

ALTERNATIVE REPORT
TO THE FIFTH PERIODIC REPORT OF JAPAN
ON THE INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS

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JAPAN FEDERATION OF BAR ASSOCIATIONS
(JFBA)

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Introduction

1. In accordance with Article 40 of the International Covenant on Civil and Political Rights, the Fifth Periodic Report of the government of Japan was submitted in December 2006. The Japan Federation of Bar Associations (hereinafter referred to as “the JFBA”) has prepared this document as a NGO alternative report to the government’s report, and respectfully submits it here to the Human Rights Committee (hereinafter referred to as “the Committee”) to provide full information about the real human rights situation in Japan for the Committee’s fruitful consideration of the government’s report.

2. This report is basically organized in correspondence with the government’s report that has been drafted in the order of the articles of the Covenant. It also includes the other important issues not mentioned in the government’s report.

In line with the Committee’s quest, the JFBA has also tried to highlight what the government has been doing so far to deal with the concerns and recommendations previously expressed by the Committee. In addition, new issues have arisen during the past ten years that had not been discussed in the previous examination. The JFBA has taken up some of these new issues that it considers particularly important with respect to implementation of the Covenant.

3. Consequently, this report is organized as follows:

(1) Chapter 1, “General Issues”, comments on the extreme inadequacy of the government's report with regard to the issues previously pointed out by the Committee, specifically such unimplemented measures that are required for effective enforcement of the Covenant as ratification of the First Optional Protocol, establishment of the domestic human rights institution, and education of the judges about international human rights law.

(2) Chapter 2, “Rights of Foreigners and Minorities”, looks at the legislation which has placed further restrictions on the human rights under the Covenant of foreigners living in Japan on the pretext of counter-terrorism measures. It also comments on the serious issues that still remain and continue to violate the human rights of the disabled people, including the (former) Hansen’s disease patients, for whom the government’s report only partially describes the situation.

(3) Chapter 3, “The Rights of Women”, notes that despite the lengthy report on this issue of the government, the statutes that violate the Covenant with regard to waiting period required for women to remarry after divorce, minimum age for marriage, and a mandatory common surname for married couples, are yet to be revised. It also comments on substantial inequality still remaining in employment and taking public office.

(4) Chapter 4, “Rights of Children”, looks at the lowered age for juvenile to be subject

to criminal punishment, insufficient measures against child abuse and physical punishment, and the discrimination in civil law against children born out of wedlock.

(5) Chapter 5, “Right to life (Capital Punishment)”, provides the information on the practical application that is not mentioned in the government’s report.

(6) Chapter 6 describes the crime victims by raising the actual problems as against the government’s report only mentioning the institutional or formal measures for the crime victims, and points out the inadequate protection of crime victim’s rights called for by the Covenant.

(7) Chapter 7, which discusses the investigation and detention of suspects/defendants, comments on the substitute prison that has not been abolished in spite of the Committee’s recommendation, transparency of interrogation that has not yet been institutionalized, and other existing issues including restrictive interviews with defense counsels of detainees.

(8) Chapter 8, which states the rights of defendants in the criminal procedure, points out insufficient disclosure of evidence, and the violation of the Article 14 paragraph 5 of the Covenant that in terms of fact-finding and sentencing, there is no higher tribunal to review the judgment of the court of appeal which reversed the acquittal judgment of the first instance and rendered conviction.

(9) Chapter 9 reports on the issues with respect to the treatment of prisoners in the detention facilities. In this regard, many improvements have been seen including the new legislation that has set up “the Criminal Facilities Inspection Committee” in each custodial facility throughout Japan, although there still remain some issues as pointed out in this chapter.

(10) Chapter 10 notes the violations of Articles 18 and 19 that have newly come up, and reports on the cases such as crackdown by police on political flyer distribution, total ban on political activities by national government employees, and infringement of freedom of expression in the school textbook authorization system as well as the revised Broadcast Law and administrative directives against broadcast stations. Furthermore, with respect to the total ban on door-to-door canvassing during election campaign by the Public Office Election Law, which was taken up in the previous Committee consideration as infringing freedom of expression, the chapter reports that the law is still maintained and that courts have authorized such infringement.

4. The Committee stated in the Concluding observations adopted on November 5 1998 that it contravenes articles 19 and 22 of the Covenant for the Central Labour Relations Commission to refuse to hear an application of unfair labour practices if the workers wear armbands(paragraph 28).

5. Later on, the hearing by CLRC was resumed for any labor union under such situation as described below, which is an improvement in response to the view expressed by the Committee.

< Current situation >

6. The hearing begins with a practice in which CLRC says to a labor union, “Please take off the armband” and “We would like to make sure here that we have made a request to you”. The labor union replies, “Yes, we certainly heard your request. However, we are not able to take off the armband due to the reasons we have already reiterated”. CLRC then says, “Now we would like to begin the hearing”.

Thus, the hearing itself is conducted without problems and the previous condition where hearing does not proceed has been cleared off.

Chapter 1: General Issues

Section 1: Public Welfare (Articles 2 and 5 of Covenant)

A. Conclusions and Recommendations

7.

Despite the concern and strong recommendation issued for the second time by the Committee after the previous examination, Japan has been continuing to restrict comprehensively the rights guaranteed under the Covenant on the grounds of “public welfare”, and permitting restrictions that go beyond the scope admitted by Covenant. In this regard, Japan violates Articles 2 and 5 of Covenant.

The Japanese government should immediately revise the domestic legislations that unreasonably restrict the rights guaranteed under the Covenant, whereas Japan’s courts should apply the interpretations so that the domestic legislations conform to the Covenant.

B. Subjects of Concern and Recommendations of the Human Rights Committee

8. Concluding observations with regard to the examination of the 4th Periodic Report of the government of Japan (paragraph 8)

The Committee reiterates its concern about the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of “public welfare”. Following upon its previous observations, the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant.

<Note>In the Comments on the examination of the 3rd Periodic Report of the government of Japan , the Committee expressed its concern by stating “It is also not clear whether the ‘public welfare’ limitation of Articles 12 and 13 of the Constitution would be applied in a particular situation in conformity with the Covenant.”(paragraph 8) and “The Committee regrets that there appears to be a restrictive approach in certain laws and decisions as to the respect of the right to freedom of expression.”(paragraph 14) Nevertheless, Japan has not yet made improvements. The Committee has therefore taken a step from expressing concern toward “strongly recommending” the improvements.

C. The Government’s Response and its Fifth Periodic Report (paragraphs 11 to 14)

9. In its Fifth Periodic Report, the Japanese government only states that concerning the concept of “public welfare” in the Constitution, as explained in previous reports (CCPR/C/115/Add.3, paras.2-8 and annex , and HRI/CORE/1/Add.111, paras.64-68), human rights are not absolute and may be subject to restriction in their

inherent nature so that conflicting fundamental human rights can be balanced and each individual's rights can be restricted on an equal level. The description of its supplementary explanation is also identical to that of the Fourth Periodic Report. Thus, neither improvements nor progress is mentioned at all as a result of accepting the recommendation previously made by the Committee.

D. Position of the JFBA

10. 1. Even after the previous examination, Japan still restricts unreasonably the rights guaranteed under the Covenant on the grounds of "public welfare" -- the Japanese government fails to revise the domestic legislations so as to adapt them to the Covenant, and Japan's courts adjudge that application of such domestic legislations does not violate the Covenant.¹

11. 2. Japan gives account by stating "the concept of "public welfare" has been defined by court precedents on the basis of the inherent nature of each right, and the restrictions on human rights provided for by the Constitution closely resemble the reasons for restrictions on human rights provided for in the Covenant. Therefore, there is no room for arbitrary use of the concept of "public welfare" by the State."(paragraph 13) However, this is not an appropriate response to the Committee's recommendation.

12. 3. The Committee considers that restrictions of the right guaranteed under the Covenant may only be imposed for the purpose and within the scope specified by each article of the Covenant, and takes a position that such restrictions for any reason other than those aforementioned or on the grounds of domestic doctrines of legal interpretation should not be allowed.

Therefore, even if the rights guaranteed under the Covenant are also guaranteed under the Japanese Constitution, such rights should not be restricted on the grounds of "public welfare", and thus restrictions should only be permitted for the purpose and within the scope specified the Covenant.

13. 4. In cases where the rights guaranteed under the Covenant are also guaranteed under the Japanese Constitution, many courts ruled based on "public welfare", a domestic legal doctrine, that the restrictions do not violate the Constitution, thus for the same reason do not violate the Covenant, without using the test of "Principle of Proportionality" in weighing the purpose and necessity of the restrictions specified by the Covenant. The Supreme Court also authorizes such a stance.^{2 3}

¹ See chapter 10 section 3 of this report, a section regarding "Freedom of election campaign" citing the unsuccessful revision of laws and ordinances and the court decisions related to the Public Office Election Law that restricts door-to-door canvassing and/or document distribution during election.

² See chapter 10 section 1 of this report, a section regarding "School Textbook Authorization" citing the decision made by the Supreme Court on August 29 1997, with regard to an argument that authorization goes against

The bottom line is that, in judging the restrictions of the rights under the Covenant, the “General Comment” announced by the Human Rights Committee and/or the “Views” to individual communications are not respected, and that the domestic legal doctrines are relied on for considerations.

14. 5. The Japanese Constitution discusses the idea of “public welfare” based on “balancing test” and “reasonable relevancy”, so that it inevitably depends on the sense of value of those who make judgment and lacks definiteness. The standard of “unavoidable extent” is vague. In this regard, restrictions tend to be allowed as a consequence of prioritizing national interests over individual human rights. Such tendency appears in the court decisions dealt with in this report as an example of issues including school textbook authorization with regard to freedom of expression and freedom of election campaign.^{4 5}

15. 6. On the other hand, to judge necessity to restrict the rights under the Covenant, the Committee relies on the “Principle of Proportionality” to specifically demand verification of existence of harms or threats that require restrictions. It also objectively considers whether or not such threats and restrictions are proportional to each other, and therefore strictly examines restrictions. It is thus generally considered that human rights are better guaranteed under the Covenant than under the Constitution interpreted by the Supreme Court.⁶

In this regard, Japan’s reports states that “the restrictions on human rights provided for by the Constitution closely resemble the reasons for restrictions on human rights provided for in the Covenant. However, that is not the case with the current court

Article 19, which stated “Judging from the text of the article, it is clear that Article 19 guaranteeing freedom of expression does not intend to deny 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.”

³ See chapter 10 section 3 of this report, a section regarding “Freedom of Election Campaign”, citing the decision given by the Hiroshima High Court to Hourai case (April 28 1999), which stated that restrictions on the door-to-door canvassing and/or document distribution do not violate the Covenant on the same grounds as they do not the Constitution. The Supreme Court endorsed the decision (September 9 2002). These two decisions were given after the Committee issued the concluding observations on the previous examination.

⁴ Cf. supra note 3. The aforementioned decision given by the Hiroshima High Court stated “The benefit from securing freedom and fairness of election by restricting door-to-door canvassing and/or document distributions surpasses that lost by restrictions”.

⁵ See a section in this report, regarding “Freedom of Election Campaign”, citing the decision given by the Oita District Court to Oishi case (January 12 2006), which concluded that it was necessary to restrict door-to-door canvassing and/or document distributions by relying on the standard of “reasonability” and not by applying the Principle of Proportionality.

⁶ See the aforementioned section regarding “Freedom of Election Campaign”, citing the Oishi case, in which Mrs. E. Evatt, a former member of the Committee explained the meaning of General Comments 10 and 25, and then testified in detail that by restricting the entire door-to-door canvassing and substantial document distributions, Japan’s Public Office Election Law violates Articles 19 and 25 due to failure to conform to the Principle of Proportionality. Nevertheless, the Oita District Court ruled that these restrictions did not violate the Covenant. In addition, the Fukuoka High Court gave a decision in the appeal that the restrictions of the rights under the Covenant were left to the discretion of the Parliament that considered various conditions of the country.

interpretation in Japan.

16. 7. Regarding the vague concept of “public welfare”, Professor Nisuke Ando, a former chairman of the Committee, has proposed to apply the specific restrictions provided for in the Covenant to the interpretation of Japanese Constitution in order to clarify the concept of “public welfare”.⁷

17. 8. The State Parties that have ratified the Covenant have an obligation to respect and ensure the rights under the Covenant. The obligation is a legal one under the Covenant and binding on the State Parties as a whole including their judiciary. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.⁸

18. The Japanese government, therefore, in accordance with the recommendations by the Committee, should revise the domestic legislations that unreasonably restrict the rights under the Covenant. At the same time, Japan’s courts should apply the interpretation so that the domestic legislations conform to the Covenant.

Section 2: The Principle of Equality and The Tolerance of “Reasonable” Discrimination

A. Conclusions and Recommendations

19.

1. Japan should amend the legislation and/or practices that violate Article 2 Paragraph 1 and Article 26 of the Covenant, without relying on the interpretation of “reasonable discrimination” that is adopted by Japan’s Supreme Court with respect to equality principle although is not based on objective criteria.
2. Japan should amend both Codes of Criminal Procedure and Civil Procedure and add the violation of human rights treaties as a mandatory ground for appeal to the Supreme Court, in order to allow the Supreme Court to function as a forum for guaranteeing rights provided for in the human rights treaties.

⁷ “Review of ‘public welfare’ as a cause to restrict human rights” Nisuke Ando, *Hougaku Ronsou*, Volume 132, No. 4, 5, and 6, published by Kyoto University, 1992; “... in order to clarify ‘public welfare’ mentioned in the Japanese Constitution, there would be no problem in directly applying provisions of in the Covenant. ... in order to clarify ‘public welfare’ mentioned in the Japanese Constitution, application of limitation clauses specified in the Covenant not only guarantees that Japan does not violate the international legal obligation which Japan has had by ratifying the Covenant, but also seems to be very useful in interpreting and applying human rights provisions of the Constitution in a more universal manner.”

⁸ General Comments 31, paras. 3, 4, 14, and 15.

B. Subjects of Concern and Recommendations of the Human Rights Committee

20. The concluding observations on the Fourth Periodic Report (paragraph 11)

The Committee is concerned about the vagueness of the concept of “reasonable discrimination”, which, in the absence of objective criteria, is incompatible with Article 26 of the Covenant. The Committee finds that the arguments advanced by the State party in support of this concept are the same as had been advanced during the consideration of the third periodic report, and which the Committee found to be unacceptable.

21. The Committee on Economic, Social and Cultural Rights comments as follows in their concluding observations dated September 24, 2001 on the Japanese government’s Second Periodic Report

The Committee expresses its concern that the State party interprets the principle of non-discrimination as being subject to progressive realization and to “reasonable” or “rationally justifiable” exceptions.(paragaraph12)

The Committee requests the State party to take note of its position that the principle of non-discrimination, as laid down in Article 2 (2) of the Covenant, is an absolute principle and can be subject to no exception, unless the distinction is based on objective criteria. The Committee strongly recommends that the State party strengthen its non-discrimination legislation accordingly.(paragraph 39)

C. The Government’s Response and its Fifth Periodic Report

22. Regarding the aforementioned concerns expressed by the Committee about Article 26 of the Covenant, the Government has continued to ignore the issue without any explanation, efforts for improvement, or rebuttals noted in its periodic reports.

D. Position of the JFBA

1. Interpretation on the principle of equality

23. Under Article 26 of the Covenant, any and all discriminations shall be banned in principle. They are only tolerated “if the criteria for such differentiation of the treatment are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”. (General comment 18, paragraph 13)

2. The Government’s response

24. Even after the Committee’s concluding observations above was made in public,

the Government has taken no measures at all to redress the situation where discriminatory legislation and/or practices are left as they are on the ground of “reasonable discrimination” that lacks objective criteria. In addition, as is seen in the court decisions, the Japan’s courts make a judgment of permitting such discriminatory legislation and/or practices by regarding them as “reasonable”, while continuing to lack objective criteria. About these circumstances, the Committee on Economic, Social and Cultural Rights expresses its concern and recommends reinforcing legislation to ban discrimination.

3. The Supreme Court’s interpretation with respect to the principle of equality

25. The Japanese Constitution, in Article 14 Paragraph 1, guarantees the principle of equality by providing that “all the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin”. The Supreme Court, in its interpretation, has expanded the target for such guarantee by not limiting to “Japanese nationals”, whereas it also maintains that it is “unreasonable discrimination” that is banned by the Constitution and thus the distinction recognized as “reasonable discrimination” does not violate Article 14 Paragraph 1.

26. The Supreme Court, however, has justified the discriminatory legislation and/or practices by recognizing them as “reasonable discrimination”, without clarifying what constitutes reasonable discrimination or based on what kind of criteria reasonability should be judged. For example, the Supreme Court has made a decision as below on discriminatory division of inheritance to children born out of wedlock, which will be later examined in detail:

“Because legal marriage is a part of the current Civil Code, the above provision should be regarded as having a reasonable basis. The reasons for establishment of this provision and its specifying as the legal inheritance for the child born out of wedlock one-half that of the child born in wedlock cannot be held to be grossly unreasonable or exceeding the bounds of the reasonable discretionary power given the legislature. This provision cannot be found to constitute unreasonable discrimination, and therefore is not in violation of Article 14 paragraph 1 of the Constitution.” (Supreme Court decision of July 5, 1995 (Grand Bench))

27. In the case where the Japanese government refused payment of military pensions to the Taiwanese residents who had been members of the Japanese armed forces when Taiwan had been annexed to Japan before World War II, giving the reason that they had lost Japanese nationality after the war, the Supreme Court made a decision as below:

“[Restriction of military pensions to Japanese nationals] can be interpreted as being

based on the fact that the problem of compensation to Taiwanese residents who were members of the Japanese armed forces was scheduled to be resolved through negotiations between the two governments. This should be regarded as constituting an adequately reasonable basis. Consequently, even though discrimination has occurred between former military members having Japanese nationality and former military members who were residents of Taiwan as a result of the nationality requirement, because it is based on the above grounds ... it cannot be said to be in violation of Article 14 of the Constitution.” (Supreme Court decision of April 28, 1992 (Third Petty Bench))

4. The Supreme Court’s response to the claim of a violation of Article 26 of the Covenant

28. In cases where discrimination is at issue, the plaintiffs have often invoked Article 26 of the Covenant, together with the principle of equality of the Constitution. The Supreme Court in such occasions has either made no judgment on Article 26 of the Covenant, or provided no remedies through application of Article 26 based on the decision that it should guarantee no more than the principle of equality in the Constitution.

29. For example, in the aforementioned decision made by the Supreme Court on discriminatory division of inheritance to children born out of wedlock, the Supreme Court rejected an appeal without making any judgment about violation claimed by the party of Articles 24 and 26 of the Covenant. With respect to the discrimination under the pension law described above, the Supreme Court again made no judgment at all about violation claimed by the party of Article 26.

30. The Supreme Court also maintained in its decision shown below on the system of fingerprinting imposed by the then Alien Registration Law on the foreigners living in Japan:

“The fingerprinting system intended for the alien residents in Japan holds reasonability, necessity, and validity for the above purposes. The aliens who are not a part of the family registration (koseki) system have a difference in terms of social facts from Japanese citizens, and difference in treatment between the aliens and Japanese is based on reasonable grounds. Article 14 of the Alien Registration Law, therefore, does not violate Article 14 of the Constitution. ... Given the aforementioned reasons, it is impossible to take Article 14 of the Alien Registration Law as being in violation of Articles 7 and 26 of the International Covenant on Civil and Political Rights.” (Supreme Court decision of February 22, 1996 (First Petty Bench))

Incidentally, this fingerprinting system was abolished later.

31. The Supreme Court thus made a judgment on Article 26 of the Covenant by

immediately applying the same domestic doctrine as that of constitutionality.

32. On the other hand, it should be noted that with respect to discriminatory division of inheritance to children born out of wedlock, two judges expressed dissenting opinions in the decision dated March 28, 2003 of the third petty bench of the Supreme Court as below:

“In the international community, the Human Rights Committee of the United Nations examined the Fourth Periodic Report submitted by Japan in accordance with Article 40 of the International Covenant on Civil and Political Rights, and in their concluding observations of November 1998 expressed continued concerns again following the previous examination over discrimination of children born out of wedlock with regard to right to inherit. It reaffirms the position that all children should be equally protected in compliance with Article 26 of the Covenant, and recommends Japan to take necessary measures to revise laws including Article 900, paragraph 4 of the Civil Code.”

5. Measures Japan should take under Article 26 of the Covenant

33. The Supreme Court’s interpretation of permitting “reasonable discrimination” that lacks objective criteria with regard to the principle of equality has resulted in recognizing a discrimination that would not be tolerated under Article 26 of the Covenant. The Japanese government, as a party to a lawsuit, also has invoked the Supreme Court’s such interpretation, and backed by that it has left discriminatory legislation and/or practices as they are without correcting them. The Government, therefore, should primarily take actions to amend legislation and/or practices in violation of Articles 2 and 26.

34. One of the major obstacles that prevents guarantee by the human rights treaties from being applied in Japan’s domestic courts is that the Supreme Court does not have a duty to make judgments on the point of issue related to the human rights treaty. In both criminal and civil proceedings including administrative lawsuits, the mandatory ground for appeal to the Supreme Court is limited to unconstitutionality, and whether or not to judge the point of issue related to the international customary law or human rights treaty is not mandatory and left to the Supreme Court’s discretion. Thus, under the present system, the Supreme Court is able to reverse the conclusion without making any decision on human rights treaty even if the lower courts decide that a certain ordinance/disposition violates human rights treaty. Moreover, even though the lower courts’ judges make an interpretation or judgment on an argument presented by the party citing the international customary law or human rights treaty, the Supreme Court does not provide the unified function for the interpretation or judgment, which puts not only the party to the case but also the lower courts’ judges to a difficult situation. These problems leave the Supreme Court no other option than to change its attitude and

willingly make a decision on the issues related to human rights treaty, or to be provided with legal obligation to judge such issues.

Section 3: Japan's anti-Covenant attitude (Article 2)

A. Conclusions and Recommendations

35.

The Committee expressed concerns and recommendations on many issues in its concluding observations on the Third and Fourth Periodic Reports. Japan should follow such recommendations and faithfully comply with the Covenant.

B. Subjects of Concern and Recommendations of the Human Rights Committee

36.

1. Concluding observations in the Fourth Periodic Report (paragraph 6)

“The Committee regrets that its recommendations issued after the consideration of the third periodic report have largely not been implemented”.

Following this comment, the Committee raised various specific issues in paragraphs 7 through 33, expressed its concerns over Japan's failure to implement the Covenant, and recommended improvements.

2. Concluding observations on the Third Periodic Report (paragraph 8)

The Committee believes that it is not clear that the covenant would prevail in the case of conflict with domestic legislation and that its terms are not fully subsumed in the Constitution.

Following this comment, the Committee raised various specific issues in paragraphs 9 through 19, expressed its concerns over Japan's failure to implement the Covenant, and recommended improvements.

C. The Government's Response and its Fifth Periodic Report

37. 1. The Japanese government in the chapter entitled “Article 2” of its report only noted several issues on its obligation to implement the Covenant without mentioning any institutional and organizational efforts that must be made after examination of its Fourth Periodic Report in order for Japan to fulfill its obligation of the Covenant:

In the subsection entitled “A. Concerns pertaining to foreign nationals, 1. Issues related to foreign nationals living in Japan”, it stated that

(a) The fingerprinting system has been abolished. (paragraph 38)

(b) Efforts have been made to develop a system to accept foreign nationals who wish to work in Japan. (paragraphs 3-941)

(c) In employment exchange or the like, foreign nationals basically “should, therefore,

be able to receive the same employment placement as Japanese nationals do”. (paragraphs 42-49)

The subsection entitled “2. Concerns pertaining to Korean residents in Japan” describes:

(a) “Awareness-raising activities to eliminate prejudice and discrimination” (paragraphs 51 and 52), and

(b) The penal provisions for not carrying the alien registration certificate have been alleviated (paragraphs 53 and 54).

(c) With respect to Korean schools, the Government stated that children of foreign nationals who do not have Japanese nationality can receive compulsory education at Japanese public schools free of charge if they wish so. If they do not, they can receive education at foreign schools such as Korean schools, American schools, German schools, etc. They can also proceed to higher education through examination. (paragraphs 55-57)

38. 2. However, all of these improvements are insufficient as described below in this report. In addition, the Committee has expressed a lot of concerns other than those referred to in the government’s report, and recommended the government of Japan to conform to the Covenant. Nevertheless, the Government has not taken any adequate measures including legislative ones so as to abide by Article 2 of the Covenant for the past nine years, which are stated in detail in each paragraph of this report.

39. Above all, for ratification of the First Optional Protocol, no progress has been seen despite a strong recommendation made in the concluding observations of the Third Periodic Report.

40. In the concluding observations of the Fourth Periodic Report, the Committee expressed its regrets as above that “its recommendations after the consideration of the third periodic report have largely not been implemented”. (paragraph 6) And it recommended again to ratify the First Optional Protocol.(paragraph 33).

41. However, the Government in its report (paragraph 62) only commented that the Optional Protocol “is noteworthy from the viewpoint of effectively securing implementation of the Covenant”. With respect to the ratification itself, the report only stated that “the Government is presently giving serious and careful consideration, ... as concerns have been raised that this system may give rise to problems with respect to the Japanese judicial system, including the independence of the judiciary as guaranteed by the Constitution”. Thus, no progress has been seen at all for this issue.

D. Position of the JFBA

42. 1. Japan's failure to implement the Covenant described above shows the fact that Japan as a State Party neither respects the Covenant nor has a will to sincerely fulfill the obligation of Article 2.

43. 2. The government of Japan does not have within its organization any system that examines whether or not domestic legislation or its administrative enforcement complies with the Covenant . Neither does it have any such system outside the governmental organization.

44. 3. Japan, therefore, should immediately take necessary measures to fulfill the obligation under Article 2 of the Covenant.

Section 4: Establishment of Domestic Institution for the Protection of Human Rights

A. Conclusions and Recommendations

45.

Japan should promptly establish a domestic human rights protection institution that is truly independent from the Japanese government and functions as a system to investigate infringements of human rights for effective remedy of harm caused by human rights infringements, and to fulfill, respect, and guarantee human rights specified in the Covenant.

B. Concluding observations of the Human Rights Committee

46. The Committee strongly recommends to the State Party to set up an independent mechanism for investigating complaints of human rights. (paragraph 9)

More particularly, the Committee is concerned that there is no independent authority to which complaints of ill-treatment by the police or immigration officials can be addressed for investigation and redress. The Committee recommends that such an independent body or authority be set up without delay. (paragraph 10)

C. The Government's Response and its Fifth Periodic Report

47. The government stated in the report that "in March 2002 the Government of Japan submitted to the Diet the human rights protection bill which has the objectives of carrying out fundamental reform of the existing human rights volunteers system and establishing a human rights committee, an entity independent of the Government, mandated to raise awareness regarding human rights and to promote the adoption of effective remedy to harm caused by human rights infringements. The bill was not

passed, however, due to dissolution of the House of Representatives in October 2003. The Government will continue to review the bill. (paragraph 1)

D. Position of the JFBA

1. The government's previous response

48. As mentioned in the government's report, on March 8, 2002 the Japanese government submitted to the Diet the Human Rights Protection Bill, which, however, included fatal flaws described below. The bill, therefore, has faced with extensive oppositions by citizen and is yet to get through the Diet.

49. (1) The human rights committee, which would be established as a domestic human rights protection institution by the Human Rights Protection Bill submitted by the government, would be recognized as an affiliated agency of the Ministry of Justice, and substantially placed under the jurisdiction of the Minister of Justice. The human rights committee would be depended on for everything including the committee's budget, administrative staff, and local office or organization control for local activities. The committee would be comprised of five members who would be appointed by the Prime Minister with the consent of the Diet and would independently its wield authority. However, the five members would depend on the administrative staff for the activities of investigating and judging the cases throughout Japan. The existing organization of the Civil Liberties Bureau of the Ministry of Justice would be retained for the staff responsible for practical business of human rights remedy activities. In addition, the committee's local activities would be conducted by not the committee itself, but the District Legal Affairs Bureau that would be entrusted by the committee. In short, the domestic human rights protection institution proposed by the government cannot be recognized as being independent from the government. In fact, it is not independent from the Ministry of Justice either. This does not comply with the Paris Principle.

50. (2) The concept of "human rights", which are the object for protection and remedy, is not clear. Among human rights infringements by public power, only "discrimination and abuse" are the object for protection and remedy. For human rights infringements other than discrimination and abuse, the victims themselves have to spend time and money to obtain a decision by court for remedies. Criminal complaints are submitted to either police or prosecutors, and therefore it cannot be much expected that the committee would act for the victims of human rights infringements by public power.

51. With respect to human rights infringements by private individuals, they would not be the object for investigation and remedy unless they fall under "discrimination and

abuse” even though they are not in accord with the human rights criteria specified in the international standards on human rights. The human rights infringements in the labor relations are entrusted to the Minister of Health, Labor and Welfare, and the human rights committee would not deal with them.

52. In addition, the provisions of investigation and remedies for human rights infringements by mass media have been specially incorporated, resulting in concerns about infringement (caused by investigation) of media freedom and public right to know.

2. The JFBA’s observation and activities with respect to the Human Rights Protection Bill

53. In the concluding observation in the examination of the Japanese government’s Fourth Periodic Report, the JFBA has requested the government to establish “a national human rights institution independent from the government” as recommended by the Committee. However, it considers that “the human rights committee” based on the Human Rights Protection Bill that the government is currently trying to enact does not satisfy the conditions of the domestic human rights protection institution that the Committee has recommended to establish.

54. The primary reason is that the committee lacks independence from the Ministry of Justice. It is because there is concern that effective investigation and remedies would not be conducted and provided for the human rights infringements by the staff of immigration offices or detention facilities, if the committee was established as the Justice Ministry’s affiliated agency that employs and supervises the staff of these facilities.

55. Second, among the human rights infringements, the object for the remedies is limited to the abuse only by public officials or persons in a certain position who use discriminatory language and behavior, and wield public power as well. The JFBA considers that with such limitation the human rights infringements of violation of the international human rights standards and of unreasonable detention will not be appropriately handled.

56. The JFBA believes that to appropriately respond to the recommendations made by the Committee in the previous examination, the government must satisfy the following six minimum conditions: (1) the committee should be placed under the jurisdiction of the Cabinet Office, not the Ministry of Justice, (2) the committee members should be appointed by the Recommendation Committee formed within the Diet, in accordance with the criteria that represent voices of all levels of Japanese

citizens, (3) the staff should be appointed/dismissed independently by the national human rights institute, and not be exchanged with those in other government ministries and agencies, (4) the Director-General as well as the members of the Secretariat should have knowledge and experience required for human rights protection, and a lawyer should be appointed if a qualification as an officer of the court is necessary, (5) Independent local offices should be established, and (6) all of the human rights infringements specified in the Constitution and international human rights laws, especially those conducted by the public power, should be stipulated as being involved, and the committee has responsibility and authority to make policy recommendation and implement human right education.

57. Some of the UN treaty bodies have requested Japan to establish as soon as possible a domestic human rights protection institution that complies with the Paris Principle.^{9 10}

Section 5: Ratification of the First Optional Protocol to the Covenant

A. Conclusions and Recommendations

58.

The Government has not ratified the First Optional Protocol stating that it may give rise to problems with respect to the Japanese judicial system including the independence of the judiciary. However, this argument has no rationality at all. Thus, the Government should immediately ratify the First Optional Protocol.

B. Subjects of Concern and Recommendations of the Human Rights Committee

59. The Committee has recommended ratification of the First Optional Protocol in

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	Organizations/Commissions	Summary
April 2001	Committee on the Elimination of Racial Discrimination	“Enactment of special law on antidiscrimination and provisions for remedies by a state institution”
September 2001	Committee on Economic, Cultural and Social Rights	Requested to establish the institution as soon as possible in accordance with the Paris Principle and the Committee’s General Comment No. 10. (concluding observations para 38)
July 2003	Committee on the Elimination of Discrimination Against Women	Expressed concern about independence of the human rights committee described in the Bill.
January 2004	Committee on the Rights of the Child	“The human rights committee described in the Bill should be reexamined so as to comply with the Paris Principle.”

¹⁰ Mr. Brian Burdekin, the Special Advisor to the United Nations High Commissioner for Human Rights who visited Japan in July 2002, the spokesman of the South Korean human rights committee, the chairman of the Australian human rights committee, and the members of the APF-related domestic human rights committees have also pointed out the issue.

its comments made after the examination of the Third Periodic Report (paragraph 16), and again in the concluding observations made after the examination of the Fourth Periodic Report (paragraph 33).

C. The Government's Response and its Fifth Periodic Report

60. The Government does not show an attitude at all to ratify the First Optional Protocol in the near future. It stated in the present report that "the Government is presently giving serious and careful consideration, while observing the system operate, whether or not to accede to the Optional Protocol, as concerns have been raised that this system may give rise to problems with respect to the Japanese judicial system, including the independence of the judiciary as guaranteed by the Constitution" (paragraph 62), thus repeating substantially the very same excuse as has been made in the Third and Fourth Periodic Reports.

Such "serious and careful" consideration would have to be continued forever.

D. Position of the JFBA

61. The irrationality of the Government's excuse of not ratifying the First Optional Protocol because of possible impingement of judicial independence have been repeatedly pointed out by the Committee in each consideration of the Third and Fourth Periodic Reports. As a result, the aforementioned recommendation for ratification has been made.

62. The First Optional Protocol, which came into effect in 1976, has rapidly increased its member states to 109 countries at present. In the Asia-Pacific region, South Korea, Philippines, Australia, and New Zealand have ratified the Protocol. Nevertheless, the Japanese government to date has not shown any stance at all toward ratification of the Protocol. Such attitude is totally improper as the state that has been appointed to a member of the council of the newly established United Nations Human Rights Council.

63. The international human rights treaties formulated by the United Nations that recognize the rights of individual victims to communicate to and seek remedy from each treaty-based international agency include this First Optional Protocol to the Covenant on Civil and Political Rights, Convention against Torture (Article 22) adopted in 1984, Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 77) adopted in 1990, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women adopted in 1999. In addition, the two international conventions on protection of human rights adopted last year, namely the Optional Protocol to the Convention on the Rights of Persons with Disabilities and the Convention for the Protection of All Persons from Enforced

Disappearances (Article 31) also contain the system of communications from individuals. These systems are indispensable for the international human rights guarantee at present. Japan, however, has neither ratified, joined, nor made declaration of acceptance of any such system.

64. In addition to the conventions formulated by the United Nations, some regional human rights treaties such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights contain the system of communications from individuals. In contrast, there is no such regional human rights treaty in Asia.

65. Looking at the 30 countries that join the Organization of Economic Cooperation and Development (OECD), 28 countries including South Korea and Turkey among them have ratified either the Optional Protocol to the International Covenant on Civil and Political Rights or one of the aforementioned human rights treaties that contain the system of communications from individuals. Among the other two countries, namely Japan and the United States, the U. S. has recognized communications to the Inter-American Commission on Human Rights for violation of declaration of human rights based on the Charter of the Organization of American States. Japan, therefore, is the only country that does not have the system of communications from individuals. Among the participating countries of G8 summit 8 to be held in Hokkaido, Japan again alone does not have the system, suggesting that among the economically advanced countries Japan is the only country that does not hold the system of communications from individuals.

66. Japan is expected to take a leading role in not only the economic field but also the human rights protection area in the international society, and thus has been appointed to one of the first members of the newly established United Nations Human Rights Council. It is quite deplorable from the standpoint of securing universal human rights on a global scale that Japan, being in such a position, has neither ratified the First Optional Protocol nor any other system of communications from individuals.

67. Moreover, the implementation within Japan of the Covenant on Civil and Political Rights has not been sufficient due to failure to ratify the First Optional Protocol. Judges have insufficient awareness of the Covenant although they are supposed to play an essential role in its domestic implementation. They neglect reflecting appropriate interpretation of the Covenant on their judgments. One of the recent examples is shown in the decision given by the Oita District Court, in which Mrs. Elizabeth Evatt, a former member of the Committee explained as an expert witness about the proper interpretation of Articles 19 and 25. Nevertheless, the Oita District Court offered its own interpretation without paying attention to her explanation. Thus, the District Court was

criticized by Mrs. Evatt for not attaching any weight to the interpretation by the Committee and making a mistake of interpreting the Covenant the same as the Japanese Constitution.¹¹ The Judges' such attitude is attributed to the fact that the Government has not ratified the First Optional Protocol and that their judgments therefore are not criticized by the Committee, resulting in showing their own arbitrary interpretation which undermines the human rights guarantee specified in the Convention. It is obvious that the ratification of the First Optional Protocol will drastically improve the situation.

68. Until now, the JFBA, in the declarations made in its periodic assembly and resolutions passed in the human rights conventions, has strongly and repeatedly called on the Government to ratify and become a party to the First Optional Protocol, based on the recognition that the ratification of the Protocol is extremely important in not only implementing the international human rights standards inside Japan but also improving the global human rights situation. It has established a new ad hoc committee recently for realization of the system of individual communications and started to address this issue of ratification with all-out efforts by the entire organization.

69. The Government should ratify the First Optional Protocol as soon as possible.

Section 6: Human Rights Education for Judges, Prosecutors and Law-Enforcement Officers

A. Conclusions and Recommendations

70.

1. The Government should make public the curricula concerning human rights education for judges, prosecutors and law-enforcement officers such as police personnel, personnel for criminal detention facilities, and immigration officials and implement the effective education to ensure human rights that are guaranteed by the Covenant.

2. Especially for judges, in order to acquaint themselves with application of the Covenant, the systematic human rights education shall be implemented including workshops using the human rights manuals issued by the Office of the United Nations High Commissioner for Human Rights and supplying the Committee's general comments and the Views expressed by the Committee to the judges.

B. Subjects of Concern and Recommendations of the Human Rights Committee

71. The Concluding observations on the Fourth Periodic Report

¹¹ Elizabeth Evatt, Comment on Oishi case.

The Committee is concerned that there is no provision for training of judges, prosecutors and administrative officers in human rights under the Covenant. The Committee strongly recommends that such training be made available. Judicial colloquiums and seminars should be held to familiarize judges with the provisions of the Covenant. The Committee's general comments and the Views expressed by the Committee on communications under the Optional Protocol should be supplied to the judges (paragraph 32).

C. The Government's Response and its Fifth Periodic Report

72. The Fifth Periodic Report states that, under the section entitled "D. Human rights education, encouragement, and publicity", human rights education is being conducted in each relevant department. (paragraph 17-34) Information concerning international human rights, education, and lectures are provided for general public officials, police personnel, judges, prosecutors, correctional officers, and immigration officials.

D. Position of JFBA

73. How the human rights education and trainings are implemented and how effective they have been are still not clear in the Fifth Periodic Report.

74. On May 21, 2007, after the Fifth Periodic Report was submitted, the UN Committee against Torture published its concluding observations on the implementation in Japan of the Convention against Torture.

75. The Committee stated that, in the paragraph 22 of the concluding observations, "the Committee notes the allegations of the existence of a training manual for investigators, with interrogation procedures which are contrary to the Convention. In addition, the Committee is concerned that human rights education, and in particular education on the rights of women and children, is only offered systematically to penal institution officials, and has not been fully included in the curricula for police detention officers, investigators, judges or immigration security personnel. The State party should ensure that all materials related to the education curriculum of law enforcement personnel, and in particular investigators, are made public. "

1. Human Rights Education for Correction Officers

76. (1) After the concluding observations of the Human Rights Committee was released in 1998, inappropriate treatment towards inmates by prison officers in many detention facilities including in Nagoya Prison as well as inappropriate treatment by

immigration officials were reported in Japan drawing people's attention to the issue. In March, 2003, the Correctional Facility Reform Council was started under the Minister of Justice.

77. (2) Based on the recommendations and proposals from the Council, "Law Concerning Penal Institutions and the Treatment of Sentenced Inmates" was enacted in May, 2006. The law stipulates that the education and training shall be conducted for correctional officers so that they can deepen the understanding on the human rights of sentenced inmates and acquire and improve knowledge and skills to be required for treating the inmates in an appropriate and effective way (Article 13, paragraph 3).

78. (3) The concluding observations of the Committee against Torture states that the Committee welcomes the activities of the Corrections Bureau of the Justice Ministry concerning training curricula and practice for penal institution staff (paragraph 7).

However, the consciousness of many prison officers has not been changed from the time of old institution. Therefore, it is still doubtful that the actual treatment of inmates in prisons has been greatly improved. At the same time, it is true that the education and training on the human rights are now actively conducted in a pragmatic way and it is expected that the outcome of such education shall be manifested as actual tangible changes in the treatment of inmates. The Committee should positively evaluate the activities of the Correction Bureau in this arena and demand them to further develop such practice extensively and promote the human rights education for prison officers.

2. Immigration Officials

79. There has been a certain progress made for immigration control facilities including the introduction of the Refugee Adjudication Counselors System in 2005. The improvements were seen in the treatment of immigration detainees as well as in disciplines of the officials.

3. Police Personnel

80. (1) The Fifth Periodic Report cites that by placing top priority on education concerning work ethics in police education as stipulated in "Rules Concerning Work Ethics and Service of Police Personnel", human rights education has been conducted for police personnel. However, it is questionable. Although, according to the National Police Agency, human rights education has been actively implemented using the "fundamentals of work ethics" in police schools, without the disclosure of the "fundamentals of work ethics", it is not clear that what kind of programs are being conducted nor what kind of education is given to police personnel to acquire high-level knowledge necessary for management and operation of detention work.

81. (2) In April, 2006, the existence of the interrogation manuals (documents including “Guidelines for Interrogation of Suspects” as of October 4, 2001) created by Aichi Prefectural Police became apparent. This guideline says that the interrogator shall not leave the interrogation room until the suspect confesses to a crime and that the suspect who deny a crime shall be put into the interrogation room from morning till night (in order to make the suspect vulnerable). “To make the suspect vulnerable” means nothing but coercing confession. Japanese police personnel are educated to continue an interrogation for a prolonged time until the suspect confesses to a crime. According to this manual, interrogators are being trained to force suspects into confession, which is clearly against the international human rights standard.

Also, the police officials in charge of police detention cells have no authority to have investigators discontinue the interrogation if they keep interrogating the suspect without letting them sleep or eat. The police officials in charge of detention can only request the investigators to consider discontinuation of the interrogation.

82. (3) In light of the current situation of police detention cells and practices of interrogations, it is quite critical to conduct human rights education of which underlying policy is to respect the suspect’s human rights.

4. Human rights education in the Self-Defense Force

83. According to the government of Japan, education of human rights has been conducted in line with “Service Principle” provided in Article 52 of the Self-Defense Force Act, but the content of the principle is not disclosed.

5. Judges

84. Regarding the education on human rights for judges, it used to be that only the judges assigned to criminal cases were subject to the training. It is still doubtful whether the current system provides the human rights education to all the judges.

85. It is said that in the past human rights education for judges, there was an instruction that in line with “New Dualistic Theory”, if any article in the Covenant does not comply with the Constitution, judges shall conform to that article only outside of the country, but not within the country. This includes the wordings that may easily lead to misunderstanding, and the JFBA has been asking for making improvements on this matter. Unfortunately, In Japan, there have been only a few court decisions which were made based on a full understanding on International Human Rights Law. In many cases, the questionable court decisions repeated that “if it is not unconstitutional, it does not go against the Covenant”. It is urged that the education and training for more accurate

understanding of international human rights be given to the judges.

Section 7: Violation of human rights recognized in the Covenant and the State remedy system

A. Conclusions and Recommendations

86.

1. It is provided that when rights or freedoms as recognized in the Covenant are violated, notwithstanding that the violation has been committed by persons acting in an official capacity, an effective remedy shall be given (Article 2 (3) a) of the Covenant). However, in many cases, currently no national remedy is provided. Such situation should be corrected by legislative measures and other measures.

2. Article 6 of the State Redress Law in Japan stipulates that when a foreigner is a victim of violation of human rights by public officials exercising public authority, the remedy can be provided only when there is a reciprocal guarantee with the foreigner's state, but such differentiated treatment of foreigners is against Articles 2 (1) and 26 of the Covenant. Therefore, the above article shall be regarded null and void as in violation of the Covenant, and abolished immediately.

B. Subjects of Concern and Recommendations of the Human Rights Committee

87. Nothing is mentioned on this matter.

C. The Government's Response and its Fifth Periodic Report

88. 1. The Report only quotes from Article 1 (1) of the State Redress Law that when officials exercising public authority intentionally or negligently in the course of their duties illegally cause harm to another person, it is possible to claim compensation for damages to national or local public organizations. (paragraphs 5 and 6)

89. 2. Article 1 (1) of the State Redress Law stipulates that it is possible to claim compensation for damages to national or local public organizations, only when it is recognized that public officials exercise public authority intentionally or negligently. According to the case law, a claim of compensation is to be rejected in the following cases; 1) when there were "reasonable grounds" for the judgment of the public official¹² even if the exercise of public authority was later found illegal, 2) when the public official exercised public authority in accordance with a standing rule¹³ having difficulty

12 The Supreme Court decision on June 24 1971. Minshu 25-4, p.574, the Supreme Court decision on December 12, 1974. Minshu 28-10, p.2028.

13 The Supreme Court decision on July 9 1991. Saibanshu Minji 163 p.133.

in understanding that the rule does not conform to the law and therefore invalid, and 3) when the public official thoroughly exercised due care¹⁴ that the person is usually expected to perform. In such cases, the case law in Japan did not recognize negligence of the public official and never accept a claim of state compensation. Based on such premise, it can be understood that even if the public official's exercise of public authority is found to be illegal, negligence of the public official is not always recognized. Of course, a claim for the state compensation is not authorized, either.

90. Therefore, victims of public officials exercising their duties illegally will have to bear the damage incurred. In spite of the fact that the public official of either national or local government exercised public authority illegally, the national or local government will have the victim bear the damage instead of bearing it by themselves.

91. When the person who was once detained during the criminal procedure is acquitted, a certain amount of compensation shall be paid¹⁵. However, except for such cases, it is quite rare that the victims of public officials' illegal use of public authority are compensated when public officials did not exercise public authority intentionally or negligently but illegally from the objective standpoint¹⁶.

92. With regard to the state compensation for an act or failure of legislations by members of the Diet, a further restriction is imposed on the requirements. Even if the content of legislation or failure to legislate is not consistent with the provisions of the Constitution of Japan, the claim of compensation for the damages shall be authorized only "when the rights guaranteed by the Constitution are being violated with obvious illegality, or when the Diet neglects to take adequate legislative measures for a long time without any due reason although such measures are obviously indispensable to protect people's constitutional rights."¹⁷

93. Article 6 of the State Redress Law has adopted so called reciprocity principle, and Japanese courts have been admitting its effectiveness without paying any attention to the question on whether this violates the Covenant or not.

D. Position of the JFBA

94. 1. Article 2 (3) of the Covenant provides that "Each State Party to the present

¹⁴ The Supreme Court decision on March 11, 1993. Saibanshu Minji 168-Jo p.191.

¹⁵ Compensation by the Criminal Redress Law

¹⁶ As exceptional cases, compensation by the National Tax Collection Law and the Fire Defense Law

¹⁷ The Supreme Court (Grand Bench) decision on September 14, 2005. Minshu 59-7 p.2087. The Supreme Court decision on July 13, 2006. LLI.

In the first court decision, the state compensation is authorized on the ground that the Diet's failure to legislate was serious. However, such ruling is very rare

Covenant undertakes” the following (a), (b) and (c). And (a) provides that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

95. However, as mentioned in the foregoing paragraph, even if a person’s right recognized in the Covenant is violated by a public official, when the negligence is not recognized in the action of the public official, the claim for the state compensation is to be rejected unless the public official’s negligence is found. In case of the Diet’s legislation or failure to legislate, the state compensation is even more limited and compensation other than those based on the State Redress Law is rarely offered. As a result, many people whose rights have been violated are not able to receive compensation in any form, which is against the state party’s obligation to ensure that any victim shall have an effective remedy.

96. In this regard, General Comment No. 31 states that “Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation” (paragraph 16).

97. In other words, the core of the Article 2, paragraph 3 is that the state party is obligated to provide compensation to a person whose rights recognized in the Covenant have been violated. Therefore, at least when it comes to the human rights prescribed in the Covenant, if those are violated, regardless of negligence of the public official who made the violation, or regardless of a serious negligence of the Diet, compensation shall be given to the victim.

98. Since the state party has an immediate obligation to implement the Covenant, the state party should take necessary legislative measures as soon as possible.

99. 2. Article 6 of the State Redress Law, adopting reciprocity principle, when the victim of the violation of human rights by the public official is a foreigner, the compensation shall be provided only when the person’s home country accepts responsibility of the state compensation for Japanese victims and the courts of Japan also acknowledge the validity of this provision. However, it is obvious that this differentiated treatment of foreigners in certain categories goes against the Article 2, paragraph 2 and Article 26 of the Covenant.

