been falsely convicted would lose the opportunity of parole. Also, while it is necessary to consider the feelings and opinions of the victim as appropriate, this cannot be thought of as a mandate reason to refuse parole. Parole standards should be determined by law, and not by ordinances of the Ministry of Justice.

(6) Institutionalize post-prison conditions and social support

Probation and Correctional authorities should work closely together to institutionalize social support offered after release. Securing jobs and housing for those released are primary objectives of such authorities, and social workers should

be appointed to execute these tasks. The fact that the prisoner has a place to go if released is a requirement in parole deliberations, but prisoners whose family and friends have passed away while they were serving their sentence, or whose prospects of going back to work are difficult due to old age, for example, should also be accepted. A public body for rehabilitation should also be established.

(7) Allow the filing of objections regarding decisions denying parole
Article 92 of the Offenders Rehabilitation Services Act allows objections to be filed regarding decisions made by regional parole boards, but because the denial of parole is not deemed to be a decision, a request for review cannot be made.

Why These Recommendations are Sought:

(1) Life imprisonment and the parole system
Under the Criminal Code, the penalty of life imprisonment allows the possibility of parole after 10 years of the sentence has been served.

The right of a prisoner to request a review for parole is not recognized under the law. Unless requested by the prison warden, a review will not take place. There is also no system set up to frequently assess whether a person serving a life sentence is eligible for parole.

Regional parole boards, which review whether parole is appropriate or not, are not judicial bodies but administrative ones. Many of their members are ex-employees of the Ministry of Justice and Public Prosecutor's Office, and there are not many with experience as judges or lawyers.

(2) Sharp increase in numbers of prisoners serving life sentences
The number of prisoners serving life sentences is rapidly increasing. At the end of 2007, there were 1,670 in number (see Annual Report of Statistics on Correction). A steady rise can be observed from 1991.

Changes in the number of people receiving final sentences of life imprisonment are as follows (see Annual Report of Statistics on Prosecution). Recently, life sentences have increased sharply in number, and are almost four times more common than 10 years ago. In this period, there have been no trends indicating an increase in or intensification of serious crimes such as murder. Thus, the rise in such convictions

can only be explained as resulting from tougher penalties requested by the public prosecutor and the accompanying decisions of judges.

Table 1

	Inmates serving life sentences	Newly admitted inmates serving life sentences	Parolees
1989	864	47	12
1990	888	34	14
1991	870	24	34
1992	873	28	20
1993	883	27	17
1994	894	33	19
1995	909	34	16
1996	923	35	7
1997	938	32	12
1998	968	46	15
1999	1002	45	9
2000	1047	60	7
2001	1097	69	13
2002	1152	75	6
2003	1242	114	14
2004	1352	119	1
2005	1467	134	10
2006	1596	136	3
2007	1670	89	3

(3) Fall in parole rates leading to literal “life sentence”

We can observe a general decline in the number of prisoners serving life sentences who are granted parole. However, since 1995, parole has not been granted unless over 20 years of the sentence has been served, and in 2005 and 2006, over 25 years.

There are about 1,700 inmates serving life sentences, with only three per year released on parole. On average, those granted parole have served over 30 years of their sentence. This situation is highly unusual, and a life sentence in Japan is, in essence, literal life imprisonment with no possibility of parole.

With no hope of being released, rehabilitation efforts don't make sense.

Parole reviews and decisions are extremely limited, and this shows that parole applications from the prison warden are extremely limited and that the regional parole board review is becoming stricter.

The reason for the extreme drop in numbers of prisoners on parole is not clear, but the Ministry of Justice gives the following:

(i) Stern public opinion regarding crime, in particular, harsh criticism for recidivism committed by prisoners on parole;
(ii) Strong demands by victims for serious penalties; and
(iii) Parole applications are becoming difficult to accommodate for various reasons, including aging of the prisoner's family, to which he/she would return if granted parole.

(4) Proposals for reform of the life imprisonment system

In essence, life imprisonment in Japan can be thought of as falling under arbitrary detention as defined under Article 9 of the ICCPR. It also violates Article 10 (3), which says regarding the treatment of prisoners that, "the essential aim... shall be their reformation and social rehabilitation."

The Committee should first request the release of all information about the situation of life imprisonment, and the clarification of grounds for policies that are sharply reducing the number of prisoners on parole to an unusual level, as well as the actual standards by which parole is granted to those serving life sentences. We believe that in addition, systematic reform is required. Changes should include granting prisoners the right to request a parole review after the required period has been served, making regional parole boards quasi-judicial bodies, granting prisoners serving life sentences the right to appoint counsel for parole procedures, allowing the prisoner and his/her lawyer to request the regional parole board to hold a parole review which they can be present, making parole review standards objective, institutionalizing social support through cooperation between the protection and correctional authorities, and allowing objections to be filed regarding decisions denying parole.

3. A dangerous situation for freedom of expression

(1) Introduction

As the JFBA Report points out in Chapter 10, there are many harsh restrictions to freedom of thought, conscience and expression other than the serious problem regarding labor union armbands. Article 19 of the Covenant has not been effectively implemented within Japan. We hope that the Committee can once again show strong interest in the true state of affairs in Japan.

In particular, at the beginning of the List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of Japan (para. 1), Japan is requested to provide information on cases, and their outcome, where provisions of the Covenant have been invoked directly before the courts or administrative authorities. This is an issue of extreme importance, but according to our findings, there is no case where Article 19 of the Covenant has actually been invoked in a Japanese court regarding freedom of expression. Progress on some of the main cases reported in the JFBA Report (Chapter 10) is described below.