100. The recommendation submitted to the Japanese government in August, 2007 by the Committee against Torture expresses its concern on such reciprocity principle¹⁸

101. Japanese courts should admit that Article 6 of the State Redress Law is in violation of the Covenant and so invalid. Therefore, this provision should be eliminated immediately.

¹⁸ CAT/C/JPN/CO/1, para.23

Chapter 2: Rights of Foreigners and Minorities

Section 1: Long-term Foreign Residents

Right to assume an office in public service

A. Conclusions and Recommendations

102.

The Japanese government should vest a status at least to exercise suffrage in local elections (right to vote and eligibility for election of membership or chair of local public body) to people of Korean origin, given their substance as local residents.

The Japanese government should immediately abolish expulsion of people of Korean origin in appointment of public servant or member of mediation committee, based on ambiguous standard that the said public duty involves participation in the exercise of public power or in public decision-making.

B. Subjects of Concern and Recommendations of the Human Rights Committee

103. Nothing particular

C. The Government's Response and its Fifth Periodic Report (paragraph 357)

104. It simply stated "as stated in the previous report". Same in the fourth report. The third report stated "Constitution stipulates in Article 15 Paragraph 1 that the people have the inalienable right to choose their public officials and to dismiss them. The Constitution also has provisions concerning the election of the members of the two Houses of the Diet (article 43), and the election of the chief executive officers of local public entities, members of the local public assemblies etc.(Article 93) , and stipulates the principle of universal adult suffrage and secrecy of the ballot in these elections (Article 15 Paragraph 3 and Article 15 Paragraph 4).

The National Public Service law(Article33) and the Local Public Service Law(Article 15) provide that officials engaged in the public affairs of the State or local public entities shall be appointed on the basis of demonstrated ability."

105. About suffrage of Korean residents in Japan, paragraph 24 of the First and Second report (June 1999) in response to Committee on Elimination of Racial Discrimination stated Korean residents in Japan do not have the rights that are not applicable to foreign nationals, thus, they are basically treated in the same way as other foreign residents under the domestic law, and paragraph 68 mentioned "Japanese nationality is required for civil servants who participates in the exercise of public power

or in public decision-making” The Japanese government also treats Korean residents in Japan as foreigners restricted in assuming public position.

D. Position of the JFBA

1. Suffrage

106. In the prewar years, Korean residents in Japan were “Imperial citizen” and male Koreans and Taiwanese living in Japan were vested with suffrage and eligibility for House of Representatives.

107. December 1945, the Japanese government took a measure to make Koreans and Taiwanese not to exercise their suffrage and May 1947, enacted Alien Registration Act, saying it would regard them as foreigner for some time and made alien registration as their duty.

108. The Japanese government expressed its view that on the occasion of effectuation of the peace treaty (April 28, 1952), all the people from the former colonies such as people of Korean origin lost their “Japanese nationality” and became “foreigner”. This view was given in official notice by Director-general of Civil Affairs Bureau,(1952 Minji-ko 438) by the Ministry of Legal Affairs (current Ministry of Justice).

109. However there is no stipulation about change of nationality in the peace treaty, the above measure was based on the Japanese government’s own view. With this view, Korean residents in Japan were divested of their rights such as suffrage and eligibility for House of Representatives.

110. At present, the 5th and 6th generation of Koreans have been residing in Japan and acquired permanent resident status to peacefully live in local communities of Japan. Given the historical circumstance that Korean residents in Japan were forced to stay in Japan as a result of colonial rule by Japan and the actual situation that they have acquired permanent resident status, they should be vested with suffrage and eligibility in local body in order to let them reflect their opinion at least in local politics.

2. Public Servant

111. National Public Service Law does not require Japanese nationality to assume as a public servant. However, it is only people of Japanese nationality that can assume other positions except for ones in government office offering academic, technical and mechanical services. Without any legal stipulation, the Japanese government officially

expressed in 1953 and has maintained its view that Japanese nationality is required for civil servants who participates in the exercise of public power or in public decision-making.

112. A survey conducted from 1997 to 1998 about local public servant showed 4.3% of prefectures do not require in principle Japanese nationality as a qualification to apply for an examination for service. However there are cases an examination for a managerial position requires Japanese nationality.

113. As for appointment of foreigner as local public servant, the Japanese government stated “it is not appropriate to qualify in general foreigners to apply for an examination for positions expected to participate in the exercise of public power or in public decision-making” (1973, Ministry of Home Affairs), and in reality, the Japanese government has given direction to local public body that appointment of foreigners as administrative or technical worker cannot be basically approved.

114. However, generally restricting people of Korean residents in Japan in assuming as public servant in this way does not have reasonable grounds, given the fact during its colonial rule, the Japanese government gave Japanese nationality to Koreans living in Japan and unilaterally deprived them of Japanese nationality without caring their will after the war, and after the end of colonial rule, people of Korean origin were forced to live in Japan, they have acquired permanent resident status, and are under the state power of Japan in general.

115. In 1994, Tokyo metropolitan government refused to accept application for examination for managerial service by a female of Korean origin, on the grounds that she did not have Japanese nationality. However there is no stipulation in law which requires Japanese nationality in applying for an examination.

116. After 1995, Tokyo metropolitan government provided Japanese nationality as qualification in applying for an examination for managerial service. However this requirement does not have legal binding force, no one without Japanese nationality has been admitted to take an examination since then.

117. The verdict of Tokyo High Court on November 26, 1997 about the case to verify the qualification of candidacy filed by the second generation of Korean origin who were refused to take the examination for managerial service at Tokyo metropolitan government said that there are occupational category among national and local public servants that people of Korean origin can assume and is guaranteed by Constitution. The verdict said that especially in case of local public servant, compared to national public servant, there is wider range of occupation and managerial position which can be

assumed by foreigner, so it is not suitable to impartially refuse appointment of foreigner for managerial service and to deprive them of chances to take part in examination closes the possibility of promotion to a managerial position and these constitute violation of Constitution.

118. However Supreme Court gave a verdict which did not admit the demand by the plaintiff on January 26, 2005 about the above mentioned case. The verdict said it is not assumed in Japan's legal system that foreigners make decision about important policies for local public body or exercise public power in establishing rights and duties of local residents. It went on to say that it is on reasonable basis that foreigners are refused in examination for managerial service, because managers are naturally supposed to assume position as "local public servant who exercise public power" in future.

119. However, refusal by prefectures in general including Tokyo of foreigner's promotion to managerial service cannot be rationalized by the absence of Japanese nationality alone and constitutes violation of article 2 paragraph 25.

3. Participation in judicial service

120. (1) Judge, public prosecutor, and lawyer are so-called three legal professions. And there are judicial trainees who are in a main training phase for these professions. In addition to these, there a number of occupations including members of a mediation committee supporting the judicial procedure and in the near future jurors together with judge are to play an important role in criminal action. To what extent foreigners are allowed to take part in such judicial field?

121. This is a table to show the regulation on nationality about the occupation related to judicial service.

occupation	Regulation on nationality
judge	None (However natural legal principle excludes foreigner.)
prosecutor	None (However natural legal principle excludes foreigner)
lawyer	None (Foreigners are qualified.)
Judicial trainees	Requirements for appointment (Natural legal principle excludes foreigner in principle. Exception is decided by Supreme Court.)
Member of mediation committee	None (Natural legal principle excludes foreigner.)
Secretary at court	None (Natural legal principle excludes foreigner.)
Secretary at Public Prosecutors Office	None (The position is dealt as the second and the third category national public servant so as "ones without Japanese

	nationality” the National Personnel Authority, regulation 8-18 article 8 paragraph 1 number 3, foreigner cannot take part in the examination for service.
juror	Juror law, article 13 (Foreigners are excluded because it is limited to “ones with votes for House of Representatives.)
Examiner for prosecutors	The Law for the Inquest of Prosecution, article 4 (Foreigners are excluded because it is limited to “ones with votes for House of Representatives.)
People’s right to examine judge of Supreme Court	The Law of the People’s Examination of the Supreme Court Judges, article 4 (Foreigners are excluded because it is limited to “ones with votes for House of Representatives.)

122. (2) Member of mediation committee

There is no law about appointment of member of mediation committee requiring Japanese nationality. Supreme Court is to decide the necessary things about appointment of member of mediation committee. (the law for Conciliation of Civil Affairs, article 8 paragraph 2, the law for Adjustment of Domestic Relations, article 2 paragraph 2)

123. However there is no case that courts throughout the nation ever appointed foreigner as member of mediation committee. In 2003 and 2007, Hyogo Prefecture Bar Association recommended a lawyer of Korean nationality who is a permanent resident of Japan as a candidate, Kobe Family Court did not appoint in either year. As a reason, the court said as a natural legal principle about public servant, Japanese nationality is required to assume as a public servant who is to participate in the exercise of public power or in public decision-making and member of mediation committee together with judge consist mediation committee and has authority such as drawing up mediation record that can be holder of liability or attendance at mediation out of court, so they are regarded as “civil servants who participate in the exercise of public power or in public decision-making”. In 2007, Sendai Prefecture Bar Association recommended a lawyer of Korean nationality as member of mediation committee, Sendai Family Court did not appoint that person. It is also the view of Supreme Court that “member of mediation committee needs to be one with Japanese nationality”.

124. However refusal of foreigner’s being appointed as member of mediation committee cannot be rationalized by the absence of Japanese nationality alone and constitutes violation of article 2 of the Covenant.

Issues of qualification of Korean Schools (Article 26, 27 of the Covenant)

A. Conclusions and Recommendations

125.

The Japanese government should take measures to correct the economic disadvantages caused by the status of North Korean schools which are not qualified as “schools” under School Education Law. The government policy of 2003 which deregulated the requirements for graduates of foreign schools in Japan in applying for entrance examination of national schools generated new discrimination between North Korean schools and other foreign or ethnic schools. So, qualification for entrance examination of national schools should be accredited to graduate of North Korean schools as is the case with other foreign and ethnic schools.

B. Subjects of Concern and Recommendations of the Human Rights Committee.

126. The Forth Periodic Report, Concluding observation, paragraph 13
The Human Rights Committee in concluding observation paragraph 13 says “The Committee is concerned about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools. The Committee draws the attention of the State party to General Comment No. 23 (1994)¹⁹ which stresses that protection under article 27 may not be restricted to citizens.”

C. The Government’s Response and its Fifth Periodic Report

127. In its Fifth Periodic Report, the Japanese government said children of foreign nationals without Japanese nationality can receive all compulsory education at Japanese public schools free of charge if they wish so. If they do not wish to receive Japanese school education, they can receive education at foreign schools such as Korean schools, American schools, German schools ,etc (paragraph 55) and in September 1999, the Government expanded the eligibility of foreigners to take the University Entrance Qualification Examination (from FY2005, the Upper Secondary School Equivalency Examination) and also in August same year, the Government broadened the eligibility to apply for admission to graduate schools in Japan (paragraph 56) adding some flexibility. And also in September 2003, as for eligibility for applying for admission to universities, each university is entrusted with decision (paragraph 57).

D. Position of the JFBA

128. 1. North Korean schools are not approved as “schools” under the School

¹⁹ CCPR/C/21/Rev.1/Add.5

Education Law as the other foreign and ethnic schools. Consequently graduation from North Korean schools is not recognized as official graduation, causing limitation in or exclusion from various state examinations.

129. North Korean schools do not receive any subsidy from the National Treasury, as they are not approved as “schools” under School Education Law. Subsidy from local public body is about 10 % of public schools or a quarter for private schools. As of 2003, Tokyo Metropolitan government provides 15,000 yen per a year for a student in high school as subsidy for school education, while public schools receive about 900,000 yen per a student (about 60 times) and private schools receive about 340,000 yen (23 times).

130. As a result, funding of these schools is supported by tuition and donation from parents, but this donation is not covered by preferential treatment in tax system, as is the case for “schools” under School Education Law. On this point, on March 31, 2003, related decrees about corporate tax and income tax laws were reformed and there added “various schools established with the purpose of providing elementary and secondary education” to Qualified Public Interest Corporation which can enjoy preferential measures, but on the same day, Ministry of Education, Culture, Sports, Science and Technology announced this was limited to a part of international schools.²⁰ Against this, in March 2006, Chinese schools and North Korean schools formally asked JFBA to protect human rights and the case has been investigated as of November 2007.

131. 2. On the other hand, it is a fact that flexibility was added to the entrance eligibility for national universities and graduate schools since 1999 and the move is welcome.

132. (1) However, the change in policy about entrance eligibility for graduate schools of national university in 1999, stated by the Japanese government in paragraph 56 was initiated by the individual acts by Kyoto University graduate school in 1998 and Kyushu University graduate school in the begging of 1999 to approve entrance eligibility for graduates of North Korean schools despite the policy of the Japanese government. In other words, the change was realized through strenuous effort of the people concerned and wise decisive steps by each university.

133. (2) And also in paragraph 57, the Japanese government said in September 2003, the GOJ broadened the eligibility to apply for admission to university in Japan.

²⁰ In announcement, schools acknowledge as Qualified Public Interest Corporation are those for children of residents with status as “diplomacy”, “public duty”, “investment and management” and only the international schools certified by an education accreditation organization, either of international baccalaureate (Switzerland), WASC (U.S.), ACSI (U.S.) or ECIS (England).

134. However, in light of the following circumstances, it is clear that the Japanese government still takes an attitude to exclude North Korean schools and the fact the change in the policy excludes North Korean schools from the foreign schools accredited with entrance eligibility for universities in Japan, causing discrimination among foreign schools.

135. First of all, on March 6, 2003, Ministry of Education, Culture, Sports, Science and Technology announced its policy to approve entrance eligibility for university for a part of Western international schools, in response to request by the U.S. government and Japan's economic world. But strong repulsion occurred from various fields as the change may bring discrimination among foreign and ethnic schools. So the Japanese government froze the policy and was forced to reform the decree to expand entrance eligibility in September same year.

136. However even under this new policy, as for North Korean schools, whose home government does not have diplomatic relation with Japan, with the reason that it is impossible to inquire whether its curriculum is in accordance with the regular school education in the home country, graduates of North Korean schools, being different from other foreign and ethnic schools, were not accredited with entrance eligibility and decision was entrusted to each university.

137. In this way, the current government policy generates new discrimination among foreign and ethnic schools by excluding North Korean schools to which majority of foreign and ethnic school students attend and with education system bearing most resemblance to that of Japanese schools from the foreign schools accredited with entrance eligibility.

138. Based on the above-mentioned policy, most of the universities independently approve entrance eligibility for graduates of North Korean schools. On the other hand, in January 2007, a graduate of North Korean school was refused to apply for general entrance examination by Tamagawa University. The said student asked for relief of human right against JFBA, and as of November 2007, JFBA is now investigating the case.

139. Such situation reveals the government's policy to entrust each university with the decision forces extremely unstable situation for graduates of North Korean schools.

The Duty to Carry the Certificate of Alien Registration at All Times

A. Conclusions and Recommendations

140.

The imposition of the duty on permanent and long-term residents to carry a certificate of alien registration at all times, as well as the imposition of a criminal or administrative penalty for violations, are both contrary to articles 12 (freedom of movement) and 26 (equality before the law) of the Covenant. The Japanese government should immediately abolish this system.

B. Subjects of Concern and Recommendations of the Human Rights Committee

141. The Fourth Periodic Report, Concluding observation, paragraph 17

“The Committee reiterates the comment made in its concluding observations at the end of the consideration of Japan’s third periodic report that the Alien Registration Law, which makes it a penal offence for alien permanent residents not to carry certificates of registration at all times and imposes criminal sanctions, is incompatible with article 26 of the Covenant. It once again recommends that such discriminatory laws be abolished”

C. The Government’s Response and its Fifth Periodic Report (paragraph 53, 54)

142. Under the amendment to the Alien Registration Law in 1999, the penal provisions for violating the obligation for special permanent residents to carry the alien registration certificate at all times were revised from a criminal penalty of “a fine not exceeding 200,000yen “to an administrative penalty of “ a fine not exceeding 100,000yen” The amended law entered into force on April 1, 2000. Given the current situation in Japan in which there are large number of foreign nationals who have entered or have been staying in Japan illegally, the GOJ considers it is meaningful to maintain the system of obligating foreign nationals to carry the alien registration certificate at all times, in order to verify whether or not a foreign national is a legitimate resident, and to immediately confirm the identity and place of residence of the foreign national.

D. Position of the JFBA

143. The Japanese government makes it a duty of foreigners over 16 year old and registered as foreigner to carry alien registration certificate at all times. Violation of the duty imposes less than 100,000 yen administrative fine on permanent residents and less than 200,000 yen criminal fine on the other foreigners. At present, more than 96 % of people of Korean origin are in second or younger generation born in Japan and these people of Korea origin permanently live in Japan in peace, without any difference to Japanese people in their clarity of identity and residency. Japanese people are not required to carry any identity certificate.

144. In response to the Concluding Observations for the examination of the Fourth Periodic Report, the Japanese government abolished criminal penalty only for the special permanent residents, but still violation of the duty to carry the certificate at all times is punished with administrative penalty. At least about the permanent residents, the duty to carry the alien registration certificate at all times should be abolished to free them from criminal and administrative penalties.

Re-entry permits and right to return to one's own country

A. Conclusions and Recommendations

145.

The application of the re-entry permit system of the Immigration-Control and Refugee-Recognition Act to permanent residents, such as Koreans, is an infringement of the right, protected by article 12 of the Covenant, to leave and return to one's own country. This practice should therefore be corrected immediately. In the case the permanent resident notifies his or her intention to maintain the status upon leaving Japan, the permanent resident status thus be understood as being maintained and re-entry should be permitted.

B. Subjects of Concern and Recommendations of the Human Rights Committee

146. The Fourth Concluding observation (paragraph 18)
Article 26 of the Immigration-Control and Refugee-Recognition Act provides that only those foreigners who leave the country with a permit to re-enter are allowed to return to Japan without losing their resident status and that the granting of such permits is entirely within the discretion of the Minister of Justice. Under this law, foreigners who are second- or third-generation permanent residents in Japan and whose life activities are based in Japan may be deprived of their right to leave and re-enter the country. The Committee is of the view that this provision is incompatible with article 12, paragraph 2 and 4, of the Covenant. The Committee reminds the State party that the words "one's own country" are not synonymous with "country of one's own nationality". The Committee therefore strongly urges the State party to remove from the law the necessity to obtain a permit to re-enter prior to departure, in respect of permanent residents like persons of Korean origin born in Japan.

C. The Government's Response and its Fifth Periodic Report (paragraph 270, 271)

147. The government has not taken any corrective measure. Foreigners lose their existing status of residence upon leaving Japan. In the case of those who gain prior

re-entry permit, the previous status of residence and period of stay for such foreign national deemed to have maintained after his/her re-entry into Japan. Even if a foreign national has been granted re-entry permission, except for special permanent residents, the foreign national shall not be given permission for landing when he/she has fallen under any of the categories to be denied permission for landing while outside of Japan (Immigration-Control and Refugee-Recognition Act, Article 5)

D. Position of the JFBA

1. Re-entry permit and freedom of movement

148. Japan's Immigration-Control and Refugee-Recognition Act make it a principle that foreigners lose status of residence upon leaving Japan. And only the foreigners with prior re-entry permit are allowed to re-enter Japan without losing the status of residence (Immigration-Control and Refugee-Recognition Act article 26). The decision whether a prior re-entry permit will be granted or not is entrusted to the broad discretion of the Minister of Justice. If a foreign citizen leaves Japan without a re-entry permit, the previously existing status of residence is lost, and re-entry is not ensured. For this reason, for a foreign citizen whose base of living is in Japan, whether or not a re-entry permit will be granted becomes in effect a matter of controlling whether or not the foreign citizen will be able to make a temporary trip outside Japan. Permanent residents, especially the great majority of resident of Koreans, are people who were born and brought up in Japan and plan to spend their entire lives in Japan. The fact that the Minister of Justice has the broad discretion over their re-entry permission essentially creates an onerous obstacle to their entering and leaving the country.

2. Permanent residents and their right to return to one's own country"

149. Article 12 of the Covenant states "Everyone shall be free to leave any country, including his own" (paragraph 2) and also states "No one shall be arbitrarily deprived of the right to enter his own country." (paragraph4). As stated above, the fourth concluding observation by the committee in 1998 says this right to return to own country is not limited to the country of nationality and requires change so that "the permanent residents, such as resident of Koreans born and brought up in Japan" do not need to gain prior re-entry permit. General Comment 27 paragraph 20 issued by the committee in 1999 says for long-term residents, the country of residence can be included as "one's own country" and requires the State party to report whether or not the right to return to own country is granted to the permanent residents.

150. The basis of living of the permanent residents is in Japan, and "the right to

enter his own country” stated in article 12 paragraph is understood to include “the right to enter the country with permanent resident status”, it should be said that those with permanent resident status have a right to freely leave and re-enter the country. To entrust the decision of granting permit to the broad discretion of the Minister of Justice is an infringement on “the right to freely return to own country”.

151. For Koreans especially, the vast majority of whom have been born and brought up in Japan, and who in fact plan to make Japan the base of their entire life activity, Japan, rather than their country of nationality, is their “own country” for the purpose of article 12 of the Covenant. With respect to the “right to return to one’s own country”, there is no reasonable ground why they should be treated differently from those who possess Japanese nationality.

3. Required Corrective Measures

152. This kind of treatment by the Japanese government for the people with permanent resident status including people of Korean origin is clearly a violation of article 12 of the Covenant and should be immediately corrected. In other words, if a notice is given about one’s intention to maintain the previously existing status of permanent resident upon his or her leaving the country, the Japanese government should permit re-entry, with an understanding that the status of permanent resident is maintained.

Section 2: Discrimination against Foreigner

Discriminatory remarks, violence and harassment against students of North Korean Schools (article 26 and 27 of the Covenant)

A. Conclusions and Recommendations

153.

Upon investigating the obstacles to overcome in order to improve the situation in which students of North Korean schools and others suffer discriminatory remarks, violence and harassment, the Japanese government should take decisive and effective measures, including making the International Convention on the Elimination of All Forms of Racial Discrimination its domestic law.

B. Subjects of Concern and Recommendations of the Human Rights Committee

154. The Fourth Periodic Report, Concluding observation (paragraph 18) In its concluding observation paragraph 13, the Human Rights Committee says “The

Committee is concerned about instances of discrimination against members of the Japanese-Korean minority who are not Japanese citizens, including the non-recognition of Korean schools. The Committee draws the attention of the State party to General Comment No. 23 (1994)²¹ which stresses that protection under article 27 may not be restricted to citizens”.

C. The Government’s Response and its Fifth Periodic Report

155. The Japanese government says as one of their activities to protect the human rights of foreign nationals, the human rights organs under the MOJ are carrying out encouragement activities including activities to eliminate prejudice and discrimination against Korean residents in Japan (paragraph 51). And the Democratic People’s Republic of Korea formally admitted at the “Japan-North Korea Summit” in September 2002 that it had abducted Japanese nationals, and this and other developments brought harassment, intimidation and violence directed at Korean children and students residing in Japan. In view of such, the human rights organs have carried out awareness-raising activities such as distributing pamphlets and leaflets and putting up posters, along commuting routes that are used by a large number of Korean children and students residing in Japan, and through these activities, have called on Korean children and students residing in Japan to consult with the human rights organs under the MOJ if they are targeted with harassment (paragraph 52).

D. Position of the JFBA

156. 1. Discriminatory remarks, violence and harassment against students of Korean schools have occurred continuously for many years, based on the adamant discriminatory feeling of Japanese against Korean. Especially whenever there is a diplomatic issue with North Korean government, hundreds of such discriminatory incidents happen throughout the nation repeatedly.

157. Especially after North Korean government formally admitted abduction of Japanese nationals on September 17, 2002, discriminatory remarks, violence and harassment against students of Korean schools became so fierce unknown in recent years, and as a result, many Korean schools were forced to take measures, such as making students commute to and from school in groups or abolishing school uniform.

158. A survey conducted mainly by young lawyers against students of 21 Korean schools in Kanto area (the number of answer 2,710) showed that 1 out of 5 students suffered any form of harassment after the report of the abduction issue and the number

²¹ CCPR/C/21/Rev.1/Add.5

increased markedly compared to before the report. It was revealed that especially in case of female students of junior schools (equivalent to junior high school in Japan), 1 out of 3 suffer damage. The most frequent harassment is remarks such as “Die! Koreans” “Kill you” along with other vicious activities which come under category of criminal act such as trying to push the students out from the platform at station, kicking, spitting, cutting the ethnic school uniform, violence, injury, damage to property.

159. On Internet, many extremely vicious comments were posted anonymously, calling Koreans “cockroach” “inferior people” or “they should be massacred during the colonial period.”

160. After that, on July 5, 2006 when the report was made about the experimental missile launch by North Korea, discriminately remarks, violence and harassment against students of Korean school became fierce again. Just in 3 weeks till July 26, as many as 121 cases were reported from schools to the headquarters of the Union of Korean Teachers in Japan. The cases involved threatening phone calls such as “we would throw in petrol bombs to your school tomorrow” or “we would kill 5 high school students within a week” or harassment to paint the school gate in red.

161. 2. The Japanese government said it had conducted awareness-raising activities against vicious discriminatory remarks, violence and harassment which took place after the report of the abduction issue in September 2002 (paragraph 52), however the fact same damage occurred continuously in July 2006 shows the government’s activity has not been effective.

162. 3. Insufficient measure by the government

In the first place, as for “the awareness-raising activity such as distributing pamphlets, leaflets and putting up posters”, there is no concrete description of how many of such media were produced, and how many were distributed where. The government also said that it called on to the Korean children and students residing in Japan to consult with the human rights organs under the MOJ if they are targeted with harassment, but there is no concrete description how many consults were made and how they responded to them. Or in the case the number of consults made was so small alienated from the actual damage done, there is no evidence at all that the government studied the reason.

163. Moreover, the government’s response is mainly targeting the victims, but what is necessary to be more effective and decisive is to control the wrongdoer.

For example, when mass media reports are solely criticism against North Korea, leading figure of the government such as prime minister should send a clear message to the society as whole through TV and other media that harassment against students of Korean schools should not occur.

164. Moreover, in order to clearly show its attitude that it does not admit any discriminatory remark as a nation, it is strongly required to establish a law which prohibits discrimination among private individuals. On this point, Japan has not established domestic law of the International Convention on the Elimination of All Forms of Racial Discrimination.

165. 4. So the Japanese government should take decisive and more effective measure including making the International Convention on the Elimination of All Forms of Racial Discrimination as domestic law, based on study of obstacles to overcome in order to improve the situation.

**Discriminatory remark against ethnic group by public officials
and encouragement of discrimination by public organs (Covenant article 26)**

A. Conclusions and Recommendations

166.

For the purpose of stopping discriminatory remarks against ethnic groups by public officials, the government of Japan should provide appropriate education and training to those in public office immediately. The government of Japan should pay utmost consideration so that it would not encourage discrimination among people against foreigners by public offices' aggressively spreading an image that "criminal acts by foreigners have deteriorated security in Japan".

B. Subjects of Concern and Recommendations of the Human Rights Committee

167. Nothing is mentioned. However, in the concluding observation adopted by the committee on the elimination of racial discrimination regarding initial and second periodic report of the Japanese government, it is recommended that "The State party is urged to provide appropriate training of ,in particular, public officials, law enforcement officers and administrators".(paragraph13)

C. The Government's Response and its Fifth Periodic Report(pragraph 48,49)

168. As part of these awareness-raising activities, in FY2002 the human rights organs under MOJ produced the human rights encouragement film "We want to Live in this Town-Thinking about the Human Rights of Foreign Nationals" which had as its main theme awareness of discrimination toward foreign nationals, and the film has been shown at lectures and training sessions sponsored by human rights organs. It has been also rented out for free to people who wished to see it. (paragraph48) Concerning the

various human rights issues involving foreign nationals, such as being refused rental of an apartment or being refused entry to a restaurant or public bath on the grounds that they are foreign nationals, the MOJ is aiming to remedy and prevent harm caused by human rights infringements through human rights counseling, and through investigation and resolution of human rights infringement cases (paragraph 49).

D. Position of the JFBA

1 .Discriminatory remarks against foreigners by public officials

169. Discriminatory remarks against foreigners by public officials have never been eradicated in Japan. Even only after 2002, the following remarks were made.

170. On the other hand, the government of Japan has not taken any aggressive measure to stop such discriminatory remarks. On the contrary, when Human Rights Bureau of the Ministry of Justice was asked to relief human rights about the remark of “people from the third category country” by Ishihara, the governor of Tokyo, the bureau did not even recommend investigation. As a result, on March 20, 2001, the government of Japan was recommended by the UN Committee on the Elimination of Racial Discrimination “” to provide appropriate training of, in particular, public officials, law enforcement officers and administrators about this “statements of a discriminatory character made by high-level public officials”.²² However, JFBA has not acknowledged this “appropriate training” was given accordingly.

171. (1)April 9, 2000, Shintarou Ishihara, the governor of Tokyo said in his speech at a ceremony at the Ground Self-Defense Force, “Looking at Tokyo at present, we see extremely vicious crimes repeatedly conducted by foreigners, the people from the third category countries²³ who made illegal entry into Japan. The type of crimes in Tokyo has changed from the ones in the past. Under such circumstance, if big natural disaster happens, large scale riot can be expected. This is the present situation”.

172. (2) May 8, 2001, Shintarou Ishihara, the governor of Tokyo touched upon the murder by Chinese nationals and said “We cannot deny the possibility that the quality of Japanese society as a whole changes as a result of the spreading of crimes which show such ethnic DNA.” And he also said “The number of illegal immigrants to Japan is about 10,000 per a year, and Chinese account about a little less than 40 % of them. Since they are illegal immigrants, they cannot get decent jobs and inevitably become

²² CERD/C/58/Misc.17/Rev.3 paragraph13

²³ Various theories exist for the origin of the word. Those who regard this word mean “people of the third category countries in the war, not a defeated country, not a victorious nation, but a country concerned in the war” after WWII, in the other words the countries and regions colonized by Japan, evaluate this word as discriminative.

criminal factor.”

173. (3) May 31, 2003, Taro Aso, then Secretary General of Liberal Democratic Party said in his speech at University of Tokyo that “Change of names into Japanese ones²⁴ was initiated by Korean people themselves” and “It is Japanese that taught Hangul and provided mandatory education.”

174. (4) July 12, 2003, Takami Etou, ex-Director General of the Management and Coordination Agency said at the general convention of branches of Liberal Democratic Party about the foreigners illegally staying in Japan, “When something breaks out on Korean peninsula, hundreds of thousands of them rush to Japan on boats. In Japan there are a million of illegally staying foreigners who steal and kill. And they cause disturbance in Japan.” “Take a look at Kabuki-cho in Shinjuku, it is now a lawless area ruled by the people from the third category countries. In these days, those from China, Korea and other countries and illegally staying in Japan commit robbery in groups.” And “It is a trumped-up story that 300,000 people were killed in Nanking massacre, it is a lie.” For your information, the number of foreigners arrested in FY2003 was about 20,000 and when it comes to those offended criminal code, the number was just 8,725 and was quite different from the above remark.

175. (5) November 1, 2002, Shintarou Ishihara, the governor of Tokyo said in his speech about the successful launching of manned rocket by China in October same year, “In our neighboring country, China, people were stunned by the launching of manned spaceship. Chinese were ignorant, so they were pleased, crying “Aiya”. But such spaceship was outdated. Japan can achieve the same just in a year, if it tries to.”

176. (6) November 2, 2003, Shigefumi Matuzawa, the governor of Kanagawa prefecture said in his campaign speech for a candidate, “Chinese people are coming to Japan with work visa, but they are sneak thieves. They return home after committing crimes.” “Jails (in Japan) are with heating system, and they feed you. They are not afraid of being put into jail, so (foreign) thieves stealing from house in the absence of the occupants or thefts increase rapidly.

2. Issues of Criminal Acts by Foreigners

177. As the above mentioned remarks by public officials show, there has been a spreading image in Japan in recent years that “vicious criminal acts by foreigners have been sharply increasing and threatening the security in Japan” and such image incites aversion and terror against foreigners, generating xenophobia and encouraging

²⁴ A policy to impose Japanese names on Korean people before 1945

discrimination against foreigners as a result.

178. Moreover, the following facts clearly show that public organs in Japan have played facilitating role in making such bad image about foreigners.

179. (1) September 2003, with the leadership of the Prime Minister, “Ministerial Meeting Concerning Measures Against Crime” was established and on December 18, the meeting issued “Action plan to realize society which is strong against crimes”. The Action Plan noted “more vicious and organized crimes by foreigners and spread of them throughout the nation” “accelerated deterioration of security standard” and mentioned the necessity “to study the scheme to accept foreigners, looking at the situation of crimes”.

180. (2) October 17, 2003, Immigration Control Bureau of the Ministry of Justice, Immigration Control Bureau of Tokyo, Tokyo metropolitan government and National Police Agency jointly announced “the joint declaration on the intensified crack down of foreigners illegally staying in Tokyo”. In the declaration, it is pointed out that “a part of those illegally staying is a hotbed of increasing organized crimes by foreigners” and “it is intended to halve the number of foreigners illegally staying in Tokyo in the coming five years” and it was decided to intensify exposure.

181. (3) In addition to that, Immigration Control Bureau of the Ministry of Justice began accepting “information about foreigners illegally staying in Japan” on its website since February 16, 2004. This system allows people to report to the bureau just by filling the information such as name, nationality, the address of “where the one works or where one was witnessed”, telephone number, types of work and others according to the acceptance form on the website and clicking “transmit”. There was much criticism about the system, because to anonymously collect information only about foreigners illegally staying in Japan in such simple way, while there are many other criminal acts or administrative crimes, may trigger vague feeling of insecurity, repulsion or hatred against foreigners in general and pointlessly encourage racial discrimination.

182. (4) Moreover, many of the crime prevention posters produced by police stations for public organs or banks use expression which may encourage distrust or fear against foreigners. For example “Dial 110 when you see a suspicious foreigner.” (Osaki police station) Or another one even says “When you get on and off a car, and especially when you reach your home, be alert on the suspicious foreigners around you.” (Kuramae police station)

183. (5) In “the white paper on police” and “the white paper on crimes” after 1991, “crimes by foreigners in Japan” has been given stress as an independent chapter. And

the content of the chapter is reported as announcement by Police Agency with the headline such as “Foreigners’ crime top 40,000 and more than 20,000 arrested, the biggest figure”

184. However, the data by police agency is unilateral one ignoring the fact that increasing number of foreigners are coming to Japan every year and about half of the crimes committed by them is violation of Immigration-Control and Refugee-Recognition Act. Many researchers doubt the accuracy and neutrality of the data.

3. On the other hand, the Japanese government says in its report it produced and showed the human rights encouragement film (paragraph 48) and provides human rights counseling and investigation and resolution of human rights infringement cases (paragraph 49).

185. As for the “human rights encouragement film”, concrete data such as how many times it was shown, how many people watched it, and how many times it was rented out, so its influence on society is greatly doubted.

186. Also as for the “human rights counseling and investigation and resolution of human rights infringement cases”, no report is made about how many cases of counseling it accepted, what kind of investigation and resolution were conducted, so its effect is doubted.

187. Putting these doubts aside, these measures are taken to eliminate discrimination among private individual, however, as mentioned above, encouragement of discrimination by public organs or discriminatory remarks by public officials can be seen one after another in Japan. Moreover, no measure is taken to address this issue by the Japanese government.

188. This issue is more serious than the discrimination in private citizens. In order to abolish discriminatory remarks against ethnicity by public officials, the Japanese government should immediately provide appropriate education and training for public officials. It also needs to pay the utmost care so that public organs will not encourage discrimination against foreigners by spreading an image “Security in Japan has been threatened by criminal acts of foreigners”.

Section 3: Interference with privacy through intensified control of immigration and foreign residents (Covenant, article 2, 17 and 26)

A. Conclusions and Recommendations

189.

1. The government obligates foreigners (except for the special permanent residents) to provide biographic information including photograph of one's face and fingerprints on their entering Japan, but obligating provision of fingerprints information violates the Covenant, article 2 paragraph 1, article 17 and 26 and this measure should not be taken. The biographic information should be deleted as soon as verification is completed at immigration inspection.

2. The Japanese government's obligating foreigners (except for the special permanent residents) to acquire and carry IC residency card, its obligating employers and schools to report acceptance of foreigners and its collectively controlling information about foreigners in the unified manner to intensify its comprehensive information control function violate article 2 paragraph 1, article 17 and 26 and these measures should not be taken.

3. When hoteliers confirm identity of foreign guest, in consideration of the Covenant, article 2 paragraph 1, article 17 and 26, they should not be obligated to keep the photocopy of passport or to provide information they obtain from their foreign guests to police and other organs.

B. Subjects of Concern and Recommendations of the Human Rights Committee

190. No comment is made in the concluding observation for the fourth periodic report.

C. The Government's Response and its Fifth Periodic Report

191. For the purpose of preventing terror and crimes by foreigners and decreasing the number of illegally staying foreigners, the government of Japan has established a new system to intensify control on immigration and residency. The main system and measures which have been realized so far are as follows.

192. 1. Foreigners (except for the special permanent residents) are obligated to provide biographic information including fingerprints and photograph to go through immigration inspection. The submitted information is kept and utilized for investigation into criminal acts.

193. 2. System concerning intensified control of foreign residents

(1) To obligate foreigners to acquire and carry IC residency card (being discussed at special unit of informal gathering for policies on immigration control.)

(2) Obligation of employers and schools which accept foreigners to report (the system is already established for employers' obligation to report. The one for schools is now

being discussed at special unit of informal gathering for policies on immigration control.)

(3) To intensify the comprehensive control function of information about foreigners (being discussed at the Ministry of Justice)

194. 3. To intensify confirmation of identity of foreign guests by hoteliers (the system is executed.)

D. Position of the JFBA

195. The Japanese government has been rapidly establishing a new system to intensify control of immigration and residency of foreigners, aiming to prevent terror and other crimes and to decrease the number of foreigners illegally staying in Japan. However establishment of such system is problem, from the viewpoint of article 17 about right of privacy or control of information about oneself, and article 2 paragraph 1 and article 26 about prohibition of discrimination against foreigners.

196. 1. Obligating foreigners to submit biographic information including fingerprints and photograph of one's face for immigration inspection and keeping and utilizing the submitted information for investigation into criminal acts.

197. (1) The Japanese government obligates all foreigners (except for the special permanent residents) to submit biographic information such as fingerprints and photograph of one's face on the occasion of immigration inspection through revision of Immigration-Control and Refugee-Recognition Act in 2006 and uses the submitted information to confirm the identity of the holder of passport, or checks the information about those who were once deported or those who are on the wanted list. However obligating submission of such biographic information infringes the right of privacy and right to control information about oneself, so the necessity and the effect of the system in light of prevention of terror and other criminal acts, the existence of less restrictive alternative, and taking votes on the system should be studied carefully.

198. Especially the obligation to submit fingerprints also infringes article 7 of the Covenant about prohibition of inhuman or degrading treatment, so such system should not be taken.

Moreover, when foreigners with status of residency through immigration inspection make temporary trip out of Japan and re-enter, they should be exempted from the obligation to submit fingerprints as the special permanent residents are.

199. (2) The Japanese government keeps the acquired biographic information after the entry and to utilize the information for control of foreign residents and investigation

into crime acts, after the introduction of the system which obligates foreigners to submit biographic information on occasion of entry into Japan.

200. About all the foreigners who enter Japan going through the procedure to check the biographic information against the one about those who were deported, or those on the wanted list or suspected as terrorist, even without any suspicion, the electronic information is collected to control and supervise them, utilizing the information for investigation into criminal acts, which infringes the right of privacy and right of controlling information about oneself which are the basic human right equally entitled to foreigners too. Especially under the current circumstance, the provision of private and other information kept by an administrative organ to the other administrative organs is possible based only on the decision by the chair of the organ about the reason, the system is remarkably harmful.

201. And to intensify control and supervision only on foreigners may hamper forming of stable Japanese society where foreigners coexist.

Therefore, the acquired biographic information should be deleted immediately after checking against passport information or information on those deported at immigration inspection and should not be kept after entry of foreigners for the above-mentioned purposes.

202. 2. A system about intensified control of residency

The Japanese government is to review the current alien registration system by municipalities, to issue IC residency card (provisional name) with IC chip, a large capacity media and to obligate foreigners except for the special permanent residents to carry the card at all times. Even the permanent residents who are not restricted in working should report one's employment or school to be carried on the IC residency card, which has possibility of infringing privacy and can be criticized as discrimination against foreigners.

203. The revision of the Employment Measures Law on November 13, 2007 requires employers of foreigners except for special permanent residents to report to the Minister of Health, Labor and Welfare about the foreign employee's name, status of residency and period of residence upon his getting and leaving the job. It is planned to fine less than 30,000 yen for violation. In addition, the idea to obligate schools accepting foreign students to respond to the inquiry by the Minister of Justice about the situation of acceptance is now getting concrete. These plans are to collect information about receiving places, such as workplace and schools, while the Employment Measures Law aims to "promote achieve balance of labor supply in terms of quality and quantity". The report of names or status of residency of each foreigner cannot be considered necessary. These plans intensify supervision of foreigners and are suspected as

infringement on privacy.

204. At present, information about entry and departure of foreigners and information about alien registration under alien registration law are controlled separately by different organs. Another idea is now discussed to intensify the comprehensive information control function by collectively controlling the information about entry and departure, alien registration and other information about foreigners provided by police agency and the Ministry of Foreign Affairs. However this may allow unified control and comprehension of information about foreigners owned by the national and local government and use of the information by them, including police. So this constitutes remarkable infringement on the right to control information about oneself and the right for privacy of foreigners and discriminative treatment against foreigners. Therefore this measure should not be taken.

205. In 2005, the Regulation on the Hotel Business Law was revised and when foreigners who do not have address in Japan lodge at Japanese style inn or hotel, nationality and passport number must be notified in the guest book. Following this revision, the Ministry of Health, Labor and Welfare gave guidance to inns and hotels to ask the foreigners in the above-mentioned category to show passport, to keep the copy of the passport and to report to the nearby police or to take appropriate action in the case the request is refused. The Passport Law only allows people in public service such as immigration officer or police to ask foreigners to show passport, so the foreigners do not have any obligation to show his passport to private individual. The said guidance actually tries to force foreigners to show his passport when it is not obligated by law and tries to make hoteliers to take the roll of police. From the view point of necessity to protect the right of privacy and the right to control information on oneself of foreigners, the Japanese government should not make hoteliers keep copy of passport or obligate them to report the information they acquire from foreign guests to police.

Section 4: Industrial Training and Technical Internship Program

A. Conclusions and Recommendations

206.

<p>The Japanese government should take measures to prevent infringement on human rights such as divesting of freedom of movement, freedom of returning to one's country, and discrimination in working conditions, in the industrial training and technical internship program.</p>

B. Subjects of Concern and Recommendations of the Human Rights Committee

207. Nothing is mentioned.

C. The Government's Response and its Fifth Periodic Report (paragraph 40)

208. It just states as follows and does not mention the program. "the GOJ aims to "more actively promote the acceptance of foreign workers in professional or technical fields from the standpoint of invigorating and internationalizing the country's economy and society" and considers that "concerning the acceptance of what are called unskilled workers, it can be expected to have a tremendous effect on the Japanese economy, society and national life, beginning with problems related to the domestic labor market. In addition, it would have a significant impact on both the foreign workers themselves and their countries. Therefore, the Government must cope with this issue with thorough deliberation based on a consensus among Japanese people.

D. Position of the JFBA

1. Industrial Training and Technical Internship

209. Industrial Training Program and Technical Internship Program are the schemes established to contribute to the development of human resources in the developing countries who will lead economic development through transfer of Japanese technique and skills to developing countries. Those who completed the training can move onto technical internship phase. Trainees receive just subsistence expense called "training allowance" and do not get paid nor are covered for compensation for labor accidents. The number of new entrants to Japan as trainees in 1985 was 13,987 and 58,534 in 2002, out of which 53,690 were from Asian countries.

2. Actual condition of industrial training and technical internship and restriction on freedom of movement and return to one's country

210. Japanese laws do not accept officially immigrant workers for unskilled labor. However, a large number of medium, small and tiny businesses take advantage of the "training" system to accept unskilled foreign workers for unskilled labor and do not guarantee their rights and exploit them. Technical interns are not for training but for labor, but in many cases they are engaged in unskilled labor and are remarkably discriminated in terms of working conditions. And many companies dispossess passport from trainees and interns as a mean to continue such exploitation and deprive them of freedom of movement and return to one's country. According to a survey conducted by Kinki Regional Administrative Evaluation Bureau, Chugoku-Shikoku Administrative Evaluation Bureau, Kanto Regional Administrative Evaluation Bureau under the Ministry of Internal Affairs and Communications in 2001 and 2002 and another one

done by Shikoku Administrative Evaluation Bureau and Kochi Administrative Evaluation Bureau in 2004 and 2005, some receiving companies uniformly keep the passports, which cannot be recognized as voluntary keeping. And there are some other companies restricting movement by imposing a fine on getting back after curfew or staying out overnight without notification.

211. Among the cases consulted to Labor Union of Migrant Workers, there are cases that receiving company imposes restrictions such as possession of mobile phone, religious ceremony, marriage and pregnancy during period of stay in Japan or interns are discriminated in working conditions like low wage for interns only.

3. Necessary Measures to Take

212. The Japanese government should investigate the actual condition of industrial training and technical internship and the actual condition of exploitation through unskilled labor or discrimination, and must make effort to resolve these issues. Since passports are dispossessed as a mean of exploitation and discrimination, dispossession of passports should be banned and freedom of movement and return to one's country of trainees and interns should be secured. While it is necessary to take measures to resolve discrimination, no measures are taken.

213. JFBA in the keynote report of the 47th Convention on Protection of Human Rights and "Declaration to seek building up of society of coexistence of multi ethnicity and multi culture and establishment of basic human right law for foreigners and ethnic minorities"²⁵ (2004) " pointed out the problems of the training scheme.

Section 5: Measures taken by the Human Rights Organs under the Ministry of Justice for Protection of Human Rights of Foreigners (Covenant, article 2)

A. Conclusions and Recommendations

214.

The human rights organs under MOJ lack independence from administration and its enlightening activities or counseling cannot be expected to be effective. The Japanese government should without delay set up national institutions for the promotion and protection of human rights which are independent from administrative organs along with "Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights"²⁵ (Paris Principles; General Assembly Resolution

²⁵ (http://www.nichibenren.or.jp/ja/opinion/hr_res/2004_5.html)

B. Subjects of Concern and Recommendations of the Human Rights Committee

215. The Fourth Periodic Report, Concluding observation, paragraph 9 and 10

The Human Rights Committee states in Concluding Observation paragraph 9 “The Committee is concerned about the lack of institutional mechanisms available for investigating violations of human rights and for providing redress to the complainants. Effective institutional mechanisms are required to ensure that the authorities do not abuse their power and that they respect the rights of individuals in practice. The Committee is of the view that the Civil Liberties Commission is not such a mechanism, since it is supervised by the Ministry of Justice and its powers are strictly limited to issuing recommendations. The Committee strongly recommends to the State party to set up an independent mechanism for investigating complaints of violations of human rights.

216. Especially about treatment at immigration control bureau, by saying in paragraph 10 “More particularly, the Committee is concerned that there is no independent authority to which complaints of ill-treatment by the police and immigration officials can be addressed for investigation and redress. The Committee recommends that such an independent body or authority be set up by the State party without delay”, the Committee asks to “set up without delay” the independent institution or authority.

C. The Government’s Response and its Fifth Periodic Report

217. The Japanese government stated in its Fifth Periodic Report that the human rights organs under the Ministry of Justice are actively taking steps in order to protect the rights of foreign nationals through awareness-raising activities, human rights counseling and investigation and resolution of human rights infringement cases. (paragraph 46 ~ 50)

D. Position of the JFBA

218. 1. Although the government in its report states enlightenment activities by human right organs or investigation and treatment of cases of infringement on human rights have been conducted to protect and rescue damage or victims, as was already stated, these activities by human rights organs under the Ministry of Justice are not effective.²⁶

²⁶ See chapter 1, section 4, Establishment of Domestic Institution for the Protection of Human Rights

219. 2. Rather as being pointed out in “Updated study by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene”(E/CN.4/2006/16/Add.2) reported at UN Human Rights Committee on January 24 , 2006, Immigration Control Bureau established a system of reporting by e-mail by asking citizens to make anonymous report about “foreigners suspected to be illegally staying” on its website in February 2004. The special rapporteur pointed out “this system directly promote or incite xenophobia and attitude to suspect foreigners as criminal based on race”, however the system is not yet abolished. Human rights organs under the Ministry of Justice are incompetent for a nation’s infringement on human rights of foreigners.

220. 3. Therefore, without delay, the Japanese government should set up independent national institutions for the promotion and protection of human rights based on Paris Principles which can deal with infringement on human rights by national organs like Immigration Control Bureau.

Section 6: Deportation of Foreigners (Covenant, article 13)

A. Conclusions and Recommendations

221.

There is no due process of law in the deportation procedures.

1. The Japanese government should not stretch the meaning of the reason of deportation.
2. No impetuous deportation should be done to deprive a foreigner to whom notice of deportation was issued of his right to go on trial.
3. Foreigners without command of Japanese should be provided with interpretation service.
4. In producing a record of a foreigner who talks through interpreter, the contents confirmed through reading aloud should be recorded on tape or videotape.
5. Laws should be revised to apply administrative procedure law to immigration procedure.
6. Acknowledgement of those related to terrorism should be done strictly and laws should be revised to incorporate substantial basis of acknowledgement into reasons of deportation.

B. Subjects of Concern and Recommendation of the Human Rights Committee

222. Nothing is mentioned in the Fourth Periodic Report, Concluding Observation.

C. The Government's Response and its Fifth Periodic Report (paragraph 271 and 278)

223. Concerning this point, the Japanese government states in its Fifth Periodic Report as follows.

The Immigration Control and Refugee Recognition Act clearly established the ground for deportation. (paragraph 281)

The three-stage preliminary procedures, Immigration Inspector's finding, an oral hearing before a Special Inquiry Officer, a final decision by the Minister of Justice or Director-General of the Regional Immigration Control Bureau is taken to provide full protection before a final decision on deportation is taken. (paragraph 281, 282)

The foreigner whose deportation has finally been decided may seek judicial relief to contest an administrative decision. (paragraph 282)

The Bureau employs external interpreters in carrying out the deportation procedures. (paragraph 284)

When drawing up a deposition or other statements, after making a record of the testimony, the testimony is read out loud to the foreign national through an interpreter and the foreign national himself/herself verifies that there are no errors in the deposition. (paragraph 285)

The Administrative Procedure Law provides that provisions of the law shall not apply to the "dispositions and administrative guidance concerning entry and departure of foreign nationals, recognition of refugees, and naturalization" (Article 3, Paragraph 1, Item 10). This provision is included because there is a distinctive procedure tailored to the special nature of the rights possessed by people subject to the dispositions stipulated in Item 10. However, it should be fully ensured that dispositions are carried out using fair procedures. (paragraph 287) (paragraph 281 to 287)

D. Position of the JFBA

1. Paragraph 281 of the Fifth Periodic Report

224. Paragraph 281 of the Fifth Periodic Report states that "The Immigration-control and Refugee-Recognition Act clearly establish the ground for deportation. The procedures under the Act aim at confirming whether a suspected ground for deportation in fact exists".

225. However, as for those "clearly acknowledged to be exclusively engaged in" (Immigration-Control and Refugee-Recognition Act, Article 24, Item 4-1) the works out of qualification, which is one of the deportation procedure, Immigration Control Bureau adopts interpretation which is away from the grammatical interpretation, causing a lot of problems. For example, in the case an international student is engaged

in a work which is not permitted by Immigration Control Bureau, the student is “acknowledged to be exclusively engaged in “ works out qualification and receives a warranty for detention and finally deportation warranty is issued to him. Even if the student attends more than 90 % of classes and do not spend so much time on the works out of qualification, Immigration Control Bureau takes interpretation that the student “is clearly acknowledge to be exclusively engaged in” such works.

226. On this point, verdict of Osaka district court on October 19, 2004 (not carried by public publication) and verdict of Osaka high court on May 19, 2005 (not carried by public publication) revoked the issuance of warranty of deportation, judging the interpretation and adoption by Immigration Control Bureau are wrong.

2. Paragraph 282

227. The government’s report stated no actual deportation is carried out during these procedures, which are often called “preliminary procedures” and the foreigner may seek judicial relief under Japan’s judicial systems. (paragraph 273)

228. However on January 21, 2005, eight male Bangladeshis appearing at Immigration Control Bureau, asking for special permission to stay, were notified of promulgation of deportation warranty at around 7 o’clock in the morning and were actually deported at around 11 o’clock in the same morning at national expense. Among these eight men, some were even clearly asking for counseling with lawyers but were not allowed even making a phone call and were boarded onto a plane for Bangladeshi with handcuffs. In Japan, it is less than one percent of total deportation that is carried out at national expense.²⁷ As typical examples of those deported at national expense, the Immigration Control Bureau cites “those with illness, those trying to avoid deportation with various reasons, and those who cannot afford the return fee and detained for a long time”, but these eight Bangladeshis do not fall into any of these categories. This extremely exceptional deportation at national expense is thought to be conducted with the aim of depriving those of their right to go through trial.

229. Moreover, in this incident, it was found that prior to the oral hearing by the Special Inquiry Officer, Director of Tokyo Immigration Control Bureau, who has the final decision on the case, submitted a statement titled “report about deportation at national expense” to the Immigration Control Bureau of the Ministry of Justice.²⁸ In other word, even before going through the oral hearing by the Special Inquiry Officer,

²⁷ For example, out of total 33,192 deported in 2005, it was only 192, 0.57 percent ,were deported at national expense.

²⁸ Seven of these eight men filed suit against national government seeking compensation for damage on February 27, 2006, insisting their rights to go through trial was infringed, and the case is still on trial while this report is being prepared.

Director of district Immigration Control Bureau who has the authority to make decision on the next step has made the decision on “deportation” and studied the possibility of exceptional deportation at national expense and asked the Ministry of Justice for instruction. It cannot be said that “full protection provided by this three-stage preliminary procedure” exist as is stated by the government’s periodic report. (paragraph 282)

3. Paragraph 284 (attendance of interpreter for deportation procedure)

230. The Fifth Periodic report states an interpreter is provided for deportation procedure in paragraph 284.

231. However, in the incident in which a Thai female without command of Japanese renounced her right to ask for the oral hearing without fully understanding the meaning, because of the absence of interpreter, the fact that investigation procedure was not conducted via official interpreter, the fact that notification about her right ask for oral hearing was not given makes the case illegal. As a result, the defendant was forced to sign a document to renounce her right to ask for oral hearing without fully understanding her intention and was issued the warranty of deportation. In this incident, the verdict cancelled the treatment as illegal. (Tokyo district court, January 21, 2005-not carried in public publication)

232. According to the verdict for this case, the Japanese government insisted interpreter is not necessary because the first procedure of violation investigation just divides those who wish to stay from those who wish to return. This insistence clearly contradicts paragraph 284 of its periodic report.

4. Paragraph 285 (drawing up a deposition or other statements)

233. As is stated in paragraph 285 of the government’s periodic report, when drawing up a deposition or other statements, the testimony is read out loud to the foreign national through an interpreter and the foreign national him/herself verifies that there are no errors in the deposition and after noting the fact at the end of the statement, the foreign national signs the statement. However, the statement is produced in Japanese and the production process is not recorded neither on tape of videotape. Moreover, the oral interpretation by an interpreter who confirmed that the statement is errorless by reading the statement aloud is not recorded neither on tape or videotape, there is no method to investigate the content of interpretation, even there is error with interpretation.

5. Paragraph 287 (Immigration Administration Not Subject to the Administrative

Procedure Law)

234. As is stated in the government's report, paragraph, the Administrative Procedure Law provides that the provisions of chapters 2-4 of the law shall not apply to the "dispositions and administrative guidance concerning entry and departure of foreign nationals, recognition of refugees and naturalization"(art.3.para.1. item 10).

235. As the reason of this non-application, paragraph 287 of the report says there is a distinctive procedure tailored to the special nature of the rights possessed by people subject to the dispositions stipulated in Item 10. However, except for presentation of reason of disposition, no alternative procedure exist for establishment and publication of investigation standard (article 5 of Administrative Procedure Law), regulation of standard processing period (article 6), immediate investigation and response to application (article 7), presentation of reason of disposition (article 8) and offering of information on progress of investigation and expected timing of disposition (article 9).

236. Administrative procedure law aims to contribute to protection of right of citizen through securing justice and further transparency in administrative operation by providing common matters for procedure concerning disposition, administrative guidance and report (article 1, item 1). And the procedure about entry and departure of foreign nationals, recognition of refugees and naturalization is not different from other administrative procedure in its necessity to insist transparency. Especially, recognition of refugees requires extremely strict and appropriate procedure, because erroneous judge may result in serious infringement on human rights when one is deported to his or her own country, including depriving of one's life or physical freedom.

237. Therefore, Administrative Procedure Law, article 3, paragraph 1, item 10 should be deleted.

6. Addition of reason for expulsion to Immigration-Control and Refugee-Recognition Act in revision 2006

238. The following two items were added as reason for expulsion in revision of Immigration-Control and Refugee-Recognition Act in 2006 (Article 24, 3-2, 3-3)

Those who are acknowledged by the Minister of Justice to have reasonable reason to possibly carry out criminal acts aiming at threatening public, to possibly act preparatory behavior for such criminal acts or to possibly act to facilitate execution of such criminal acts.

Those whose entry to Japan is recommended by international agreement to prevent.

239. As for , "those who are acknowledged by the Minister of Justice to have

reasonable reason to possibly carry out” is too insufficient in setting limits. If the problem is just acknowledgement of the Minister of Justice, there is no room to contend. And the wording “those who are acknowledged by the Minister of Justice” has a possibility that it is interpreted to give the primary acknowledging authority to the Minister of Justice and recognize his or her discretion. In addition to this, the wording “those who are acknowledged to have reasonable reason” to possibly carry out has too wide range of subjects and too abstract. For example, in a case, relatives or friends who are in foreign countries of the foreign national staying in Japan are suspected to conduct terror, the facts the foreign national in Japan is a friend or acquaintance of them, had contact with them in the past, or had remitted money to them can be basis of acknowledgement to possibly act to facilitate execution of criminal acts, and it is severe for the said foreign national if he or she uniformly becomes subject of expulsion.

240. As for , though it is said the entry should be prevented, the reason to be prevented is not a prerequisite for expulsion. As a result, even if the foreign national files a suit claiming for revocation of expulsion disposition, Immigration Control Bureau just needs to prove the existence of international agreement and the said foreign national is the one whose entry to Japan is recommended to be prevented, and there is possibility that the foreign national virtually loses all mean of defense.

7. Summary

241. As stated so far, the current deportation procedures are completely inadequate. Laws should be revised to make it possible to apply the Administrative Procedure Law to immigration procedures and to require solid evidence to identify foreigners as terrorists and deport them, so that due process of law is secured and the right to a fair trial by the court should be fully respected.

Section 7: Refugee Problem

Treatment of Applicants for Recognition of Refugee Status.

A. Conclusions and Recommendations

242.

Applicants for recognition of refugee status (including those in litigation) should be provided stable statuses and exceptions should be minimized. Also, they should be allowed to receive livelihood assistance or to work during the application process.
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B. Subjects of Concern and Recommendations of Human Rights Committee

243. Nothing is mentioned.

C. The Government's Response and its Fifth Periodic Report (paragraph 274)

244. The newly established system for permitting provisional stay was put in place to stabilize the legal status of illegal foreign nationals, who satisfy certain requirements such as 1) they filed an application for recognition of refugee status within six months from the date they landed in Japan, 2) they entered Japan directly from a territory where they had a well-founded fear of being persecuted, and 3) they have not been sentenced, after entering Japan, to imprisonment with or without work for a crime stipulated in the Penal Code or other laws. In such cases the procedures for compulsory deportation will be suspended and the procedures for recognition of refugee status will take precedence and be carried out. “

D. Position of the JFBA

1. Permission for Provisional Stay

(1) System for Permitting Provisional Stay

245. In general, the government will grant the permission for “provisional stay” to those who filed an application for recognition of refugee status. There is not any provision in law itself concerning preferential treatment for the applicants for recognition of refugee status. Even if they obtain the permission for provisional stay, they are prohibited from working as described later. Permission for provisional stay will be one of the requirements for welfare payment which the Ministry of Foreign Affairs entrusts to Refugee Assistance Headquarters of Foundation for the Welfare and Education of the Asian People. This system for permitting provisional stay is a new system went into effect in 2005, before which the applicants for recognition of refugee status were given no legal status at all, and this gave precarious status to all applicants with illegal residency.

(2) Grounds for Exception of Permission for Provisional Stay

246. A few examples in which permission for provisional stay is not granted are: 1) application for recognition of refugee status was made over six months after the date they landed in Japan, 2) applicant did not enter Japan directly from a territory where they had a well-founded fear of being persecuted and 3) there are reasonable grounds to suspect that applicant is likely to flee. (Immigration-Control and Refugee-recognition Act Article 61-2-4 paragraph 1).

247. The UNHCR and JFBA have pointed out the risk that these grounds for exception will be broadly applied. In addition, if procedures for refugee recognition have concluded but applicants cannot be protected and are preparing or have filed lawsuits, their permission of provisional stay shall be expired.

248. In fact, in 2005, only 50 applications have obtained the permission out of 326 applications for provisional stay. The major reason were 166 applicants who didn't file an application for recognition of refugee status within six months from the date they landed in Japan, 99 applicants who have already received the written deportation order, 58 applicants who didn't enter Japan directly from a territory where they had a well-founded fear of being persecuted.

249. Moreover, the reason that "there are reasonable grounds to suspect that the alien is likely to flee" is ambiguous, which provokes the suspicion that its application is getting broader.

(3) Prohibition of Working

250. Under the current system for permitting provisional stay, without exception, an applicant should be granted permission of provisional stay on condition that they should be "prohibited from engaging in activities related to the management of business involving income or other activities for which he/she has received rewards" (ICRRA Enforcement Regulations Article 56-2.3.3). Current protection measures for applicants for recognition of refugee status are performed under commission from the Ministry of Justice by the Refugee Assistance Headquarters of the Foundation for the Welfare and Education of the Asian People, but the monetary amount paid is far lower than the amount for public livelihood assistance considered necessary to guarantee a minimum livelihood, and it is paid only to some applicants for refugee status. Considering these circumstances, prohibiting the people with permission for provisional stay from working threatens the survival of applicants for recognition of refugee status. Therefore, applicants, including those without permission for provisional stay, should be allowed to receive livelihood assistance or to work during the application process.

2. Detention (Custody)

251. The legal status of people who were not granted permission for provisional stay, and of those who have lost their permission for provisional stay because they have concluded refugee recognition procedures but cannot be protected, and are preparing or have filed lawsuits, is exactly the same that of illegal residents in general. Especially, those who are preparing lawsuits are compulsory detained in general, regardless of whether they are thought likely to flee or not. There are no special detention facilities

for asylum seekers. People in litigation as refugees are placed in the same detention facilities as illegal residents. Applicants for recognition of refugee status and people who have filed lawsuits for recognition of refugee status should not be detained without any particular reason.

3. Criminal Proceeding and Penalty

252. Any person who has an evidence of refugee status may be exempt from penalty (ICRRA Article 70-2). However, applicants for recognition of refugee status who have no legal status because they could not obtain permission for provisional stay could be arrested as illegal residents in criminal proceeding even if their procedures for recognition of refugee status have not concluded. Moreover, there is a case in which an applicant was sentenced to prison because his illegal residency during refugee recognition procedures was subject to punishment. The person who can be exempt from punishment under the article 70-2 of ICRRA should not be arrested during refugee recognition procedures without any particular reason.

4. Suspension of Deportation Procedures during the Preparation of Lawsuits or Litigation

253. Even in cases when the provisional stay is not granted, repatriation by deportation procedures shall be suspended during the application for recognition for refugee status, however when the objection is dismissed or denied, the procedures for deportation are resumed (ICRRA, Article 61-2-3). Therefore, it is legally possible to give notice of the decision to dismiss the objection and carry out the deportation at the same time. Actually, there is a case in which the person who was preparing for filing lawsuit was deported a few days after the denial of the application for recognition of refugee status. In addition, it is possible to stop the deportation by judicial proceedings but it takes at least one month to being determined. Therefore, there was a case in which an applicant was deported during filing lawsuit. This is a violation of the right to a fair trial under the International Covenant on Civil and Political Right, Article 14.

Treatment of the Convention Refugee

A. Conclusions and Recommendations

254.

<p>The Government should provide a status of residence as “Long-term Resident” to all the foreign nationals recognized as refugees. If the Government gives the permission to stay to the person who is not convention refugee for the need of</p>
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protection on human rights and humanitarian cause, a status of residence as “Long-term Resident” should be provided.

B. Subjects of Concern and Recommendations of Human Rights Committee

255. Nothing is mentioned.

C. The Government’s Response and its Fifth Periodic Report (paragraph 275)

256. “Moreover, in order to realize early stabilization of the legal status of foreign nationals who have been recognized as refugees, the status of residence of “Long-term Resident” will be granted to those who came to Japan directly from a territory where they were likely to be persecuted, made an application for recognition as a refugee in Japan without delay, thus, are considered to be especially in need of protection, and if they satisfy certain other requirements “.

D. Position of the JFBA

257. The people recognized as convention refugees should be supported to settle down and provided status of residence as “Long-term Resident” by the government because of substantial need of protection, regardless whether they are illegal residents recognized as refugee, whether they came to Japan directly from a territory where they were likely to be persecuted, or whether they made applications for refugee recognition without delay. Furthermore, if the permission to stay is granted to those who are not recognized as convention refugees for the need of protection on human rights and humanitarian cause, the government should support them to settle down because the need to protection is the same.

258. However, although the need of protection is considered to grant the status of stay, the status of residence for “special activities” instead of the status of “long-term resident” may be granted to the foreign nationals who have not entered directly from the country where they were likely to be persecuted, who filed an application for refugee recognition over six months from the day they landed to Japan, or who are not recognized as convention refugee. Those who are granted this permission of residence for “special activities” cannot be granted the social security such as the national health insurance or public assistance. Also, they have a disadvantage for bringing their families from their country of origin. There is no logical reason for this discriminatory treatment.

Procedures for the Convention Refugee Recognition

A. Conclusions and Recommendations

259.

The procedures for the refugee recognition should be performed by an independent organization of the government ministries and agencies in charge of immigration control, public security policy and foreign policy.

UNHCR views should be respected in the procedures for the refugee recognition, improvements should be made to ensure full procedural guarantee in refugee recognition procedures, and public officials should be required to protect the confidentiality of applicants in the procedures for the refugee recognition.

B. Subjects of Concern and Recommendations of Human Rights Committee

260. Nothing is mentioned.

C. The Government's Response and its Fifth Periodic Report (paragraph 272 to 276)

261. "Japan's refugee recognition system was established on January 1st1982 and has been operating since then but the conditions affecting Japan's refugee recognition system have changed substantially as a result of changes in the international climate in recent years. In order to appropriately respond to these changes, the government reviewed its refugee recognition system and submitted the Law for Partial Amendment of the Immigration-Control and Refugee-Recognition Act to the 159th Diet Session, which was passed on May 27, 2004. The law includes the establishment of a system for permitting provisional stay, the stabilization of the legal status of foreign nationals who have been recognized as refugees, and a review of the objection submission system. The Amended Immigration-Control and Refugee-Recognition Act was promulgated on June 2, 2004, and it is to enter into force on a date determined by a cabinet order within one year of the date of promulgation of the law."

"As of the end of 2003, Japan has recognized 315 foreign nationals as refugees among 3,118 applicants applied for refugee status, while 402 applicants withdrew and 2,230 applicants denied."

D. Position of the JFBA

1. Brief overview of the Procedures for the Recognition of Refugee Status

262. The procedures for the recognition of refugee status were established by the ICRRRA and came into effect on January 1st, 1982. Under these procedures, people

who want to ask for asylum can apply for recognition of refugee status. The Minister of Justice makes the decision. Before, the law stipulated that application for recognition of refugee status had to be made within 60 days from the date they landed in Japan, therefore the government has ritually refused recognition merely because an applicant went over the time limit. The amendment to the law in May 2005 eliminated this time limit. Asylum-seekers can file an objection if they are not recognized as refugees. The Minister of Justice makes a judgment on objections. Furthermore, if an objection is rejected, the applicant can file a lawsuit and the court makes a judgment by ordinary.

2. Non-Independence of Examination Organizations

263. (1) The Ministry of Justice holds jurisdiction over the procedures for the recognition of refugee status. All the decisions should be made in the name of the Minister of Justice. Actual decisions are made in accordance with the Ministry of Justice's ordinary decision-making procedures (approval line) with the participation of prosecutors and executives of the political divisions. Thus, examination organizations have no independence at all from the government.

264. Investigations of applications for recognition of refugee status are performed mainly by refugee inquirers in the Refugee Recognition Office in the Ministry of Justice Immigration Control Bureau's General Affairs Division, but sometimes these inquirers are the personnel of the Immigration Control Bureau who are responsible for deportation procedures. Therefore the investigation organizations for refugee recognition also have no independence from the government.

265. (2) Numbers of Application for the Recognition of Refugee Status and Approvals, Number of Residence Permits

The numbers of refugee status recognitions and the number of residence permits granted other than for recognized refugees up to 2006 are as shown by the Annex 1²⁹. When the procedures for recognition of refugee status was first instituted, it recognized many refugees from Indochina and the recognition rate was high, however, with the decline in the number of Indochinese applicants, the overall rates of recognition and application, and the number of people recognized have dropped precipitously. The reason cited for most cases of non recognition is that applications were submitted after the application period of 60 days. In response to public criticism, finally in 1998, the number of applicants granted recognition and residence permission climbed into the double digits.

²⁹ Annex 1, <http://www.moj.go.jp/PRESS/070306-1//070306-1.html>

266. However, this number of recognition is still lower than the international standard. While the government granted recognition to 161, or 25%, of the 636 applicants from 1982 to 1984, it granted recognition to only 215, or 6.5%, of the 3,292 applicants from 1985 to 2005, and even adding the 381 people to whom residency was granted for humanitarian reasons raises the percentage to only 16.4%.

267. (3) Bias in Number of Convention Refugee by Nationality

The government-released figures on applicants for the recognition of refugee status and statistics according to nationality are shown as below³⁰.

268. Refugee Recognition (initial screening) / Non recognition (top three countries) in the Past Five Years according to Year and Major Nationalities

year	nationality	number of people recognized	nationality	number of people not recognized
2001	Myanmar	12	Turkey	165
			Afghanistan	39
			Myanmar	35
2002	Afghanistan	6	Afghanistan	40
			Pakistan	38
			Turkey	30
2003	Myanmar	5	Myanmar	73
			Turkey	65
			China	32
2004	Myanmar	9	Turkey	136
			Myanmar	46
			Iran	13
2005	Myanmar	29	Myanmar	118
			Bangladesh	28
			Turkey	27

269. Although the government does not publish all the figures on the numbers of people granted refugee status by nationality, using information which enables one to determine this reveals that recognition is skewed far from the international trend.

270. For example, although the government has not released figures of refugee status recognition granted to the people of Chinese nationality, its total number since 1982 was only a few people. In addition, there was no person of Turkish nationality

³⁰ this statistical table made from press release “number of recognition of refugee status in FY20006 (text)” <http://www.moj.go.jp/PRESS/070306-1/070306-1.html>

who has been granted the refugee status. It is inferred that the government have paid diplomatic consideration in the background.

271. (4) Political Non-independence

JFBA insists that the government should improve the present situation that the Ministry of Justice Immigration Control Bureau holds jurisdiction over procedures for recognition of refugee status and should establish the procedures for recognition of refugee status performed by a third-party organization independent of the government agencies which hold jurisdiction over immigration control and diplomatic policy. This opinion is based on the fact that the current system of recognition for refugee status resulted in the distortion of what the system should be, due to the immigration administration and the diplomatic consideration.

272. (5) Examination of the Opposition and Refugee Examination Counselors

The constitutional revision in 2004 established the consulting system in which third-party refugee examination counselors (hereinafter called “counselors”) are involved in procedures if the applicant files an objection against denial of refugee status recognition, and when making a decision on the objection, the Minister of Justice shall consult with the refugee examination counselors (ICRRA Article 61-2-9 paragraph 3 and 4).

The refugee examination counselors shall be appointed by the Minister of Justice (ICRRA Article 61-2-10 paragraph 1 and 2). They do not have their own secretariat and the Immigration Control Bureau performs administrative duties. As such, establishment of this consulting system did not result in the establishment of an organization for petition of objection that is independent of the government agencies which hold jurisdiction over immigration control or diplomatic policy.

UNHCR and JFBA pointed out that improvements should be made so that an organization independent of the Ministry of Justice is established and that said organization carries out examination of objections.³¹

273. (6) Selection of the Refugee Examination Counselors

Concerning the appointment of the refugee examination counselors, the Minister of Justice shall appoint a certain number of refugee examination counselors from among candidates who are “reputable character”, “who are capable of making fair judgments on the objection” and “have an academic background in law or current international affairs” (ICRRA Article 61-2-10 paragraph 1 and 2).

³¹ concerning UNHCR’s View, refer to “UNHCRs COMMENTS ON THE BILL TO REFORM THE IMMIGRATION CONTROL AND REFUGEE RECOGNITION ACT OF JAPAN”

(http://www.unhcr.or.jp/protect/pdf/040520comm_e.pdf)

274. When the procedures of recognition of refugee status came into effect after the amendment of May 16, 2005, the Minister of Justice appointed 19 persons as counselors based on recommendations from related organizations, not from public recruiting. The breakdown of 19 members is; six are from the legal profession, four are from university professors, one is formerly from the House of Representatives Cabinet Legislation Bureau, two are former diplomats and six from others. Two of the counselors from the legal profession are former prosecutors, that is, they connected to the Ministry of Justice, and two formerly diplomats were appointed. On the other hand, two were recommended by JFBA and one by UNHCR. In addition, counselors formed teams of three persons each and discussed cases.

275. The counselors' secretariat is staffed entirely by Immigration Control Bureau personnel, and therefore the counselors do not have guaranteed neutrality in relation to the Immigration Control Bureau as an institution.

In consideration that immigration administration and diplomatic consideration could distort the administrative procedures for refugee recognition, JFBA has made the following requests to the Ministry of Justice: establish refugee recognition procedures performed by a third-party authority that is independent of the government agencies in charge of immigration administration and diplomatic policy, former prosecutors and former diplomats should not be selected as counselors, UNHCR's recommendations should be further respected, and the counselors' secretariat should be made independent of the Immigration Control Bureau.

4. Lack of Respect for UNHCR Views

276. (1) In the procedures for the recognition of refugee status, there is no system or practice which allows to admit the involvement or to receive the advice of UN High Commissioner for Refugees (UNHCR). In addition, on the application of the refugee examination counselors, only one member was selected by UNHCR's recommendation as stated above.

277. (2) From 1982 to February 25, 2005, 82 refugee applicants in Japan who were refused recognition by the Japanese government were recognized as refugees by the UNHCR office in Japan under the office's own rules. However, after this UNHCR's judgment, only seven of those applicants were recognized as refugees by the government. Most applicants had to seek asylum in third countries and were accepted. Some of them are still in Japan with illegal residence status and therefore are not eligible for any social security at all.

278. (3) On January 18, 2005, the Japanese government deported two members, father and a son, of a seven-member Kurdish family of Turkish nationality whose all

members had been recognized as refugees by the UNHCR office under its own rules. The UNHCR Regional Office for Japan and the Republic of Korea had been working on measures to enable this seven-member Kurdish family to live in a third country other than Japan, and the government had been informed of that. The office has expressed its concerns about this situation.³²

5. Procedural Guarantee for Procedures for the Recognition of Refugee Status etc.

279. (1) The Ministry of Justice denies applicants for refugee status recognition the right to select representatives in the primary examination. Therefore, even lawyers cannot be present during primary examination interviews or state their legal opinions. The Ministry of Justice allows applicants for refugee status recognition to select representatives for objections.

280. (2) Nondisclosure of evidence

In current procedures of objections, those filing objections are not allowed to see the information from their native countries, including materials gathered by refugee inquirers, or the records from primary examination procedures such as records of oral statements. This also holds for additional documents gathered by refugee inquirers in the course of objection procedures. Applicants filing appeals therefore cannot determine the content of records provided to counselors.

6. Protection of the confidentiality of applicants for the recognition of refugee status

281. (1) There is no special law or regulation requiring public officials to protect the confidentiality of refugees or applicants for refugee recognition. Additionally, under the newly added Article 61-9 of the Immigration-Control and Refugee-Recognition Act (ICRRA) in 2005, the Minister of Justice can provide information to the immigration authorities of other countries, and can agree that said information may be used by those countries in investigations. This article makes no exception for information on applicants for refugee recognition.

282. In addition, although the article makes an exception for use in political crime investigations, it sets forth no criteria for political crimes, and guarantees no procedures for complaints by people whose personal information has been provided to another country.

283. (2) Inquiry Using Real Names

At least since 2000, part of the evidence submitted by applicants and plaintiffs

³² URL: <http://unhcr.or.jp/news/press/pr050118.html>

for refugee recognition procedures and refugee-related lawsuits has been shown to the governments of refugee applicants' countries of origin by the Ministry of Justice through the Ministry of Foreign Affairs, and the Ministry of Justice continually asks those governments for their opinions on the authenticity of the evidence. Applicants are not informed about these investigations, or their consent is not obtained.

These inquiries have been conducted in ways that enable government agencies of applicants' countries of origin to identify the applicants.

284. The number of enquiries from 2000 to 2003 by country is as follows.

2000 Ethiopia, Iran, Cameroon, 1 each

2001 Afghanistan (Taliban government) 2, Iraq (Saddam Hussein government) 1

2002 Afghanistan 4, Turkey 3, Ethiopia 1, Tunisia 1, Sudan 4

2003 Afghanistan 5, Iran 5, Turkey 7, Myanmar 4, Pakistan 1

285. (3) Field Survey

Personnel of the Ministry of Justice visited the Republic of Turkey and leaked to Turkish government officials the names, addresses, and other personal information identifying refugee applicants, and the fact that they are applying for refugee status (information identifying individuals), and also went with Turkish police and security force personnel on visits to the families of applicants to ask questions.

286. More specifically, some of the Kurdish asylum seekers of Turkish nationality in Japan have, as proof that they are refugees, submitted documents titled "Arrest Warrant" which were supposedly issued by the Turkish government. Prosecutors with the Ministry of Justice Immigration Control Bureau and personnel from the Refugee Recognition Office of the Immigration Control Bureau's General Affairs Division (below, "employees") at that time visited Turkey from late June until mid-July 2004 for purposes including verifying the authenticity of the supposed arrest warrants. In Ankara the employees met with bureaucrats from the Ministry of Justice, provincial governors, prosecutors from the National Security Court, and others. After explaining the purpose of their investigation, they showed the totally unredacted arrest warrants and other documents bearing the applicants' real names and dates of birth, and asked the Turkish authorities to confirm their authenticity. Moreover, employees of the Ministry of Justice had a record of an oral statement made in Turkey by a person arrested and indicted in 1998 for allegedly supporting the Kurdistan Workers Party, which is claimed to be a dissident organization. This statement, which included Applicant A's name, was shown to the director of the anti-terror unit of the police headquarters of a certain province, who was asked to confirm its authenticity, and replied that the statement was real.³³

³³ p.5, "Report of Research Visit in Turkey (regional visit)" by the Minister of Justice Immigration Bureau

287. Also, to investigate the kind of lives led by asylum seekers when in Turkey, the employees went with security units to visit asylum seekers' native villages and met with their relatives. Turkish security units asked the relatives questions such as "Are there any families in this area that had gone to Japan?" or "Have you received any money from your sons?" Furthermore, the employees were led by police to visit the home of Refugee Applicant B's father and asked why the applicant had gone to Japan in the presence of police. Applicant B's family members invited only the employees of the Ministry of Justice into their home and explained that Applicant B was being persecuted.

288. Concerning these cases, JFBA has warned the Ministry of Justice that it should not infringe asylum seekers' right to not have identifying information provided to the governments of their countries of nationality (secrecy right). Amnesty International has also published a critical statement.³⁴

Section 8: Feudalistic Status Discrimination (Article 26)

A. Conclusions and Recommendations

289.

1. The government should carry out policy measures to close the gap in discriminated *Buraku* district with regard to working or education.
2. The government should promptly establish an effective domestic organization independent of the government for human-rights protection, in order to help the victims of human rights violations including those discriminated against the members of *Buraku* district.

B. Subjects of Concern and Recommendations of Human Rights Committee

290. The Fourth Periodic Report. the Concluding Observations paragraph 15 "With regard to the *Dowa* problem, the Committee acknowledges the acceptance by the state party of the fact that discrimination persists vis-à-vis members of the *Buraku* minority with regard to education, income and the system of effective remedies. The Committee recommends that the state party take measures to put an end to such discrimination".

C. Government's Response and its Fifth Periodic Report

³⁴ URL: <http://www.incl.ne.jp/ktrs/aijapan/2004/0409020.html>

291. In the Fifth Periodic Report, the report says as follows.

(Paragraph 374)

“The Constitution of Japan guarantees equality under the law for the people of Japan and no discrimination against *Dowa* district residents exists under the laws of Japan.”

(Paragraph 375)

“With a view to prompt resolution of the *Dowa* problem, the Government has been implementing special policies limited to *Dowa* districts and residents thereof, based on three Special Measures Laws since 1969. These special policies have been implemented taking into account the intents of the 1965 report of the *Dowa* Policy Council, a national body set up to deliberate on the *Dowa* problem, with the objectives of rapidly improving the poor economic conditions and inferior living environment of *Dowa* districts through measures carried out promptly and over a limited timeframe. Through promotion of these measures, the government of Japan is aiming to resolve the *Dowa* problem, or in other words, to eliminate *buraku* discrimination (The Government’s Report Attached Document).”

(Paragraph 376)

“As a result of the efforts of the national government and local authorities over many years, large improvements, including those in the living environment have been realized, rectifying the gap that had existed in various aspects, and the conditions in *Dowa* districts have largely improved. The fact-finding surveys carried out in *Dowa* districts by the former Management and Coordination Agency in FY1993 (The Government’s Report Attached Document) revealed, concerning the situation of the housing environment, that the average number of rooms per house within *Dowa* districts higher than the national average, and that the share of municipal roads developed within *Dowa* districts was higher than for municipalities overall. Moreover marriages between *Dowa* district residents and non-*Dowa* district residents make up the majority of marriages among young people, so it seems that discriminatory attitudes are also steadily disappearing.”

(Paragraph 377)

“Taking into account these circumstances, with the expiration of the Law regarding the Special Fiscal Measures of the Government for Regional Improvement Projects on March 31, 2002, it was decided to end special policies to resolve the *Dowa* problem.”

292. Also, as The Government’s Report Attached Documents , “Process of Regional Improvement Measures”, a chronological table from the Report of the *Dowa* Policy Council in 1965 to the Report of the Council for Human Rights Promotion (Role and function of the remedy system for human rights) in May 2001 is provided, and also, as The Government’s Report Attached Documents , Results of the Fact-finding Surveys Carried Out in *Dowa* Districts in FY1993 (Excerpts), “Situation of the housing environment (average number of rooms per house, average size based on tatami mats)”, “Status of development of municipal roads”, “Status of development of rice paddies”,

“Situation of marriage (Number of couples based on place of birth)” are provided.

293. *Buraku* discrimination is strongly related to background check therefore the amendment of Family Registration Law in 2007 restricts the demand of family register to the identical person or lawyer and others ,and provides that demander’s identity should be confirmed at the request of issue.

D. Position of the JFBA

1. Government’s Report and Study

294. According to the government’s report concerning the *Dowa* problem, as a result of the efforts of the national government and local authorities over many years, large improvements, including those in the living environment have been realized, rectifying the gap that had existed in various aspects, and the conditions in discriminated *Dowa* district have largely improved, and therefore the special policies based on the special measures law was completed. Moreover, as the evidence of improvement stated in the report, it provides “Results of the Fact-finding Surveys Carried Out in *Dowa* District” conducted in 1993.

2. Advancement Rate, Annual Income, Unemployment Rate, etc.

295. However, according to “Opinion Statement” on May 1996 by the Consultative Council on Regional Improvement Measures, which was based on the above-mentioned survey result in 1993,

“Advancement rate is increasing and the percentage is over 90% for the past few years, but there are a few points of difference compared to the national average. Concerning the academic background, the percentage of people who finished higher education (junior colleges or universities) is considerably higher among people in their 20’s and 30’s than people over 40’s, but the difference from the national average is still large.

Concerning the employment situation, it becomes stabilized mainly among the young people, however, compared to the national average, the percentage of unstable working style is higher. Concerning the place of work, the percentage of small companies is generally high. In addition, their annual income is generally lower than the national average and their household budget is also still lower than the national average on the whole. The farm households are generally small farmers and their agricultural workers are aging. The self-owned business households are mainly under small private management.”

296. Furthermore, in the Report of the Osaka Prefectural *Dowa* Policy Council in 2001 based on the results of the fact-finding survey in 2000 carried out to resolve *Dowa*

problems by Osaka prefecture where many discriminated against the *Buraku* district live, the reality of the situation as below was pointed out.

“[3] In university advancement rate, the gap is still very large. Moreover, high school dropout rate is high and the dropout problem is one of the important issues towards education.”

“[8] A large gap exists in PC penetration rate in the *Dowa* district compared to the national average. The percentage of Internet users stays only half of the national average.

[9] Unemployment rate exceeds the average of Osaka for both men and women, especially it is very high among young people, and unemployment rate of men in their 40's doubles the prefectural average.

297. Thus, in the *Buraku* problem, there is a distinct gap in employment or education even today. However, in the Fifth Periodic Report, no explanation has been given for measures to eliminate discrimination in employment and education, which was recommended improvement by the Human Rights Committee in the Fourth Periodic Concluding Observation.

3. Marriage Discrimination

298. In the Fifth Periodic Report, concerning marriage discrimination, they said that marriages between *Dowa* district residents and non-*Dowa* district residents make up the majority of marriages among young people and it seems that discriminatory attitudes are also steadily disappearing.

299. However, in above-mentioned Report of the Osaka Prefectural *Dowa* Policy Council in 2001 based on the results of the prefectural fact-finding survey carried out by Osaka prefecture in 2000, the following were pointed out and it shows that the deep-rooted marriage discrimination still remains.

300. “Regarding the marriage types, the marriages between *Dowa* district residents and non-*Dowa* district residents show a steady increase, and this percentage is higher among younger people. However, in case of marriages between *Dowa* district residents and non-*Dowa* district residents, more than 20% of couples have experienced discrimination. In addition, 20% of those who acknowledge oneself as members from the *Dowa* district have the experience of breaking off an engagement, and almost half think that the *Dowa* problem was one of the reasons for that. Moreover, about 20% of residents of Osaka worry whether their partner would be from the *Dowa* district and the *Dowa* problem affects the views of marriage. Development of counseling system for those who try to overcome the discrimination to get married as well as measures to eliminate the deep-rooted discrimination is needed.”

4. Personal Background Investigations

301. Concerning marriage or employment, the fact that personal investigations into family background are conducted by credit agencies or detective agencies in order to investigate whether the person is from a discriminated community or not. For these investigations, there are many cases of illicit obtainment of another person's family registry by administrative scriveners. In addition, the existence of a new comprehensive list of *Buraku* district names was found out since 2005 and there is the case that said comprehensive list stored on floppy disk was impounded from an Osaka-based private investigation firm. In the Fifth Periodic Report, there is no indication on this serious situation that such an electronic version of comprehensive list was found out, nor consideration on drastic, concrete policy including the government regulation which is more than advice or enlightenment against investigation firms.

5. Measures to be Taken by the Government of Japan

302. After "the Fact-finding Surveys Carried Out in *Dowa* District" in 1993, any nationwide fact-finding survey in the discriminated *Dowa* community has not been carried out up to the present date. Also, there is concern that these surveys could raise new discrimination. The government should carry out the measurement to eliminate the gap in employment or marriage of people from the discriminated *Buraku* community examining the necessity of these surveys.

303. Regarding "the System of Effective Remedies" recommended in "Concluding Observation" of the Fourth Periodic Report by Human Rights Committee, the human-rights protection legislation to establish a human rights commission in an external bureau of the Ministry of Justice, which is lack of independence, was submitted to the Diet, but this legislation resulted in withdrawal and any effective organization to monitor human rights independent of the government has not been established yet for now.

Section 9: The Ainu people (Article 27)

A. Conclusions and Recommendations

304.

- | |
|---|
| <p>1. The government should</p> <ul style="list-style-type: none">(1) expressly recognize the Ainu's indigenous nature in domestic laws including the Ainu culture promotion law,(2) take radical measures to correct structural discrimination and human rights |
|---|

violations against the Ainu people and to recover their rights, and
(3) guarantee the right to traditional use of land and resources as part of the right for an indigenous people, return property, or provide appropriate compensation for the past violations of their economic rights.

2. Given the indigenous nature of the Ainu people, the government should publicly guarantee opportunities in school education and higher education to learn the history and language of the Ainu people and to receive ethnic education.

B. Subjects of Concern and Recommendations of the Human Rights Committee

305. 1. The 1993 Concluding observations of the Human Rights Committee (Third) noted “The Committee expresses concern at the continued existence in Japan of certain discriminatory practices against social groups, such as persons belonging to the Ainu minority (paragraph 9). The Committee stated again in their 1998 Concluding observations (Fourth) that “The Committee is concerned about the discrimination against members of the Ainu indigenous minority in regard to language and higher education, as well as about non-recognition of their land rights.” (paragraph 14), and pointed out both the indigenous rights to the Ainu's land and discrimination in regard to language and education as its subjects of concern.

306. 2. On August 31, 2001, the Committee on Economic, Social and Cultural Rights made recommendations stating in its Concluding Observations that “the Committee recommends that the State party continue to undertake necessary measures to combat patterns of de jure and de facto discrimination against all minority groups in Japanese society, including the Buraku people, the people of Okinawa and the indigenous Ainu, particularly in the fields of employment, housing and education.” (paragraph 40)

307. On March 20, 2001, the Committee on the Elimination of Racial Discrimination also made recommendations stating that “The Committee recommends that the State party take steps to further promote the rights of the Ainu, as indigenous people. In this regard the Committee draws the attention of the State party to its General Recommendation XXIII (51) on the rights of indigenous peoples that calls, inter alia, for the recognition and protection of land rights as well as restitution and compensation for loss.”

308. Furthermore, the Committee on the Rights of the Child made recommendations stating in its Concluding observations dated January 30, 2004 (Second) that “The Committee recommends that the State party undertake all necessary proactive measures to combat societal discrimination and ensure access to basic services, in particular, for

... children ... Ainu and other minorities, ..., through, inter alia, public education and awareness campaigns.” (paragraph 25), and also expressed its concern stating that “Children of minorities have very limited opportunities for education in their own language” (paragraph 49), and recommended that the State party “Expand opportunities for children from minority groups to enjoy their own culture, profess or practice their own religion and use their own language” (paragraph 50).

C. The Government's Response and its Fifth Periodic Report

309. 1. The government noted that on the basis of the Ainu Culture Promotion Law which entered into force on July 1, 1997, the government, principally through the Foundation for Research and Promotion of Ainu Culture, has promoted measures based on the following four pillars of Promotion of comprehensive and practical research on the Ainu, Promotion of the Ainu language, Promotion of the Ainu culture, and Dissemination of knowledge about Ainu traditions (paragraphs 378-380).

310. 2. The Fifth Periodic Report merely stated the following two points: that by implementation of the measures based on the Ainu Culture Promotion Law and the "Survey on the Hokkaido *Utari* Living Conditions" conducted by the Prefectural Government of Hokkaido in 1999, compared to the situation at the time of the previous survey in 1993, the living standard of Ainu people has been steadily improving, but the gap with the living standard of general public in Hokkaido has not completely narrowed; and that the Prefectural Government of Hokkaido has been implementing measures with a new title of the "Policies for Promoting an Improved Living Standard for the Ainu People," since FY2002, and the government continues to offer its cooperation in the above measures and is working to enhance the related budgets so that these measures may be promoted smoothly. (paragraphs 378-381)

D Position of the JFBA

1. The Japanization of the Ainu and the current state

311. The government deprived the Ainu people of land in the region where the Ainu people had created their original culture and society, negated their culture and life, exploited them economically and adopted thorough "Japanization policies" to assimilate them into the Japanese or the Japanese society. According to the survey conducted by Hokkaido in 2006, the population of the Ainu in Hokkaido is estimated to be approximately 24,000. Due to the long-standing Japanization policies and discrimination, however, the social environment set in place is far from sufficient to convince the Ainu to identify themselves as the Ainu people. The actual number of the Ainu population in Hokkaido is said to be five times, or even ten times the above

number. A considerable number of the Ainu people live also in the mainland and southward.

2. The indigenous natures recognized in the Nibutani Dam decision

312. The so-called Nibutani Dam decision³⁵ decided that “The Ainu people lived mainly in Hokkaido before the Japanese rule reached this territory, created an original culture, and had an identity. Even after they became under the Japanese rule, the Ainu people received severe blows economically and socially due to the government policies adopted by the majority members. Even though, the Ainu people constitutes a social group which has not lost their own culture and identity.” The decision has great significance as a precedent in which a Japan's court for the first time recognized that the Ainu people qualifies as “indigenous people”.

313. The decision further decided that “For a minority, their own culture is essential for not assimilating themselves into the ethnic majority and maintaining their ethnicity. Therefore, for an individual who belongs to the ethnic group, the right to enjoy their own culture might be as important as the right necessary to the existence of individual character. Guaranteeing minority rights is tantamount to respecting an individual practically, and presumably meets the principle of democracy that the majority tries to understand and respect the status of the socially disadvantaged. ... if so, it is understood from Article 13 of the Japanese Constitution that the plaintiffs have the guaranteed right to enjoy the inherent culture of the minority, the Ainu, to which they belong.” And it squarely recognized the right to enjoy their own culture that the Ainu people have as an inherent right.

3. The denial of the indigenous nature by Ainu Culture Promotion Law and the government

314. However, the government, afterwards and even now, does not recognize the Ainu people as an indigenous people.

315. The Ainu Culture Promotion Law enacted in May, 1997 has no small significance as Japan's first law enacted on behalf of a minority people. However, as exemplified by the absence of indigenous rights of the Ainu people in it, the law does not take into account the historical developments in which the ethnic survival, life, property including land, and dignity of the Ainu people have been destroyed due to the government's thorough Japanization policies adopted for more than 100 years. Therefore, the law is pitifully inadequate for a guarantee of indigenous rights that the

³⁵ Sapporo District Court, Judgment of March 27, 1997 · 1993 [Gyo U] Docket No. 9 Case seeking to nullify the decisions on acquisition of right and evacuation

Ainu people demand.

316. It is understood that the reason the Concluding observations repeatedly noted the guarantee of indigenous rights is that the Committee is concerned that due to the government's non-recognition of the Ainu people as an indigenous people, structural discrimination is not eliminated and occurrence of human rights violations continues to be preserved.

4. Discrimination and elimination of it

317. The Fifth Periodic Report noted that "the gap with the living standard of general public in Hokkaido has not completely narrowed (paragraph 381)." The nature of fact-finding ways in "The Report of Investigation on the Living Conditions of Hokkaido Ainu for the 18th year of Heisei" conducted in 2006 has been criticized for not having revealed the actual condition of indirect and structural discrimination against an ethnic group, because questions about experience of discrimination have a style which asks whether there has been any direct and obvious discrimination against an "individual". The continuation of this type of investigation for more than 30 years is also being criticized. (Hokkaido Shimbun Newspaper, May 11, 2007, Hideaki Uemura "Hokkaido's report of investigation on the Ainu people lacks a viewpoint of the structural discrimination").

318. Since 2002, based on the policies renamed "Policies for Promoting an Improved Living Standard for the Ainu People," the Prefectural Government of Hokkaido has been promoting measures with a basic direction including stability of livelihood, improvements in education, employment stability and promotion of industries. The government set up a "Liaison Conference among the Relevant Ministries and Agencies for Measures related to Promoting an Improved Living Standard for the Ainu People" consisting of seven relevant ministries to support these measures. However, these measures hardly take into account any real situation of the past occurrence of human rights violations and structural discrimination against the Ainu people.

319. The above-mentioned report of investigation on the living conditions of 2006 showed that conditions including social welfare, educational record and annual income were deteriorating compared to the previous investigation. The Prefectural Government of Hokkaido, however, emphasized that the gap with the general public in Hokkaido narrowed, as the economy in the whole Hokkaido was declining.

320. It is feared that the policies for an "Improved Living Standard" which does not take into account the real condition of discrimination structurally created by the

thorough Japanization policies of the government in the past toward the Ainu people might conceal the actual situation of structurally created discrimination, and economic and social disparities. Furthermore, as these investigations and measures were conducted and implemented mainly in Hokkaido alone, the actual livelihood of and discrimination against the Ainu people living outside of Hokkaido are not known. The Ainu Culture Promotion Law or other domestic laws should expressly recognize the indigenous nature of the Ainu people. In addition to that, the Japanization-derived structural discrimination and human rights violations should be rectified, and their rights should be recovered.