(2) Court precedents when Article 19 of the Covenant was not invoked

A. The distribution of flyers by citizens (JFBA Report, paras. 729-738)

Recently, there has been a series of cases in which people have been arrested and indicted for the crime of trespassing because of their act of distributing flyers or leaflets containing political content in apartment blocks by inserting them into mailboxes in the entrance hall or into those fixed to the front door of each apartment (Tachikawa Case, Arakawa Case). It is very common for commercial advertisements to be distributed in this manner, yet we have never heard of such a case being prosecuted.

In the Tachikawa Case, three activists distributed flyers opposing the dispatch of the Self-Defense Forces to Iraq into the mailboxes of an apartment block housing members of self-defense force and their families. In March 2004, they were arrested and indicted for the crime of trespassing. The Tokyo District Court acquitted them at their first instance trial in December 2004, but the Tokyo High Court convicted them in December 2005. In April 2008, the Supreme Court also rejected their appeal.

In the Arakawa Case, a man distributed metropolitan assembly flyers in the

mailboxes of an apartment block in Tokyo and was arrested and indicted in December 2004 for the crime of trespassing. The Tokyo District Court acquitted him in August 2006 but the Tokyo High Court convicted him in December 2007, and the case is now pending at the Supreme Court.

B. The distribution of flyers by national government employees (JFBA Report, paras. 739-754)

Two government employees have been arrested and indicted successively for violating the National Civil Service Law which prohibits political activities, because they distributed flyers issued by political parties in apartment blocks in the districts outside their duties on their day off (Horikoshi Case, Ujibashi Case). The lawyers argued in these two cases that a uniform ban on all political activities by government employees was not in line with the proportional principle and violated Article 19 of the Covenant, but this was not accepted by the courts.

The Tokyo District Court convicted the defendant in the Horikoshi Case in June 2006 and the case is now pending at the Tokyo High Court.

The Tokyo District Court is expected to hand down its decision on the Ujibashi Case on September 19, 2008.

C. Textbook authorization (JFBA Report, paras. 755-774)

The JFBA Report cites the decision made by the Supreme Court on August 29, 1997 which said that, “Judging from the text of the provision, it is clear that Article 19 of the Covenant guaranteeing freedom of expression does not intend to deny a restriction that is reasonable and to an unavoidable extent on the grounds of public welfare. As the authorization in this case does not violate Article 21 of the Constitution that guarantees freedom of expression, the argument that the authorization goes against Article 19 should not be accepted.”

The reasoning that a regulation that does not violate the public welfare also does not violate the Covenant makes the error of interpreting the Covenant according to domestic law theory.

D. The issues of the rising- sun, Hinomaru flag, and the Kimigayo national anthem

(JFBA Report, paras. 797-809)

From the Meiji era until the end of the Second World War, the “Kimigayo” national anthem and the “Hinomaru” (rising sun) flag have been seen as spiritual pillars for militarism and imperialism, with the emperor as sovereign ruler. Thus, some people oppose the raising of the Hinomaru flag and singing of the Kimigayo on the grounds of their own conscience and beliefs.

In a case brought to court by teachers of a Tokyo metropolitan high school against the board of education to confirm that they are not under a duty to sing the national anthem or play it on the piano at school ceremonies, the Tokyo District Court ruled in September 2006 that they were under no duty to do acts that violated their freedom of thought and conscience. This decision secures the rights enshrined in Article 18(1) of the Covenant, but the board of education has appealed and the case is now pending before the Tokyo High Court.

The Supreme Court, on the other hand, has not been willing to recognize the right to freedom of thought and conscience. In a separate case contesting disciplinary action taken against a music teacher who refused the school principal’s order to play Kimigayo at the school opening ceremony, the Supreme Court ruled in February 2007 that the principal’s order did not infringe upon the teacher's freedom of thought and conscience and thus, did not violate Article 19 of the Constitution (same as Article 18(1) of the Covenant). There was however a dissenting opinion by one of the judges, who embraced the purpose of the Covenant.

E. Restrictions to Election Campaigns (JFBA Report, paras. 810-835)

The three judgments regarding the Oishi Case that are cited in the JFBA report typically display the lack of positive will of Japanese courts to invoke the Covenant. The courts are ignoring the testimony of former Committee Member Ms. Evatt regarding the interpretation of Article 19 of the Covenant. Japan explains that the matter of freedom of election campaigns is up to the legislative discretions of the State Party, but this violates its obligations under the Covenant (Article 2 of the Covenant, General Comment 31). This is a grave problem, and a full explanation from the government should be requested at the very review.

In particular, the Supreme Court decision in this case states that the full

prohibition of door-to-door canvassing is not in violation of Articles 19 or 25 of the Covenant, but does not explain the reasons at all. It is a matter of regret that such behavior refuses dialog with the Committee and goes against good faith in international community. (The three judgments regarding this case - the Oita District Court, the Fukuoka Appeals Court and the Supreme Court rulings - can be found in the JFBA Report Annex No. 9-12).

(3) Characteristics of court rulings in Japan

As can be seen from the examples presented above, it is characteristic of courts in Japan to make their rulings based on the logic that if the matter is not in violation of the Constitution, it is not in violation of the Covenant. However, following the Universal Declaration of Human Rights, the protection of basic human rights through the Covenant and international law has advanced, so Japanese courts must recognize the reality that there are occasions where the guarantees under the Covenant surpass those under the Constitution.

In its concluding comments after reviewing Japan's third periodic report, the Committee pointed out that it "believes that…. its (the Covenant's) terms are not fully subsumed in Constitution" (para. 8). Such concern dose still remain.