5. The right to traditional use of land and resources and other rights

321. According to the general comment regarding article 27 of the Covenant, when the minority is an indigenous people, the enjoyment of their own culture includes a particular way of life closely related to their use of land and resources (general comment 23, paragraphs 3.2 and 7). Thus, their right to land and resources that were traditionally used for fishing and hunting would logically result from their right to enjoy their own culture. The Committee on the Elimination of Racial Discrimination, in its General Recommendation XXIII (5) on the rights of indigenous peoples, calls for the recognition and protection of land rights as well as restitution and compensation for loss.

322. Concurrent with the enactment of Ainu Culture Promotion Law in 1997, the Hokkaido Aboriginal People Protection Law which had encouraged discrimination against the Ainu people was abolished. The law promulgated in 1899 has a clause that the Director General of the Prefectural Government of Hokkaido (Governor) designates and manages the common property of the Ainu people on behalf of persons concerned. This clause led to justification for continuously depriving the Ainu people of land. Concurrent with the abolition of this law, “return” of common property including their land and fishing grounds to the Ainu people was made with a nominal amount of money equivalent to the price at the time when designation and management started. Twenty-four Ainus filed an administrative litigation of a rescissory action asking for nullity of restitution measure and others. However, on March 24, 2006, the Supreme Court dismissed it as a final decision. Even if the past discriminatory law was abolished, the indigenous people is still deprived of the right to land and other rights, and neither appropriate restitution nor compensation has been provided.

323. In order to promote measures including return of land to an indigenous people, like those conducted in Canada and Australia, investigation into the past property should be conducted, and return of property or appropriate compensation for the past occurrence of violation of economic rights should be provided while taking into account

wishes of the Ainu people.

6. Ethnic education

324. Currently, public education does not specially provide classes to learn the history, culture and language of the Ainu people. However, at long last, Center for Ainu & Indigenous Studies was set up in Hokkaido University in 2007. The fact that two Ainus were elected to the executive committee showed the direction of conducting research through collaboration with the Ainu people. School education needs to provide opportunities to learn Ainu language and the history and culture of the Ainu people, to publicly guarantee opportunities for especially Ainu children to receive ethnic education, and to increase Ainu lecturers.

Section 10: Discrimination against persons with disabilities (Articles 26 and 2 of the Covenant, Article 2 paragraph 2 of the International Covenant on Economic, Social and Cultural Rights)

The right to live in a community (Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights)

A. Conclusions and Recommendations

325.

1. The government should ratify the Convention on the Rights of Persons with Disabilities, eliminate discrimination against persons with disabilities, and enact a non-discrimination law to guarantee real equality.
2. The government should abolish provisions in the law for the support of independence of persons with disabilities which impose heavy economic burdens on persons with disabilities so that they can receive welfare services.
3. The government should have judicial control over the Mental Health Review Boards which review petitions for discharge and for the improvement of treatment filed by mentally ill persons involuntarily hospitalized, to conform to article 9 of the Covenant.

B. Subjects of Concern and Recommendations of the Human Rights Committee

1. Non-discrimination

326. (1) Concluding Observations of the Human Rights Committee

The Committee considered the fourth periodic report of Japan and noted its concern in its Concluding Observations of the Human Rights Committee stating that "The Committee is concerned about the vagueness of the concept of "reasonable discrimination", which, in the absence of objective criteria, is incompatible with article

26 of the Covenant(paragraph 11).”

327. (2) Concluding Observations of the Committee on Economic, Social and Cultural Rights

On August 31, 2001, the Committee on Economic, Social and Cultural Rights considered the second periodic report of Japan and stated its concern in its Concluding Observations of the Committee on Economic, Social and Cultural Rights that “The Committee expresses its concern that the State party interprets the principle of non-discrimination as being subject to progressive realization and to "reasonable" or "rationally justifiable" exceptions.” (paragraph 12), and further stated its recommendations that “The Committee requests the State party to take note of its position that the principle of non-discrimination, as laid down in article 2 (2) of the Covenant, is an absolute principle and can be subject to no exception, unless the distinction is based on objective criteria. The Committee strongly recommends that the State party strengthen its non-discrimination legislation accordingly.” (paragraph 39) and that “The Committee recommends that the State party abolish discriminatory provisions in statutes and that it adopt a law against all kinds of discrimination relating to persons with disabilities. It further urges the State party to continue, and speed up, progress in enforcing the employment rate for persons with disabilities in the public sector that is provided in legislation.” (paragraph 52)

2. The right to live in a community

328. The above-mentioned Concluding Observations of the Committee on Economic, Social and Cultural Rights noted its concern stating that “The Committee notes with concern that discrimination against persons with disabilities continues to exist in law and practice, particularly in relation to labour and social security rights.” (paragraph 25)

C. The Government's Response and its Fifth Periodic Report (paragraphs58-61)

329.

(Paragraph 58)

(The government) “in December 2002 formulated the “Basic Programme for Persons with Disabilities” and the “Five-Year Plan for Implementation of Priority Measures”.”, “Based on these, Japan will make efforts to promote measures for persons with disabilities in the new century.”

(Paragraph 59)

“Concerning welfare services for persons with disabilities, in April 2003 ... the GOJ shifted to ... the “assistance benefit supply system”. “The assistance benefit supply system” ...was established with the aims of respecting the self-determination of persons

with disabilities and providing a user-friendly service.”

(Paragraph 60)

“Concerning measures for persons with mental disorders, in 1999 the Mental Health and Welfare Law was amended to further ensure medical care that considers the human rights of persons with mental disorders, including strengthening the functions of the Mental Health Review Tribunal established in the prefectures.”

(Paragraph 61)

“Social participation by persons with disabilities in employment situations has been promoted based on the Fundamental Policies for Employment Measures for persons with disabilities (FY1998 - FY2002), which outline the approach to the development of employment policies for persons with disabilities over the five years beginning in 1998, the year they were formulated. In 2003, based on the situation over the previous five years, new Fundamental Policies for Employment Measures for persons with disabilities were formulated.”

D. Position of the JFBA

1. Enactment of a non-discrimination law against persons with disabilities

330. In Japan there is still discrimination against persons with disabilities in education, employment and every opportunity in life. At the root of discrimination lie deep-seated prejudice and a lack of understanding.

331. After the Committee’s consideration of the fourth periodic report, the Committee on Economic, Social and Cultural Rights considered the second periodic report of Japan on the implementation of the International Covenant on Economic, Social and Cultural Rights in 2001 and specifically recommended in its Concluding Observations that the government legislate a comprehensive law to ban discrimination against persons with disabilities. Even so, no specific efforts toward the legislation have been made yet. On September 28, 2007, the government signed the “Convention on the Rights of Persons with Disabilities”. The government should ratify it as soon as possible. By taking this opportunity of joining the convention, the government should immediately legislate to ban discrimination against persons with disabilities, and start reviewing and revising discriminatory clauses against persons with disabilities in existing laws.

2. Revision of the Law for the Support of Independence of Persons with Disabilities

332. The above-mentioned convention requires that States Parties undertake to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention (Article 4 paragraph

1(a)). In connection with non-discrimination, it also requires that States Parties undertake to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise (paragraph 1(e)). In order to practically eliminate discrimination, it requires that States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds (Article 5 paragraph 2). Furthermore, it demands that in order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided (Article 5 paragraph 3).

333. As described above, the convention on the rights requires that States Parties shall realize non-discrimination, and imposes on States Parties the obligation of ensuring reasonable accommodation, and demands that States Parties undertake to adopt all necessary legislative measures for the implementation.

334. Although the government's report refers to it as simply "assistance benefit supply system", the system fully implemented since April 2006 according to the "Law for the Support of Independence of Persons with Disabilities" uniformly demands that persons with disabilities shoulder in principle 10 percent of the charges for the welfare services they receive including placement in facilities for persons with disabilities, regular visits to the facilities, helper dispatch request, and utilization of in-home home help, regardless of their ability to bear the costs, claiming that users should "bear costs according to benefit principle".

335. Since the start of this system, the use of facilities and other welfare services by persons with disabilities was drastically reduced for economic reasons. Because persons with severer disabilities whose level of need for public support is higher have to bear the heavier economic burden, many actually have to give up the use.

336. This generates another human rights violation and severely abuses human rights of persons with disabilities.

337. The "Law for the Support of Independence of Persons with Disabilities" which has created this situation and the system which asks users to bear assistance benefit costs according to benefit principle based on this law should immediately be abolished.

338. These acts of the government discriminate persons with disabilities with economic obstacles, therefore, obviously violate article 26 of the Covenant and article 2 paragraph 2 of the International Covenant on Economic, Social and Cultural Rights.

3. Guarantees of human rights in involuntary hospitalization to mental hospitals

339. For mentally ill persons, involuntary hospitalization system based on the Mental Health and Welfare Law, and involuntary hospitalization and compulsory hospital visit system based on the Mental Illness Treatment and Observation Law are established. The involuntary hospitalization system based on the Mental Health and Welfare Law consists of involuntary hospitalization whose requirement is that the person poses a danger to himself or others, and involuntary hospitalization for medical care whose requirement is a need for medical-protective admission. As to the former, the decision on hospitalization is made on the authority of Governor based on expert opinions by two designated physicians. However, the requirement is broad and regional differences in judgments are significant, and there are a large number of people hospitalized for more than 20 years. Therefore, problems with protection of human rights have been pointed out. As to the latter, it is not clearly articulated that the application of this is only limited to the cases where a patient loses the capacity to consent. Therefore, there is a risk of too much interference in the patient's right to self-determination. The Mental Illness Treatment and Observation Law covers the cases where a person committed a crime of certain kinds including murder and is unable to bear full criminal responsibility. However, the requirements for compulsory medical care are extremely ambiguous, and these persons are treated with special procedures and in special wards which are different from those for general defendants in criminal cases and mentally ill persons in general. These are against normalization, and even encourage discrimination and/or prejudice against those persons. In addition, establishment of a new system centering around involuntary hospitalization might go back to hospitalization-centered policy. Since before the enactment of the law, JFBA has warned against the establishment of a new law of facility-centered policy by which a patient receives compulsory medical care with no regard for the patient's right to self-determination, without striving for the improvement of medical welfare in general (Proposals including the one dated June 17, 2005). The system of involuntary hospitalization for mentally ill persons deprives them of or limits their right of physical freedom. Therefore, the strict requirements for the procedure should be defined also in light of the International Covenant on Civil and Political Rights. The judicial control based on article 9 of the Covenant needs to be introduced.

Section 11: Hansen's Disease Problems

A. Conclusions and Recommendations

340.

As a part of measures to provide remedy for grave human rights violations caused
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by policies of discrimination, segregation and extermination of patients of Hansen's disease, which was implemented under Leprosy (Hansen's Disease) Prevention Law until 1996, violating article 7, article 8 paragraph 3 (a), article 9 paragraph 1, article 10 paragraph 1, article 12 paragraph 1, articles 16 and 17, article 23 paragraphs 1 to 3, article 26 of the Covenant, the government should immediately

(1) revise article 2 of the "Law to Abolish Leprosy (Hansen's Disease) Prevention Law" serving as the basis for the restrictive management of sanatorium into unrestrictive provisions, so that its usage will not be limited to Hansen's disease patients and former patients, but open to local people, and at the same time, the government should present a future plan to widely open sanatoriums to local communities in order to secure healthcare and living standard of inmates (residents in sanatoriums), and

(2) take preventive measures (such as, legislating various rights of patients and human subjects, clear statutory provision of the government responsibility to prevent discrimination and prejudice against patients and their families, establishment of a national human rights institution, providing thorough human rights education) proposed by the "Verification Committee Concerning Hansen's Disease Problem" (hereafter, the "Verification Committee"), an independent body which carried out the task of verifying and investigating facts concerning problems involving Hansen's disease, commissioned by the Ministry of Health, Labour and Welfare.

B. Subjects of Concern and Recommendations of the Human Rights Committee

341. Nothing is mentioned.

C. The Government's Response and its Fifth Periodic Report (paragraphs 150 to 153)

342. In the Fifth Periodic Report, the government covers the isolation policy for Hansen's disease in the section of "liberty of person". The government also reports that it carried out legislative measures to restore the honor and dignity of Hansen's disease patients and former patients and enhance their welfare after the judgment by the Kumamoto District Court in May 2001. In addition, the government reports that it intends to provide appropriate compensation based on the "Law Concerning Payment of Compensation, etc. to Inmates of Hansen's Disease Sanatoria", take measures to restore the honor and dignity of inmates of Hansen's disease sanatoria, etc. and promote their welfare, and continue making utmost efforts toward a swift and comprehensive

resolution of the Hansen's disease issue.

343. However, as shown below, human rights violations as a result of the government policies toward Hansen's disease in Japan is not only limited to the infringement of "liberty of person."

344. Moreover, considering the fact that the "Law Concerning Payment of Compensation, etc. to Inmates of Hansen's Disease Sanatoria" is the only legislative measures regarding Hansen's disease problem since May 2001, only the compensation based on this law should not be enough as a remedy for victims of harsh and grave human rights violations, and also, the government's measures of remedy that has been taken in the last 6 years are still not enough, as shown below.

D. Position of the JFBA

1. Policies of discrimination, segregation and extermination of Hansen's disease patients

(1) Overview

345. The basis of Japan's Hansen's disease policies between 1907 and 1996 was policies of discrimination, segregation and extermination, which were to create, foment and maintain discrimination and misunderstanding as if Hansen's disease were a horribly infectious and dangerous disease, to segregate all patients into large sanatoriums in remote places for their entire lifetime, and to prevent their having children to eradicate.³⁶ As the time goes by, it is true that its compulsory characteristics of these policies were diluted, but the Leprosy Prevention Law, which had been the basis and reasons for these policies, was not repealed until the formulation of "Law to Abolish Leprosy Prevention Laws" in 1996.

(2) Segregation of all patients and creation, fomentation and maintenance of discrimination and prejudice

346. The facts that the government implemented the policy of segregation of all patients for their entire lifetime without medical rationale, and with the policy it created, fomented and maintained discrimination and misunderstanding as if Hansen's disease were horribly infectious and dangerous, clearly violate article 9 paragraph 1 of the

³⁶ The details of Hansen's policies and human rights violations caused by the policies are found in the judgment by the Kumamoto District Court on the 11th May 2001 (p 30, *Hanrei Jiho*, vol. 1748. As the Fifth Periodic Report points out, the government did not appeal the judgment and accepted it) and described in the final reports prepared by an independent body of the Verification Committee, mentioned below. The summary version of the final report is available in English on the internet. <http://www.mhlw.go.jp/english/policy/health/01/pdf/01.pdf>

Covenant³⁷ specifying the right to liberty and security of person, article 12 paragraph 1 of the Covenant specifying right to liberty of movement and freedom to choose his residence, article 17 of the Covenant specifying protection of privacy, family, and home, article 26 of the Covenant specifying prohibition of discrimination (and do not meet requirements for the exception listed in article 12 paragraph 3 of the Covenant)³⁸.

(3) Treatment at sanatoria

347. Adding to the above, forced labor, extremely insufficient medical treatment (including absence of care of sequelae), recommendation for signing acceptance form for postmortem, community-cell-like living denying privacy (including community-cell-like living of several married couples) and other inhumane treatment of those in sanatoriums, whose liberty was restricted due to the admission to sanatoria, violate article 7 of the Covenant³⁹ prohibiting cruel, inhuman or degrading treatment, and article 8 paragraph 3 (a) of the Covenant prohibiting forced or compulsory labor, article 9 paragraph 1 of the Covenant specifying right to security of person, article 10 paragraph 1⁴⁰ of the Covenant stating “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”, article 16 of the Covenant specifying “everyone shall have the right to recognition everywhere as a person before the law”, article 17 of the Covenant specifying protection of privacy, article 26 of the Covenant prohibiting discrimination. It is needless to say, these human rights violations, including forced labor, are grave human rights violations that would violate *jus cogens* of international law.

(4) Eugenic Policy

348. Moreover, the fact of making sterilization as a condition of marriage for those at sanatoriums violates article 7, article 10 paragraph 1, articles 16, 17 and 26 of the Covenant, and also violates article 23 paragraphs 2 and 3 of the Covenant specifying the

³⁷ According to General Comment 8 paragraph 1, article 9 paragraph 1 of the Covenant is applicable to all deprivations of liberty, whether in criminal cases or in other cases.

³⁸ The judgment by the Kumamoto District Court refers the segregation of Hansen’s disease patients as “depriving all possibilities for development in their lives that those should naturally have had as human beings, and restricting human rights over the whole social life. Such restriction of human rights cannot be rightly evaluated as just restriction of freedom to choose and change residence, but also against personal rights itself with the article 13 of the Constitution providing its ground.” In addition, it says that “the damage suffered is from the violation of the right to live peacefully in society caused by the segregation into sanatoria, and by the social discrimination and prejudice against Hansen’s disease created, fomented and maintained by the New Law (note by quoter, Leprosy Prevention Law) and the segregation policies based on the law. This damage had occurred in a continuous and accumulative manner until the abolition of the law,” and calls this damage as “damage to their life (lifetime damage)”.

³⁹ According to General Comment 20 paragraph 5, “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” and protects patients in medical institutions.

⁴⁰ General Comment 21 paragraph 2 states that Article 10 of the Covenant, paragraph 1 of the Covenant applies to any one deprived of liberty under the laws and authority of the State who is held in hospitals or elsewhere. General Comment 21 paragraph 3 adds that “not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7 of the Covenant, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty ”

right to marriage based on free consent. The fact of forcing pregnant women to have abortion violates not only article 7, article 10 paragraph 1, articles 16, 17 and 26 but also article 23 paragraph 2 of the Covenant⁴¹, specifying the right to have a child and to found a family. Furthermore, it is needless to say but the fact of killing babies that were able to survive (there were both cases of killing babies artificially induced prematurely and killing term newborns) violates article 6 paragraph 1 of the Covenant, and measures to turn babies deprived of lives in such ways and fetuses by abortion into samples violates article 7, article 10 paragraph 1, articles 16, 17, and 26 of the Covenant for babies, fetuses and/or their parents. These gross human rights violations are in no ways inferior to the human rights violations, as the ones mentioned earlier in (3).

(5) Grave human rights violations

349. As stated above, these human rights violations caused by Japan's Hansen's disease policies are not just violations of many articles and paragraphs respectively, but also taken as a whole harsh and grave human rights violations that would amount to crimes against humanity committed to the entire patients and former patients of Hansen's disease.

2. Reparations by the government for damage caused by Hansen's disease policies

(1) Kumamoto District Court Decision

350. The Law to Abolish Leprosy Prevention Law in 1996 hardly provided reparations for grave human right violations stated above. Subsequently, in 1998, former patients of Hansen's disease filed lawsuits against the government, and on the 11th of May 2001 the Kumamoto District Court delivered a judgment that the government pay compensation for damage as partial reparation, and the government did not appeal the judgment.

(2) "Law Concerning Payment of Compensation, etc. to Inmates of Hansen's Disease Sanatoria" and the basic agreement and memorandum of confirmation

351. However, since the compensation, ordered by the judgment, was no more than a partial reparation, firstly, the "Statement by Prime Minister Junichiro Koizumi Concerning the Swift and Comprehensive Solution of the Hansen's Disease Issue" was made an announcement, and secondly, the "Law Concerning Payment of Compensation, etc. to Inmates of Hansen's Disease Sanatoria" was enacted, and thirdly, the basic agreement and the memorandum of confirmation were concluded between Ministry of

⁴¹ General Comment 19 paragraph 5 says that article 23 paragraph 2 of the Covenant guarantees the possibility to procreate and live together.

Health, Labour and Welfare and former patients of Hansen's disease, etc. in July and December 2001 based on the legal responsibilities ruled by the judgment. In these agreements, the government promised on basic terms regarding (i) apologies and measures to restore honor, (ii) the guarantee of their living at sanatoriums, (iii) the support to their social reintegration and social life, (iv) truth-finding, etc., and also promised to (v) have consultation on these matters, *inter alia*, annually at the Conference for Hansen Disease Issues (hereafter, "the Conference").

352. Implementation of these items is very important in realizing the right to have an effective remedy specified in article 2 paragraph 3 of the Covenant, because effective remedies should include various items, as the general comment 31 paragraph 16 states "the Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."⁴² In addition, now that the government agreed on remedies and reparations with victims, it should be said the government is under the obligation to implement these agreed measures due to article 2 paragraph 3 of the Covenant, too.

(3) Realized remedial measures

353. As a result, in addition to monetary compensation, certain measures to restore honor, including public apologies, and to support their social reintegration and social life have been taken based on the agreements between the government and patients and former patients of Hansen's disease at the Conference.

These implementations are commendable as a part of remedial measures and should be continued. Moreover, the establishment of an independent body, the "Verification Committee Concerning Hansen's Disease Problem", which carried out the task of verifying and investigating facts concerning problems involving Hansen's disease commissioned by the Ministry of Health, Labour and Welfare, is commendable as such.

(4) Unrealized remedial measures

354. 1. About 2890 former patients, who are currently living at thirteen national sanatoria, were forced to be placed in the sanatoria, have no children, and their average age is hovering over just 79 years old, have lost a place to return in any community, and

⁴² General Assembly resolution 60/147 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" also describes various forms of reparations to be provided to victims of serious human rights violations.

just keep living in the sanatoria. Since the government started to reduce the size of staff in these sanatoria due to the drop in the number of inmates, medical and welfare functions will not be able to be maintained if no further measures are taken.

355. In order to overcome the issue, it is indispensable to work on concrete plans, including setting up, on the premises of these sanatoria, facilities that should have functions other than care and treatment for the current inmates, and can be widely used not only by patients and former patients but also by local citizens. In the memorandum of confirmation, Ministry of Health, Labour and Welfare promises “where inmates of the thirteen national sanatoriums hope to stay at sanatoriums, they will not be discharged or transferred against their will, their lifetime stay will be guaranteed, and at the same time, we will make our best efforts to develop and maintain living conditions and health care settings in order to secure their standard of life comparable to the life people have in a society.” However, no future plans for realizing such sanatoriums have been submitted yet. On the contrary, the Ministry has taken the position that the establishment of such facilities on the premises of these sanatoriums is impossible based on article 2 of the “Law to Abolish Leprosy Prevention Law”.

356. To provide a total remedy for victims of the policies of discrimination, segregation and extermination, it is indispensable to reconsider, and give new, social positioning of each sanatorium in the society, and the past image of segregation and discrimination attached to the sanatoriums should be wiped out, by opening these sanatoriums themselves to the local communities and permitting the establishment of other facilities on these premises without limiting its use to just patients and former patients of Hansen’s disease. Such a future plan can only guarantee the lifetime stay of former patient residents at sanatoriums while maintaining standard of medical and welfare services to all of those.

357. Therefore, the government should *revise* article 2 of the “Law to Abolish Leprosy Prevention Law”, serving as the basis for restrictive management of sanatoria that limits its coverage of care and treatment to those inmates who were Hansen’s disease patients, *to* an unrestrictive provision⁴³, and at the same time, the government should immediately present a future plan to widely open sanatoriums to local communities in order to secure healthcare and living standard of those inmates.

358. 2. In addition, as the Verification Committee recommended, the government should immediately take recurrence prevention measures including legislating various rights of patients and human subjects, clear statutory provision of the government

⁴³ As noted above, General Comment 31 paragraph 16 says that reparation can involve changes in relevant laws.

responsibility to prevent any discrimination and prejudice on the basis of any illness against patients and their families, establishing of a national human rights institution, and providing thorough human rights education, all of which are not only for Hansen's disease problems but also for preventing recurrence of similar human rights violations. The importance of taking measures to prevent recurrence is stressed in General Comment 31 paragraphs 16 and 17.

CHAPTER 3: The Rights of Women

Section 1: Discrimination against Women

The prohibition for women to remarry for a certain period

Age of marriage

Dual-surname system

A. Conclusions and Recommendations

359.

The government of Japan should amend the provisions of the Civil Code which mandate the prohibition for women to remarry within six month for a certain period, different age of marriage for men and women, and common surname for husbands and wives as soon as possible.

B. Subjects of Concern and Recommendations of the Human Rights Committee

360. In paragraph 16 of the concluding observations on the Fourth Periodic Report, the Committee is concerned that “there still remain in the domestic legal order of the State party discriminatory laws against women, such as the prohibition for women to remarry within six months following the date of the dissolution or annulment of their marriage and the different age of marriage for men and women.” And it recalls that all legal provisions that discriminate against women are incompatible with articles 2, 3 and 26 of the Covenant and should be repealed.”

C. The Government's Response and its Fourth Periodic Report

361. The Legislative Council of the Ministry of Justice submitted to the Ministry of Justice an outline for a bill for a partial amendment to the Civil Code introducing the following amendments; 1) shortening the period to prohibit women to remarry (the current provision provides a period of 180 days to prohibit only women to remarry and the drafted bill shortens it to 100 days), 2) unification of age of marriage for men and women (the current provision provides that the different marriage ages for men and women which are 18 years old and 16 years old respectively and the drafted bill unifies the ages to 18 years old), and 3) dual-surname system (the current provision provides that a married couple shall have the same surname and the drafted bill will permits husbands and wives to use their surnames they had before their marriage if they so wish.) eleven years ago. However, the bill has not been submitted to the Diet by the government.

D. Position of the JFBA

362. The government should submit a bill for a partial amendment of the Civil Code to the Diet to introduce the shorter period to prohibit women to remarry, unification of marriage age for men and women and dual-surname system as soon as possible⁴⁴.

Labor-related issues

A. Conclusions and Recommendations

363.

1. The government should amend the Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment once again to realize the further equality between men and women in employment, work conditions and wages.
2. The government should not limit in the new Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment enacted in April, 2007 the cases of indirect discrimination forbidden to the ones enumerated in the ministerial ordinance, but leave them to Shishin (the guiding principle which can be changed more flexibly). In addition, in respect to wages, also, not only direct discrimination, but indirect discrimination should be prohibited and it should be clarified that indirect discrimination against women also will be redressed by the above-mentioned law.
3. The government should take concrete measures to improve the percentage of both male and female workers obtaining the child care leave and/or other family member care leave.

B. Subjects of Concern and Recommendations of the Human Rights Committee

364. Nothing is mentioned in the consideration of the Fourth Periodic Report with respect to the issue of discrimination against women in the field of labor. The Committee on Economic, Social and Cultural Rights recommends the State Party to implement the current law with more enthusiasm and enact new legislations to ensure further gender equality especially in the fields of employment, work conditions, wages from the appropriate perspectives of gender equality.

C. The Government's Response and its Fourth Periodic Report (paragraph 82 to 97)

365. 1. The government in the Fifth Periodic Report refers to the revised Equal

⁴⁴ The JFBA put up a statement to the same effect with regard to the dual-surname system on April 20, 2002.

Employment Opportunity Law enacted in April, 1999 and the revised Law Concerning the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (hereinafter to be referred to as the Law Concerning Child Care Leave and Others” enacted in April, 2005. The government describes the introduction of provisions to eliminate the de facto disparities between male workers and female workers with regard to the recruitment, hiring of workers, assignment and promotion, establishment of a system to disclose the company names and improvement of mediation system.

366. However, regarding indirect discrimination, which was left as a problem in the revised Equal Employment Opportunity Law enacted in April, 1999 and was suggested to be expressly stipulated in the above-mentioned law in Concluding Comments of SEDAW in July, 2003, the government made certain provisions in the new Equal Employment Opportunity Law enacted in April, 2007, however, since the government states that the prohibited indirect discrimination is limited in the above-mentioned law to the examples enumerated in ministerial ordinance, different treatments based on different forms of employment (for example, part-time employment, employment for a definite term, etc.) are not included into the prohibited indirect discrimination and the extent to be relieved by the law is strictly limited. And the discrimination in respect to wages is not covered by the government’s redress. Also, with regard to the positive actions, in the new Equal Employment Opportunity Law enacted in April, 2007 also, it only provides that government shall grant aids to business owners when they disclose or try to disclose the implementing status of the positive actions.

367. 2. Furthermore, the Fifth Periodic Report mentions the issue of wage disparity, but the analysis remains that “the major reasons for the wage disparity between men and women are considered to be the differences in type and level of position between men and women and the fact that women work for a fewer continuous number of years than men. Therefore, the GOJ prohibits discrimination in posting and promotion by the Equal Employment Opportunity Law and is developing measures that aim to ensure equal treatment between men and women.”

368. Although the report indicates that the number of female workers takes up approximately 40% of the total workers in Japan, it does not mention that 50.6% of the female workers remain in non-regular employment such as part-time worker and contract employee for a definite term⁴⁵, which serves as a significant factor in wage disparity between male workers and female workers (the disparity in official wage between male workers and female workers in 2005 was 65.9%)⁴⁶.

⁴⁵ Based on “Labor Force Survey” by the Statistics Bureau of the Ministry of Internal Affairs and Communications in 2003

⁴⁶ Based on “Basic Survey on Wage Structure”

369. 3. In addition, the report indicates that the revision “expanded the number of workers able to receive child care leave and family care leave, extended the child care leave period, relaxed limitations on the number of times family care leave can be taken, and established a system which enables workers to take leave for taking care of sick or injured children”. However, while presenting the results of the survey as objective facts, which shows that only “0.33% of men whose spouses had given birth obtained child care leave, 0.08% of female workers obtained family care leave and 0.03% of male workers obtained family care leave” (paragraph 95), there is no consideration made to these figures show that women still bear the burden of domestic duties including child care and other family members care and that the objectives of gender equality has not yet achieved.

370. 4. The ratio of women in positions at the levels Chief, Section manager and Director overall remains low (less than 10% in either position)⁴⁷. Furthermore, concerning measures taken for "active efforts by companies to promote the full utilization of the abilities of women (Positive Action)," approximately only 40% of companies state that they "are already taking Positive Action" or "are planning to take Positive Action in the future."

D. Position of the JFBA

371. 1. The government of Japan should amend the current Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment in order to realize the further gender equality in employment, work conditions, and wages, and the penalties should be applied to business owners who violate the provisions in Article 5, 6 (Prohibition of Discrimination based on sex difference , 7 (measures for the reasons other than sex) and 9 (disadvantageous treatment based on marriage, pregnancy, delivery and so on).

372. 2. The government should revise the new Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment enacted in April, 2007, should not limit the cases of indirect discrimination forbidden in new Law to the ones stipulated in mistral ordinance, but leave them to Shishin (guiding principle which can be change more flexibly).

373. In respect to wages, not only direct discrimination, but indirect discrimination should be prohibited and it should be clarified that indirect discrimination against women also will be redressed by the above-mentioned law. Furthermore, provisions to

⁴⁷ Exhibit 8 of the Fifth Periodic Report

impose on business owners the obligation of implementing Positive Actions should be created⁴⁸.

374. 3. Considering the current status where domestic duties including child care and other family members care are mainly born by women is rooted in feudalistic conception of gender roles, the government should educate its nation with regard to the need to correct the conception of gender role and take specific measures to enhance the percentage of both male and female workers who obtain the child care leave and/or the other family members care.

Recruitment of female national public officers to the Diet and other administrative bodies

A. Conclusions and Recommendations

375.

In order to realize the further gender equality for female public officers to receive high positions in the Diet, public sectors and administrative departments, the government of Japan should take measures to ensure that a certain rate of high positions in the Diet, public sectors and other administrative departments will be taken up by female officers.

B. Subjects of Concern and Recommendations of the Human Rights Committee

376. Nothing is mentioned in the consideration of the Forth Periodic Report with respect to the issue of discrimination against women in recruitment of female officers in the Diet and public sectors.

377. In paragraph 42 of the concluding consideration on the Fourth Periodic Report as of August 30, 2001, The Committee on Economic, Social and Cultural Rights recommended the State Party to implement the current law with more enthusiasm and enact new legislations from an appropriate standpoint of gender equality to ensure further gender equality so that female officers can assume the high positions in public sectors and other administrative departments.

C. The Government's Response and its Fourth Periodic Report (paragraph 63 to 81)

⁴⁸ The JFBA put up an opinion to the same effect with regard to the outline of a bill for a partial amendment of the Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment.

378. The Fifth Periodic Report describes the government's reforms including establishment of Council for Gender Equality and the Gender Equality Bureau in the Cabinet Office in January, 2001, enactment of the Basic Law for a Gender-equal Society in June, 1999, a Cabinet Decision on the first plan based on the Basic Plan for Gender Equality in December 2000, and the current status of women's participation in policy decision-making processes. Furthermore, in the Basic Plan for Gender Equality, the promotion of the participation of women as members of national advisory councils and committees, and recruitment and promotion, etc. of female national public officers are advocated as pillars of the priority objective.

379. However, the report passes the discussion regarding the rate of female remains around 10% of the total⁴⁹ and the rate of female senior officers in the total government officials⁵⁰ on to the Exhibit for no special reason.

380. According to the "Gender Gap" ranking issued by World Economic Forum on November 8, 2007, Japan ranked 91 out of 128 countries, going down from 80 in the previous year. Japan is in the lowest among the Group of Eight and the statistic shows that Japan is still fixed on the conventional practice and idea of long working hours and gender gap.

D. Position of the JFBA

381. 1. With the enactment of the Basic Law for a Gender-equal Society, the Council for Gender Equality was newly established with the prime minister as its head in the Cabinet Office. At the same time, the Headquarters for the Promotion of Gender Equality with the prime minister as its chief and all the cabinet members as its headquarters continues to exist. The Headquarters consists of officials in charge of gender equality such as bureau chiefs from ministries and agencies that make up the Headquarters. The role of the Headquarters is to smoothly and effectively promote the measures, but authorities and relationship of the Council for Gender Equality and the Headquarters for the Promotion of Gender Equality are not clear.

382. Furthermore, the most of the officials in the Headquarters have not fulfilled their roles as the responsible focal points. Beijing Declaration and Platform for Action provides to "give all ministries the mandate to review policies and programmes from a gender perspective and in the light of the Platform for Action. Locate the responsibility for the implementation of that mandate at the highest possible level. Establish and/or strengthen an inter-ministerial coordination structure to carry out this mandate and monitor progress and to network with relevant machineries." From this perspective, in

⁴⁹ Exhibit 3 of the Fifth Periodic Report

⁵⁰ Exhibit 7 of the Fifth Periodic Report

the light of the Platform for Action, it is necessary to give the officials in charge of Gender Equality the mandate to review policies and programs in each ministries and agencies and locate the responsibility for the implementation of that mandate at the highest possible level. With regard to the relationship between the Council for Gender Equality and the Headquarters for the Promotion of Gender Equality, the relationship between the Council that has the legal mandate and the Headquarters for the Promotion of Gender Equality that holds the meeting of officials who are in charge of Gender Equality should be clarified to network with other ministries.

383. 2. The Fifth Periodic Report cites that the following targets were decided ; 1) concerning the promotion of the participation of women as members of advisory councils, the target has been reached 20.4% by March 2000 and in August 2000, the Headquarters for the Promotion of Gender Equality passed a resolution to achieve as early as possible before the end of FY2005, the international goal of 30% representation set out in the Nairobi Forward-looking Strategies for the Advancement of Women, and 2) the Headquarters for the Promotion of Gender Equality passed a decision in June 2003, which stated that "we expect that by the year 2020 women will occupy at least 30% of leadership positions in all sectors of society. To this end, the government of Japan will lead the private sector in actively taking such measures as to appoint women, etc. and will encourage independent efforts to set numerical targets and deadlines to achieve those targets in each sector."

384. In order to achieve the above-mentioned numerical targets, in other words, to realize the Gender Equality for women in taking up the high posts in public sectors and administrative bodies, the government should implement measures to ensure that a certain rate of high positions in the Diet, public sectors and other administrative departments will be taken up by female officers.

Section 2: Trafficking in Women, Pornography and “comfort women”

A. Conclusions and Recommendations

385.

1. Even in the case where a victim of human trafficking is violating some punitive regulations, when such conduct has direct causality with the circumstances where the victim is placed, the government should request the specialized institutions for protection of the victim and carry out the subsequent investigation in a cautious manner.
2. When a victim of human trafficking is a foreigner, who does not have a status of residence, his/her status of residence should be allowed as his/her own right instead of leaving the decision on whether to allow him/her to stay in the country to the

discretion of the Minister of Justice under the system of special permission for residence.

3. The government should position the Women's Consulting Offices as facilities to provide urgent protection to victims of human trafficking. For the further protection of such victims, the government should establish a specialized institution tentatively called as the Support Center for Human Trafficking Victims, by assigning specialized staff for the program for the recovery from the damage and using its own financial resources. Furthermore, the sufficient financial aids including the facility maintenance expenses and labor costs shall be granted to the private shelters.

4. The government should enact a law which is tentatively called as the Law Concerning Protection of Human Trafficking Victims to serve as a governing law for establishment of the Support Center, financial aids to private shelters, and assumption of expenses for accommodation, medical care, living and other costs during temporary protection as well as a certain period until the victim obtains a stable status of residence such as a long-term residence status.

5. The government should conduct research on the current operation status of the Business Entertainment Law as well as the Law for Punishing Acts Related to Child Prostitution and Child Pornography (hereinafter to be referred to as the Child Prostitution Law) to explore what kind of legislative measures shall be taken in order to prevent trafficking in women, child prostitution and child pornography.

6. The government should meet with the representatives of the victims of "comfort women" as soon as possible to take necessary measures for the victims to recover from the damages, by thoroughly hunting for truth, making an official apology and conducting legal compensation based on the legal responsibility toward the victims.

B. Subjects of Concern and Recommendations of the Human Rights Committee

386. 1. The Committee expresses its concerns and makes recommendations in the concluding observations on the consideration of the Fourth Periodic Report as follows; "despite the amendment to the Business Entertainment Law, traffic in women and insufficient protection for women subject to trafficking and slavery-like practices remain serious concerns under article 8 of the Covenant. In light of information given by the State party on planned new legislation against child prostitution and child pornography, the Committee is concerned that such measures may not protect children under the age of 18 when the age limit for sexual consent is as low as 13. The Committee is also concerned about the absence of specific legal provisions prohibiting bringing of foreign children to Japan for the purpose of prostitution, despite the fact that abduction and sexual exploitation of children are subject to penal sanctions. The Committee recommends that the situation be brought into compliance with the State party's obligations under articles 9, 17 and 24 of the Covenant."

387. 2. The Committee on the Elimination of Racial Discrimination recommends in the concluding observations on the consideration of the First and the Second Periodic Report that “the next State party report contain socio-economic data disaggregated by gender and national and ethnic group and information on measures taken to prevent gender-related racial discrimination, including sexual exploitation and violence (paragraph 22)”

388. 3. The Committee on the Elimination of Discrimination against Women is concerned that “information on the extent of the problem is insufficient and the punishment for perpetrators under current laws too lenient, while recognizing the efforts made by the State party to address trafficking in women and girls, including its cooperation for prevention and investigation with law enforcement and immigration authorities in countries of origin and transit in the Asia-Pacific region” in the concluding observations on the consideration of the Fourth and the Fifth Periodic Report. The Committee recommends that the State party increase its efforts to combat trafficking in women and girls.” The Committee requests “the State party to systematically monitor the phenomenon and compile detailed data reflecting the age and national origin of victims, with a view to formulating a comprehensive strategy to address the problem and ensure that penalties for perpetrators are appropriate.” The Committee also requests “the State party to provide in its next report comprehensive information and data on the trafficking of women and girls as well as on measures taken in this regard.”

389. 4. The Committee, in the concluding observations on the consideration of the Fourth and the Fifth Periodic Reports, stated that “while appreciative of the comprehensive information provided by the State party with respect to the measures it has taken before and after the Committee’s consideration of the second and third periodic reports of the State party with respect to the issue of “wartime comfort women”, the Committee notes the ongoing concerns about the issue” and recommends that the government of Japan “endeavor to find a lasting solution for the matter of “wartime comfort women.” The Committee also expressed its disappointment that, in the concluding observations on the consideration of the Second and the Third Periodic Reports, “the Japanese report contained no serious reflection on issues concerning the sexual exploitation of women from other countries in Asia and during the Second World War. It noted that Japan's commitment to the Convention required it to ensure the protection of the full human rights of all women, including foreign and immigrant women.” The Committee also encourages the government to take specific and effective measures to address these current issues as well as war-related crimes and to inform the Committee about such measures in the next report.

390. The Committee on Economic, Social and Cultural Rights strongly recommends

that before it's too late, the government of Japan discuss with the organization representing "comfort women" and find out the appropriate ways with regard to the means to compensate for the victims in line with the "comfort women's" expectations.

C. The Government's Response and its Fourth Periodic Report (paragraph 110 to 112)

391. 1. The report indicates that "...related laws and ordinances, such as the Immigration Control and Refugee Recognition Act, the Anti-Prostitution Law and the Law Concerning Regulation and Rationalization of Work of Entertainment-Related Establishments, are applied to actively crack down on these cases. Since female victims sometimes seek protection from their embassies in Japan, cooperation with these concerned agencies is conducted in order to gather related information."

392. 2. It shall be highly evaluated that the "Law for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children" was entered into force on November 1, 1999. Article 2, Section 1 of the law defined children (boys and girls) as persons under the age of 18, solving the second concern of the Committee expressed in the concluding observations.

393. 3. The Fourth Periodic Report cites that the government of Japan has conducted investigations on this matter and released the results of the investigations twice so far and that the government has expressed apology and remorse toward the former "comfort women" on every opportunity. It is also reported that from a standing point of fulfilling moral responsibility for this matter, the government supported the establishment of the Asian Women's Fund in July, 1995 and is fully supporting the funding activities by paying all expenses of its operation and cooperating in its funding activities.

D. Position of the JFBA

394. 1. The measures taken to provide care for women who subject to trafficking and slavery-like practices and suffer both physical and mental damages have not been sufficient. Considering the circumstances where the government is trying to ratify the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime⁵¹ and Japan was placed in the list of Tier 2⁵² as "a country requiring

⁵¹ In June, 2005, the Diet of Japan has already approved to conclude the Protocol. However, as Japan has not yet conclude the United Nations Convention against Transnational Organized Crime, the situation is that it is still impossible for Japan to conclude the Protocol. Although the diet of Japan has already approved the Convention also, the Government has not yet conclude the convention, because it has not yet legislated sufficient domestic laws to enact the Convention.

⁵² Tier 1 is for those countries which have just met the minimum requirements for abolition of TIP, Tier 3 is for those

scrutiny” of the US State Department’s annual Trafficking in Persons (TIP) Report in 2004, it is commended that a series of amendments of laws including the establishment of anti-trafficking law in the amended Criminal Code (entered into force on July 12, 2005) and expansion of scope of punishment for the Law Concerning Abduction and Kidnapping for the Purpose of Transfer Outside the Country of Japan in Which They Are Located⁵³ have been made to further crack down on human trafficking mainly of women and children.

395. 2. However, it should be pointed out that a series of amendments of laws was putting so much emphasis on punishment on perpetrators and considerations on the protection of victims and self-support measures were insufficient.

396. Except for cases where a victim manages to escape from a perpetrator and ask for police protection, if a victim of trafficking is found at the raid on adult-entertainment shop and police is not able to confirm that she is a victim of trafficking, there is a high possibility that the victim may be arrested for violation of the Immigration-Control and Refugee-Recognition Act. Unless police recognizes that the arrested person is the victim of trafficking in the subsequent investigation, the victim will not be protected. Human trafficking involves many perpetrators beyond borders and at least in the country of origin and the country of destination there are perpetrators. Therefore, the minimum requirement is to secure the safety of the victim and her family and people concerned in the country of origin and Japan. However, there has not been any effective measure for that matter at this moment.

397. 3. When it comes to the current status on measures to help victims to recover from the physical and mental damages is even poorer. Women’s Consulting Centers in local prefectural governments are the only public shelters for women who need protection for the reasons including being a victim of domestic violence. However, the government is requesting the local prefectural governments that the protection to the victims of human trafficking shall be provided by the Centers⁵⁴. It has been indicated that man power and the facilities of the Centers are still inadequate and the term for victims to stay in such centers is limited to two weeks in principle (four weeks at maximum even when extension is permitted). Furthermore, there is no specialized staff that is familiar with the backgrounds of human trafficking as well as neither the victims’ situations nor appropriate interpreter. There is no system in place where the Centers are able to provide counseling and medical care of its own. What Women’s Consulting Centers can provide is limited to food, shelter and clothing, since they do not have

countries which have not yet met the minimum requirements and Tier 2 comes in the middle.

⁵³ The amended law expanded the scope of punishment by including the transfer from the third countries, not only from Japan.

⁵⁴ “Action Plan against Human Trafficking” on December 7, 2007.

program or fund to provide the further support to victims.

398. 4. The social security system including the welfare benefits only covers “citizens of the state” in principle and is applied *mutatis mutandis* to foreign residents only when they have a stable status of residence such as a status of “long-term resident”. However, the most of victims of human trafficking are not eligible for receiving benefit from the system, and their medical expenses, costs of living or housing expenses are not secured.

399. The reality is that the facilities that accept victims of human trafficking are the private shelters, but there are only two shelters in Japan that are continuously accepting the victims. Although they are making tremendous efforts and contributions, those shelters are faced with financially severe situation on an ongoing basis because it is quite difficult to receive public grants for victims who do not have any legal status of residence. Starting from April 2005, the national government and local authorities have decided to pay 6,500 yen per person to the private shelter as expense for temporary protection when the victim entered in the private shelters via Women’s Consulting Centers. However, this amount is much small in order to provide a sufficient protection and there has not been any direct support for facility’s maintenance expenses and labor costs.

400. 5. While the Law for Punishing Acts Related to Child Prostitution and Child Pornography and for Protecting Children stipulates that an act of buying and/or selling a child with the objective of prostitution and an act of transporting a child who has been abducted or kidnapped with the same objective outside the country in which that child is located are subject to penal punishment, an act to bring a child with the same objective to Japan with the consent of the child and make the child engage in prostitution is not subject to punishment.

401. Therefore, it seems that the concerns expressed in the above-mentioned concluding observations of the Committee have not been drastically improved.

402. 6. It is conceivable that the Committee on Economic, Social and Cultural Rights has taken into consideration the Japanese government’s insufficient restitution measures for victims of “comfort women” during World War II, and the Committee’s concern is manifested in “...insufficient protection for women who are victims of slavery-like practices” in its concluding observations. On July 27, 2007, the U.S. House of Representatives approved a resolution demanding Japan’s formal apology over its practice forcing Asian women into slavery during World War II, directly condemning Japan for its insufficient restitution measures for the victims of such practice.

403. However, the government of Japan has not taken any further restitution measure so far commenting that the resolution in both the House of Representatives and the Senate is based on misinterpretation of facts. The government also continues to ignore the above-mentioned requests made by the Committee on the Elimination of Discrimination against Women and the Economic, Social and Cultural Rights.

404. 7. The government of Japan should take the following measures;

(1) To ensure stability of legal status of a victim of human trafficking

Even if a victim of human trafficking is violating some punitive regulations, when such conduct has direct causality with the circumstances where the victim is placed, the punishment shall be suppressive. Even when a person is a suspect who violated some punitive law, if there is a possibility that the person may be a victim of human trafficking, the priority should be placed on the protection of that person. The government should request the specialized institutions for protection of the victim and carry out the subsequent investigation in a cautious manner.

405. When a foreigner, who does not have a status of residence is applicable to the victim of human trafficking, his/her status of residence should be allowed as his/her own right instead of leaving the decision on whether to allow him/her to stay in the country to the discretion of the Minister of Justice under the system of special permission for residence. In particular, the government should consider the creation of the law tentatively called as Victim Recognition System that includes; (a) a system for permitting provisional stay, b) granting a status of “permanent residence” to a person recognized as a victim of human trafficking, and c) objection submission system by the third party institution independent from the Immigration Control. In this case, the victim’s cooperation for the punishment of the perpetrator should not be considered as one of the requirements of granting a status of residence.

406. (2) To implement measures to protect victims of human trafficking

Victims of human trafficking are located in many places in Japan, and it makes a sense to utilize Women’s Consulting Centers which exist in each prefecture so that the institutes that are geographically close to the victims can take prompt actions for the protection of such victims. However, as mentioned in the foregoing paragraph with regard to the limitation of the capacity of the Centers in providing protection support, Women’s Consulting Centers should be positioned as institutes to address the urgent need of protection. For the further protection of such victims, the government at its own responsibility and financial resources should establish a specialized institution tentatively called as the Support Center for Human Trafficking Victims, by assigning specialized staff for the program for the recovery from the damage.

407. Also, private shelters should play important roles as main bodies in charge of accepting and protecting the victims before the establishment of the Support Center for Human Trafficking Victims, and after the Center is instituted, it should play roles as the supporting bodies in protecting the victims in cooperation with the Center. The sufficient financial aids including the facility maintenance expenses and labor costs shall be granted to the private shelters.

408. (3) Enactment of legislation concerning protection for victims of human trafficking

Protection support for the victims of human trafficking shall normally be implemented on the state's own responsibility, and a governing law for establishment of the Support Center, providing financial aids to private shelters, and assumption of expenses for accommodation, medical care, living and other costs during temporary protection as well as a certain period until the victim obtains a stable status of residence such as a long-term residence status. A special law shall be instituted, incorporating the comprehensive measures for protection of victims.

409. (4) The government should conduct research on the current operation status of the Business Entertainment Law as well as the Law for Punishing Acts Related to Child Prostitution and Child Pornography to explore and clarify what kind of legislative measures shall be taken in order to prevent trafficking in women, child prostitution and child pornography

410. (5) The government should meet with the representatives of the victims of "comfort women" as soon as possible to listen to their requests and to take necessary measures for the victims to recover from the damages, by thoroughly hunting for truth, making an official apology and conducting legal compensation based on the legal responsibility toward the victims.

Section 3: Domestic Violence against Women

A. Conclusions and Recommendations

411.

1. The government of Japan should conduct the investigation on and clarify the reality of the operation of the Law for the Prevention of Spousal Violence and the Protection of Victims (hereinafter called the Spousal Violence Prevention Law) to carry out necessary amendment of the laws to eradicate domestic violence.
2. Effective education and trainings on human rights and gender shall be given to all the judicial professionals including judges in respect to the limitations of the current Spousal Violence Prevention Law as well as the future vision of amendment of the

law in order for judicial professionals to fully understand the domestic violence against women.

3. The government should conduct education and trainings on human rights and gender as needed to drastically prevent domestic violence against women.

B. Subjects of Concern and Recommendations of the Human Rights Committee

412. The Committee, in the concluding observations on the consideration of the Fourth Periodic Report, states that “[t]he Committee continues to be gravely concerned about the high incidence of violence against women, in particular domestic violence and rape, and the absence of any remedial measures to eradicate this practice.” And the Committee is troubled that “the courts in Japan seem to consider domestic violence, including forced sexual intercourse, as a normal incident of married life.”

C. The Government's Response and its Fourth Periodic Report (paragraph 98 to 109 and 118 to 123)

413. The government touched upon the following points in the Fifth Periodic Report;

1. In April 2001, the Spousal Violence Prevention Law was enacted and entered into force on October 13 of that year, providing the reinforced protection order system, penal provisions for violation of such protection orders, establishment of Spousal Violence Counseling and Support Centers, aids to be granted to the relevant NGOs from the national government and local authorities and implementation of training to the relevant officials.

2. In May 2004, the Spousal Violence Prevention Law was amended (enacted on December 12 of that year). The content of the revisions include: 1) the renewed interpretation on “spouse violence” that includes not only the violence against a victim harming victim’s physical condition, but other forms of violence, 2) a court shall issue an order for protection from violence not only by the current spouse, but also by the former spouse, and 3) the period of protection order is extended⁵⁵.

3. Under a partial amendment of the Code of Criminal Procedure in May 2000, the time limit for filing a complaint for certain sex crimes such as indecent assault or rape was abolished.

D. Position of the JFBA

414. 1. It shall be commended that 1) an expansion of the definition of “spousal violence”; 2) an expansion of the protection order system; 3) commencement of

⁵⁵ Six months for “Order to Prohibit Approach” and two months for “Order to Vacate”

operation of Spousal Violence Counseling and Support Centers in municipalities; 4) clarification of support to enable the independence of victims; 5) support from police commissioners, 6) appropriate and prompt handling of complaints; and 7) measures for foreign nationals and people with disabilities, 8) abolishment of the time limit for filing a complaint for certain sex crimes such as indecent assault or rape.

415. 2. However, considering the following points, the governmental measures against prevention of spousal violence and self-support for victims are far from sufficient until the new Spousal Violence Prevention Law was enacted on Jan. 11, 2008.

1) the issuance of an order for protection is limited to cases where the spousal violence harms victim's physical condition⁵⁶,

2) the conducts prohibited by "Order to Prohibit Approach" are limited to "pursuing a victim in victim's residence or other places, or wandering around victim's residence, place of work, or other places to which the victim are normally located", not including recurrent and continuing harassing behavior using telephone, fax or email,

3) conventional Women's Consulting Centers are actually performing the functions of Spousal Violence Counseling and Support Centers. However, it has been pointed out that in respect to the number of staff and the facility setting is insufficient to respond to the need of victims of spouse violence, and furthermore, the government is requesting the Centers to provide the protection of victims of human trafficking in accordance with "Action Plan against Human Trafficking" on December 7, 2004. The Centers are expected to assume heavy burden by playing roles beyond their capacities, and

4) the term that a victim can stay in the Centers is limited to approximately two weeks in principle (four weeks at maximum even when extension is permitted).

416. 3. Use of violence and/or threat that makes the victim unable to resist or refuse is still one of the requirements for a rape to be established as a crime case based on the precedents. It is grave infringement of women's rights of decision making on sexual matter that in the civil lawsuits for the compensation for the damage from rape, there are many judges who tend to make a decision on whether the sexual intercourse in question is an illegal conduct depending on whether any violence or treat was used instead of whether the victim gave a consent or not. Therefore, even from the view point that a rape should be simply defined as forced sexual intercourse against woman's will", this is an important problem.

417. 4. The government should take the following measures:

(1) The government should conduct a research to clarify the actual operation status of the Spousal Violence Prevention Law and conduct necessary amendment of the law to root out domestic violence.

⁵⁶ Article 10 of the Spousal Violence Prevention Law

(2) The government should provide effective human rights and gender education for all judicial professionals including judges to thoroughly aware and understand that since rape is grave infringement of women's rights of decision making on sexual matters, rape should be simply defined as "forced sexual intercourse against woman's will" and also that forced sexual intercourse against woman's (wife's) will is unacceptable even within marriage.

418. According to the Fifth Periodic Report, the Ministry of Justice is implementing lectures and talks with emphasis on the significance of the Spousal Violence Prevention Law in all forms of training for public prosecutors and other officers and with regard to the courts, the government of Japan understands that the courts provide judges and other officers with training which includes lectures and other talks on such issues as the significance of the Spousal Violence Prevention Law⁵⁷. However, unless the training deals with the limitation of the current law and shows the ideal state of future amendment, their efforts are still insufficient.

419. (3) In addition to the current after-the-fact measures including the above (1) and (2), the government should conduct human rights and gender training as needed to drastically prevent domestic violence.

420. <Note> Afterwards, the Spousal Violence Prevention Law was revised again and the new Law was enacted on Jan. 11, 2008. In the new Law, it has become to be possible to issue an order for protection to cases where the spousal violence dose not harm victim's physical condition for the present but the spouse had threatened victim's life or physical condition. Now it has become possible to prohibit not only pursuing a victim and children accompanied by a victim but also pursuing victim's relatives etc. ,and it has also become possible to prohibit recurrent and continuing harassing behavior using telephone, fax or email etc..

Section 4: Sexual Harassment

A. Conclusions and Recommendations

421.

1. The government should enact the provisions to prohibit sexual harassment by explicitly making it a crime.
2. In order to provide prompt and appropriate redress to the victims of sexual harassment, the government should clarify a relief organization for the victims.
3. The government immediately implements the measures to prevent sexual

⁵⁷ Paragraph 106 and 107 in the Fifth Periodic Report

harassment in the field of education such as universities.

B. Subjects of Concern and Recommendations of the Human Rights Committee

422. In the concluding observations on the Fourth Periodic Report, the Committee expresses its concern about “allegations of violence and sexual harassment of persons detained pending immigration procedures, including harsh conditions of detention, the use of handcuffs and detention in isolation rooms.” The Committee recommends that “the State party review the conditions of detention and, if necessary, take measures to bring the situation into compliance with articles 7 and 9 of the Covenant.

C. The Government's Response and its Fourth Periodic Report (paragraph 118 and 120)

423. The Fifth Periodic Report states that “The tendency to view the roles of men and women as being fixed is still deeply entrenched in society and this is a factor leading to various kinds of gender-based discrimination in the home and workplace. In addition,, violence by husbands or partners and sexual harassment are also major problems with respect to women’s rights”(paragraph 118), and that “The human rights organs under the Ministry of Justice have been aiming to remedy and prevent harm from human rights infringements with respect to a range of human rights issues faced by women, such as violence by husbands and partners, sexual harassment in the workplace and other places and acts of stalking, through human rights counseling and investigation and resolution of human rights infringement cases” (paragraph 120).

D. Position of the JFBA

424. 1. Despite the statement made in the Fifth Periodic Report as seen in the foregoing paragraph, the JFBA has little knowledge about any fact that the government of Japan has implemented any effective remedy or prevention from sexual harassment cases, through human rights counseling and investigation and resolution of human rights infringement cases.

425. 2. The “Basic Measures pertaining to Violence against Women” mentions the issues of sexual harassment. However, when it comes to sexual harassment in workplace, not only an aspect of violence against women, but also an aspect of infringement of basic working rights of women shall be taken into consideration. In that sense, the government’s measures have not been sufficient.

426. 3. The Forth and the Fifth Periodic Reports state that penal provisions for sexual violence against women as mentioned above have been appropriately enforced

and the police are consulted on sexual harassment through their counselor for sexual crime, etc. to respond to the victim's needs. The reports go on to state that as for sexual harassment in educational organizations, universities and private organizations have been undertaking measures to tackle these issues. However, with regard to sexual harassment in workplace, the reports simply mention that under the Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment , it is an obligation for those in charge of employment management to give consideration to the prevention of sexual harassment in the workplace.

427. While there are serious damages made by sexual harassment, the most of cases do not become apparent, and the state has been allowing sexual harassment spread in every arena in the society including workplaces and field of education. Since sexual harassment takes place based on the gender inequality and the disparity in power relationship between men and women, a program to eliminate those shall be needed. The nation-wide Research on the actual situation of sexual harassment in the field of education shall be conducted, and the national government as well as local authorities shall provide guidance to each educational institution to take measures against sexual harassment by furnishing themselves with the complaint window and giving training to the teachers and staff. While making further progress in improving education content from a view point of gender free.

428. In workplaces, the new Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment enacted in April, 2007 strengthens the employers' obligation to give considerations to prevent sexual harassment up)to "obligation to take proper measures" and established assistance systems to settle a dispute (for example, mediation according to the New Law) and the names of companies which violated the New Law are to be opened. However, furthermore, clear prohibition provisions, establishment of remedy organization to provide relief to the victims in prompt and appropriate manners and development of necessary institutions shall be required.

Section 5: Forced Sterilization

A. Conclusions and Recommendations

429.

1. With regard to forced sterilization of women with disabilities such as patients of Hansen's disease, the government of Japan should clarify the concrete plan to implement the comprehensive investigation and the compensation for such women.
2. In order to prevent the recurrence of such damage in the future, the government should conduct human rights as well as gender education as needed to respect women's

rights of decision making on sexual matters including reproductive rights.

B. Subjects of Concern and Recommendations of the Human Rights Committee

430. The Committee states in the concluding observations on the Fourth Periodic Report that “while acknowledging the abolition of forced sterilization of disabled women, regrets that the law has not provided for a right of compensation to persons who were subjected to forced sterilization”, and recommends that “the necessary legal steps be taken.”

C. The Government's Response and its Fourth Periodic Report

431. 1. While the government plans to compensate for forced isolation regardless of whether the person is plaintiff of the lawsuit or not, it has not even conducted a research on the actual situation, let alone compensation with regard to forced sterilization.

2. Although the case of forced sterilization happened to become apparent as a part of human rights infringement of patients of Hansen’s disease, in Japan, conventionally there has been insufficient awareness that forced sterilization against women’s will is grave infringement of reproductive rights that is essential part of women’s rights of decision making on sexual matters, regardless of whether a woman has disability or not.

3. Nothing is mentioned in the Fifth Periodic Report in respect to forced sterilization of disabled women.

D. Position of the JFBA

432. 1. The government of Japan should immediately clarify the concrete plan to implement the comprehensive investigation and the compensation for disabled women including patients of Hansen’s disease who were subject to forced sterilization in the past.

433. 2. In order to prevent the recurrence of such damage in the future, the government should conduct human rights as well as gender education as needed to respect women’s rights of decision making on sexual matters including reproductive rights⁵⁸.

⁵⁸ Refer to chapter 2, section 11 “Hansen’s Disease Problems” for further detail views of the JFBA.

Chapter 4: The Rights of Children
Section 1: Discrimination against Children Born Out of Wedlock

A. Conclusions and Recommendations

434.

<p>The government should take measures to immediately eliminate any form of discrimination against children born out of wedlock in acquiring nationality, the family register, and share in succession by legislative measures.</p>

B. Subjects of Concern and Recommendations of the Human Rights Committee

435. 1. The comments of the Committee at the concluding observation of the Fourth Periodic Report of the Japanese Government expressed their continuing concern about discrimination against children born out of wedlock. The Committee was concerned, in particular, about discrimination including those with regard to nationality, family registers and inheritance rights and reconfirmed its position that every child has the right to equal protection to be consistent with article 26 of the Covenant. The Committee recommended that the Japanese Government take necessary measures to amend its legislation including article 900 (4) of the Civil Code (paragraph 12).

436. 2. The Committee on the Rights of the Child recommended, in the concluding observations of the consideration of the report submitted by the Japanese government (adopted in January, 2004), that the government amend its legislation in order to eliminate any discrimination against children born out of wedlock, in particular, with regard to inheritance and citizenship rights and birth registration, as well as discriminatory terminology such as “illegitimate” from legislation and regulation (paragraph 25).

437. 3. The Committee on the Elimination of Discrimination against Women, in the concluding observation (adopted in July, 2003) of the consideration on the Fourth and the Fifth Periodic Reports of the Japanese Government, expressed its concern that, “discrimination in law and administrative practice against children born out of wedlock with regard to registration and inheritance rights and the resulting considerable impact on women.” The Committee went on to request, “the State party to repeal discriminatory legal provisions that still exist in the Civil Code and to bring legislation and administrative practice into line with the Convention (Paragraph 371 and 372).

C. The Government’s Response and its Fifth Periodic Report

438. 1. In the Fifth Periodic Report, the Japanese government stated that, “with

respect to the acquisition of nationality by birth, the Nationality Law of Japan provides that a child shall acquire Japanese nationality if, at the time of his/her birth, the father or the mother is a Japanese national (The Nationality Law, Article 2, Item 1).” The government went on to add, “...as long as the parent-child relationship is recognized under the law, a child can acquire Japanese nationality regardless of whether he/she is legitimate or not, and therefore there is no discrimination.” (paragraph 336)

439. However, as the provision of The Nationality Law stipulates that the parent-child relationship is recognized under the law at the time of his/her birth, and does not find the retroactive effect of acknowledgement to children born out of wedlock, with respect to a child born to a Japanese father and a foreign mother who are not married, the child can acquire Japanese nationality only if his/her father submits to authorities an acknowledgement of paternity before the child’s birth.

440. The Supreme Court understands the above as the premise, but it approved Japanese nationality for a child when there was a particular reason why the father could submit the acknowledgement after birth in Judgments of October 17, 1997 and of June 12, 2003. Although Japanese nationality was approved for children in these cases but they are extremely exceptional cases.

441. 2. Concerning the difference in how children born in wedlock and children born out of wedlock are recorded in the family register, the report stated that, “... the difference in the family register reflects the distinction provided in the Civil Code for the purpose of recording and authenticating family lineages. Therefore, it cannot be claimed that it is unreasonable discrimination.” However, it added that, “...concerning the way to record the parent-child relationship in the family register, the Tokyo District Court indicated in a decision that distinguishing between children born in or out of wedlock in the family register with regard to their relationship with their parents would infringe the right to privacy.” The government also reported that, “...considering this decision and the demands from the public to reform the method to record the parent-child relationship, Regulations for Enforcement of the Family Registration Law were partially amended under which the relationship of children born out of wedlock to their parents will be recorded in the family register in the same way as children born in wedlock.” Concerning existent entries in the family register, it is reported that, “the parties concerned may now apply to have them modified.” (paragraph 359)

442. 3. Concerning the provision of Japan's Civil Code (Article 900, Item 4, proviso) which stipulates that the statutory share in succession of a child born out of wedlock shall be one-half of that of a child born in wedlock, the report of the Japanese government stated that the provision is “reasonable” with the objective of protecting families comprised of a married husband and wife and their children. However, the

report also recognized the need to “...undertake a review of the system in accordance with changing social circumstances affecting inheritance.”

443. With respect to this provision, the Japanese Supreme Court decided on that the provision is not in violation of Article 14 paragraph 1 of the Constitution in decisions handed down on July 5, 1995 at the Grand Bench (en banc) as well as at the Petty Benches (March 28 and 31, 2003, and October 14, 2004). However, five justices out of fifteen at the Grand Bench and two justices out of five at the Party Benches dissented from the majority opinion stating that the provision is against Article 14 paragraph 1 of the Constitution. Moreover, in the decisions handed down in each Petty Bench on March 31, 2003 and October 14, 2004, while agreeing with the majority on the ground that the unconstitutional judgment would greatly compromise the legal stability, one justice cited in the concurring opinion that it is strongly expected that the legislative body would amend the provisions immediately. These dissenting opinions and concurring opinions carry quotations from the provisions in the articles in the Covenant as well as the concluding observation by the Committee.

444. In 1996, after the court decision in the foregoing paragraph is given, the Legislative Council of Ministry of Justice, an advisory body to the Minister of Justice submitted to the Minister the draft of bill to amend the Civil Code that prescribes that the inheritance of a child born out of wedlock shall be equal to that of a legitimate child. The Ministry of Justice has not submitted the draft bill. In 1998, the draft bill to amend the Civil Code was submitted by a Diet member, but it did not pass the Diet.

D. Position of the JFBA

445. 1. Even though the acquisition of nationality is premised on the provisions of the Nationality Law reported by the government of Japan as mentioned in C1, the practices for the acquisition of Japanese nationality is quite different depending on whether the child is legitimate or not. There is no reasonable ground why a child born out of wedlock should be treated differently from a legitimate child. Such practices should therefore be corrected immediately.

446. 2. The rule mentioned in C2 was amended with regard to the family registration that clearly showed whether the child is born out of wedlock or within wedlock. However, the Family Registration Law prescribes that the birth registration form shall indicate “whether the child is legitimate or not” (the Family Registration Law, Article 49, Paragraph 2, Item 1) and there is a check box to indicate whether the child is legitimate or not on the birth registration form to be in accordance with the Ordinance for Enforcement of the Family Registration Law.

447. As a result, it is possible that the situation may be arisen, in which the birth registration form of a child born out of wedlock will not be submitted on the ground that the parents feel uncomfortable to make such a discriminatory indication on the “illegitimate” child. In such cases, the family register for the child will not be created.

448. 3. There is no reasonable ground for Article 900 paragraph 4 of the Civil Code that prescribes that the inheritance of a child born out of wedlock shall be one half of that of a legitimate child. The provision should therefore be abolished immediately.

449. 4. There are various reasons why the child’s parents are not married at the time of his/her birth, but in any sense, it is not the child’s fault and there is absolutely no reasonable ground why the child should be discriminated only because he/she is born out of wedlock. It is obvious that such a discriminatory legal system violates the Covenant as well as the Constitution and leads to the discrimination against the children born out of wedlock in the society. The provision should therefore fully corrected immediately.

Section 2: Juvenile Justice (Article 9, 10, and 14 of the Covenant)

A. Conclusions and Recommendations

450.

1. The Government should amend the minimum age for criminal responsibility to 16 years, as the current 14 years is too low.
2. The period of protective measure can be extended to maximum eight weeks, which is too long. Therefore, the Government should amend it to maximum four weeks.
3. The system of involving prosecutors in the process is structured so that the fact-finding will be conducted in a procedure that is more unfavourable for the juvenile than the procedure for adults, and the Government should, therefore, abolish it. If the prosecutor’s presence would be admitted, it should be done after the procedures for the protection of the rights of the juvenile are put in place, such as introducing the hearsay principle, and ensuring the right to cross-examine witnesses.
4. The current system of state-appointed defense counsel is limited to very few cases, and is insufficient. The Government should swiftly implement a system of state-appointed defense counsels at the general expense of the state.
5. The Government should adopt explicit legal provisions, which stipulate the right to silence and the right to examine witnesses of juveniles.
6. To release a juvenile from the procedures immediately, after having received a decision to discharge for being found not delinquent, the Government should recognize the Family Court’s decision’s effect of double jeopardy.
7. The Government should immediately implement measures in the investigation

procedures of juvenile cases, to make the investigations more transparent, such as with video or audio recording of the examinations, even if earlier than such measures are introduced in the procedures for adults.

8. The Government should revise the current practice, in which arrest, detention and protective measure in Juvenile Assessment Centers are unnecessarily and too easily imposed, as well as the broad practice, in which periods of detention and protective measure are extended.

9. Regarding separation of adults and juveniles, Article 10 provides for separation of accused juveniles and adults in paragraph 2 (b) and of juvenile offenders and adults in paragraph 3. There are similar provisions under Article 37 (c) in the Convention on the Rights of the Child. The Government should immediately reconsider its position of having ratified the Convention with a reservation attached to this paragraph, and should withdraw its reservation.

10. The Government should establish an independent monitoring and complaint mechanism on the treatment in Juvenile Training Schools.

B. Subjects of Concern and Recommendations of the Human Rights Committee

451. Although it is not mentioned in the Concluding Observations of the Committee, the Concluding Observations of the Committee on the Rights of the Child to the consideration on the Second Periodic Report submitted by the Japanese Government indicated the following concerns and recommendations.

452. The paragraph 53 stated that, “... it is concerned that many of the reforms were not in the spirit of the principles and provisions of the Convention and international standards on juvenile justice, in particular, with regard to the minimum age of criminal responsibility, which was lowered from 16 to 14 years, and pre-trial detention, which was increased from four to eight weeks.” It went on to state that, “[i]t is concerned that an increasing number of juveniles are tried as adults and sentenced to detention, and that juveniles may be sentenced to life imprisonment.” Finally, the Committee is concerned at reports that children exhibiting problematic behavior, such as frequenting places of dubious reputation, tend to be treated as juvenile offenders. Also, in the paragraph 54, the Committee recommended that the Japanese government (a) ensure the full implementation of juvenile justice standards, in particular articles 37, 39, and 40 of the Convention, as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), in light of the Committee’s 1995 day of general discussion on the administration of juvenile justice; (b) amend legislation so as to abolish life imprisonment for juveniles; (c) strengthen and increase the use of alternatives to detention, including pre-trial detention, in order to ensure that deprivation of liberty is used only as a measure of last resort; (d)

review the existing possibility for Family Courts to transfer a case against a child of 16 years or older to a criminal court for adults with a view to abolishing this practice; (e) provide legal assistance to children in conflict with the law throughout the legal proceedings; (f) ensure that children with problematic behavior are not treated as criminals and (g) strengthen rehabilitation and reintegration programs.

C. The Government's Response and the Fifth Periodic Report

453. The Government has not taken any measures in response to the concerns and recommendations raised in the above Concluding Observations of the Committee on the Rights of the Child to the consideration of the Second Periodic Report, other than establishing a system of state-appointed defense counsel for suspects in detention in the criminal procedure that also covers juvenile suspects.

454. The Fifth Periodic Report at paragraph 290 and 291 stated that, “[t]he procedure in juvenile cases is as stated in the part on Article 14.4 of the Second Periodic Report. Japan's Juvenile Law firmly adheres to the basic policy of fostering the sound development of juveniles. In November 2000 the Juvenile Law was partially amended as follows.” Further, at paragraph 293, it states, “[i]n order for the family courts to provide appropriate treatment to juveniles, and thereby ensure the trust of the people toward this process, is first of all important that the facts of the case are established fairly. Therefore legislation to make the fact-finding processes fairer was approved. For example, in juvenile protection cases, a panel consisting of three judges may be employed (Court Organization Law, Article 31.4, para. 2). Moreover in certain cases the public prosecutor can participate in the fact-finding process of the family court (Juvenile Law, Article 22.2) and in such case, if the juvenile does not have a defense counsel who is a lawyer, the family court must appoint lawyer as a defense counsel for the juvenile (Juvenile Law, Article 22.3, Para. 1).”

D. Position of the JFBA

1. Amendment of the Juvenile Law in 2000 and its Problems

455. The Juvenile Law in Japan defines juvenile as a person who is under 20 years of age. All juveniles, who commit a crime, will be referred to the Family Court, and would follow a separate juvenile procedure from the criminal procedures for adults. The purpose of the Juvenile Law is not to punish the juvenile offender, but to protect the juvenile and support his/her growth and development. In order to achieve such purposes, as a general rule, prosecutors are not permitted to be present at juvenile arraignments, the hearsay principal are not applied, and the judge will examine all the records and documents sent from the investigative organizations (police and prosecutors' office)

before the trial in an *ex officio* hearing structure.

456. Later, the draft Juvenile (Amendment) Law (Government draft), whose major elements included the involvement of prosecutors in the proceedings and the granting of the right to appeal to the prosecutors, was submitted to the Diet in March 1999⁵⁹. Although the discussions on the draft began in the Diet in May 2000, it was dropped after the Diet was dissolved in June of that year. But the three government parties of that time, submitted in September another draft Amendment Law including the lowering of the minimum age of criminal responsibility, this time as a draft initiated by a member of the Diet⁶⁰, and the draft was adopted on November 28 of that year, with an additional provision to review the legislation five years after the enactment of the amended Law. The amended Law went into force on April 1, 2001.

457. The amended Law includes the following provisions; (1) the minimum age of criminal responsibility (age at which the person can be referred to a prosecutor) is lowered from 16 to 14, (2) a juvenile, who was 16 or older at the time of committing a crime which caused the death of the victim, would be referred to the prosecutor as a general rule, (3) the period of protective measure may be extended (specially) for “maximum 8 weeks” instead of the previous “maximum 4 weeks,” (4) prosecutors may be involved in the hearings, if it is deemed necessary to establish the facts in cases of crimes, which carries punishments of at least two years of imprisonment (in which case if a privately appointed defense counsel is unavailable, the courts will appoint a defense counsel), (5) a panel of judges on a discretionary basis is introduced, and (6) certain measures will be taken in consideration of the victim (disclosure and copying of records, opportunity of expressing views, notification of results, etc.).

458. The recommendation of the UN Committee on the Rights of the Child indicates the need to review the juvenile justice system in line with the principles and rules in the UN standards. The contents of the above “amendment” must be seen as a regression from the UN standards.

459. The “criminalization” and “stricter punishment” ((1),(2)) go against Article 14 paragraph 4 of the Covenant, which requires that “(I)n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation,” or the right of the child to reintegrate in society in Article 40 paragraph 1 of the Convention on the Rights of the Child and emphasized in the Riyadh Guidelines, as well as against the provision for “establishment of laws,

⁵⁹ The discussions for the amendment began after the courts suggested the need for “appropriate fact-finding” after the “Yamagata Meirin Junior High School Case,” in 1993, in which the Family Court and the Appeals Court reached different conclusions.

⁶⁰ In the background were serious cases, such as the murder of a housewife with a knife by a 17 year old boy, and a bus-jacking case, that attracted the public’s attention.

procedures...specifically applicable to children,” in Article 40 paragraph 3. The extension of the period of protective measure (3) goes against the objectives of the provisions of Article 9 paragraph 3 of the Covenant on the right “to a trial within a reasonable time or to release,” to which the General Comment 8 (16) stated that “(P)re-trial detention should be an exception and as short as possible,” as well as of Article 10 paragraph 2 (b) “(A)ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.” It also does not conform with Article 37 (b) of the Convention on the Rights of the Child, which stipulates that detention “shall be used only as a measure of last resort and for the shortest appropriate period of time.” On the involvement of prosecutors (4), since the principle of exclusion of prejudices do not apply to the juvenile justice procedures and the rule on hearsay is excluded, it would lead to a far unfavourable structure for juveniles than that of adults. The court would read all the records from the investigation, launch proceedings with a preconceived idea that there “has been a fact of delinquency,” and if the juvenile denies his/her guilt, he/she would be vigorously pursued by the prosecutors. This is not in conformity with Article 14 paragraph 1 of the Covenant on the right to a fair and public hearing by a competent, independent and impartial tribunal, as well as the right to have the matter determined by a competent, independent and impartial authority or judicial body in Article 40 paragraph 2 (b) (iii) of the Convention on the Rights of the Child. The system of state-appointed defense counsels was introduced for the first time (4), but its scope was limited to cases in which the prosecutors were involved, and is problematic from the perspective of Article 14 paragraph 3 (d) of the Covenant.

2. State-appointed attendants

460. To protect the rights of in general financially disadvantaged juveniles in general to a defense counsel and an attendant, a system to appoint defense counsels and attendants using public funds is necessary.

461. On this matter, apart from the system of requiring state-appointed attendants in cases in which prosecutors are involved, a new system was created in which the Family Courts appoint at their discretion, lawyers to be state-appointed attendants in cases of intentional criminal act leading to the death of the victim or of crimes with punishment of two or more years of imprisonment. But this is far too limited, and utterly insufficient. In particular, as the system of court appointed state-appointed defense counsel for the accused will be expanded in 2009 to cover all cases involving crimes with punishment of three or more years of imprisonment, a public defense counsel appointed to defend a juvenile while he is an accused will not be appointed as an attendant at the juvenile hearings stage, and will not be able to act as his attendant. The system must be revised to have state-appointed attendants appointed for all juveniles deprived of liberty, also according to Article 37 (d) of the Convention on the Rights of the Child.

3. The Right to Silence, to Examine Witnesses for Juveniles

462. In the juvenile procedures, attendants and juveniles can only request to examine evidence, and the admission of witnesses (evidence) is left to the discretion of the judges. In criminal procedures for adult defendants, if the defendant disagrees with documentary evidence, witnesses will be examined, yet in juvenile procedures, defendants cannot disagree to the documentary evidence, and also cannot cross-examine the witnesses, who gave the original statement, leaving the juvenile in an unfavourable position compared with adult defendants⁶¹.

463. To improve this situation, the right of juveniles and attendants to request examination of evidence and cross-examination must be protected institutionally.

4. Double Jeopardy

464. The Supreme Court in 1991 indicated that even when a Family Court decides after hearings to discharge the juvenile finding no fact of delinquency, that decision does not have the effect of comprising an element of double jeopardy. This means that even after winning a decision to discharge after arguing and proving the innocence in the Family Court, there is a possibility that the juvenile may be prosecuted in the criminal procedures on becoming an adult. This is extremely unreasonable, placing the juvenile in a very unstable position. As a matter of fact, there has been a case, in which a juvenile, who was found not delinquent by the Family Court, was prosecuted under the criminal procedures⁶².

465. If the decision to discharge after finding no fact of delinquency has no effect on double jeopardy, the possibility of such cases happening again cannot be denied. Therefore, in order to stabilize the position of juveniles, who has received a decision to discharge, the effectiveness of Family Court decisions must be explicitly stipulated in law.

⁶¹ In the juvenile proceeding's appeal hearing in the "Soka Case," the attendant requested calling 17 investigating officers, including those who examined the juveniles, the coroner, who conducted the autopsy, and the forensic science engineer from the prefectural police crime laboratory, who examined the saliva and semen, as well as inspection of the crime site and site of the alibis. However, the court allowed only the chief investigator and coroner as witnesses, strictly limited the questions that the attendants could ask in advance, and refused everything else. Moreover, although the main dispute in the case was the existence of evidence of AB-type blood (saliva, semen, hair), which contradicted with the blood-types of the accused juveniles, no examination of even the forensic science engineer, who gave the expert opinion on the AB-blood type, was conducted. Only during the civil case procedures, after examining the engineers and coroner, did it become apparent that the fact-finding in the appeal hearing was flawed on the point of basic forensic science, and the error pointed out scientifically.

⁶² The "Chofu Case." After 26 hearings, when, in the final stages, a not guilty verdict seemed inevitable, the case was concluded after the prosecutor withdrew indictment.

5. Investigation Reform

466. There have been many cases of unlawful investigations and examinations of accused juveniles by investigative organs, mostly using the detention in the *daiyo kangoku* (substitute prisons) in police facilities, involving violence, blackmail, deceit or other methods that ignore the rights of juveniles⁶³.

467. The situation of the examination of accused juveniles reflected in these cases is in violation of Article 37 (a) of the Convention on the Rights of the Child.

Because the rules of exclusion of prejudice or hearsay evidence are not adopted in the juvenile procedure of this country, all evidence gathered by the investigators, including false admissions of guilt based on unlawful and unjust examination, will be introduced in the hearing procedures. As the juvenile and his/her representative have no guarantee to the right to cross-examination, there is a possibility that the juvenile procedures may develop into an extremely unfair one for the juvenile.

468. To solve this issue, reform of the investigation level itself is necessary, and the juvenile procedures should take the lead in implementing transparency measures in investigation, such as video-recording of the examinations.

6. Deprivation of Liberty

469. The actual use of various forms of deprivation of liberty, such as protective measure, which takes place instead of detention violates Article 37 (b) of the Convention on the Rights of the Child, which requires that detention “shall be used only as a measure of last resort and for the shortest appropriate period of time.”

The phrase, “only as a measure of last resort,” in light of the objectives of United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules 13.2) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty Articles 2 and 17, requires in assessing the necessity of deprivation of liberty of juveniles, consideration of issues, such as whether alternative measures including close supervision, intensive care or placement in a family,

⁶³ For example, the Yokohama Bar Association sent a warning to a police station on January 11, 2000, about a case in which violence and threats were used in October 1994, including hitting the juvenile’s head against the table during examination, to get a statement that conforms with the wishes of those investigating, and another in June that year, in which the police used violence and threats at the juvenile, who would not make a statement as told by the police during the examination, including shouting and slapping the juvenile in the face.

The Naha Branch of the Fukuoka Appeals Court decided on January 25, 2007 in a case, in which the police station chief detained a 13 year old juvenile, who was placed under guidance for alleged arson, that the detention was illegal, and allowed the claims for compensation. In this case, false statements admitting guilt were made while the juvenile was detained by the police according to the request for temporary protection from the head of the child guidance center.

In the case of the attack on the Chief of the Osaka District Court on February 16, 2004, using the fact that the 14 year old juvenile was detained in the temporary protection facility, the authorities examined him for 76 days leading him to make a false statement of admission of guilt.

educational setting or other facilities are available, and whether the continuation of hearings would be difficult if such measures were taken.

470. However, in Japan, no such alternative measures are systematically available. Also, for detention, which is the deprivation of liberty following arrest, the only alternative measure is the protective measure, but even this alternative is rarely used. Further, in deciding the need for detention in the courts, the prosecutors do not argue or explain whether taking alternative measures is difficult. The courts just examine whether the case satisfies the requirements that are almost identical to those applying to adults, allowing detention too easily. The Juvenile Law in Japan also stipulates that detention should be used only when it is “absolutely necessary” Yet “efforts to ensure alternative measures” were not given much consideration. In fact, a considerable number of juveniles are detained, and the alternative protective measure is hardly used.

471. Also, on the places of detention, from the objective of the provision to place juveniles in “a family or in an educational setting,” the provision in the Juvenile Law designating the Juvenile Classification Home as places of detention should be used, but in practice, the Home is rarely used as a place of detention, and in most cases, they are detained in the *daiyo kangoku*.

472. The requirements for protective measure is extremely vague in practice, and in fact, for juveniles, who are detained at the time they are referred to the Family Court, courts decide on protective measure as a general rule. The questions put on the juvenile in the hearing procedures for deciding on protective measure are also extremely formal, and the requirements are not examined substantively. Moreover, almost 100% of the protective measure decided is placement in the Juvenile Assessment Centers under Article 17 paragraph 1 (2) of the Juvenile Law, and the provision on protective measure at home under supervision of the probation officer under Article 17 paragraph 1 (1) is not used. The current situation, in which the procedure, which would be the “close supervision” provided for in the Beijing Rules, is completely ignored, violated the objective of the Convention on the Rights of the Child, in the sense that it fails to consider alternative measures.

473. The deprivation of liberty for juveniles in this country has problems in the aspect of “for the shortest appropriate period of time,” regarding the detention and protective measure.

474. The Code of Criminal Procedure stipulates that the extension of period of detention is limited to cases, in which they are “absolutely necessary” even for adults, and even more stricter consideration must be given to allowing extensions for

juveniles, but in practice, extensions are too easily granted. Protective measure in Juvenile Assessment Centers is limited to within two weeks in principle, and single extension for two weeks is granted on an exceptional basis “if continuation is specially required.” But in practice, extension of protective measure has been the rule, and the proceeding due date of many juvenile cases are set at three weeks or more from the date of the decision of protective measure, indicating that the exception has become the rule.

475. Moreover, under the amended Juvenile Law, in cases, in which examination of witnesses are conducted, extension of protective measure may be extended up to three times, to maximum eight weeks (special extension of protective measure). There is considerable concern, that in cases, in which examination of witnesses are conducted, extension of maximum eight weeks would be readily granted.

476. The current practice goes against the objectives of Article 37 (b) of the Convention on the Rights of the Child and other international rules requiring detention of juveniles to be short as possible. The current practice on extension of detention and special extension of protective measure should be improved to consider stricter requirements, and the provision of special extension for protective measure should be reviewed.

7. Separation of adults and juveniles

477. Juveniles are detained mostly in *daiyo kangoku* at the investigation stage. These substitute prisons have cells placed in a fan-shape (comb-shape in more recent facilities), and although they may be in separate cells from adults, they are detained in the same prison, and it is possible to exchange words and gestures with the adults in the cells, as well as see each other in the cells when entering or leaving the prison. Therefore the separation of juveniles and adults is insufficient. The Juvenile Law provides for protective measure as an alternative for detention (Article 43 paragraph 1) and placement in Juvenile Assessment Centers (Article 48 paragraph 2), but these provisions are rarely used. Those detained in Juvenile Prisons are mostly young adults, and the number of Juvenile Prisoners is extremely small⁶⁴. For this reason, in many Juvenile Prisons, juveniles and adults are not separated during work in workshops in practice⁶⁵. There are also no separate buildings for juvenile inmates, and the cell of juvenile inmates are right next to those of adults.

⁶⁴ In 2005, in Kawagoe Juvenile Prison for example, of 1,729 inmates, only 22 were children. In the same year, there were 12 criminal justice facilities, which accommodated children, but of the total 11,147 inmates, only 61 were children.

⁶⁵ In this regard, in Kawagoe Juvenile Prison, there is a gardening workshop especially for juvenile inmates, but some of the juveniles are in adult workshops to keep accomplices apart, and therefore the separation of adults and juveniles are not thoroughly maintained.

This situation clearly violates Article 10 of the Covenant.

8. Treatment in Juvenile Training Schools

478. Article 10 paragraph 1 of the Covenant stipulates that, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Paragraph 3 of the same Article states that, “Juvenile offenders shall ... be accorded treatment appropriate to their age and legal status.” The Concluding Observation raised concerns on “inadequate protection for prisoners who complain of reprisals by prison warders, lack of a credible system for investigating complaints by prisoners.” The Concluding Observation of the Committee on the Rights of the Child also has called for particular attention to be paid to establishment of independent monitoring and complaints procedures for juveniles deprived of their liberty. Such a system should be established immediately.

Section 3: Child Abuse (Article 24 of the Covenant)

A. Conclusions and Recommendation

479.

The government should take institutional and financial measures to improve and expand the Child Guidance Centers, the child welfare facilities, the temporary shelters, and the foster parents system to provide the appropriate care of abused children, and to ensure sufficient numbers of the capable staff such as child welfare caseworkers who are specialized in child abuse cases (in this section, the term “abuse” means the abuse by a parent if not otherwise specified.)

The government should conduct criminal prosecutions against child abuse cases in appropriate manner and design the system and the training for investigators in order to prevent secondary victimization of the abused child.

B. Subject of Concern and Recommendations of the Human Rights Committee

480. The issue of child abuse was not addressed in the consideration on the Fourth Periodic Report.

481. The Committee on the Rights of the Child is concerned, in the concluding observations of the consideration of the Second Periodic Report (February, 2004), that, “(a) there is no comprehensive and multidisciplinary strategy for the prevention of child abuse, (b) the number of cases prosecuted are still low, and (c) Recovery and counseling service for victims are insufficient to meet the increased demand for such service” (paragraph 37 in the concluding observations) and it recommends that the government

of Japan should “ (a) develop, in collaboration, among others, with civil society, social workers, parents and children, a multidisciplinary national strategy for the prevention of child abuse, (b) review legislation with a view to improving protective measures for the victims of child abuse in family, (c) Increase the number of trained professionals providing psychological counseling and other recovery services in a multidisciplinary fashion to victims at Child Guidance Centers, and (d) increase the training provided to law enforcement officials, social workers, staff of Child Guidance Centers and prosecutors on how to receive, monitor, investigate and prosecute complaints, in a child-service manner (paragraph 38).

C. The Government Response and the Fifth Periodic Report (paragraph 342 to 354)

482. The government explained in the report about its steps to prevent child abuse including the enforcement of the Child Abuse Prevention Law in November 2000, the amendment of the Child Abuse Prevention Law entered into force in October 2004 as well as amendment of the Child Welfare Law enacted in November 2004, promulgated in December 2004 and then sequentially entered into force. The report stated that efforts by municipalities to promote establishment of the abuse prevention network, enforcement by the police, prevention of occurrence of child abuse, early detection and early response, and protection, support and after-care shall be further promoted, and that human rights organs shall be making efforts to prevent child abuse.

483. The report also mentioned that the total number of the reports received and handled by Child Guidance Centers throughout the country in 2003 was 26,569 doubled from 11,631 in 1999 and that the number of child abuse cases handled by the human rights organs under the Ministry of Justice as human rights infringement cases was 634 in 2000, 644 in 2001, 558 in 2002, and 529 in 2003.

D. Position of the JFBA

484. 1. Article 24 of the Covenant provides that every child shall have “the right to such measures of protection as are required by his status as a minor” and it is interpreted that “such measures” shall include legislative, administrative and other measures to protect children especially against their abusive parents. It is also pointed out that protection by the criminal law including punishment for sexual abuse and child killing.

485. 2. In Japan, Child Guidance Centers as administrative bodies of local governments are in charge of providing relief to the child welfare violations including child abuse. The number of child abuse cases consulted and processed at Child Guidance Centers in the country is drastically increasing. The number has been trippled

during 3 years from 11,631 cases in 1999 to 34,472 cases in 2005,

On the other hand, the number of the child welfare caseworkers is not catching up the speed of the increasing number of cases, showing the slight increase from 1,230 persons in 1999 to 2,003 persons in 2005. The standard average of assignment of caseworkers is one person for 63,365 of the national average population and this is too few. The Ministry of Health, Labor and Welfare's 2005 investigation on abuse-related death cases that took place in the latter half of 2003 reveals that Child Guidance Centers were actually involved in 50 % of the total cases. It is obvious that the number of cases that one caseworker has to handle was too large for him/her to address all the cases. It is also pointed out that the training system for specialized staff such as child welfare caseworkers is not sufficient⁶⁶.

486. With the increase of the abuse cases consulted and processed at the Centers, the number of the abused child who cannot be returned to home from foster home is also increasing. However, the capacity of such foster home that can provide alternative child care is leveling out from 33,792 persons in 1999 to 33,812 persons in 2004. The number of the children taken under foster families' care was 2,122 in 1999 and 3,022 in 2004 showing the steady increase, but considering the rapid increase rate of the number of total abuse cases received at the Child Guidance Center, there is a high possibility that some of the children who need protection may have to go back home because there is no foster home or foster family available for them. It is also reported that, in some cases, the abused children were once taken into protective custody by foster home, but because of the need at their facilities to accept other children, the above-mentioned abused children were returned to their parents before any appropriate improvement was made in their family environments and the sufficient follow-up action was not taken. In those cases, the children are reportedly often exposed to the recurrence of the abuse by their parents⁶⁷.

487. It cannot be overlooked that the current settings at such facilities are not fully prepared so that the child cannot receive the appropriate care with a safe conscience. Not only that, the considerable number of incidents of abuse by the staff or/and other children of the Child Welfare Facilities including foster home have also been reported. After the incidents of sexual abuse taken place in several foster home, the Ministry of Health, Labor and Welfare released the notification titled "Prevention of Abuse in Child Welfare Facilities" to each prefecture on October 6, 2005. However, the government of

⁶⁶ For example, in May, 2006, the case of a 3-year-old boy that died of starvation due to child neglect by his parents was reported in Fukushima Prefecture. In this case, the Child Guidance Center in Fukushima could not be actively involved in the case despite the fact that it was aware that the Child Guidance Center in the different prefecture once took the boy's sister into protective custody and that there was the high risk of abuse for the deceased child.

⁶⁷ For example, in 2006, the case of 2-year-old girl that died of abuse by her parents was reported. In this case, when she was returned to home after once taken into the protective custody at the Child Welfare Center in Takashima City, Shiga Prefecture, no appropriate judgment or ex-post follow-up action was not made.

Japan should take further effective measures to prevent such incidents.

488. Meanwhile, the number of child abuse cases handled by the human rights organ of Ministry of Justice is decreasing. While concentration of consultation for child abuse to the Child Guidance Centers was one of the possible reasons, this implies that the human rights organ is not functioning properly as a consultation body. It is expected that the system where an abused child can easily call in for help including the abuse within the Child Welfare Facilities shall be established. Under the current legal system in Japan, when a child is temporarily protected or taken into custody at the facility, there is no provision to secure the chance for him/her to be listened to or for the representative to speak for the child. Support system where the child can express the view shall be established.

489. 3. The legal system of relief and protection from child abuse is insufficient. Despite enactment and amendment of the Child Abuse Prevention Law (paragraph 342 of the Fifth Periodic Report), not even the system to temporarily or partially suspend the parental authority of the abusive parent has not been established. There is substantially no system for a court to be able to limit the parental authority. Therefore, administrative authority has not been a strong one since there is little judicial involvement in the administrative authority of the Child Guidance Centers. The number of staff (child welfare caseworkers) in the Child Guidance Center is also insufficient. For a long period of time, the standard had been one caseworker is assigned to 100,000 to 130,000 people of population, which was reviewed to respond the need of the staff on the field who handle the increasing number of cases and changed to one caseworker for 50,000 to 80,000 people in 2005. However, as mentioned in the foregoing section, the number is still far from being sufficient. Regarding “a system enabling the involvement of the Family Court among other measures” (paragraph 342), there is no system where the Family Court is able to request the guardians a certain action or failure to act. The current system is extremely limited and indirect.

490. Furthermore, in order to promote public awareness and improve the attitude of the government, it is necessary to change the misconceptions of parental authority and clarify in the Civil Code that parents cannot control their children and abuse them in the name of discipline, but the right of disciplinary punishment (Article 822 of the Civil Code) is still recognized as a part of the parental authority.

491. 4. The Japanese Government states that enforcement by the police force on the child abuse cases has been conducted. While the number of the identified child abuse cases shows a slight increase from 120 in 1999 to 222 in 2005 according to the statistics by the National Police Agency, it is not clear that the appropriate criminal prosecutions were conducted in those cases, since there is no statistics on the processing results. It

needs to be ensured that the criminal prosecution shall be conducted in an appropriate manner on extreme child abuse cases and the comprehensive statistics including the processing results shall be taken.

492. During the process of criminal prosecutions, there is no appropriate measure is taken to consider the particularity of and alleviate the mental burden of the victimized child. The lack of such measures often causes the second victimization of the child during the investigations as well as trials. Very few investigators have understanding of child abuse and the training to deepen their understanding has not been in place in a sufficient manner. A system design and trainings for the investigators and the prosecutors shall be conducted to prevent the second victimization.

Section 4: Corporal Punishment (Article 7 of the Covenant)

A. Conclusions and Recommendations

493.

The government of Japan clarified its interpretation of the significance of corporal punishment provided in Article 11 of the School Education Law that teachers are permitted to use physical force as disciplinary measures against students depending on circumstances. The government should correct such interpretation immediately and the purpose of prohibition of corporal punishment should be thoroughly familiarized.

B. Subjects of Concern and Recommendations of the Human Rights Committee

494. The issue of corporal punishment of children was not addressed in the consideration on the Fourth Periodic Report.

495. The Committee on the Rights of the Child, in the concluding observations of the consideration of the report (February, 2004), pointed out that “[t]he Committee notes with concern that corporal punishment, although legally prohibited in schools, is widely practiced in schools, institutions and the family (paragraph 35).

C. The Government’s Response and the Fifth Periodic Report (paragraphs 355 and 356)

496. The Fifth Periodic Report pointed out that, “corporal punishment is strictly prohibited under Article 11 of the School Education Law. The MEXT gives instructions to education-related institutions to realize the principle of this law through various opportunities.” It also reported that, “[i]f the human rights organs under the Ministry of Justice receive reports or information concerning corporal punishment, the human rights

organs will investigate the people involved in the case and based on the results of the investigation, they will take suitable measures such as raising the awareness of the teacher who carried out the corporal punishment and the principal of the teacher's school on the concept of respect for human rights or requesting them to take measures to prevent the reoccurrence of such acts. Furthermore, they have been carrying out human rights encouragement activities in cooperation with schools and local communities. In 2000, 2001, 2002 and 2003, corporal punishment cases numbered 236, 252, 236 and 275, respectively.”

D. Position of the JFBA

497. 1. Article 7 of the Covenant provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” And it is also stated in the General Comment 20 (44) 5 that “[t]he prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.”

498. Even though the School Education Law prohibits any corporal punishment, in the actual school settings, corporal punishment against students seems to be unending⁶⁸.

499. 2. In the current situation with unending number of incident of corporal punishment, the MEXT released the notification titled “Regarding the Guidance to the Problematic Children” providing the guideline on the disciplinary punishment and corporal punishment against students provided in Article 11 of the School Education Law. In this notification, it is cited that even though the limit of the right of disciplinary punishment was publicized by the former Ministry of Justice in 1948 and education boards as well as schools have given guidance to students, but that such position in the past shall be corrected and the new guideline shall be ensured to serve as the basis of the guidance to be given by schools.

500. However, this new guideline is still problematic because it is interpreted that not all the disciplinary punishment in a form of the use of physical force is prohibited as corporal punishment and it quotes from past court precedents which stated that the use of tangible force can be allowed within certain limitations if the educational consideration is cautiously made. While many of the past court precedents did not allow

⁶⁸ According to the MEXT, the number of cases where the school conduct the investigation on whether the case is corporal punishment or not were 944, 955, 954 and 938 respectively from 2000 to 2003. The number of school where the corporal punishment took place were 804, 820, 823, and 835 respectively and there is no significant sign of decline.

the use of tangible force for the purpose of disciplinary punishment, the notification arbitrarily chose two court precedents which go against the main stream.

501. As mentioned in the foregoing section, the number of corporal punishment cases is not decreasing and it is evident that in the current school settings in Japan, there is an environment to tolerate corporal punishment. From that perspective, the interpretation of the MEXT may lead to the increase of corporal punishment. The MEXT should immediately correct such notification and thoroughly familiarize the purpose of prohibition of corporal punishment.

Chapter 5: The Right to Life (Capital Punishment)

A. Conclusions and Recommendations

502.

(Defects in the System of Capital Punishment)

The system of capital punishment in Japan bears serious defects which violate the Covenant as stated in the following. Therefore execution of capital punishment should be stayed immediately.

(Concern About Substantial Increase in the Number of Death Sentences)

Serious concern is expressed about the substantial increase in the number of the criminal cases leading to capital punishment including the ones against juveniles though there is no aggravating criminal situation.

(Legal Guarantees)

- 1 The mandatory appeal system against death sentence should be established.
- 2 A court-appointed attorney should be made available in case of appealing for retrial.
- 3 Meetings without observers and uncensored communication between death-row inmates and their attorneys for retrial should be clearly secured.
- 4 The system should be improved in such a way that the amnesty system could be reasonably applied to inmates on death row.
- 5 Death penalty should be commuted in case that the period between the day being sentenced to death and the execution date is too long. Establishment of such a system should be considered.

(Execution of Capital Punishment)

- 1 The lack of prior announcement of the execution date to inmates is clearly inhuman. They must be notified beforehand.
- 2 The system which ensures prohibition of the execution of the inmates in the state of insanity should be established.
- 3 Appealing for retrial or amnesty should be considered as a cause of suspension of the execution.
- 4 Stipulations which restrict the execution of elderly inmates should be added.

(Treatment of Inmates on Death Row)

- 1 Introduction of the new law which improves the situation of meetings and the range of communication of death-row inmates is favorable. However serious concern remains about the way it is inappropriately implemented. Meetings and communication with friends and acquaintances should be admitted appropriately.
- 2 Solitary treatment of the inmates on death row should be reviewed. To maintain their humanity, contacting with other inmates should be admitted.

B. Subjects of Concern and Recommendations of the Human Rights Committee

503. The Committee expresses profound concern that the number of crimes which can lead to capital punishment has not been reduced as the representatives stated when reviewing the Third Periodic Report of the government of Japan. The Committee recalls that the Covenant ultimately aims at the abolition of capital punishment and that States parties which have not abolished the death penalty are bound to apply it only for the most serious crimes. The Committee recommends that Japan should take actions for the abolition of capital punishment, and that meanwhile it should be applied only to the most serious crimes pursuant to article 6 paragraph 2 of the Covenant.

504. The Committee also expresses serious concern about the state of detention of inmates on death row. Especially it considers that inappropriate limitation on meetings and communication and the lack of announcement of the execution to the inmates' families and attorneys violate the Covenant. The Committee recommends that the state of detention of death-row inmates should be human pursuant to article 7 and article 10 paragraph 1 of the Covenant.

C. The Government Response and its Fifth Periodic Report

1. The Government Response

505. The government has done nothing to respond to the recommendations.

506. The number of the crimes which can lead to capital punishment has not been reduced (The number of crimes has been increased as stated in the Periodic Report). The number of the death sentences and death-row inmates tends to increase substantially these days (See the table 2). Prior announcement of the execution date has not been implemented. The Law Concerning Penal and Detention Facilities and the Treatment of Inmates (hereinafter to be referred as 2006 New Law) has not covered that point. Although this law improved the treatment of the death-row inmates to some extent, it becomes clear that the current state is far from the standard required by the interpretation of the law.

2. The Content of The Fifth Periodic Report (Summary)

(1) State of Application

507. The number of the crimes which can lead to capital punishment is limited to 18. The number has increased from 17 to 18 since the Fourth Periodic Report was released. It is due to the fact that the lower limit of the definite term of imprisonment with labor was raised for organizational murder, not that one more new crime was added

to the list.

508. Based on the judgment of the Supreme Court, capital punishment is applied only to cold –blooded murder or robbery and murder.

(2) Ideas behind the Retention or Abolition of Capital Punishment

509. Whether the death penalty is abolished or not should be considered on the basis of the people’s sentiment and criminal situation of each country. In Japan, majority of the people consider it inevitable to apply death penalties to extremely vicious and cruel crimes. With frequent outbreaks of these crimes, it is inappropriate to abolish capital punishment.

510. Therefore deliberate consideration is required for the ratification of the Second Optional Protocol. As for the imprisonment for life without parole, a possible alternative for capital punishment, problems are pointed out in the penal policies. Thus it should be carefully examined.

(3) Treatment of Death-Row Inmates

{1} Treatment in General

511. Death-row inmates have almost the same treatment as the unsentenced detainees do. They can request consultation with religious preachers and volunteer visitors for inmates.

{2} Communication

512. It is necessary to ensure the detention of death–row inmates and stability of their sentiments. From that point of view, limitation to a certain extent is unavoidable. Except for that, communication with their families and attorneys is admitted. When the decision to open retrial is finalized, meetings with people like attorneys are admitted without observers like the case of other unsentenced detainees. The treatment of this kind was not supposed to be violation of the Covenant at the civil trial.

{3} Announcement of the Execution Date to Inmates and Their Families

513. The announcement to an inmate of the time of an execution is made on the very day of the execution. There are some reasons including the one that prior announcement might affect gravely the sentiments of the inmate. Likewise, prior

announcement of the execution date to the inmate's family is not implemented, because it might impose unnecessary mental agony on them, and in some cases the inmate himself might obtain that information through his notified family, which might give enormous influence on his state of mind.

D. Position of the JFBA

1. Application of Capital Punishment

(1) Sharp Increase in the Number of Capital Sentences

514. The government's Periodic Report states that the death penalty is applied in a severe and deliberate manner, based on judicial precedents of the Supreme Court (Paragraph128).

515. Though there is no significant increase in the number of recognized cases of heinous crime recently (Table1), the number of death sentences has increased remarkably (Table2). The main reason for this is that the criteria for the death penalty have been changed from that of the precedents. In a case where life imprisonment with labor should have been sentenced years ago, death penalty tends to be sentenced now. In Japan, since 1997, cases have been seen frequently in which prosecutors objected to life imprisonment with labor and appealed for death penalty.

(2) Capital Punishment for Juveniles

516. The most remarkable instance of the increase in the number of death penalty is the rising number of capital punishment applied to juveniles.

In Japan, a person under the age of twenty is treated as a juvenile and the one under the age of eighteen cannot be sentenced to death. After the1990s, there was only one case of the death penalty applied to the person of eighteen years and up, and under twenty. It was in 1990, and the accused was 19 years old when he committed the crime.

517. However, in 2001 death penalty was confirmed for the one who was 19 years and one month when committing the crime. In June,2006, when life imprisonment with labor was sentenced to the juvenile of eighteen years at the time of the crime, prosecutors appealed to the Supreme Court which reversed the judgment, and referred the case back to the Hiroshima High Court.

(3) Sharp Increase in the Number of Death-Row Inmates with Convicted Sentences

518. With the rising number of sentence of death penalty, the number of death-row inmates whose sentences were finalized is growing rapidly. There were two death-row inmates whose sentences became convicted in 2003, 14 inmates in 2004 , 11 in 2005, 19 in 2006, and (*to be filled in at the end of the year) in 2007.

519. (Table1)

Changes in the number of recognized cases

	homicide	robbery	arson	kidnapping	Total
1996	1,218	2,463	1,846	251	5,778
1997	1,282	2,809	1,936	284	6,311
1998	1,388	3,426	1,566	221	6,601
1999	1,265	4,237	1,728	249	7,479
2000	1,391	5,173	1,743	302	8,609
2001	1,340	6,393	2,006	237	9,976
2002	1,396	6,984	1,830	251	10,461
2003	1,452	7,664	2,070	284	11,470
2004	1,419	7,295	2,174	320	11,208
2005	1,392	5,988	1,904	277	9,561

Changes in the number of arrested cases

	Homicide	Robbery	Arson	Kidnapping	Total
1996	1,197	1,974	1,749	250	5,170
1997	1,225	2,232	1,804	279	5,540
1998	1,356	2,614	1,369	211	5,550
1999	1,219	2,813	1,458	244	5,734
2000	1,322	2,941	1,372	272	5,907
2001	1,261	3,115	1,540	211	6,127
2002	1,336	3,566	1,234	215	6,351
2003	1,366	3,855	1,448	231	6,900
2004	1,342	3,666	1,513	232	6,753
2005	1,345	3,269	1,361	204	6,179

The National Police Agency White Paper 2006 (Page 73 to75)

520. (Table2)

Year		Executed death-row inmates	newly convicted death row inmates	Inmates sentenced to death at the first instance	Total of the inmates with convicted sentences at year end
1996	(H08)	6	3	1	51

1997	(H09)	4	4	3	51
1998	(H10)	6	7	7	52
1999	(H11)	5	4	8	50
2000	(H12)	3	6	14	53
2001	(H13)	2	5	10	55
2002	(H14)	2	3	18	57
2003	(H15)	1	2	13	56
2004	(H16)	2	14	14	66
2005	(H17)	1	11	13	77
2006	(H18)	4	19	13	94
2007	(H19)	9	23	14	107

1996-2006 The Public Prosecutor's Office Annual Report of Statistics 2006

2007 JFBA Research

(4) Increase in the Number of Execution

521. As the number of inmates with confirmed death sentences increased, the number of execution tends to grow, especially after 2000. Until then the average number of execution was 1 or 2 per year. Seiken Sugiura, Minister of Justice did not consent to executions while in office. However next Minister, Jinen Nagase ordered ten executions during his about 11 month service. On December 25, 2006, 4 inmates were executed. In February, 2007, the number of the inmates reached 100, and subsequently 3 inmates were executed in April. Then in August, right before leaving the office, he ordered 3 executions.

2. Legal Guarantees for the Inmates Facing Death Penalty

(1) Lack of Mandatory Appeal System for Capital Punishment

522. The recent tendency is that the accused does not file an appeal against death sentence, or even withdraws the one filed by his attorney. As a result, the cases where capital sentences become final without review by upper court are increasing. Filing an appeal is not regulated as a mandatory step, and there is a period of time without an attorney between the end of the first trial and the beginning of the second when another attorney is assigned. Therefore continuous withdrawal of an appeal can be seen during this period.

523. As for that point, in May, 2007, the Committee against Torture expressed serious concern about the lack of mandatory appeal system and recommended its establishment to the Japanese government (Paragraph 20).

(2) Insufficient Legal Guarantees after the Sentence was Confirmed

524. After the sentence was confirmed, there are no sufficient legal guarantees under which death-row inmates can exert their rights. The Committee against Torture made recommendations on that.

{1} Court-Appointed Attorney System is not Available

525. Once the death sentence is confirmed, death-row inmates cannot use the court-appointed attorney system for filing an appeal for retrial, or amnesty. Most of the inmates with confirmed sentences are indigent. Therefore instituting procedure for retrial is quite difficult.

526. The Committee against Torture expressed serious concern about “the lack of access to state defense counsel after the final sentence is handed down. “ (Paragraph 20).

{2} Confidential Communication with an Attorney is not Ensured

527. The 2006 New Law stipulates that the meetings of the death-row inmates must be attended by observers except when there are justifiable reasons for the meeting without them, like preparation for a lawsuit or other reasons for the protection of the inmates’ rightful benefit (Article 121). Therefore it is possible for the observer to attend the meeting between the inmate and his attorney for retrial. Actually, right after the enforcement of this new law, observers attended the meetings for retrial with inmates’ attorneys in detention centers nationwide. The JFBA strongly demanded the Ministry of Justice to improve that situation and give guidance to the local detention authorities. Even under this new law, all the correspondence between an inmate and his or her attorney for retrial must be a target of censorship. This act violates article 14 paragraph 3 of the Covenant.

528. As for the restriction on the right of communication with the outside world, The Committee against Torture expressed serious concern, stating “ the limitations imposed on death row prisoners concerning access to their legal representatives, including the impossibility to meet with them in private, while on appeal requesting retrial; the lack of alternative means of confidential communication.”(Paragraph 20).

(3) Approach to Commutation

529. Once the death penalty is confirmed, there is no possibility of the sentence

being commuted to life imprisonment with labor in Japan. Though the amnesty system exists, it has hardly been applied to capital punishment. The last time it was applied to a death-row inmate was 1975, when the death penalty was commuted to life imprisonment with labor. Many of the inmates who insist on their innocence and continue fighting over their sentences through retrials and so on keep the status of death-row inmates for a long time. As of May, 2007, 27 inmates have been on death row for more than 10 years, four of them for more than 30 years. However even old inmates are not granted amnesty, and some of them die of illness in detention center. In a recent case, a female death-row inmate of 75 years old died of pneumonia after suffering from acute myocardial infarction in July 2007.

3. Execution of Capital Punishment

(1) The Lack of Prior Announcement of the Execution Date to Inmates

530. The announcement to an inmate of the time of an execution is made about an hour before it occurs. The prior announcement to his family or attorney is not made. In the course of introduction the 2006 New Law, no stipulation was made about the prior announcement of the execution date.

531. However the lack of prior announcement imposes enormous fear on the death-row inmates every day, because they cannot know when the execution is conducted. In this sense, it is just inhuman. The Committee against Torture expresses serious concern, mentioning “the psychological strain imposed upon inmates and families by constant uncertainty as to the date of execution, as prisoners are notified of their execution only hours before it is due to take place” (Paragraph 19). Moreover, the lack of prior announcement to the inmate completely deprives him of the means to fight over the legitimacy of his execution, which violates article 14 paragraph 3 of the Covenant.

(2) Cause of Suspension of the Execution

532. The Code of Criminal Procedure prohibits execution of the inmate in a state of insanity (Article 479 paragraph 1). However it is impossible to verify if it has been observed. Because even inmates themselves cannot get access to their medical records, and the medical specialists outside of prison had not been admitted to visit them for medical examination. In March, 1993, Tetsuo Kawanaka, a death-row inmate, who had been suspected to be suffering from schizophrenia, was executed. Based on this situation, The Committee against Torture expressed serious concern on “the absence of a review mechanism to identify inmates on death row who may be suffering from mental illness”.

533. Filing an appeal for retrial, or for amnesty is not considered to be a cause of suspension of the execution, which is another profound concern of the Committee against Torture (Paragraph 20).

534. Furthermore, there is no stipulation restricting the execution of elderly inmates. On December 25, 2006, 4 inmates were executed. Two of them were 77 and 75. The one of 75 years old noted in a letter to his relative that he was not able to walk well, and using a wheel chair.

4. Treatment of Death-Row Inmates

(1) Communication with the Outside World

{1} The Situation so far

535. Except for legal representatives for retrial or civil suits and relatives, death-row inmates have been admitted to have meetings with others, only when they are considered to be "the people who can contribute to stabilizing the state of mind of the inmates" by the head of the prison. In reality, communication with the outside world except for their relatives or attorneys is hardly admitted. This severe restriction, considered to be inhuman, has been criticized inside and outside of Japan, and as mentioned earlier, Human Rights Committee gave recommendations to Japan in 1998.

{2} Revision by 2006 New Law

536. After the revision of the 2006 New Law, the right of meeting and correspondence between the inmates and the ones mentioned below was admitted.

-Relatives

-People who are handling matters which affect greatly the inmate's status, legal or occupational benefits.

-People who are considered to contribute to stability of the inmate's state of mind.

537. Moreover, when there is necessity of meeting, for example maintaining friendly relationship, and the meeting is considered not to cause any disturbance to discipline and order of the penal institution, it can be admitted by discretion of the authorities.

{3} The Current Situation under the New Law

538. The 2006 New Law was put into effect on June 1, 2007. Extremely restricted

situation under which inmates could meet and correspond only with their relatives and attorneys was improved.. However death-row inmates' communication with the outside world was not so expanded as expected. On the contrary, restriction on the communication clearly against the new law is frequently seen.

539. The Tokyo Detention House, which has the largest number of death-row inmates, started letting them submit the names of 5 persons they want to meet or send letters. Then about three of them are admitted for communication. The new law does not restrict the number of the people for meeting or correspondence. If the conditions required by the new law are met, inmates must be able to meet or correspond with whoever they want to, regardless of the number of the people. Furthermore, in principle, the ones admitted for meeting or correspondence are limited to the people who had already known the inmate before the death penalty was finalized. That is another newly imposed condition which is not required by the new law. As for the person who takes care of the important business for inmates, the law does not require qualification of attorney, but the Tokyo Detention House only accepts attorneys for retrial and civil suit.

(2) Other Problems in Treatment

540. The new law still approves inhuman treatment to death-row inmates.

They are supposed to be in their cells alone all day and night and not to have any contact with each other outside their cells (Article 36), which means segregation is principle.

541. However segregation of sentenced inmates in general is only admitted under the extremely severe requirements (Article 76), and continuous segregation gives serious influence on the inmates physically and mentally. As for the death-row inmates who are segregated in principle, there is no upper limit of the segregation period. The Committee against Torture expressed concern, stating "The principle of solitary confinement after the final sentence is handed down. Given the length of time on death row, in some cases his exceeds 30 years". Treatment of this kind is inhuman and must be improved immediately.

5. Stay of Execution

542. As mentioned above, even after the new law was introduced, execution in Japan still holds institutional and operational issues which do not comply with the Covenant. The Committee against Torture recommended that "The States party should consider taking measures for an immediate moratorium on executions and a commutation of sentences and should adopt procedural reforms which include the

possibility of measures of pardon.” Its recognition is that these issues are too serious to be overlooked.

543. To continue capital punishment under the current circumstances violates the Covenant, and it should be stayed immediately.

Chapter 6: Crime Victims

A. Conclusions and Recommendations

544.

1. The government should establish a compensation law for crime victims, simplify and speed up the procedure to claim compensation for damages, and clarify the process to determine the payment.
2. In order for a crime victim to recover from the violation of rights and restore the dignity, the system to provide the aid to cover counsel's fee of the victim at government expense should be created.
3. The criteria of the disclosure of the records of non-prosecution cases shall be further clarified to make it easier for victims to exercise their right to claim for disclosure.

B. Subjects of Concern and Recommendations of the Human Rights Committee

545. The issue of crime victims was not addressed in any report published so far.

C. The Government Response and the Fifth Periodic Report

546. The Fifth Periodic Report mainly addresses the issue of crime victims in "Protection of the Rights of Crime Victims" (paragraph 316 to 326) in discussing the issues related to Article 19: Freedom of Expression and also the issue is mentioned in "Protection of Victims of Sex Crimes in Criminal Proceedings"(paragraph 114 to 117) as a part of the issues related to " Protection from Violence" (paragraph 98 to 123) in Article 3: Gender Equality Principle.

547. In December, 2004, the government enacted the Basic Law on Crime Victims. The law stipulates that the dignity of individuals for crime victims shall be respected and indicated basic measures that should be taken by the government as well as local authorities to ensure that crime victims have the right to be treated appropriately for their dignity. Also, the government established "Law for Partial Amendment of the Code of Criminal Procedure to Protect the Rights and the Interests of Crime Victims" in June, 2007, which stipulates that names and addresses of crime victims shall not be disclosed in the public trial and that crime victims can participate in the criminal cases and have the right to examine a witness with regard to court statement and circumstances.

D. Position of the JFBA

1. Financial support for crime victims

548. The current benefits system for crime victims is not sufficient in terms of the amount of payment, and the system also fails to ensure the respect to the human rights of crime victims in the claim procedure and the nature of right. The government should establish a new compensation law for crime victims⁶⁹ to ensure that the claim procedure for compensation can be simplified and accelerated. At the same time, the process to determine the amount of payment shall be clarified by reference to the legislations in other countries.

2. Introduction of Crime Victim Support System using government expense

549. In order for a crime victim to recover from the violation of rights and restore the dignity, it is indispensable to have the legal support by lawyers. Crime victims need wide-ranging legal supports by lawyers including reaching out to various organizations, applying for aids, gaining information and securing safety from the time when the damage is made and even after the trial is concluded. In order to support such activities, a crime victim support system to provide the aid to cover counsel's fee of the victim at government expense should be created⁷⁰.

3. Disclosure of the records of non-prosecution cases to crime victims

550. Even though, in principle, the records of non-prosecution cases are not made public, it is claimed that in cases where the records are deemed necessary in order for the victims to exercise their right to claim compensation for damages and other rights, a flexible approach is taken toward the victims' requests to know the record by providing it for the victims on the condition that the record constitutes objective evidence and no substitute exists. However, the criteria of the disclosure of the records of non-prosecution cases shall be further clarified to make it easier for victims to exercise their right to claim for disclosure.

⁶⁹ (JFBA statements as of November 22, 2006 and August 26, 2005)

⁷⁰ (JFBA statements as of November 22, 2006 and May 1, 2007)

Chapter 7: Investigation and Detention of Suspects and Accused Persons

Section 1: Substitute prisons (Daiyo Kangoku) (Article 7, 9,10 and 14 of the Covenant)

A. Conclusions and Recommendations

551.

1. So-called substitute prison (Daiyo Kangoku) is a system where a suspect remains under the police control and is detained for a long period even after the person appears before the judges. Substitute prisons are serving as breeding grounds for infringement of human rights such as the confessions forced by the police and sexual assaults against women and miscarriage of justice. The system of substitute prison goes against Article 7, 9, 10 and 14 of the Covenant, and the government of Japan should immediately abolish substitute prisons.
2. In order to be consistent with international minimum standards, the maximum period of incarceration of the accused person by the police should be limited to 24 or at least 48 hours.
3. Limitations should be clearly defined regarding when and how long the investigation by the police could be conducted per a day.
4. The accused persons detained by the police should be assured prompt access to appropriate medical treatment.
5. The Independence of the external monitoring of police custody should be guaranteed by ensuring that attorneys recommended by the Bar associations shall be appointed as members of the Boards of Visitors for Inspection of Police Custody.
6. An effective system of filing of complaints which is independent from Public Safety Commissions should be established to examine the complaints from the detainees in the police cells.
7. Use of gags in police detention facilities should be abolished.

B. Subjects of Concern and Recommendations of the Human Rights Committee

552. (Paragraph 23 of the concluding observation on the Fourth Periodic Report)

The Committee expresses its concerns by stating that “the substitute prison system (Daiyo Kangoku), though subject to a branch of the police which does not deal with investigation, is not under the control of a separate authority. This may increase the chances of abuse of the rights of detainees under articles 9 and 14 of the Covenant. The Committee reiterates its recommendation, made after consideration of the third periodic report, that the substitute prison system should be made compatible with all requirements of the Covenant.

C. The Government's Response and its Fifth Periodic Report (paragraph 236 to 268)

553. In spite of a series of recommendations made by international organizations, the government of Japan has not taken any step forward to abolish the substitute prison system. The Law Concerning Penal and Detention Facilities and the Treatments of Inmates (hereinafter to be referred as the 2006 New Law) which was enacted in June 2006 includes the similar provisions (Article 14 and 15) as Article 1 Section 3 of the Prison Law permitting the police detention facilities to be used as substitute for penal institutions. This means that so-called substitute prison as a system have not been abolished but continue to exist by changing its name which is now called “substitute penal institution”. There is no substantial difference between these systems.

554. In the Fifth Periodic Report, totally 33 paragraphs are spent to discuss this particular issue; however, the most of the discussions consist of explanation of institutions and the system.

555. With respect to the recommendation to abolish the substitute prison system in the Conclusions and Recommendations of the Committee against Torture in May 2007, in answering the question from a member of House of Representatives, Nobuto Hosaka, the government stated that, after confirming that the recommendations by the Committee do not have any legal binding force, “Under the current judicial system in Japan, it is realistic to detain suspects in the police detention facilities which are located at every corner in the country to smoothly and effectively conduct the interrogations of the suspect and other investigations during the limited period of detention, and to provide proper opportunities of meetings between suspects and their families or attorneys. From this point of view, we have recognized the important roles that substitute penal institutions have played so far....there is a clear provision which prescribes that the police officers who are in service with detention facilities are not allowed to deal with the investigation of the crime of which suspects detained in the facilities concerned are accused. On top of that, the improvements of the system have been made, including the establishment of the Boards of Visitors for Inspection of Police Custody, which are composed of ordinary citizens. At this moment, there is no plan to make any further amendment of the 2006 New Law” Thus the government has expressed its policy on continuation of substitute prisons.

D. Position of the JFBA

556. 1. So-called substitute prison system is the system unique to Japan, in which the police cells are used as substitute of prison and detain the suspect in the detention

facility within the police even after the arrested suspect appear before the court for detention. Under the new law, the name has been changed, but there is no substantial difference between the new “substitute penal institutions” and the former “substitute prisons”. In spite of a series of recommendations made by the Committee, the substitute prison system still continues to exist.

557. Currently many detainees as many as 98.3% are held in the police detention facilities instead of the detention centers which are under control of the Ministry of Justice. Considering such current situation, in May 2007, the Committee against Torture stated that the government “should take immediate and effective measures to bring pre-trial detention into conformity with international minimum standards. In particular, the State party should amend the 2006 Prison Law, in order to limit the use of police cells during pre-trial detention.” As a matter of priority, it also made seven recommendations including a) amending its legislation to ensure complete separation between the functions of investigation and detention (including transfer procedures), excluding police detention officers from investigation and investigators from matters pertaining to detention, and b) limiting the maximum time detainees can be held in the police custody to bring it in line with international minimum standards (paragraph 15). The government is demanded to respond to these recommendations within a year.

2. Nature of so-called substitute prisons

558. The real nature of substitute prisons is that the police that own the primary investigative authority physically detain the suspects, place them under its control, and have control over the suspects’ whole lives. While the suspect who is cooperative and complies with the wish of the police is granted favors including smoking and eating in the interrogation room, the suspect who denies the charge has to go through the interrogation for long hours, stirring up the person’s anxiety that he/she may suffer disadvantages if continue to maintain the deposition that does not comply with the wish of the police. The police tend to interrogate such person all day long to completely wear him/her out physically and mentally. During the interrogation, they even impair and undermine the person’s character and dignity to force the confession. After the interrogation, the person has to go back to the police cell as a substitute prison. The suspect has to spend time under the control of the police for 24 hours for days. In such a system, the fact that the suspect’s life is entirely controlled by the investigative body will work as pressure by itself, and even though no bodily assault or threat is, the suspect is led to assentation to the police.

3. Forced confession in substitute confession

559. The substitute prison functions as a system to force the suspect to make a false

confession and maintain it. Even though the tasks of investigation and detention are separated in the administrative system within the police stations, it does not make any difference to the substance of the substitute prison system, and the system still continues to be serving as a breeding ground for forced confessions and false charges. In all the cases known as “Retrial of four cases of death row inmates”⁷¹, the accused persons were forced to “confess” to crime which they had not committed, which led to the miscarriage of justice. Although those cases took place in 1950’s, the fact that the substitute prisons are still the breeding ground of forced confessions and false charges has not been changed. In 2007, a series of cases of false charges such as the Shibushi Case⁷², the Kitagata case⁷³ and the Toyama Himi Case⁷⁴ were brought to light . In every case, the suspects were forced “confessions” and then false charges were made.

4. Separation of investigation and detention

(1) The government’s explanation

560. The government states that the National Police Agency sent an instruction to each prefectural police department to strictly separate the section in charge of crime investigations and the section in charge of detention of suspects. In addition, it emphasizes that the 2006 New Law legally clarified the separation of two functions.

(2) Institutionally insufficient separation

561. In spite of the government’s explanation, there is no personnel titled as the staff in charge of detention, and the staff with such responsibilities will be hired just as usual police officers. It is also possible that the police officer who used to be in charge of detention may be transferred to the section in charge of crime interrogations after serving a certain years. According to the answer made by the National Police Agency at the Diet session, the police officers who are not involved in treatments of detainees are able to be in charge of transferring the suspects. While the officer is in charge of

⁷¹ In the Menda Case Sakae Menda was granted re-trial at which he was acquitted on July 15, 1983, in the Saitagawa case, Shigeyoshi Taniguchi was acquitted on March 12, 1894, in the Matsuyama Case, Yukio Saito was acquitted on July 11, 1984, and in the Shimada case, Masao Akahori was acquitted on January 31, and these persons had once been sentenced to death by the Supreme Court.

⁷² In the Shibushi case, 12 innocent persons were indicted in violation of the Public Offices Election Law in the campaign for a local politician who was elected for a local assembly. Kagoshima District Court decided they were not guilty and the decision was settled. The entire case was made up by the high-handed interrogation method, although the alleged case itself did not even exist at all.

⁷³ In Saga Prefecture, a person who had been indicted and demanded capital punishment for killing three women was acquitted. The court found that there was no evidence against the man other than the confession, which had been extracted from him after 17 days of interrogations that went on more than 10 hours a day..

⁷⁴ In this case, a person was mistakenly arrested for raping two women, got a prison sentence and his was found not guilty after serving his sentence. At first he denied his involvement, but he reversed his statement, being forced “confession” by the high-handed interrogation. After he served his sentence, he was found not guilty because the real perpetrator was identified.

transferring the suspects, he/she cannot be in charge of the investigations of the applicable case, but when transferring responsibility is fulfilled, the officer will be able to be involved in investigations of the case.

(3) Investigation advantage in the “separation” system

562. More problematically, even when interrogations lasts till midnight for long hours, the officers in charge of detention are only able to “request” for consideration about discontinuation of interrogation to the officers in charge of investigations, but do not have any authority to restrict the long-hour interrogation which can last till midnight. This means that, in practice, the need of investigation is given priority and the officers who are in charge of treatment of detainees has no means to have them stop long-hour interrogation which last till midnight.

(4) In reality, investigation and detention are not adequately separated.

563. According the results of survey conducted to the people who have been detained in police detention facilities, the practice became apparent that interrogators will provide the detainees with meals in the interrogation room (from “the survey on the real situation of substitute prison” compiled by incorporated NPO Center for Prisoners’ Rights) . The National Police Agency had to admit such current state in a Diet session (Upper House, legal committee on June 1, 2006). The result of the survey showed that if the suspect denies, that person is treated harshly, and if the suspect confesses to the crime, that person is allowed to smoke in the room or provided with delivered food which are usually not permitted to the detainees. Taking such current practices into consideration, it cannot be possibly said that investigation and detention are clearly separated.

5. The leaked “Guideline for interrogation of suspects”

564. In April, 2006, it became evident that, among a series of documents leaked from the personal computer of an incumbent police captain of Ehime prefectural police department, there was a manual titled as “Guideline for interrogation of suspect”. This manual describes 13 points that an investigator should keep in his/her mind when the investigator interrogates a suspect⁷⁵. This guideline says that the interrogator shall not leave the interrogation room until the suspect confesses to a crime and that the suspect who deny a crime shall be put into the interrogation room from morning till night (in order to make the suspect vulnerable). As seen in the guideline, there is a recommendations to conduct a long-hour interrogation to make the suspect vulnerable

⁷⁵ Refer to Annex 2 “Guideline for Interrogation of Suspects”

and to say a greeting each time when police staff check the suspect's conditions in the detention cell to remind the suspect that he/she is physically under control of the police for 24 hours, and by making the best use of such tactics, it seems that the police plans to put the suspect in mentally precarious situation.

565. The National Police Agency tried to justify the manual by explaining that the found manual is just a personal memorandum which was created for lectures to be given in the police school, therefore the manual is not used as a guideline given to the police officers nation-wide. Despite such explanation, the fact that such manual is being used in the field of police education is itself a significant problem. It is firmly believed in the minds of the investigators on sites that interrogating the suspect for long hours to make the person vulnerable and extract his/her confession is the legitimate investigative method. The substitute prison is the system that has been allowing such practice in place in the actual police practices.

6. The need for regulations on interrogation

566. The Fifth Periodic Report states that “[s]ince the progress of the investigations is unforeseen and cases are diverse, it is difficult to establish regulations to regulate the time and length of interviews. Currently due consideration is being given to ensure that an excessive burden is not placed on the suspect. For these reasons, the government of Japan’s view is that it is not necessary to establish legal regulations concerning the time and length of interviews” (paragraph 165).

567. In reality, however, it is obvious from many cases in the past that infringement of the human rights of the suspects is seen in interrogations that last for long hours, utilizing the substitute prison system.

568. The Committee against Torture recommends that the government “should promptly adopt strict rules concerning the length of interrogations, with appropriate sanctions for non-compliance” (paragraph 16) and the need for definitive rules are identified.

7. Treatment in substitute prisons

569. Since the police detention cells are designed and built for the purpose of temporary detention, usually there is no sunlight to be introduced into the cells, no window to the outside and exercising space is very limited area within the building and actually used as smoking area.

570. There is no doctor regularly stationed in the facility and it is difficult for the

detainees to have prompt examinations by cooperating doctors in outside hospitals due to the lack of the staff to escort them to the hospitals. The medical examinations by outside doctors at the detainee's expense are also difficult since the criteria for that practice is quite stringent.

571. The prison officers are allowed to use gags to the detainees who shout or make a big noise due to the side-effects of the usage of drugs or psychic disorder and so on when there is no protective cell where sufficient sound absorption system is provided.

572. Such conditions of the police cells are inhumane as pointed out by the Committee against Torture. It states that "the government of Japan should ensure prompt access to appropriate medical care to persons while in police custody", and also recommends that "the government should abolish the use of gags at police detention facilities" (paragraph 15).

8. The lack of effective inspection and a system of filing complaints

573. Under the 2006 New Law, it was determined to set up the Board of Visitors for Inspection of Police Custody under each prefectural police department and regional headquarters. However, it has not been ensured that the attorneys recommended by the Bar associations shall be appointed as the members of the Board (according to the investigation conducted by the JFBA on August 2007, there were 41 attorneys selected by the Bar associations including the ones who were confirmed after the fact and 10 attorneys who were not recommended by the associations). It is suspected that Board members were arbitrarily selected, which pose a serious question on the neutrality and eligibility of the Board as an inspection body. The Committee recommends the government to "[g]uarantee the independence of external monitoring of police custody, by measures such as ensuring that prefectural police headquarters systematically include a lawyer recommended by the bar associations as a member of the Board of Visitors for Inspection of Police Custody", but this recommendation has not been respected so far.

574. Also under the 2006 New Law, a new system of filing complaints on the treatments in the police detention cells was established, and the provisions prescribe that, re-examination of the complaints shall be conducted by the Public Safety Commissions. But, the Public Safety Commissions, first of all, has a problem of independency from the police organization and secondly, because of the fact that clerical work after a complaint is filed will be done by the internal department of the police department, independency or impartiality cannot be assured at all. With regard to this point, the Committee recommended to "establish an effective complaints system, independent from the Public Safety Commissions, for the examination of complaints lodged by person detained in police cells" (paragraph 15) and immediate

implementation of the Committee's recommendation is urged.

9. Cases of human rights infringements in substitute prisons (from recent cases)

575. Please refer to the attached document of "Cases of Human Rights Infringements".

Section 2: Ensuring transparency in interrogations (Article 7, 9 and 14 of the Covenant)

A. Conclusions and Recommendations

576.

The government should ensure that all the process of interview shall be electronically recorded even during voluntary interviews, not to mention all the interviews of detainees, and take necessary measures so that every interview will be systematically monitored by accessing to the defense counsel or having the presence of the defense counsel.

B. Subjects of Concern and Recommendations of the Human Rights Committee

577. (Paragraph 25 of the concluding observations on the Fourth Periodic Report) "The Committee is deeply concerned about the fact that a large number of the convictions in criminal trials are based on confessions. In order to exclude the possibility that confessions are extracted under duress, the Committee strongly recommends that the interrogation of the suspect in police custody or substitute prisons be strictly monitored, and recorded by electronic means."

C. The Government's Response and its Fifth Periodic Report (paragraph 167 and 168)

578. The government has been consistently expressing a negative attitude toward ensuring transparency of interrogations. In the Fifth Periodic Report, the government states that "Recording of interviews by audio, video or other electrical equipment is not conducted in Japan. In Japan, in order to seek the truth of a criminal case, detailed questioning is carried out built upon the trust and rapport between the investigator and the suspect. Making an audio or video recording of this process would not only make the building of rapport more difficult with all communication between the investigator and the suspect being monitored, but would also expend significant time and cost in playing and transcribing such records, and therefore in view of such problems recordings are not made".

579. However, in the interrogation by prosecutors, partial recording by audio and video has tentatively been started.

580. In addition, with respect to the recommendation to implement of a systematic monitoring of interrogations in the consideration of report by the Committee against Torture in May 2007, in answering the question from a member of House of Representatives, Nobuto Hosaka, the government reiterated the same view by stating that, “considering the current practices in criminal procedures, we recognize that the suspects’ statements extracted from appropriate interviews are playing extremely important roles in order to seek the truth in criminal cases. It is also concerned that obligating investigators to record the entire process of interrogations by audio or video would not only make the building of trustful relationship between the investigator and the suspect more difficult, but would also make the suspect hesitate to make a statement. As a result, it is anticipated that the truth may not be clarified. Introducing recording by audio or video into interrogations should be carefully examined considering the possible impact on collecting information on organized crimes, honor of parties concerned and protection of one’s privacy.”

D. Position of the JFBA

1. Interrogation in a “closed chamber”

581. Under the criminal justice system in Japan, interrogations of the suspects during the investigation stage were conducted in so-called “closed chambers” in which the suspects are completely cut off from the outside world. Because of this, there have been many cases of illegal interview or ill-treatment in interrogation, in which the investigator intimidated the declarant or peddled influence. In such cases, many declarants were forced to make statements against the person’s will, and even false written statements were made and the result of that, the declarants’ mental or physical health was often harmed.

2. Prolongation of trial and cause of false charges

582. Usually when the declarant insists in a trial that the person was forced to sign the written statement or that what has not been said was actually written in the statement, since there is no mean to objectively prove what has actually happened during the interrogations, both defense counsels and prosecutors do nothing but have dialogue des sourds, and it leads to lengthening of trials and serving as a serious cause of false charges. In recent cases, for all 12 defendants, the Court decided they were not guilty, and stated that it is strongly doubted that the high-handed interrogation method was used by the police during interrogations, and therefore, credibility of

confession is not recognized (Shibushi Case) , A person denied his involvement in the case, but he reversed his statement and made a false confession. He got a prison sentence, but after he served his sentence, he was found not guilty because a real perpetrator was identified (Toyama Himi Case), In saga Prefecture, a person who had been indicted and demanded capital punishment was acquitted. The court found that the false confession had been extracted from him after 17 days of interrogations that went on 10 hours a day (Kitagata Case) have been reported to show that there have been cases where the trials are prolonged and false charges caused by illegal and unreasonable interrogations.

3. Need to record all the process of interrogation electronically

583. It is easy to prepare the clear evidence on what happened in an interrogation room. To admit the presence of a defense counsel is one of the measures, but other than that, to record the entire process of an interrogation electronically (by audio or video) can also be an effective measure. By doing so, an appropriate judgment can be easily made even when there are discrepancies between the suspect's argument and the investigator's.

584. However, it would be meaningless unless the entire process of all the interrogations and interviews are completely recorded. If only "clean" interrogations are recorded after high-handed interrogations are already conducted, the subsequence is that not only the true problem of unreasonable interrogation would not become apparent, but that "clean" interrogations could be authorized.

585. In addition, as seen in the Toyama Himi Case, it is often seen that a person is "voluntarily" interviewed for long hours before the person is arrested. In such cases, an arrest warrant is issued on the ground that the person "confessed" to a crime during these "voluntary" interviews. Therefore, it is critical to record all the interrogations electronically including the ones with a detained suspect as well as the ones a person is being interrogated under the name of an "unsworn witness" in "voluntary" interviews.

4. Recording interviews electronically is the global trend

586. Today, in UK, many states in USA, Australia, Korea, Hong Kong, Taiwan, and Mongolia, reforms have been taken place to obligate investigative authorities to record and/or videotape the interviews. From such perspectives, it is obvious that ignoring paragraph 25 of the concluding observations cannot be tolerated.

587. In addition, in May 2007, the Committee against Torture recommends that the government should ensure that the interrogation of detainees in police custody or

substitute prisons is systematically monitored by mechanisms such as electronic and video recording of all interrogations; and that recordings are made available for use in criminal trials” (paragraph 16).

5. Partial implement of recording of interrogations by prosecutors office and issues

588. Conventionally, the prosecutors’ office has viewed practices of recording by audio and/or videotape in a negative light by stating that it could disturb the functions of interrogations. However, in order to realize prompt and fruitful trials by introduction of a citizen judge system, they decided that such an experimental conduct of electronically recording the process of interrogations is indispensable. In May, 2006, the office announced that “regarding the cases in which citizen judges are participating, by the judgment and responsibility of prosecutors who bear a burden of establishing the facts, the prosecutors’ office has decided to conduct partial recording of interrogations of cases where the need of recording is acknowledged for effectively and efficiently proving the voluntariliness, within the range that such practice would not disturb the functions of interrogation.” This means that at the discretion of a prosecutor, interrogation by a prosecutor will be partially recorded and videotaped electronically.

589. However, by merely recording a part of interrogations at the discretion of a prosecutor, transparency of investigation process and appropriate interrogations would not be ensured. This could have opposite effects that only “clean” and convenient parts of interrogations are recorded, which leads to incorrect estimation on the reality of interrogations.

590. Therefore, it is urged to realize the electronic recording of all the interrogations not only by prosecutors, but by the police.

Section 3: Principles of Detention of Suspects and Defendants (Article 9 and 14 of the Covenant)

A. Conclusions and Recommendation

591.

1. To take into consideration "the fear of destruction of incriminating evidence" at the time of deciding the legality of the detention of a suspect or the propriety of permitting bail for a defendant violates the right to the presumption of innocence guaranteed article 14 paragraph 2 as well as the provision of article 9 paragraph 3 of the Covenant. The government must remove the "fear of destruction of incriminating evidence" from the reasons justifying detention as determined by the Code of Criminal Procedure.
2. The lack of a legal right for a person who is under arrest to file a complaint

concerning the legality of the arrest violates the article 9 paragraph 4 of the Covenant. The government must take legislative measures for the right to file a complaint against the unlawfulness of an arrest or make explicit that a so-called "quasi-complaint against detention" can be applied correspondingly against an arrest.

3. The lack of the system by which a suspect be released on bail before the indictment violates article 9 paragraph 3 of the Covenant. The government must create the system of the pre-indictment bail.

B. Subjects of Concern and Recommendations of the Human Rights Committee

592. (Paragraph 22 of the concluding observations on the Fourth Periodic Report)“The Committee is deeply concerned that the guarantees contained in articles 9, 10 and 14 are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-day period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defense counsel under article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect. The Committee strongly recommends that the pre-trial detention system in Japan should be reformed with immediate effect to bring it in conformity with articles 9, 10 and 14 of the Covenant.”

C. The Government's Response and its Fifth Periodic Report (paragraph 154 and 155)

593. Paragraph 154 of the report describes the provisions of detention of suspects under the Code of Criminal Procedure, and in paragraph 155 in emphasizing the importance of investigation during the detention period, the government only states that “... the detention period of suspects in Japan is reasonable because it appropriately balances the needs of the investigation or of public interest with guarantee of the rights of the suspect.” Nothing is mentioned regarding the lack of the system by which a suspect be released on bail before the indictment.

D. Position of the JFBA

1. Justificatory Reasons for Detention

594. The Code of Criminal Procedure provides that a "sufficiently reasonable grounds to suspect that the accused may destroy evidence" is a condition of the detention of a suspect. (Article 60(1)[2]) In practice this condition is interpreted to mean

that a mere abstract "fear of the destruction of evidence" is sufficient and, furthermore, such a fear extends not only to evidence concerning the legal elements of an offence, but also to evidence of mitigating circumstances in general. Accordingly, if the investigative authorities have a subjective fear of the destruction of evidence, the detention of a suspect tends to be easily permitted. Moreover, because there is no adversarial procedure in accordance with which both parties contest the validity of the detention, such as the preliminary examination in the Anglo-American legal system, judges relying only on the evidence collected by the investigative authorities tend to accept the possibility of the destruction of evidence. As a result, judges accept more than 99% of all requests from prosecutors for detentions. Hence, it is fair to say that the judicial check on detention is merely pro forma. (According to the "Annual Report of Judicial Statistics 2005," the rejection rate of requests for detention in that year was 0.45%.)

595. However, because article 14 paragraph 2 of the Covenant guarantees to a suspect the right to the presumption of innocence, it is manifestly irrational to detain a suspect presumed to be innocent on the grounds of a "fear of destruction of evidence." As article 9 paragraph 3 explicitly shows, the purpose of detaining a suspect who is criminally charged is to ensure he will "...appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment," and not to provide prosecutors with facilities to demonstrate the guilt of the suspect.

596. Although principle 36 of the UN Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment permits the detention of a suspect in such cases as the actions of the suspect can be regarded as a "hindrance to the administration of justice," and the Council of Europe (Committee of Ministers meeting held on June 27,1980) recommended principles applicable to decisions on custody pending trial in which substantial reason for believing a "danger of the suspect's interfering with the course of justice" is justified as one of the reasons of the detention. This rationale is different from the "fear of the destruction of evidence." The point of these principles is not to support the prosecutor's effort to prove the suspect guilty but to guarantee a fair trial.

597. Therefore, the section pertinent to "'fear of destruction of evidence" in Article 60(1)[2] of the Code of Criminal Procedure must be removed from the list of reasons of detention.

2. The Lack of Means by which a Suspect Can Dispute the Rationality of His Custody after Arrest

598. The Code of Criminal Procedure has the institution of a quasi-complaint

against detention corresponding to the right to habeas corpus in article 9 paragraph 4 of the Covenant. However, because this procedure has no explicit provision for the right to complain against an arrest, the Supreme Court has rejected the quasi-complaint against the arrest, modeled on the quasi-complaint against the detention, as having no basis in law (Supreme Court, Judgement of August 27, 1982, page 726 of the law report on criminal cases volume 36-6). As a result, during the initial 72 hours in jail an arrestee is in a totally helpless situation from the viewpoint of the Code of Criminal Procedure. During this time while an arrestee awaits a court's decision concerning the continuation of his detention, a maximum of 72 hours, the right to demand a remedy from a court for illegal custody, which is guaranteed by article 9 paragraph 4 of the Covenant, is denied to the arrested suspect.

599. Because the absence of any means to appeal against arrests is clearly a failure of legislation, the government must enact such a measure immediately, instead of penalizing a suspect, or the courts must change the case law in such a way that a quasi-complaint against arrest also can be brought until the legislation is corrected.

3. The Lack of the Institution of Pre-indictment Bail

600. In current practice even if a suspect in pre-trial detention requests bail, that request is rejected on the grounds that there is no such institution. The reason is that the Code of Criminal Procedure is interpreted to permit the right to request the bail only to a suspect after indictment and not to a suspect before indictment. As a result, a suspect, once detained, is subject to custody for a maximum of 23 days, and cannot request the bail at all. Whatever the origin of the current practice, to leave the status quo unchanged clearly violates the right "to trial within a reasonable time or to release" as guaranteed under article 9 paragraph 3 of the Covenant and goes clearly against "the pre-trial detention is an exceptional measure and has to be as short as possible". Furthermore, in May 2007, the Committee against Torture recommended that "the government should consider the adoption of alternative measures to custodial ones at pre-trial stage". Hence, the government must immediately create the institution of the pre-indictment bail.

4. The Reduction of the Institution of the Post-indictment Bail to a Hollow Shell

601. While article 89 of the Code of Criminal Procedure provides for "bail as a statutory right" to a defendant after indictment, in practice the proportion of defendants who are actually released on bail is only approximately 10%. According to "The Annual Report of Judicial Statistics 2005," the rate in that year was only 12.57%. Indeed, seven out of eight defendants detained remain in custody after indictment. Moreover, the proportion of successful applications for bail to the total number of applications is

approximately 40%. That is to say, only one half of the requests for bail are successful. In contested cases, it is quite rare that the requests for bail go successful before his first hearing in his case. Even in most of the cases where the requests are accepted before the judgment is rendered, bails are permitted only after the most part of the witnesses are examined. While a suspect in a western country, which has adopted the adversary model for its criminal justice system as well as Japan, usually faces trial while released on bail, more than 90% of suspects in Japan face trial while still in custody. Under these circumstances, the so-called right to bail in Japan is far from being a right.

602. Although there are several causes for this unacceptable situation, the most important one is that the same reason which is used for detentions, namely a "sufficiently reasonable grounds to suspect that the defendant may destroy evidence," is provided as the reason for rejecting a request for bail.

603. This condition is interpreted broadly to mean an abstract "fear of the destruction of evidence." If a defendant denies the charge or remains silent, such actions in themselves are regarded as indications of the defendant's tendency to destroy the evidence. As a result, if a defendant contests the charge, bail before his first hearing in his case is almost impossible. Moreover, even after the first hearing up until the prosecution rests its case, it is difficult to be granted bail. Such a reality breeds cases in which a defendant confesses falsely simply in order to be granted bail. In Japan the severe practice with respect to the bail becomes a tool for coercing confessions. We call this system "hostage justice."

604. But article 9 paragraph 3 of the Covenant provides suspects with a right to bail and obliges States parties to prevent excessive custody by releasing as many suspects as possible, while imposing conditions to ensure the suspect's presence when required in court. Accordingly, the current practice in Japan with respect to the bail clearly violates this provision of the Covenant.

605. Therefore, the Government must remove "sufficiently reasonable grounds to suspect that the defendant may destroy evidence" from the provision and change the provision in such a way that in principle a request for the bail as of right is granted.

Section 4: The Restriction of Access to and Communication with Defense Counsel, and his Presence at Interview with Suspect, and the Institution of Consultation Designation (Article 14 of the Covenant)

A. Conclusions and Recommendations

606.

1. The article 39 paragraph 3 of the Code of Criminal Procedure, which allows the designation by the investigative authorities of the date, place, and time of a defense counsel's interview with a suspect, violates article 14 paragraphs 3(b) and (d) of the Covenant. Therefore, the government must eliminate this provision.
2. Whenever a suspect requests, a defense counsel should be able to be present in the interview. Especially when a suspect is the minor, the presence of a defense counsel should be the must.
3. Censorship on any letter between a suspect and a defense counsel should be completely eliminated.

B. Subjects of Concern and Recommendations of the Human Rights Committee

607. (Paragraph 22 of the concluding observations on the Fourth Periodic Report)
“The Committee is deeply concerned that the guarantees contained in articles 9, 10 and 14 are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-day period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defense counsel under article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect. The Committee strongly recommends that the pre-trial detention system in Japan should be reformed with immediate effect to bring it in conformity with articles 9, 10 and 14 of the Covenant.

C. The Government's Response and its Fifth Periodic Report (paragraph 166, and 182 to191)

608. The report cites in paragraph 166 with regard to the presence of defense counsel that “[g]ranted the defense counsel the right to be present at the interviews in the initial investigation stages would have an adverse effect on the investigation process as a whole, and in particular the truth-seeking function of the investigation. For these reasons, the presence of defense counsel at the interviews is not allowed in Japan.” In paragraphs 182 to 191, the government only makes legal explanation on the restrictions of interviews by defense counsel, instead of trying to correct such restrictions.

609. In addition, in answering the question from a member of House of Representatives, Nobuto Hosaka, with regard to the point that in the concluding observations of the Committee against Torture recommended to ensure the defense

counsel's presence in interviews, the government stated that, "...considering the current practices in criminal procedures, we recognize that the suspects' statements extracted from appropriate interviews are playing extremely important roles in order to seek the truth in criminal cases. To permit a defense counsel's presence in interviews should be examined carefully within the broad framework of the entire criminal procedure system, taking into the consideration that interrogations should be facilitated to seek for the truth of the case during the very limited period of the suspect's detention." The government has expressed its policy on continuation of substitute prisons.

D. Position of the JFBA

1. Guarantee of the right of communication between a suspect and defense counsel under international human rights norms

610. Article 14 paragraph 3(b) provides that everyone should be guaranteed "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing" and (d) provides that a suspect should be guaranteed "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."

611. The rights here does not only indicate the guarantee of the rights during the trial phase, but also covers the guarantee of all the rights to counsel throughout the entire procedures starting from an initial phase of investigation, prosecution, trials and court ruling to determine the criminal conviction, and it guarantees that the rights of access to a defense counsel through investigation and trials including the detained suspect's right of communication with counsel.

612. Since the suspect's right to contact a defense counsel that he chooses (the right of communication with counsel) was created to guarantee the suspect to prepare for his defense, the right should be provided in which the preparation for the defense is actually needed. When he faces with the most critical situations where he is being interrogated by prosecutors and/or police officers, the suspect would definitely need the right to counsel with a defense attorney.

613. Therefore, to restrict a suspect's right of access to a defense counsel on the ground that he is being or will be interviewed by an investigator goes against the right to counsel in essence as well as Article 14, paragraph (b) and (d). When an interview is requested by a suspect or a defense counsel, investigators should immediately stop the interrogation. If an interrogation is conducted by depriving a counsel of providing a suspect with advice shall be considered as illegal. This interpretation is in accordance with the general rules of interpretation of the Vienna Convention on the Law of

Treaties, which goes that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Article 31, paragraph 1).

614. General Comment No. 13 states that “this subparagraph (Article 14, paragraph 3 (b)) requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.” To refuse or postpone the request of a suspect for an interview with his defense counsel, or unreasonably restrict the time of consultation on the grounds that interrogation is being underway or planned is nothing but “restrictions” and “undue interference” prescribed in the General Comment No. 13.

615. Among the other provisions and precedents composing the International Human Rights Law that need to be referred to when interpreting the Covenant, the provision of the UN Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment is especially important and conforms to the above interpretation.

616. Principle of 18, paragraph 3 provides that “The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.”

617. The principle does not accept that a interview between a suspect and a defense counsel is refused or restricted on the ground that an interrogation by investigative authorities is being underway or planned.

2. Legal system of the right to counsel and its operation in Japan

618. In Japan, Article 34 of the Constitution guarantees the right to counsel and Article 39, paragraph 1 of the Code of Criminal Procedure guarantees the right of confidential communication between a suspect and a defense counsel in principle. On the other hand, Article 9, paragraph 3 of the Code of Criminal Procedure acknowledges the restriction of communication by “the need of investigation”.

619. According to the provisions of the Code, restrictions of communication shall be limited to the exceptional cases, however, in practice, by creating a system called

the institution of general designation that is not defined in any law, the Ministry of Justice and investigative authorities have been operating the principle provided in paragraph 1 of the above-mentioned law and exceptional case of paragraph 3 by reversing them.

620. In other words, investigative authorities generally prohibits communication with a defense counsel stipulated in a written form called “General Designation Form” for a certain period up to 23 days from the moment of arrest of a suspect to the institution of prosecution for some types of crime. Authorities operated this system where a suspect could only have a partial communication with a defense counsel only when the counsel received “Specific Designation Form” a prosecutor for long time till March, 1988.

621. Currently, the system for a counsel to bring in “Specific Designation Form” was abolished and not being operated any more, but a communication between a suspect and a defense counsel is still controlled by prosecutors, and until a decision on whether a designating right prescribed in Article 39, paragraph 3 is exercised or not is made by a prosecutor, a suspect and a counsel are not able to have a communication (in a state of general designation). On top of this, in the current situation, if a suspect is being interrogated or planed to be interrogated (even if there is no plan, a plan for interrogation can be used as an excuse for the restriction), the time for the interview is limited to 15 to 20 minutes.

3. Violation of the Covenant by Article 39, paragraph 3 of the Code of Criminal Procedure

622. In accordance with the interpretation by the Supreme Court, interview between a suspect and a defense counsel can be restricted on the ground of a suspect being interrogated or scheduled to be interrogated. In fact, communications are actually restricted.

623. Therefore, as stated above, Article 39, paragraph 3 of the Code of Criminal Procedures is not consistent with Article 14, paragraph 3 (b) and (d) of the Covenant.

4. Defense counsel’s presence at interviews

624. Article 14, paragraph 3 (b) and (d) guarantee a suspect “[t]o have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing” and “[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where

the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

625. Article 1 of the UN Basic Policy Concerning Roles of Counsel defines that every person owns the right to protect and establish his rights and receive a counsel’s support to defend him in every stage of criminal procedure.”⁷⁶

626. It is clearly identified that every person has the right to receive a counsel’s support in every stage of criminal procedure, therefore, it is natural to interpret that all the processes in the investigation stage including interrogations are covered.

627. To ask for the presence of a defense counsel is a part of a suspect’s rights. Especially, when a suspect is a minor, the risk to make a false confession is even higher since a minor may not be able to deal with an interrogation due to his mental immaturity. In such a case, regardless of whether a suspect requests or not, a presence of a defense counsel is considered as the must.

628. The Committee against Torture also recommends, in May, 2007, that a defense counsel to be present during interrogations (paragraph 15 and 16). The government of Japan is urged to establish a system to guarantee the counsel’s right to be present at interrogation and clarify it in a written form immediately.

5. Censorship of letters between a defense counsel and a suspect

629. Article 14, paragraph 3 (b) provides the suspect’s right to contact a defense counsel, but in detention institutions in Japan, all letters even the ones between a defense counsel and a suspect are censored. In a law suit claiming the state compensation, in which the content of a letter was censored by a detention institution and abused by a prosecutor, the court confirmed the principle by stating that Article 39, paragraph 1 demands to protect the confidentiality of the letters between a detainee and a defense counsel in accordance with the confidentiality of interview as much as possible.”⁷⁷

⁷⁶All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and defend them in all stages of criminal proceedings.

⁷⁷ (Osaka District Court on May 25, 2000, Page 17 of the Digest No. 1728. The Tkami Case, seeking for the state compensation.)
“Considering the importance of the right of confidential communications in a visit guaranteed by the constitution, even while giving and/or receiving objects between a detainee and a visitor (a defense counsel), when the communication of intention or information does matter between a detainee and a counsel, it is reasonable to interpret that the applicable paragraph requests as much due consideration as possible to ensure to protect the confidentiality”, and “As for giving and/or receiving letters, at least between a detainee and a defense counsel, different consideration should be paid. In such giving and receiving of letters, communication of intention and information becomes

630. However, the Ministry of Justice, by the reason that there is no mean to confirm whether a letter was sent from a defense counsel, has continued to censor letters. Following this court decision of Takami Case claiming the state compensation, the JFBA came up with a method to prove that a letter is sent from a counsel using seals which are only available to defense counsels. And it asked the Ministry of Justice to discuss the usage of this method only to be refused.

631. In the 2006 New Law, it is prescribed that the censorship of the letters sent from a counsel to a detainee should be minimized just to confirm that it was actually from a counsel and the contents should not be censored, but letters sent from a detainee to a defense counsel shall be censored (Article 135). Therefore, censorship of the letters is still continued and such practice goes against Article 14, paragraph 3 of the Covenant and should be corrected.

Section 5: Lengthening and expansion of prohibition of a suspect's access to visitors (Article 10 and 14)

A. Conclusions and Recommendations

632.

The number of cases where a suspect is prohibited from meeting with visitors except for his defense counsel and receiving goods has been increasing and the continuation of prohibition has been lengthening even after trial starts. The government should amend the provision in such a way that to prohibit a suspect from meeting with visitors as well as receiving goods shall be limited only when a “danger of interfering with the course of justice” is clearly identified.

B. Subjects of Concern and Recommendations of the Human Rights Committee

633. Nothing is mentioned on this subject.

C. The Government's Response and its Fifth Periodic Report

634. Nothing is mentioned on this subject.

important, and such communication of intention and information in form of giving and/or receiving letters is very important for the detainee's right to defend himself and a counsel's right to defend his client. Therefore, the need to guarantee that the confidentiality of such communication shall be protected from investigative institutions, prosecution institutions and detention institutions is not substantially different from the oral communication during a visit.” By stating those, the court concluded that “with regard to giving and/receiving letters between a detainee and a defense counsel, Article 39, paragraph 1 shall conform to the visits as much as possible, and requests for protecting the confidentiality of the content.”

D. Position of the JFBA

635. 1. As long as not violating the purpose of pre-sentence detention, a suspect/defendant owns a right to meet with people from outside the detention institution. To unreasonably restrict that is against Article 10 section 1. However, on the ground of “the fear of destruction of incriminating evidence”, the number of cases where a suspect/defendant is not allowed to meet with people including his family members is increasing.

636. 2. Based on the Annual Report of Statistics of Prosecution and Annual Report of Judicial Statistics, as a result of calculation of the rate of suspects who received the decision to prohibit access to his visitors out of those who were detained (the ratio of prohibition of access to his visitors), the ratio which was 23% in 1986 went up to 28% in 1996, 32% in 2000, 35% in 2003, and 37% in 2005 showing a steady increase.

637. This figures show that two out of five who received the decision to be detained are prohibited to have an access to outside world.

638. Furthermore, after the duration of the prohibition is once defined as “up until the institution of prosecution”, it often changed to “till the first trial day”, and in some cases, unlimited duration is decided, in which a suspect is prohibit to have an access to visitors for several years.

639. 3. Such ill-treatment of a suspect/defendant is a violation of Article 10 paragraph 1 as well as Article 14 paragraph 2.

640. As raised in the issues of a system of permitting bail, the provision shall be amended in such a way that implementation of restriction of the access to visitors should be limited to only when the true need to do so actually is manifested.

Section 6: Redress from illegal detention (Article 9 of the Covenant)

A. Conclusions and Recommendations

641.

<p>Article 4 of the Habeas Corpus Rule, which is the implementing regulations for the Habeas Corpus Law, prevents the Habeas Corpus Law from functioning properly because it limits the reasons for obtaining a writ of habeas corpus to: 1) the absence of a legal right to place a person in custody; or 2) manifest violation of due process, and also requires the exhaustion of all other remedies. Therefore, article 4 of the Rules violates</p>

article 9 paragraph 4 of the Covenant, which guarantees the right to seek a judicial remedy to an unlawful detention. The government must eliminate article 4 of the Habeas Corpus Rule as soon as possible.

B. Subjects of Concern and Recommendations of the Human Rights Committee

642. (Paragraph 24 of the concluding observations on the Fourth Periodic Report)
“The Committee is concerned that rule 4 of the Habeas Corpus Rules under the Habeas Corpus Law limits the grounds for obtaining a writ of habeas corpus to (a) the absence of a legal right to place a person in custody and (b) manifest violation of due process. It also requires exhaustion of all other remedies. The Committee is of the view that rule 4 impairs the effectiveness of the remedy for challenging the legality of detention and is therefore incompatible with article 9 of the Covenant. The Committee recommends that the State party repeal rule 4 and make the remedy of habeas corpus fully effective without any limitation or restriction.”

C. The Government's Response and its Fifth Periodic Report (paragraph 178 and 179)

643. The report only mentions in paragraph 179 that “The concluding observations were distributed to the Supreme Court” and also that “...whether or not to repeal the provisions of Rule 4 of the Habeas Corpus Rules” will continue to be carefully studied. It did not sincerely respond to the Committee request to abolish the provisions designated by the Committee.

D. Position of the JFBA

644. 1. Japan enacted the Habeas Corpus Law in 1948 following the creation of its new Constitution. The law itself is problematic, because it limits the beneficiaries of the law to "a person who is bodily restrained without any procedure established by law" and excludes from its protection a person who is, as a substantive as opposed to a procedural matter, held in illegal custody. What is worse, Article 4 of the Habeas Corpus Rule, which stipulates the implementing rules for the Habeas Corpus Law, limits protection to "the case where a certain law or ordinance of procedure was seriously violated and the violation is obvious, or where the decision or disposition relating to custody has been rendered without legal grounds." The same rule also determines that a "request for a writ of habeas corpus shall be suspended until it comes clear that any alternative way will fail to reach the goal of rescue within a reasonable period when there is any possible alternative way to rescue a person from illegal custody."

645. As a result, the Habeas Corpus Law cannot play the proper role envisioned at

the time of its creation. At present, habeas corpus is used only in cases where the illegal custody is "obvious and remarkable," such as the request for the surrender of an infant.

646. 2. When the JFBA conducted research on the Japanese Law of Habeas Corpus in connection with its usefulness as a remedy for illegal confinements in mental hospitals, it discovered that it is article 4 of the Habeas Corpus Rule which transforms the Japanese habeas corpus system entirely from the Anglo-American version of the remedy. This rule, because it blocks the proper functioning of the writ, violates article 9 paragraph 4 of the Covenant. The JFBA made recommendations that Article 4 of the Habeas Corpus Rule should be eliminated.

647. 3. The government of Japan, however, has ignored this issue and done nothing to improve the system despite the clear manifestation of intention from the Committee in the concluding observations which designates the provision and requests to abolish the provision. The attitude of Japan is an act of disloyalty against the international society. In order to realize the remedy from illegal detention which is the original spirit of Habeas Corpus, the status quo, which violates article 9 paragraph 4 of the Covenant, must be corrected as soon as possible.

Chapter 8: The Rights of the Defendant in Criminal Trials

Section 1: Insufficient disclosure of evidence (Article 9 and 14 of the Covenant)

A. Conclusions and Recommendations

648.

The legal institution and manner of implementation of the disclosure of evidence in Japan violates article 14 paragraph 3(b) of the Covenant. The government must take proper legislative action to ensure that a defendant and his/her defense counsel have the right to require the full disclosure of evidence.

B. Subjects of Concern and Recommendations of the Human Rights Committee

649. (Paragraph 26 of the concluding observations on the Fourth Periodic Report)
The Committee is concerned that “under the criminal law, 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 defense has no general right to ask for the disclosure of that material at any stage of the proceedings” and it goes on to recommend that “in accordance with the guarantees provided for in article 14, paragraph 3, of the Covenant, the State party ensure that its law and practice enable the defense to have access to all relevant material so as not to hamper the right of defense.”

650. In addition, in May 2007, in the consideration report on the report submitted by the government of Japan, the Committee against Torture is gravely concerned at “the limited access to all relevant material in police records granted to legal representatives, and in particular, the power of prosecutors to decide what evidence to disclose upon indictment.”

C. The Government's Response and its Fourth Periodic Report (paragraph 297 to 299)

651. The Fifth Periodic Report makes general explanations of a system to disclose evidence in general in paragraph 297 and a system to establish the pre-trial procedure in which disclosure of evidence by the prosecutors was expanded for defense counsel to prepare for criminal trials. However, neither of the system discussed in the reports can be considered as the full disclosure of evidence. Paragraph 299 explains the reasons for that by insisting that “[t]he investigation records of criminal cases include a multitude of documents gathered as a result of wide-ranging investigative activities. The records include not only documents that have no bearing on the points of contention of the case

but also documents that could damage the privacy or reputation of the people involved and make it impossible to gain their cooperation in future investigations if such evidence were to be disclosed. For this reason, it is not appropriate to impose a general obligation on prosecutors to disclose evidence other than evidence they plan to submit in the trial or to grant a general right for disclosure of evidence to the defense.

652. In addition, in respect to the point that, in May 2007, the Committee against Torture expressed its concern at the current procedures to disclose evidence, the government, in responding to the memorandum of questions prepared by Nobuto Hosaka, a member of House of Representative, stated that if all the prosecutors' evidence were to be fully disclosed to defense counsel, adverse effects such as infringement of the privacy or reputation of the people involved, destruction of evidence and intimidation of witnesses may be caused, and it would be impossible to gain the cooperation from the public. For this reason, it is not appropriate to impose a general obligation on prosecutors to disclose evidence.” and expressed its intention of not making a further progress in the development of the current system of disclose evidence.

D. Position of the JFBA

1. The need of full disclosure of evidence

653. Article 14, paragraph 1 guarantees that everyone shall be entitled to a fair and public hearing, and Article 14, paragraph 3 (b) guarantees to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

In the abovementioned Article 14, paragraph 3 (b), one of the most important “facilities” is to guarantee that for both prosecutors and defense counsel to have an equal opportunity, the evidence that were collected by prosecutors shall be disclosed to defense counsel or defendant himself. Usually, the many of the evidence collected by the prosecutors are favorable to a defendant. However, if such evidence is not disclosed, the defendant side will not be able to use the evidence, and in many cases, the defendant will not know about such evidence exists. Without knowing it, it is impossible for a defendant to prepare in such a way that the rights to examine the witnesses against him and to summon the witnesses (Article14, paragraph 3(e)) shall be exercised⁷⁸.

⁷⁸ Therefore, here it is obvious that Article 14, paragraph 3(b) guarantees the suspect's rights to access to all the evidence collected by prosecutors for defend himself. Such interpretation is consistent with the interpretation indicated by the European Committee of Human Rights in Jesper vs Belgium Case (No.8403/78). In accordance with Article 6, paragraph 1 and (b) European Covenant of Human Rights, the Committee, in this case, interpreted that a defense counsel or if not a defendant himself shall be guaranteed to have an rational access to files pertaining to the criminal case. Also the above-mentioned interpretation is also consistent with Article 20 “Basic

2. The current situation of disclosure of evidence in Japan

654. In Japan, the right to petition for disclosure of evidence is not guaranteed for a defendant and a defense counsel.

655. The Code of Criminal Procedure enacted in 1949 has adopted the adversary model for its criminal justice system. Therefore, since a written indictment is the only document to be submitted to the court from a prosecutor for the institution of prosecution, all the evidence collected by investigative authorities will continue to be maintained by a prosecutor. If this is true, there should be a provision which prescribes the disclosure of the evidence maintained by a prosecutor to a defendant and a defense counsel.

656. However, Article 299, paragraph 1 is the only provision of the Code of Criminal Procedure pertaining to the disclosure of evidence, which only provides that “[i]n cases where a public prosecutor intends to question witnesses, expert witnesses, interpreters or translators in court, that public prosecutor must give the defendant and the defense counsel an opportunity to know the names and addresses of those witnesses in advance. In cases where a public prosecutor intends to submit evidential documents or articles of evidence for examination in court, that public prosecutor must give the defendant and the defense counsel an opportunity to peruse them in advance of the court procedures.”

657. Under this provision, the defendant or counsel cannot petition for the disclosure of evidence of which a prosecutor has no intention of petitioning for the examination. Hence, such provisions of the Code of Criminal Procedure fail to guarantee “fair hearings” prescribed by Article 14 of the Covenant.

658. Under such provisions, driven by the efforts of many lawyers aiming at realizing the disclosure of evidence, the Supreme Court of Japan made a significant decision pertaining to this issue summarized as follows:

659. In the stage of examination of evidence, if a defense counsel specifies the needed evidence and demonstrates “the concrete necessity” for its disclosure, the court shall order the prosecutor to disclose the evidence, based on its authority to preside over a lawsuit.

Principle of Roles of Lawyer”, which provides that “Supervisory authority is responsible for guaranteeing the defense counsel’s right to have an access to the appropriate information in files and records in such a way that the defense counsel shall be able to provide a defendant with effective legal aids, and that such access shall be granted at reasonable timing as early as possible.

660. However, such a court order for the discovery of evidence shall be limited to when it is recognized that the disclosure of evidence is absolutely necessary and reasonable, especially for the defense of the defendant and there is there is no possibility of destroying the evidence and threatening the witness, after taking into consideration of the nature of the case, progress of the trial, type and content of the evidence, timing and method of the inspection of the evidence and other situations.

661. This decision has significance in that the discovery of evidence is to be realized through the method of a court order for the discovery of evidence based on its authority to preside over a lawsuit without having a governing law. But, it faces a limit; 1) such and order does not rely on the defendant's or defense counsel's right to petition for the disclosure of evidence, 2) such an order requires defense counsel to specify the needed evidence and demonstrate "the concrete necessity" for its disclosure. Hence, the defendant or defense counsel cannot petition for the disclosure of evidence the existence of which is unknown to them, and the evidence would never be revealed at all, and 3) because the requirements for a disclosure order, such as "especially important for the defense" or "there is no possibility of destroying the evidence and threatening the witness" are too severe, such a court order is not an effective means for the disclosure of evidence. This court decision has not been changed so far. Then how the actual practices are being conducted now?

3. Examples of false charges caused by nondisclosure of evidence

662. Japanese public prosecutors office has been firmly refuse to disclose the evidence in serious cases or denial cases where the disclosure of evidence is desperately needed. It is considered that because of the resistance by the public prosecutors office in disclosing evidence, numerous false charges were generated. In 1980's, Japan experienced a series of retrial of the prisoners sentenced to death in which prisoners were acquitted at the end of the re-opened trials. The important aspect common to those cases was that the prosecutor presented the evidence favorable to the defendants for the first time, which had never been disclosed in the previous trials. The Matsuyama Case is one of the series of such retrial cases⁷⁹.

4. Disclosure of evidence for the proceeding for arranging issues and evidences prior to the trial under the amended Code of Criminal Procedure in 2005

⁷⁹ The case took place in 1955 where a suspect was arrested for murder and arson. The suspect who had no involvement in the case, due to the severe interrogation happened in the substitute prison during investigation phase, was forced to "confess" to a crime and a detailed statement of his confession was fabricated. A written statement of expert opinion was submitted stating that a stain found in the suspect's futon was a blood stain which matches the victim's blood type. The defendant consistently denied the crime and insisted for not guilty, but the sentence of death was settled in 1960. The defendant's first petition for retrial was dismissed, and 1969, the defendant petitioned for retrial again and re-opening of trial was decided in 1979. Finally in 1984, he was acquitted to be released from the fear of death for the first time in 28 years since the occurrence of the case.

663. In the amendment of the Code of Criminal Procedure in 2005 after recommendation was made by the Committee, a new procedure of the proceeding for arranging issues and evidences prior to the trial was created. Following the new procedure, new provisions for the disclosure of evidence were established. Therefore, currently there are two institutions regarding the disclosure of evidence, namely, the provisions which can be applied to the cases that fall in to the scope of “the proceeding for arranging issues and evidences prior to the trial” and the conventional provisions.

664. However, the new system of the disclosure of evidence is not in line with the recommendation made by the Committee.

In the new system, there are three steps for disclosing the prosecutor’s evidence;

“Disclosure of evidence requested by a prosecutor” (Article 316-14 of the Code of Criminal Procedure)

This provision allows a disclosure to prevent a surprise attack. But, when a prosecutor recognizes that “it is not appropriate to disclose the evidence”, the prosecutor can present “a written summary of the evidence” instead of disclosing the evidence, therefore, this provision cannot fully prevent a surprise attack or be functioning as “passive defense”.

”Typological disclosure of evidence” (Article 316-15)

This provision requires the prosecutor to disclose the evidence, even if he doesn’t have an intention to disclose it; therefore, this provision has an aspect of “aggressive defense”. However, it is required that the defendant and the defense counsel specify the needed evidence and demonstrate "the concrete necessity" for its disclosure.

”Disclosure of evidence relevant to the points of dispute (Article 316-20)

This provision has an aspect of “active defense”, but it is up to the prosecutor to judge whether it is appropriate to disclose the evidence, after considering relevance to the defendant’s argument and the necessity.

Under and , the defendant or defense counsel cannot petition for the disclosure of evidence the existence of which is unknown to them. Therefore, the defendant has no choice, but reveals his cards to the prosecutor. This practice goes against the right guaranteed by Article 14, paragraph 3(g) which states that everyone should “not to be compelled to testify against himself or to confess guilt.” This provision also admits the prosecutor’s discretion in deciding the disclosure evidences.

665. In either case, the JFBA takes the position that the new procedure for disclosing evidence only applicable to the proceeding for arranging issues and evidences prior to the trial is far from the full disclosure of evidence prior to trial requested by the Committee in its concluding observations.

5. Criticism against paragraph 299 of the Periodic Report

666. The current situation of criminal justice in Japan, in which the right to petition for disclosure of evidence is not guaranteed as a right of defense, allows that the critical evidence which could determine the court decision is not always disclosed. This practice is a violation of the rights guaranteed by Article 14, paragraph 1 and article 14, paragraph 3 b).

Section 2: The right to defendant's conviction and sentence being reviewed by a higher tribunal (Article 14 paragraph 5)

A. Conclusions and Recommendations

667.

When the prosecutor files an appeal against the decision of not guilty and the second trial reverses the previous decision and hands down guilty decision, in terms of the facts or the sentence, the defendant's right to his conviction to be reviewed and retried is not recognized in principle even if the defendant makes a final appeal to the Supreme Court. This practice is a violation of Article 14 paragraph 5 and the system should be corrected.⁸⁰

B. Subjects of Concern and Recommendations of the Human Rights Committee

668. No indication on this matter.

C. The Government's Response and its Fourth Periodic Report

669. No indication on this matter.

D. Position of the JFBA

670. 1. In Japan, the ratio of a decision of not guilty being handed down in the first trial is 0.06 to 0.12% (According to Annual Report of Judicial Statistics 2002 to 2006) , and this indicates that a decision of guilty is so high in Japan, which is extraordinary from the international perspective. And in reality, the prosecutors would file an appeal against almost all the very rare cases where the court hands down a decision of not guilty. The statistics figures of the prosecutors appeal against decisions of not guilty is not made public, but the reversal rate in all the cases where the prosecutors file an

⁸⁰ The provision which does not allow the second trial to make its own judgment and the trial should be remanded to the District Court, or the one which allow an appeal on the ground of misinterpretation as the reason of appeal should be established.

appeal against the previous ruling is 69.4 to 78.0%, which shows a significant difference with 12.4 to 14.2% of reversal rate in cases where the defendant files appeal. This condition needs to be reviewed.

671. The number of cases, such as Nabari Toxic Wine Case, where the first trial decides that a defendant is not guilty, which is reversed in the second trial started due to the prosecutors appeal seems to be endless. When the previous ruling is reversed in the second trial, the defendant can file an appeal to the final court, but the reasons for final appeal are limited to the followings, in accordance with Article 405 of the Code of Criminal Procedure; 1) there is a violation of the constitution or there is a misinterpretation of the constitution, 2) the decision of the second trial contradicts the precedents of the Supreme Court, and 3) in case where there is no precedent in the Supreme Court, the decision in the second trial contradicts the precedents of Daishinin (the final court of law before the Supreme Court was established) or High Courts as the appealing court, or High Courts as the appealing court after this provisions enacted. Also, false recognition on the facts or inappropriate conviction cannot be the reasons for an appeal.

672. 2. Article 14 paragraph 15 stipulates that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. With regard to this provision, the following was pointed out in the general comment 32 that “Violation of Article 14 paragraph 5 includes the cases where a decision handed down in the first trial becomes the final and binding decision, and where after a decision of not guilty handed in the lower court, a decision by an appeal court or a final court cannot be reviewed in the upper court” (paragraph 45).

673. “The right to appeal defined in Article 14 paragraph 5 obligates the state party to review a decision and penalty substantially, from such viewpoints that the nature of the case is well-considered in the procedures based on adequacy of evidence and law. The retrials limited to a pro forma decision or legislative aspects are not sufficient under the Covenant” (paragraph 46)

674. “The supervisory reexamination system is considered as an extraordinary appealing method because it is only applicable to the existing executory decisions. And it does not satisfy the requirement of Article 14 section 5, even in the case where such review is requested by the convicted person or by the arbitrary authority of judge or prosecutor” (paragraph 48)

675. In the cases where a guilty verdict was handed down in the second trial for the first time, the defendant’s right to have the decision and the penalty reexamined in the upper court has to be recognized, otherwise, it is regarded as a violation of the

Covenant.

676. Also, the system of appealing to the Supreme Court in Japan is not considered as the defendant's right to his conviction and sentence being reviewed by a higher tribunal according to law, because facts are not being reviewed and misinterpretation of facts or inappropriate sentence cannot be the reasons of appeal under the current system.

677. 3. Article 411 of the Code of Criminal Procedure states with regard to the above point that finale appellate court can reverse the original decision when not reversing the previous decision would significantly go against justice in line with the reasons on the left" and also adds that a significant misinterpretation or unreasonable sentence may be reviewed by authority. Therefore, it is controversial whether the provisions are conforming to Article 14 of the Covenant or not.

678. However, as pointed out in the general comment 32 paragraph 46, Article 14 provides that reexamination shall be "based on adequacy of evidence and law" and "obligates to review the decision and penalty substantially", instead of just pro forma review. Under such Covenant, it is clear that the current Japanese appealing system where assertion based on the evidence is not allowed does not possibly guarantee the right of reexamination in the upper courts.

679. 4. The appealing system when a decision of not guilty is handed down in the first trial and the sentence is decided in the second trial for the first time is the violation of Article 14 paragraph 5. This procedure needs to be corrected.

Chapter 9: Problems with Convicted Detainees
(Treatment of Detainees in Correctional Institutions)

A. Conclusions and Recommendations

680.

(General Comment)

1. The JFBA welcomes the active commitment of the Correction Bureau of the Ministry of Justice in implementing the correctional administration reforms based on the recommendations made by the Correctional Administration Reform Council. It is highly expected that the bureau shall further promote such initiatives.

(The Board of Visitors for Inspection of Penal Institutions)

1. Person who has enthusiasm in improving the operation of penal institutions in a true sense shall be selected as a board member of the Board of Visitors for Inspection of Penal Institutions.

2. Necessary measures shall be taken for the boards to conduct the investigation effectively and independently.

3. The Ministry of Justice should respect the opinions and views from the Boards of Visitors for Inspection of Penal Institutions as much as possible.

(Grievance Mechanism)

1. It is welcomed that the “Review and Investigation Panel on Complaints by Inmates in Penal Institutions” was established as an independent body from the operation of penal institutions. The JFBA demands the government to guarantee the legal independency of this committee and allow them to have a secretariat which is independent from the Ministry of Justice and has staff attorneys as researchers.

2. Appointment of an attorney by the detainee should be permitted when the detainee submits a complaint.

3. The strict restriction on term of 30 days for submission of complaints should be reviewed.

(Use of restraining devices and confinement in protection cells)

1. The JFBA welcomes the abolishment of use of leather handcuffs that caused many human rights infringement and demand the government to take preventive measures so that new handcuffs which was introduced instead of leather handcuffs will be used properly not to lead to any more human rights infringement, especially not to be used for punitive purposes.

2. The JFBA urges that the upper limit of confinement term in protection cells should be determined and the requirement that doctor visits the actual site regularly and permits the confinement of the detainees after assesses the detainee conditions should be included.

(Solitary confinement as treatment)

1. It is urged that the law-evading practice where the inmates who do not satisfy the

criteria for solitary confinement are actually isolated and confined by segmenting the inmates into treatment categories shall be corrected.

2. An investigation based on specialized psychiatric and psychological evaluation shall be conducted on the inmates who have been continuously put in solitary confinement for a long time, and transfer them from solitary confinement to the normal treatment.

(Health, sanitation and medical treatment)

1. It is urged that the government will thoroughly review the insufficient medical system in penal institutions, which suffers the lack of medical staff and establish a system which is independent from the security system of the penal institutions to provide the appropriate medical care at the most appropriate timing as prompt as possible.

2. The government should correct the current practices where the inmates are allowed to exercise and bathe only once a week during the solitary confinement as punishment and increase the number of exercise and bathing.

3. The inmates should be permitted to have a right to maintain normal hair styles.

(Overcrowding)

In order to resolve the current overcrowding which would destruct the basis of all the constructive treatments, it is urged that the government should take every judicial and administrative measure such as introduction of a program for persons convicted for drug offenses, review of the sentenced imprisonment, expansion and improvement of parole system and introduction of community sanctions and measures.

(Female detainees)

1. It should be legally prohibited for a male officer to patrol in the part of institute set aside for female detainees alone and that during the night for male officers, even if more than one officer, to patrol in the women's section.

2. The number of woman officers should be considerably increased.

(Right of access to the court)

Inmates who are interested parties in civil suits shall be guaranteed to have opportunity to plead at the bar and get fair hearings.

B. Subjects of Concern and Recommendations of the Human Rights Committee

681. The Committee is deeply concerned at many aspects of the prison system in Japan which raise serious questions of compliance with articles 2, paragraph 3 (a), 7 and 10 of the Covenant. Specifically, the Committee is concerned with the following:

- (a) harsh rules of conduct in prisons that restrict the fundamental rights of prisoners, including freedom of speech, freedom of association and privacy;
- (b) use of harsh punitive measures, including frequent resort to solitary confinement;
- (c) lack of fair and open procedures for deciding on disciplinary measures against prisoners accused of breaking the rules;
- (d) inadequate protection for prisoners who complain of reprisals by prison warders;

- (e) lack of a credible system for investigating complaints by prisoners; and
- (f) frequent use of protective measures, such as leather handcuffs, that may constitute cruel and inhuman treatment.

C. The Government's Response and its Fourth Periodic Report

682. The Fifth Periodic Report only shows the progresses up to March 2004 and nothing is mentioned with regard to the series of revisions of the Prison Law which was prompted by the incident of the Nagoya Prison. Therefore, the report is completely insufficient in providing the information.

683. As indicated in the Fifth Periodic Report, in October 2002, the incident became apparent to the public, in which Nagoya Prison officials abused the inmates to deaths and injuries. In this case of inmates' human rights infringement, the prison officials who are responsible for the deaths of two and serious injuries of one inmates were prosecuted for "Causing Death or Injury through Violence or Cruelty by a Special Public Official".

684. With such incident as a turning point, the bill of the Law Concerning Penal Institutions and the Treatment of Sentenced Inmates (hereinafter to be referred to as 2005 New Law) passed the Diet, realizing the revision of the Prison Law first time in about 100 years.

685. This new law has just been enacted on May 24th 2006 and has made little change in the actual situation in correctional facilities. However, the overall direction of improvement was clear and areas that require further improvement were identified.

D. Position of the JFBA

1. New creation of the Boards of Visitors for Inspection of Penal Institutions

686. New creation of the Boards of Visitors for Inspection of Penal Institutions was the best outcome from 2005 New Law. The board is set up for each penal institution; therefore, not only the convicted detainees in prisons as well as the unsentenced detainees and the detainees whose death penalty has become final in detention houses are now able to use this new system.

687. The board which was created based on the recommendations submitted by the Correctional Administration Reform Council is not aimed at redressing the individual cases. The board members shall be part-time national public officials and less than 10 persons.

688. The board visits penal institutions on a regular basis and the detainees are able to meet them without the presence of any prison official or staff. The correspondence in writing to the board shall not be inspected by the prison (Article 9 section 4). An opinion-box will be provided in each institution, which makes it possible for detainees to make suggestion to the board other than by confidential correspondence. This box can only be unlocked and opened by the board.

689. The board shall advance its opinions and views with regard to the operation of the institution to the head of the penal institution at least once a year. The Minister of Justice will compile these opinions and views of the board together with actions and measures implemented by the head of the penal institution and officially publish the summary report.

690. Since the inspection to be conducted by the board will cover the entire range of the operation of the institution, grave human rights infringement cases such as torture and body assaults could be the subjects of the inspection. But in reality, in some cases, an investigation is never conducted because the penal institution does not provide necessary information to the board. The limitation of the budget is also making it difficult for the board to activate its activities. Regarding this issue, in May 2007, the Committee against Torture states is concerned at the lack of authority of the Board of Visitors for Inspection of Penal Institutions to investigate cases or allegations of acts of torture or ill-treatment (paragraph 21-b). The Committee recommends that the government of Japan should consider establishing an independent mechanism, with authority to promptly, impartially and effectively investigate all reported allegations of and complaints from detainees (paragraph 21).

691. Also, transparency of the process to appoint the board members shall be further promoted and a system which allows the most appropriate persons to be appointed shall be established.

2. Grievance Mechanism

692. Under 2005 New Law, a new grievance mechanism was established. Under this system, the detainees are able to apply for examination when they have complaints of measures taken by the head of the institution (Applying for Examination), and the detainee also can state facts about illegal body assaults as well as use of restraining devices and protective cells (Stating Facts).

693. Applying for Examination and Stating Facts should be submitted to the superintendent of the regional correction headquarters and when the detainee is not

satisfied with the subsequent result, he/she is able to file the Request for Re-Examination or Stating Facts to the Minister of Justice. Before the Minister dismisses such filing, he/she should ask the Review and Investigation Panel on Complaints by Inmates in Penal Institutions to provide advice, and handle the case with the maximum respect to the suggestions from the panel.

694. However, the panel does not have any full-time secretariat staff and the secretarial staff of the Minister of Justice is assuming that role concurrently. Although the JFBA demanded to set up a secretariat which is independent from the Ministry of Justice and have enough staff including attorneys, it was not accepted.

695. Though the JFBA insisted that the detainee should be permitted to appoint a third party such as attorney in a series of procedure to submit a complaint, this was not accepted.

696. On the above-mentioned points, in May 2007, the Committee against Torture expressed its concern about “[t]he lack of independence of the Review and Investigation Panel on Complaints by Inmates in Penal Institutions, as its secretariat is staffed by personnel of the Ministry of Justice, and its limited power to investigate the cases directly, as it cannot interview prisoners and officers, nor does it have direct access to any related documents” as well as “[t]he statutory limitations on the right of inmates to complain and the impossibility of defense counsel assisting clients to file a complaint”(paragraph 21).

3. Use of restraining devices and confinement in protection cells

(1) Restraining devices

Abolishment of leather handcuffs and introduction of new restraining devices

697. Leather handcuffs were used for torturing purpose, having caused many human rights infringements. In 1998, the Human Rights Committee expressed its concern about “frequent use of protective measures, such as leather handcuffs, that may constitute cruel and inhuman treatment.”

698. While the abolishment of use of leather handcuffs in September 30, 2004 should be considered as a positive step taken by the government, it should be noted that, instead of leather handcuffs, the “Type 2 handcuffs” were introduced. These handcuffs are composed of two bracelets that cover the forearms of a person, connected each other by a plate. These handcuffs are often used with putting the restrained person’s arms in the back, since if they are used in front of the body, the restrained person can move the

arms up and down. In such cases, long-hour-usage of the handcuffs creates an acute pain, but there is no upper limit of the time that the handcuffs are allowed to be used is provided. The use of such handcuffs requires the strict monitoring.

Metal handcuffs

699. Under the provisions of the 2005 New Law (Article 55), the use of the metal handcuffs which are called as “Type 1 handcuffs” is allowed when the sentenced inmates are escorted, or when the inmate is likely to 1) escape, 2) harm his/her self or other people, or 3) damage equipment or others in the penal institution.

700. However, in practice, the use of such handcuffs is deviated from the original purpose as seen in the following cases;

In March 2006, when an inmate of Kakogawa Prison in Hyogo Prefecture underwent a medical examination in an external hospital, handcuffs were put on the inmate’s ankles by the warden’s order and the handcuffs were tied to rope held by a detention officer.

In May 2005, a female detainee in Tokyo Detention House stayed in an external hospital for delivering a baby. The handcuffs were put on her wrist and tied to the bed with rope during her stay in the hospital.

Need of supervision on the use of restraining devices

701. These handcuffs are used in an inhumane way, and the Committee against Torture recommends that “the government of Japan should ensure strict monitoring of restraining devices, and in particular adopt measures to prevent them being used for punishment” (paragraph 17). The use of metal handcuffs and Type 2 handcuffs should be closely monitored.

(2) Protection cells

702. There is considerable number of cases of deaths of inmates caused by repetition of confinement in protection cells, which is also supported by the report issued by the investigation team on register of death in penal institutions. The JFBA has been demanding a time limit of confinement. The 2005 New Law provides a time limit of 72 hours in principle and requires a renewal in each 48 hours; however, it does not mention the maximum limit of the number of renewals, let alone the maximum limit of duration of the cell.

703. Of course, the principle of proportionality will be applicable, and considering the nature of the matter, obligation to release the confined detainee is provided when there is no need for confinement. Even though it is not a legal measure, the new law

also provides to video tape the conditions of the detainee being confined within the cells.

704. The new law stipulates that penal institutions shall listen to doctors' comments when the inmate is to be confined in protection cells; however, it is not provided that doctors shall express their views after examination of the physical and mental conditions of the inmate

705. In order to eliminate human rights infringements in protection cells, it is urged that a time limit of confinement in protection cells shall be defined, sufficient consideration shall be made in the operation, and doctors visit and inspect the actual situations on a regular basis and final decision on whether to confine the inmate or not shall be made after doctors examines the inmate's physical and mental conditions

4. Solitary confinement as treatment

(1) Law-evading practice of isolation of the inmates

706. Prolonged use of solitary confinement has come under criticism from inside and outside the country as grave human right infringement. In the recommendations of the Human Rights Committee in 1998, its concern about "use of harsh punitive measures, including frequent resort to solitary confinement" was expressed. Based on such criticism, the 2005 New Law provides strict requirements or criteria to determine the need for the isolation of the inmates (solitary confinement as treatment) and made it possible for the inmates to file a complaint about the determination of solitary confinement (Article 53 Section1).

707. However, when the new law was enacted, it became apparent that the new practice of solitary confinement which evades the provision has been widely conducted. In such practice, the inmates are classified into 4 security categories, and the inmates in type 4 are treated within the cell unless it is absolutely necessary. Except for exercise and bathing which the confined inmate can have with other inmates and an opportunity more than once a month (once a month in reality) is given for them to contact with other inmates, their confinement conditions are nothing but solitary confinement. Imposing such treatment on the inmates is equal to implementing the isolation which the provisions strictly prescribe the criteria for. It is clear that such unlawful practice is the evasion of the law; therefore, an immediate improvement on this matter is urged.

(2) Prolonged isolation

708. The 2005 New Law prescribes that the time limit of isolation shall be three

months in principle, but in reality, there is no time limit on the renewal of the three-month rule. Therefore, there are detainees who have still been in the prolonged isolation up until now.

709. According to the research conducted November 2005 before the enactment of the new law, there were 30 inmates treated in isolation most of who were sentenced to life in prison (refer to table 1).

710. Some inmates who were sentenced to life in prison were in isolation for 42 years out of 50 years and 11 month of their imprisonment. There are two inmates who have been in isolation all though their life in prison. The result of the research shows that 125 inmates which is 8.61 % of total 1452 inmates who were sentenced to life in prison in Japan (as of November 1st, 2005) were under the isolation treatment.

711. With these results in mind, the Committee against Torture recommends that the government of Japan amend its current legislation in order to ensure that solitary confinement remains an exceptional measure of limited duration, in accordance with international minimum standards. In particular, the government should consider systematically reviewing all cases of prolonged solitary confinement, through a specialized psychological and psychiatric evaluation...”(paragraph 18).

712. It is obvious that prolonged isolation is the inhumane treatment which has harmful influence to the inmates both physically and mentally. This should be immediately improved.

713. (Table 1)

Progress of inmates in solitary confinement for more than 10 years

As of November 1, 2005

Anonym of detainee	Term of Execution	order	Total period in isolation	Time served	Number of performing work at factory
A (Kita-Kyushu-med)	life imprisonment	1	42 years 01 months	50 years 11 months	9
A (Asahikawa)	life imprisonment	2	41 years 06 months	45 years 06 months	2
B (Kita-Kyushu-med)	life imprisonment	3	39 years 08 months	49 years 08 months	0

B (Asahikawa)	life imprisonment	4	38 years 7 months	44 years 7 months	9
A (Hiroshima)	life imprisonment	5	27 years 15 months	52 years 6 months	3
A (Osaka)	life imprisonment	6	26 years 8 months	36 years 7 months	6
A (Gifu)	life imprisonment	7	26 years 07 months	35 years 11 months	7
C (Kita-Kyushu-med)	life imprisonment	8	25 years 5 months	40 years 5 months	0
A (Tokushima)	life imprisonment	9	25 years 09 months	28 years 8 months	29
B (Gifu)	life imprisonment	10	24 years 10 months	28 years 3 months	2
A (Miyagi)	life imprisonment	11	23 years 11 months	38 years 9 months	1
C (Gifu)	life imprisonment	11	23 years 11 months	34 years 1 months	5
E (Kita-Kyushu-med)	life imprisonment	13	23 years 6 months	35 years 11 months	37
B (Miyagi)	life imprisonment	14	21 years 7 months	33 years 8 months	16
C (Asahikawa)	life imprisonment	15	20 years 3 months	42 years 3 months	25
D (Kita-Kyushu-med)	life imprisonment	16	19 years 8 months	20 years 1 months	3
I (Kita-Kyushu-med)	life imprisonment	17	18 years 5 months	27 years 8 months	3
F (Kita-Kyushu-med)	life imprisonment	18	17 years 1 months	32 years 4 months	8
C (Miyagi)	life imprisonment	19	16 years 1 months	22 years 9 months	2
G(Kita-Kyushu-med)	life imprisonment	20	15 years 9 months	39 years 1 months	4
D (Miyagi)	life imprisonment	21	15 years 3 months	29 years 5 months	8

	imprisonment		months	months	
H(Kita-Kyushu-med)	life imprisonment	22	15 years 2 months	19 years 0 months	13
E (Gifu)	20 years 8 months	23	14 years 1 months	14 years 5 months	1
D (Gifu)	20 years 0 months	24	13 years 7 months	13 years 7 months	0
E (Miyagi)	life imprisonment	25	13 years 5 months	34 years 5 months	1
F (Miyagi)	life imprisonment	26	13 years 4 months	30 years 4 months	9
F (Gifu)	life imprisonment	26	13 years 4 months	20 years 11 months	0
A (Fuchu)	17 years 0 months	28	13 years 1 months	13 years 6 months	7
B (Tokushima)	life imprisonment	29	10 years 6 months	10 years 6 months	0
G (Miyagi)	life imprisonment	30	10 years 0 months	19 years 7 months	1

Adapted from “Annual Report of Statistics by Correction Bureau”(2006)

5. Health, sanitation and medical treatment

(1) Health, sanitation and medical treatment

714. The 2005 New Law prescribe that the appropriate measures for health, sanitation, and medical treatment shall be taken for the sentenced inmates in line with the standards of the society in general. Except for holidays, the inmates shall be given an opportunity of outdoor exercise everyday as much as possible, and take baths appropriately on hygienic ground.

715. On the other hand, the inmates in solitary confinement as punishment are restricted to do exercise in so far as the inmates can maintain their health. Enforcement regulations permit the inmate in solitary confinement as punishment to exercise and bathe more than once a week. However, the practice of permitting once-a-week exercise obviously goes against Article 21 (1) of the UN Standard Minimum Rules for the Treatment of Prisoners. Also, bathing once a week is considered insufficient since Japanese penal institutions are not equipped with air-conditioning system and the climate is highly humid especially during summer and rainy season in Japan.

716. Furthermore, recently a case where one inmate was not permitted to bathe for about 9 months due to a medical reason in a penal institution was known to public. In Niigata Prison, the inmate who became unable to perform the work in the prison due to lower back pain was prohibited from bathing from December 2003 to September 2004 except for 8 times which were permitted by doctors. During this period, the inmate was only permitted to wipe the body with his underwear on and not allowed to wash his hair. In addition, outdoor exercise was not permitted for 450 days from September 2003 to March 2005. Niigata Prison insists that they change underwear everyday to consider the cleanliness of the person.” Although this case took place under the former law, it is absurd for them not to take any appropriate measure for sanitation due to medical reasons.

(2) Failure to provide speedy and appropriate medical treatment

717. Inadequacy of medical treatment in penal institutions was clearly indicated in the recommendations made by the Correctional Administration Reform Council. The council put emphasis on the points including the lack of doctors, insufficient quality in medical treatment, the security divisions’ interventions into the medical treatment and the lack of transparency in medical treatments. As of August 2006, out of 74 penal institutions in Japan, in 18 institutions the number of doctors is below strength and in 7 institutions there is no doctor at all.

718. In February 1993, a male inmate of Asahikawa Prison expressed chest pain and back pain which are earliest manifestation of the spinal caries, but no medical examination or treatment was accepted. After that, the pains got worse and the inmate was in and out of a hospital within the institution, but the symptoms got worse and worse. In August when tuberculosis meningitis appeared, he was treated in a hospital outside the prison, but he had to suffer aftereffects including paralysis below the waist. In October 2006, Maebashi District Court acknowledged the doctor’s act of negligence and ordered the government in compensation for the damage.

719. In April 2004, in Saga Juvenile Prison, a male inmate experienced melaena and asked for a medical examination only to be rejected by the institution. Right before he released from the institution, he underwent a doctor’s medical examination where he was diagnosed as hemorrhoid only by palpation. In the following month when he was examined at a hospital outside the institution, he was finally diagnosed as advanced colon cancer and a spread to lymph gland was recognized. The person is now suing the government for the damage.

720. The Committee against Torture clearly responds to such issues in the

consideration on the report. It urged the government to “ensure that adequate, independent and prompt medical assistance be provided to all inmates at all times (paragraph 17)”, clarifying that, in order to respond to this demand, it is essential for the government to enact a law or a regulation or issue a governmental instruction, which defines that appropriate medical examination shall be provided when asked by an inmate. With regard to this point, the government should correct its official instructions as reasonably earliest as possible to obligate institutions to provide medical treatment by doctors.

(3) Lack of Independence of Medical Affairs Division from Prison Authorities

721. The Committee also demands the government to “consider placing medical facilities and staff under the jurisdiction of the Ministry of Health” (paragraph 17). The serious issues regarding the abovementioned medical reform in correctional institutions can be solved only when the responsibilities are transferred to the Ministry of Health, Labor and Welfare. The government has insisted that there will be administrative difficulties in transferring the responsibilities to the MHLW, but it has not identified what kind of specific problems should occur. The recommendations made by the Committee clearly show the direction of the reform.

(4) Hair style

722. The government instruction strictly defines the hairstyle of inmates. It has been made mandatory that male inmates have to shave their heads as so-called “close-cropped hair” except for the inmates who will be soon released from the institutions. The Ministry of Justice explains for this strict rule on the hairstyle by stating that on top of sanitary reasons, if the inmates are allowed to maintain their hairstyle as they wish, there will be some persons who would intimidate other inmates with vagarious hairstyle. Therefore, it is a normal measure that the person who refuse to shave his hair is segregated from others. However, the right to maintain free hairstyle should be derived from the dignity of the individual and such an excessive regulation is inhumane.

6. Overcrowding

723. The problem of current overcrowding in Japanese penal institutions is in a very serious situation. It has become normal states to accommodate 9 inmates in a room of which limit number is 6 or 2 inmates in a 5-square-meter room for a single person’s use in some institutions. The inmates’ frustration has reached the limit.

724. In Kobe Prison, a case of death of an inmate has taken place presumably

resulting from the stress of overcrowding. In the midnight of May 3, 2006, an inmate in his 50's was bodily assaulted by another inmate in his 50's in the same cell. A prison officer checked the assaulted inmate's injury, but did not have him examined by a doctor. In the following morning, he was found unconscious with his pupils dilated. Even though he was sent to a hospital outside the institution, the person died on the day. This tragedy highlights not only the current inhumane overcrowding, but also problems of medical system in correctional institutions.

725. As the Committee recommends that the government of Japan "should take effective measures to improve conditions in palaces of detention, to bring them in line with international minimum standards, and in particular take measures to address current overcrowding" (paragraph 17), actions including positive introduction of non-custodial measures.

7. Female detainees

726. Under the 2005 New Law, it is prescribed that the physical inspection of a female detainee shall be conducted by a responsible woman officer in principle, and that when a woman officer is not available, a woman staff can be conducted under the command of a male officer (Article 16-2 and 52 -2). However, there is no provision to prohibit male officers to provide treatment to female detainees in other scenes. Male officers are patrolling in the part of the institution set aside for women during the day or night, and this practice is clearly against 53 of the Standard Minimum Rules for the Treatment of Prisoners. In fact, there seems to be unending cases of abuse by male officers against female detainees in Japanese penal institutions.

727. In April 2004, a male officer in Kisarazu Branch Detention House of of Chiba Prison was given a dishonorable discharge on suspicion of entering into the cell of a woman defendant to press himself to the woman and showing naked bodies each other. In June 2004, a male officer in Toyohashi Branch of Nagoya Prison was arrested on suspicion of "Causing Death or Injury through Violence or Cruelty by a Special Public Official" by allegedly having sexual relationship with a woman defendant. It is urgent for the government to ensure human rights education to prevent an abuse case and to considerably reinforce the number of woman officers in penal institutions.

8. Right of access to the courts

728. There are many inmates to pursue legal actions such as to complain about treatment in prisons. They sometimes are, in reverse, sued by the victims of the criminal cases or other third-parties. In any case, since normally the inmates' pecuniary resources are quite limited, it is difficult for them to leave it to lawyers. However, in many cases,

the inmates are not allowed to appear in the courts due to administrative reasons of institutions. As a result, there are many cases where only opponent party attends in the court, the inmates lost a case, or where even opponent party does not appear in the court and the case is regarded as withdrawn in accordance with Article 263 of the Civil Procedure Code. In such situation, it is difficult to say that the right of access to the courts of the inmates in Japan is guaranteed and this practice clearly goes against Article 14 (1) of the Covenant. The inmates who are interested parties in civil suits shall be guaranteed to have opportunity to plead at the bar and get fair hearings.

Chapter 10: Freedom of Thought, Consciousness and Expression

Section 1: Freedom of expression

Suppression of distribution of flyers by the police(Article 19)

A. Conclusions and Recommendations

729.

The police department in each prefecture and the police stations under the jurisdiction of the prefectural police department often ask the persons who are distributing flyers to come to their office against their will or arrest them and conduct investigations which significantly violate freedom of expression and speech provided in Article 19 of the Covenant. The government of Japan, adopting a position that the form expression to distribute flyers which include political contents shall be generally protected as freedom, should strictly supervise the police's conducts from the standpoint of strict construction of laws and regulations, and provide the guidance to the police to discontinue the abuse of investigative power through the authority concerned.

B. Subjects of Concern and Recommendations of the Human Rights Committee

730. Nothing is mentioned on this matter.

C. The Government Response and its Fifth Periodic Report

731. 1. Recently, in Tokyo and other urban areas, people who were carrying or distributing flyers of election policies or political views were questioned, asked to come to the police station, or even arrested by the police which used various kinds of laws and ordinances to justify their acts. The situation of freedom of speech has become what we have never experienced before. Flyers mentioned above range from a leaflet to a booklet of several pages containing demands or questionnaires from opposition parties, their diet members, or groups of peace movement or human right. Carrying or distributing them has been an act of expression permitted without any problem from a viewpoint of freedom of speech or political activities described in the Constitution of Japan.

732. Distributing political flyers on the street, or to houses is seen in our daily lives and has caused no problems so far in Japan.

733. 2. Dispatching the Self-Defense Forces to Iraq and revising the Constitution to militarize it have become big political issues in Japan these days. There are arguments

and criticism from the people against the government policies to promote them, which results in the political demands from the opposition parties and heated activities by the groups of peace movement and human right. Understanding the government's fear of rising criticism stimulated by the political flyers by the opposition parties and groups, the police tends to take actions for the containment of public opinion.

734. 3. In urban areas, there are a number of apartment houses where many of the city residents live. The door to the entrance hall of the apartment house does not have any lock, and anybody can go in or out of the building freely. Mail and advertisement letters are put into the mailboxes in the entrance hall or the one fixed at the front door to each room. Political flyers have been frequently distributed to these apartments because of the necessity and effects.

735. 4. The fifth Periodic Report of the government of Japan has no comments on those issues.

D. Position of the JFBA

736. 1. The problem is that carrying or distributing political flyers is considered to be crime by the police when it is conducted in the ground, entrance halls, stairs or corridors of the apartments, so called space shared by residents, where anyone from outside can go in and out of freely as mentioned above. Sometimes it is a target of police interference or compulsory investigation. The followings are some of the examples.

a) The police arrested a person who had distributed flyers opposing the dispatch of the Self-Defense Forces to Iraq to the official residence of its members and their families (A case of Tachikawa Self-Defense Forces official residence on February 27, 2004).

b) The police arrested a person who had distributed flyers against the dispatch of the SDF to Iraq and revision of the Constitution to the mailboxes at the entrance of apartment(A Horikoshi case of distribution of flyers to the apartment in Tsukishima, Chuohku on March 3, 2004).

c) In the ground of an apartment, the police arrested a person who had been carrying extra editions of an opposition party organ on the pension problem(A Higashimurayama case of carrying flyers on May 2, 2004)

d) Distribution of flyers to a mailbox at the front door of each room of the police official residence(A Ujihashi case on September 10, 2005).

e) Distribution to each mailbox of newsletters of Tokyo municipal assembly and a ward assembly and so on(December 23, 2004).

As for a) and e), the criminal law (crime of trespassing on others' property) was applied, breach of the Government Officials Act, for b) and d), and the Minor Offenses Act for

c). In each case, the police suppressed freedom of expression by extending the interpretation of the laws.

737. 2. What is characteristic about all these cases is, first of all, that each one of them was stopped by the resident of the apartment who seemed to have connections with the police. Then the police was called by the resident's cell phones, came to the scene, asked the person to come to the police station with them and arrested him. In many cases, the arrested one was detained and indicted. Secondly, not the criminal police, but the public safety police took the charge of investigation, which means that they considered those cases public safety matters. Though a number of commercial leaflets delivered to mailboxes of apartment houses every day have never been questioned, only the political flyers are the targets of regulation. This situation is a serious problem.

738. 3. Needless to say, distributing political flyers is one of the acts of expression, which should be fully respected. Furthermore, there is no reason for the application of the restriction of article 19 III to both the contents and the way of distribution of all the cases. In some of the pending cases, judgments were "not guilty" at the first trials (e.g. Case e). All the cases appealed to the high courts ended up with the judgments of "guilty"(e.g. Case a). As for the distribution of the political flyers, arrests and regulations including the investigation afterwards violate article 19 of the Covenant. The National Public Safety Commission and prefectural Public Safety Commissions which should supervise the police investigation have not taken any appropriate measures mentioned at the beginning of this chapter. The supreme organization in the police hierarchy is the National Police Agency, which is a national apparatus. Thus, the government of Japan should supervise and provide guidance to the police as mentioned in A.

**Uniform total ban on political activities by national government employees
(Article 19 of the Covenant)**

A. Conclusions and Recommendations

739.

1. The government should abolish article 102 paragraph 1 and article 110 paragraph 1 provision 19 of the National Civil Service Law, which uniformly and totally bans any political activities by national government employees and imposes punishment to its offenders, because these provisions violate article 19 of the Covenant.

2. The government should revise parts of the 14-7 of the National Personnel Authority

Regulations that, defines under the commission of the National Civil Service Law the range of application, political purpose and political activities to be prohibited, since its paragraph 4, which bans political activities in their private life when they break off from their duties, violates article 19 of the Covenant. It should be changed to that the ban on political activities by government employees under laws and regulations shall not be applicable if they are done outside their duty hours.

B. Subjects of Concern and Recommendations of the Human Rights Committee

740. Nothing is mentioned on this matter.

C. The Government's Response and its Fifth Periodic Report

741. Nothing is mentioned on this matter.

D. Position of the JFBA

1. A spate of oppressions over leaflet distributions

(1) General facts

742. In recent years, the police successively oppress distributors of leaflets bearing political claims. In many cases, people are arrested and charged with criminal offense by distributing leaflets issued by a political party or an organization with political purposes to posts (either the ones on the 1st floor, or individual's ones on each floor) of apartments of general public or residential quarters of the police or the Self Defense Force. If the offender is a private citizen, they are likely to be accused of trespassing, but in case of government employees, they are accused of violation of the National Civil Service Law. In case of commercial leaflets, they are not interfered in the past and at present. On the other hand, it was highly unlikely to be filed by distributing political leaflets in the past, however, situation has changed in recent years and the police bring charges without hesitation.

743. As oppressions over leaflets distribution by government employees, there are arrests over distributions to apartments in Chuo Ward in Tokyo on 3 March 2004 (so called Horikoshi Case), distributions to residential quarters of the police in Setagaya Ward in Tokyo on 10 September 2005 (so called Ujibashi Case).

(2) Progress of criminal trials

744. (a)Progress of trials

a. In the Horikoshi case, it was found guilty at the first trial, and the case has moved to appeal court.

b. The Ujibashi case is at the first trial.

745. (b)A point in dispute?

Regarding these two cases charged with National Civil Service Law violation, article 102 paragraph 1 and article 110 paragraph 1 provision 19 of the National Civil Service Law prohibits political activities by government employees with punishment, and 14-7 of the National Personnel Authority Regulations defines such political activities. This National Personnel Authority Regulations state that political activities by government employees even out of their duty hours should be penalized. Considering that the National Civil Service Law regards the legal purposes of prohibitions of political activities as political neutrality of the administration, the neutral management of the administration and public trust conferred on them, it is disputed that this prohibition not only deviates these purposes but also severely restricts their rights. There is a full-scale controversy over interpretations and applications of the Covenant, as the above regulation, claiming for National Civil Service Law violation, is a provision totally and uniformly prohibits political activities by government employees even outside of their duty hours, and totally limits their civil rights to involve in political activities and also is not among exceptions recognized by the Covenant, thereby, violates article 19 of the Covenant.

(3) Controlling distributions of leaflets by government employees outside their duty hours violates article 19 of the Covenant.

746. (a)Freedom of expression is one of the essential foundations of a democratic society and of basic conditions for the development of a democratic society and self-actualization.

747. “Everyone” shall have the right to freedom of expression, and no one’s freedom should not be disregarded because they are government employees.

748. The “information and ideas” related to freedom of expression mentioned in article 19 paragraph 2 of the Covenant naturally includes information and ideas which are inconvenient for the government. For example, leaflets distributed at the above-mentioned case “oppose constitutional revision”, and such a claim is no more than unpleasant things for the government. Distributing leaflets are expressive actions guaranteed by the Covenant.

749. (b) Freedom of expression is most important in a democratic society, therefore, when a government try to impose restriction, it should carry out strict justification test. Article 19 paragraph 3 of the Covenant defines a strict justification test, but the contents of the leaflets distributed by the defendants of the National Civil Service Law violation cases, cannot be considered to pose a threat to “national security” or “public order”.

750. (c) According to the proportional principle, that is one of the interpretations of the Covenant by committee, if their right to freedom of expression is to be restricted by prohibiting political activities of government employees, it should be done only when it is necessary to achieve any of the purposes listed in article 19 paragraph 3 (a) and (b) of the Covenant, such as “national security” or “public order” mentioned above, however, the purposes of the law, both “neutral management of the administration” and “ public trust conferred on them” are not relevant, therefore, it cannot be said that prohibiting leaflets distribution is necessary to achieve these purposes.

751. (d) “when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.” (General Comment 10 paragraph 4) The prohibition of political activities by the National Civil Service Law does not only limits the right of the government employees to freedom of expression, but totally deprives their right itself, thus, is against the general comment and threatening the spirit of the Covenant.

752. (e) The contents of the prohibition of political activities by government employees becomes clear only by the regulations of the administration, the 14-7 of the National Personnel Authority Regulations. Since the National Civil Service Law itself does not specify what is prohibited, the National Civil Service Law lacks both clarity and predictability, thus, cannot satisfy the condition of article 19 paragraph 3 of the Covenant, that is, these restrictions should be provided by law.

753. (f) Although the National Civil Service Law enables criminal sanction against offenders of prohibition of political activities, it cannot be said that the purpose of the above law cannot be achieved through criminal sanctions, and it will be excessive sanctions in proportion to the degree of violation, thereby, the proportional principle required by article 19 paragraph 3 of the Covenant will not be satisfied.

754. From these perspectives, the above provisions, which uniformly and totally prohibit political activities by government employees even out of their duty hours, and allow to impose criminal sanctions against offenders, violates article 19 of the Covenant. Therefore, the government primarily should solve the issue by Conclusions and Recommendations 1, if not, should make immediate settlement at least by A. Conclusions and Recommendations 2 mentioned above.

Textbook authorization (Article 19 of the Covenant)

A. Conclusions and Recommendations

755.

The textbook authorization system violates Article 19 of the Covenant. The government should abolish the system or at least admit that the criteria of the current textbook authorization system are preliminary one and just an outline of the standards, and also should establish proper legislation for the system.

B. Subjects of Concern and Recommendations of the Human Rights Committee

756. In the concluding observations on the Third Periodic Report, the Committee regrets that “it appears to be a restrictive approach in certain laws and decisions as to the respect of the right to freedom of expression” (comment 14) and expresses its concern at that “...it is not clear whether the "public welfare" limitation of articles 12 and 13 of the Constitution would be applied in a particular situation in conformity with the Covenant” (comment 8).

757. The Committee also emphasizes, in the concluding observations on the Fourth Periodic Report, that the above concern is still lingering by stating that “[t]he Committee reiterates its concern about the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of "public welfare", a concept which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant. Following upon its previous observations, the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant” (paragraph 8).

C. The Government's Response and its Fifth Periodic Report (paragraph 310 and 312)

758. In the report, the government states that “[t]he textbook authorization is carried out to meet the following requirements: 1) The maintenance and enhancement of education levels nationwide; 2) The guarantee of equal opportunity in education; 3) The maintenance of appropriate educational content; and 4) The guarantee of neutrality in education. It merely prohibits the publication of textbooks as primary teaching materials if such books contain material which is recognized to be inappropriate. Since the textbook authorization does not interfere in any way with the publication of books for general use, such restriction on the freedom of expression is within the limits of rationality and necessity.”

D. Position of the JFBA

1. Reality of the textbook authorization system

(1) Authorization based on political intentions

759. Although the government explained the objectives of the textbook authorization system as seen in the foregoing paragraphs, standards and rules of authorization which have been operated in the real life had been defined in a ministerial instructions by the Ministry of Education, Culture, Sports, Science and Technology, and they are not the law which was discussed, examined and then passed in the Diet to be enacted. Since these standards are ambiguous as criteria, it allows the examiners of the textbooks have strongly had political views of their own, of their appointer, the Minister of Education, Culture, Sports, Science and Technology, or of the ruling party reflected in the textbook authorization. For instance, in the authorization of Japanese history textbooks for high school students, the government obscured the number of victims of Nanjing Massacre on the ground that “that expression of the textbook manuscript poses one-sided view in line with the current theories discussing the number of the victims”, and it rewrote the explanation of so-called “comfort woman”, on the ground that the expression may mislead the readers”, from “Japanese military took many women away from their homes and caused them unbearable suffering....there has been criticism from inside and outside the country that the actions that the government of Japan has taken have been insufficient.” To “...many women were taken away to be inflicted unbearable suffering... there has been criticism that the reactions of Japanese government has been insufficient” with the aim of obscuring that Japan was the victimizer to cool down the criticism during the authorization process.

760. Also, in the recent case regarding the fact that Japanese military urged civilian in Okinawa on to commit mass suicide in the Battle of Okinawa at the end of Pacific War, the government changed the expression in the script from “(civilian in Okinawa) were forced to commit mass suicide by Japanese military” to “(civilian in Okinawa) were driven up against the rope and committed mass suicide” to try to imply that mass suicide was not forced by the military but a voluntary action of the civilian in Okinawa.

761. During the textbook authorization, every word and every sentence of all the manuscripts of textbooks are completely examined in detail. When the examiners order to delete or correct the expressions or the sentences which the examiners felt inappropriate, if the textbook company does not accept that order, the examiners have a authority to prohibit the publication of that textbook by not approving the textbook. Even though expressions simply reflect the outcome of historical science, the textbook

companies have no choice but rewrite the expressions if ordered to do so. Under such circumstances, the freedom of expression of authors and textbook companies are easily restricted.

762. In addition, the Periodic Report states that “[i]t merely prohibits the publication of textbooks as primary teaching materials if such books contain material which is recognized to be inappropriate. Since the textbook authorization does not interfere in any way with the publication of books for general use, such restriction on the freedom of expression is within the limits of rationality and necessity.”

The main underlying spirit of the freedom of expression is that if one wishes to express something, an intended form of that expression should not be hindered by anyone. If the form of expression that he wishes is forced to be changed against his will, such act is nothing but the restriction of freedom of expression. However, Japanese government obligates elementary, junior high and high schools to use the textbook authorized by the government. The textbooks serve as the principal teaching materials in courses taught in those schools. Therefore, the rejection to the publication of the textbook means that the academic and educational beliefs of authors who wish to convey the fruits of their studies and researches to students in the field of education through the form of textbooks will be hindered, even if the textbook is published as books for general use. Furthermore, textbooks secure a large market with a huge volume of circulation and are usually published by textbook companies that are specialized in compiling textbooks. That means that even though they are allowed to publish the rejected textbooks as books for general use, it will not be profitable enough for the companies to publish them. As a result, companies have no choice, but give up the publication of such textbooks. Hence, “the textbook authorization does not interfere in any way with the publication of books for general use” does not change the true nature of textbook authorization that certainly restricts the freedom of expression.

(2) The system to cause self-imposed restriction

763. As explained in the foregoing paragraph, without the authorization by the government, the textbook companies will not be able to publish the textbooks as the textbook to be used in the field of education. And companies may incur a huge loss if they fail to submit the textbook for the process of authorization. Therefore, even before the completion of compilation, those companies tend to surmise the intentions of the examining authority and impose voluntary restrictions on themselves in order to avoid expressions that seem to be “unacceptable” or be pointed out by the authority. This is superficially not the direct imposition of governmental restriction, but there is no doubt that the textbook authorization system itself is affecting the companies’ activities of free expression. The outstanding case is that the description of so-called “comfort women” was almost wiped out from the junior high social study textbooks in 2000. The reason

why this happened is because the textbook companies voluntarily avoided any description of “comfort women” in their textbooks even before the manuscript for application for authorization was completed, knowing that there was a strong view within the ruling party to deny the facts and the responsibility to the comfort women.

(3) “Kentei” (textbook authorization) interlocking with the system of adopting textbooks

764. Textbooks are supposed to be selected by each teacher who conducts educational activity using them as an educational material. But, in Japan, the decision on what textbooks to be used for compulsory education (elementary and junior high schools) is left to the textbook adoption committee consists of education boards. Such situation has accelerated oligopoly in the textbook industry and textbook companies are, for a survival in such industry, reinforcing the tendency to reflect MEXT’s intention in the textbooks.

2. Article 19 and “Kentei (textbook authorization)”

(1) Textbook authorization is a violation of Article 19 of the Covenant.

765. The reasons for restriction on freedom should strictly conform to the conditions defined in Article 19 paragraph 3, different from general clauses such as “public welfare”.

766. The Committee states that when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.”

767. In line with this General Comment, the textbook authorization system is gravely problematic. First of all, the standards or rules of textbook authorization which are governing rules of the system do not satisfy the condition that “restrictions must be provided by law”. Secondly, when the exercise of the right is subject to certain restrictions, there are only 4 purposes admitted by Article 19, namely, (a) for the respect of the rights or reputations of others; (b) for the protection of national security; (c) public order (*ordre public*) and (d) public health or morals. And the reasons of necessity for the system described by the government do not meet any of the reasons for restrictions approved by the Covenant.

(2) Lack of understanding of Japanese courts with regard to the relationship between the concept of “Public Welfare” and Article 19 of the Covenant

768. It is evident that the situation where the textbook authorization is forcing the authors or the companies to exercise self-imposed restrictions or make corrections and deletions against their will indicates that the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of "public welfare(specifically, restrictions from the necessity of textbook authorization)", a concept which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant.”

769. However, the courts of Japan have been ignoring such indication made by the Committee.

770. The Supreme Court on March 16, 1993 handed down the decision over the unconstitutionality of the textbook authorization system and its operation. This is the Supreme Court decision of so-called the first lawsuit of Textbook Trial, and the Supreme Court ruled that “even the freedom of expression is guaranteed by Article 21 section 1 of the constitution, it should not be unlimitedly guaranteed. The freedom of expression is subject to certain restrictions which are rational and absolutely necessary on the ground of public welfare. Whether the restrictions are recognized as “rational and absolutely necessary” on the ground of public welfare should be determined after weighing the extent of freedom that requires restrictions, the content and nature of the freedom to be restricted and specific restrictions to be imposed.” According to the ruling, the Supreme Court abstractly approved the necessity of authorization as stated in the Periodic Report, and ruled that “the restrictions imposed on the freedom of speech by authorization system should be considered as the ones which are rational and absolutely necessary.” Superficially, this decision somehow provided examination on “public welfare”, but this examination does not identify and list the reasons for restriction as seen in Article 19, instead, it abstractly compares the necessity of the system and the importance of the right. Such standard is extremely arbitrary because the value judgment of the judge directly reflected in the conclusion.

771. To criticize against the ruling, the appellant (plaintiff: Saburo Ienaga) filed a lawsuit in the third lawsuit of Textbook Trial to demand the court to decide the compatibility of the Covenant and the authorization system, asserting the violation of Article 19 of the Covenant which provides the reasons for restrictions different from the constitution. However, on August 29, 1997, the third trial at the Supreme Court, referring to the previous decision, ruled that the authorization system is constitutional and that “it is clear from its wordings that the provisions of Article 19 do not intend to

deny the implementation of restrictions which are rational and absolutely necessary on the ground of public welfare.” The court ruling ignored the criteria of the Covenant and subordinated the reasons for restriction of Article 19 to the concept of “public welfare” of the constitution that allows ambiguous and arbitrary interpretation.

772. This clearly shows that as the Committee repeatedly pointed out, the risk of the concept of “public welfare” has become reality. The Committee commented after examining the Fourth Periodic Report that the concept of "public welfare" which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant and that the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant. However, by subordinating the interpretation of the provisions of the Covenant to the domestic laws, the Supreme Court has trampled on the most important principle that the Covenant takes precedence over domestic laws.

773. In the above comment, the Committee pointed out the necessity of International Human Rights education especially for judges, prosecutors and administration. However, as manifested in the above ruling, the awareness of judges in Japan toward the Covenant has not been improved at all.

774. (3) With the actual operation of the authorization system in mind, the JFBA takes position that the current authorization system is against Article 19 of the Covenant. Since the state interference into education shall be as minimal as possible to guarantee the free educational activities, even if the system continues to be operated, the JFBA recommends that the government admit that the criteria of the current textbook authorization system are preliminary one and just an outline of the standards and establish proper legislation for the system.

Restriction on Mass Media

A. Conclusions and Recommendations

775.

1. The government is not able to prevent any pressure and influence on broadcasting media imposed by politicians mainly from the ruling party as the Ministry of Internal Affairs and Communications (MIC) governs the administration of broadcasting. MIC should not control broadcasting stations via administrative guidance through the production process of programs including the content, editing, and stage-direction.
2. The government should establish an independent administrative committee to watch over broadcasting administration to eliminate political pressure against broadcasting stations.

3. The government should delete Article 53 (8)-2 from the bill of the amendment of the Broadcast Law
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B. Subjects of Concern and Recommendations of the Human Rights Committee

776. Nothing is mentioned on this matter.

C. The Government's Response and its Fifth Periodic Report

777. Nothing is mentioned on this matter.

D. Position of the JFBA

1. An attempt of dominance and intervention by the power into media as manifested in the case of NHK (Japan Broadcasting Corporation)'s program on "comfort women"

778. The Japanese Constitution stipulates in Article 21 that "Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated" to guarantee assembly, association, freedom of speech, prohibition of censorship, and secrecy of communication.

779. However, in reality, domination and intervention into mass media by the power are actually conducted.

780. On January 29, 2007, Tokyo High Court ruled that NHK altered the content of the draft program under the pressure of some politicians just before it was finalized. The program was dealing with a comfort women issue during World War 2. The program was highlighting the people's court bringing a charge against the government. According to the Tokyo High Court's judgment, after meeting with the government high officials (deputy chief cabinet secretary) NHK executives altered the content of the program against the will of the producer, by instructing him to eliminate the scene of the people's court handing down the judgment or the scene of victims' (foreign female) testimony. As the background of this abnormal incident, there is a reality where NHK usually visits almost the half of the Diet members individually to make explanations before the Diet approval on the budget bill in order to facilitate the approval of the bill.

781. Broadcasting stations are supposed to be independent and free from any influence by politicians.

782. In Japan, shortly after World War 2, three major laws pertaining broadcasting

were established, and an independent regulatory commission (Radio Regulatory Commission) that was independent from the government and the ruling party was in charge of broadcast administration. Therefore, the budget plan of NHK was explained by the commission to the Diet, which prevented an intervention from politics.

783. However, soon after Japan recovered its sovereignty, the ruling party abolished the Radio Regulatory Commission and put the broadcast administration under the General Post Office. This practice was quite exceptional for world leading countries.

784. As a result, NHK has lost its shield of independent regulatory commission, and its executives have to be directly pressed by politicians, allowing them to intervene into the individual program as finally seen in the case of NHK “comfort women” program.

785. Furthermore, the MIC issued “broadcast order” to NHK to say “Report on the abduction by North Korea should be prioritized”, giving an instruction to individual matters.

786. The same can be said to commercial TV stations. In cases of commercial TV stations, they are subject to strict administration guidance on the production of programs including the content of a program, stage-direction and editing, since the MIC, a central government agency under the influence of the ruling party is the responsible authority to update their licenses. In recent days, the MIC has been picking up minor mistakes of such TV stations and frequently issues “written reprimand” as an administrative punishment, but, to be in line with the principle of freedom of report, the MIC should be more moderate and humble. Under the current circumstances, independence of each commercial TV station from administrative bodies and politicians has been hindered, and as a result, the monitoring function on the intervention of the power within all the commercial TV stations is generally weakening. For instance, in the report on the Tokyo High Court decision on the case where NHK sabotaging its “comfort women” program, the fact that Tokyo High Court recognized that NHK altered its draft program before the program was finalized under the pressure of some politicians was not accurately reported, but the report was deviated to give an impression that the court did not recognize the direct impact from the politicians. Among the major leading countries, Japan and Russia may be the only two countries where broadcasting administrative power is controlled by the government and the ruling party. It is urged that Japan should reestablish the independent regulatory commission in order to secure independency of broadcasting.

2. A bill for the amendment of Broadcast Law

787. With the critical public opinions against a series of scandals by media as the

background, as a part of efforts to try to restrict media, the MIC finally submitted a bill for the amendment of Broadcast Law, after an incident of one information program's data fabrication happened at a commercial TV station.

On June 19, House of Representatives started the deliberations on the bill.

788. Article 53 (8)-2 of the amendment of the Law stipulates that 1) When Prime Minister recognizes that a broadcaster (excluding contractors) produces, via broadcasting, makes a false explanation to mislead the viewers into a false fact, which exerts or can exert an adverse effect on national economy or people's lives, or contracts to do so, Prime Minister can demand the broadcaster to prepare and submit action plan to prevent recurrence of such conduct within the designated period; 2) When the Minister of Internal Affairs and Communications accepts such plan, he/she releases the plan with his /her comments after he/her closely examined the plan.

789. The above provisions, however, use many ambiguous wording including "misleading", "adverse effect" and "can exert". Such ambiguity of the provisions actually allows the Minister of Internal Affairs and Communications to intervene into the broadcasting content more easily via evaluation on each program. Hence, the bill for the amendment of Broadcast Law is highly problematic in terms of the risk of infringement of the freedom of broadcast, and also there is keen suspicion that the provisions are against Article 21 of the constitution.

3. Making broadcast station as designated public institution by National emergency legislation

790. By national emergency laws stated that broadcast stations are designated public institutions and they are obligated to conduct necessary measures. Under such laws, there is a risk that the government puts media under its control, infringes the freedom of report including citizen's right to know, free criticism by media and function of monitor the power and distracts the basis of popular sovereignty and democracy.

4. Independency of broadcasting administration from the government

791. As stated in 1, the only countries where the government controls the broadcast administration are Japan and Russia among the leading nations of the world. There is Federal Communication Committee (FCC) in USA, Independent TV Committee and Broadcast Standard Committee in UK, CSA in France, and broadcast administration bodies in Germany are located in each state of the country. In Italy, Autorita was established (this body is run by national fund and broadcast stations' funds). In Asia, a new Broadcast Law was enacted in Korea in 2000 to establish the independent regulatory organization called Korea Broadcast Committee. In Taiwan, in 2006, a

National communication and broadcast committee which has strong independency aspects was established.

792. In addition in Korea, Speech mediation committee was established with the introduction of the right of counterargument. This Committee (consists of judges, lawyers, mass media, intellectuals) was funded by Broadcast development funds.

793. In Japan, in 1950, an independent regulatory commission was established, but it was abolished and the authorities were transferred to the General Post Office in 1952. It is urged now that in Japan an independent regulatory commission shall be in charge of broadcast administration.

5. Establishment of voluntary cross-functional organization

794. In TV industry, there is a voluntary cross-functional organization called BPO which deals with juvenile matters, human rights infringements, and broadcast ethics. However, as for newspapers and magazine media, there is no such cross-industrial organization. In order of protect the freedom of expression from the power of the state, cross-industrial organization such as a press council consisting of scholars, people from mass media and lawyers recommended by the Bar association should be established.

795. And this council should have functions to investigate, mediate and decide the defamation by mass media, infringement of privacy. As means of providing redress to victims of report, such press council can provide 1) simple, prompt and reasonable redress, 2) more possibility of redress out of legal scope and 3) auto purification can be expected inside of mass media and there is a possibility to prevent damage by press.

796. Currently, the attempts to regulate mass media by the power of the state on the ground of defamation and infringement of privacy are underway, but by establishing such organization, intervention of the power can be prevented. It is desired that press council will be established as soon as possible.

Section 2: The issue of the Hinomaru, the rising-sun flag, And the Kimigayo national anthem (Article 18 of the Covenant)

A. Conclusions and Recommendations

797.

<p>When Kimigayo is sung as the national anthem and Hinomaru is hoisted as the national flag at graduation and entrance ceremonies of public elementary, junior high and high schools, the government should not force the teachers or the staff who do not</p>

stand up for Hinomaru or sing Kimigayo, on the ground of their thoughts and consciousness, to rise and sing Kimigayo in unison by issuing directive orders. Such teachers and staff should not face the disciplinary punishment or any ill-treatment.

B. Subjects of Concern and Recommendations of the Human Rights Committee

798. Nothing is mentioned on this matter.

C. The Government's Response and its Fifth Periodic Report

1. History surrounding Hinomaru and Kimigayo

799. Hinomaru is said to be symbolizing a rising sun. The Grand Council of State (Dajokan) of the Meiji government issued a proclamation which defined Hinomaru as the national flag of Japan. Hinomaru was, then used by commercial vessels or trading ship as a national flag. Hinomaru was also used for military flag and designated as national flag for Japanese army and marine forces. On the other hand, as for Kimigayo, there was no written law to clearly stipulate that Kimigayo is anthem, but it has been as national anthem. "Kimi" in Kimigayo means that an emperor and "Kimigayo" means the reign of an emperor who used to be the sovereign under the Meiji Constitution. Lyrics of "Kimigayo" was written to admire an emperor. According to the decision at Tokyo District Court, it notes that the flag and anthem were together a "spiritual pillar" of militarism after Meiji era until the end of World War 2".

2. After World War

800. In August 1945, Japan accepted Potsdam Declaration which brought World War 2 to an end. Under the new constitution enacted in 1947, it was declared that sovereign power resides with the people. However, without any unambiguous legal grounds, Hinomaru and Kimigayo continued to be used as a national flag and anthem, and the Ministry of Education used to say that it is preferable for schools to hoist the national flags and sing the anthem in unison in the events on national holidays.

801. In 1999 when the National Flag and National Anthem Law was established and implemented, it was provided by the law that Hinomaru and Kimigayo are used as the national flag and the anthem. The government explained that "Kimi" of Kimigayo means that "an emperor as the symbol of the state". Ever since, under the guidance of the MEXT (former Ministry of Education changed its name to Ministry of Education, Culture, Sports, Science and Technology), in graduation and entrance ceremonies at public elementary, junior high, and high schools, students, teachers, school staff and parents were demanded to stand up for Hinomaru and sing Kimigayo in unison. Schools

ordered for a music teacher to play the piano to accompany the singing of the anthem. There have been many cases where teachers and staff who refused to stand up or sing or did not play piano were ordered to leave the ceremony hall or faced disciplinary punishment for violating the directive order from the head masters.

3. Decision handed down at Tokyo District Court on September 21, 2006

802. A group of 401 teachers and staff Tokyo filed a suit and claimed that their constitutional rights had been infringed upon for being punished and forced to go through a retraining program after they had refused to stand up and face the Hinomaru national flag and to sing the "Kimigayo" anthem at school events. Tokyo District Court noted that the fact that Hinomaru flag and the Kimigayo anthem were used as spiritual pillars of Japan's past militarism cannot be denied and said that even now that they are recognized as a national flag and an anthem as provided by the law, from the political and religious points of view, they were not value-neutral and continued to state that therefore, there are more than a few people who oppose standing up for the flag and singing the anthem in unison at graduation and entrance ceremonies at public schools and the freedom of thoughts and consciousness of those who have such view of the world, principles and opinions should be acknowledged as the right to be constitutionally protected as long as it does not go against the public welfare. As for the observation that the headmaster's requirement of teachers to stand up and sing the anthem is a mere formality which orders an external act and does not restrain their spiritual activities, the court ruled that "people's spiritual activities are closely intertwined with an external act and it is difficult and unnatural to dissociate those two and teachers and librarians are not obliged to sing the "Kimigayo" anthem at school events, declaring that punishing teachers for refusing to sing the anthem in front of the Hinomaru sun flag infringes upon their freedom of thought as guaranteed under the Constitution." Tokyo metropolitan education board appealed the ruling.

4. The Supreme Court decision on February 27, 2007

803. In the case where an school teacher who had been reprimanded for having refused to play the piano at her school's entrance ceremony for singing the national anthem in unison, the music teacher argued that she could not sing or accompany to the national anthem Kimigayo, because it had been associated with Japan's aggression against Asia in the past. While the Supreme Court noted that "it can be said that such opinion regarding the role that Kimigayo played in the past is the appellant's views on history or the world , or social belief, and although it is the appellant's choice not to play piano at the entrance ceremony based on the appellant's views on history or the world, the act of singing the national anthem in unison and playing the piano for that purpose is generally not associated with someone's views on history or the world; thus

an order to play the piano for the national anthem cannot be regarded as negating such views.” And the Supreme Court concluded that the order to play the piano for the national anthem is not incompatible with Article 19 of the Constitution, and dismissed the appeal.

5. The government’s position

804. Tokyo District Court ruled that ordering teachers and staff to stand up in front of Hinomaru and sing Kimigayo in unison at graduation and entrance ceremonies of public schools and reprimanding the ones who refused to do so are infringement of freedom of thought and consciousness, but Tokyo metropolitan education boards appealed this ruling. After the Supreme Court decision, it is anticipated that the government and education boards in each region will demand teachers and staff to stand up and sing, and reprimand the ones who refused to do so. The Fifth Periodic Report does not discuss this issue.

D. Position of the JFBA

1. The conclusion of Tokyo District Court is reasonable.

805. Article 18 paragraph 1 states that “everyone shall have the right to freedom of thought, conscience and religion“, and this right includes freedom of thoughts on all matters, personal conviction and the commitment to religion or belief(General Comment 22-1). “These thoughts and consciousness” mentioned in the decision of Tokyo District Court and “these views on history or the world” mentioned in the Supreme Court decision are both included in the freedom of thought and consciousness. Tokyo District Court recognized the infringement of such freedom; therefore, its decision is reasonable.

806. The Supreme Court ruled that the act of singing the national anthem in unison and playing the piano for that purpose is generally not associated with someone's views on history or the world, but the focal point here is the freedom of thought and consciousness of the appellant and it is unreasonable to “generalize” it. The school principal’s directive order itself and the act of reprimanding the appellant are the infringement of appellant’s freedom of thought and consciousness and a violation of Article 18 paragraph 1.

2. The Committee’s concluding observations and general comments

807. The Committee, in the concluding observation⁸¹ on the Periodic Report submitted by Zambia, stated that it is irrational request to give a salute to the national flag as a condition to enter the school in the State Party and a violation of Article 18 and 24 of the Covenant.” The Committee also states, in the General Comment 22, that although the Covenant does not mention the right of conscientious refusal, the use of force to take someone’s life is contradicting the freedom of consciousness and the rights of religion and creed and therefore such right shall be led from the Covenant”. The right of conscientious refusal shall not be limited to conscientious objection to conscription. The above indication in the concluding observations on Zambia’s report is one of the scenes of conscientious refusal.⁸²

808. The above observation is mentioning the conditions to enter a school of the State Party, but the same conclusion can be applied to the treatment
It is possible to consider that to refuse to stand up in front of Hinomaru and sing Kimigayo at ceremonies at public schools based on the roles that Hinomaru and Kimigayo played during World War 2 is another scene of conscientious refusal.

3. Conclusion

809. As stated above, there have been more than a few cases where teachers and staff who refuse to stand up in front of Hinomaru and sing Kimigayo at ceremonies at public schools are reprimanded and such treatment is a violation of Article 18 paragraph 1.

Section 3: Freedom of Election Campaigns (Articles 25 and 19 of the Covenant)

A. Conclusions and Recommendation

810.

The Public Office Election Law in Japan places an outright prohibition on door-to-door canvassing by all candidates and voters and sets considerable limitations on distribution of documents for election campaigns. Violations of these provisions are punishable by imprisonment or fines, as well as suspension of civil rights to vote or be elected for public office for a period of five years or less. This is in violation of Articles 25 and 19 of the Covenant, protecting the freedom of election campaigns, of all citizens through free expression, including documents.

The Government should immediately amend the Public Office Elections Law and the courts should clearly declare the protection of these rights by the Covenant in cases

⁸¹ CCPR/C/79/Add.62

⁸² The International Covenant on Civil and Political Rights Second Edition p513

involving these issues.

B. Subjects of Concern and Recommendations of the Human Rights Committee

811. 1. The limitations on the election campaigns in Japan were an issue that attracted the attention of Committee Members as early as in the examination of the Third Periodic Report of Japan. During the session, Ms. Evatt, a Member of the Committee raised concerns about the very tight restrictions on the people taking part in election campaigns, and asked about how the restrictions met the requirements of Article 25 for a free and open electoral process. It was a question that represented the concerns of other Members.

812. The Government, however, responded merely that “if the visiting of houses is permitted in election campaign in Japan, it might be the occasion of receiving bribes and so on, and the freedom and fairness of the election will not be fully secured. This is a concern, and we are of the view that this restraint is on reasonable grounds,” and did not clarify how the tight restrictions complied with Article 25.

As a result, in the Concluding Comments after the examination of the Third Periodic Report, the Committee regretted “that appears to be a restrictive approach in certain laws and decisions as to the respect of the right to freedom of expression” as part of the principal subjects of concern (paragraph 14).

813. 2. Again, five years later, in the Fourth Periodic Report of Japan, there was no specific account on this subject, and again Ms. Evatt asked how it was possible to justify the prohibition of door-to-door canvassing, distribution of brochures and use of fax machines as being compatible with the Covenant. She thought that the explanation on the concern for bribes and ensuring equality was not sufficient.

The Government repeated its response of five years ago, saying that it thought the restrictions necessary, as visiting homes could invite bribery. It noted that unfortunately, there were bribery cases during elections in Japan, and again did not explain in detail on the relation between the need for tight legal restrictions and the Covenant.

814. 3. The Concluding Observations on the Fourth Periodic Report does not mention this issue in its Concerns or Recommendations directly, but its concern “about the restrictions which can be placed on the rights guaranteed in the Covenant on the grounds of ‘public welfare’, a concept which is vague and open-ended and which may permit restrictions exceeding those permissible under the Covenant. Following upon its previous observations, the Committee once again strongly recommends to the State party to bring its internal law into conformity with the Covenant,” clearly includes this issue (paragraph 8).

815. As seen from the above, the Committee has expressed its concern about the strict restrictions on election campaigns in Japan, in which the law restricts the rights beyond what is permitted under the Covenant, and has strongly recommended improvement.

C. The Government's Response and the Fifth Periodic Report

816. 1. The Government has not responded to the repeated requests from the Committee in good faith. For the upcoming examination, it merely mentioned provisions regarding the minimum age for the right to vote as well as to be elected to be Members of the Diet, the term of office for the Members, the number of seats and constituencies, in "II General Political Structure B. the Legislature" of the Core Document. It also states in "III General Legal Framework for Human Rights Protection C. Protection and Restriction of Human Rights by the Constitution 1. Protection of Human Rights in the Constitution" in the same document, that the Constitution protects the rights, including those to universal suffrage, as well as the freedom expression.

In the Fifth Periodic Report, it also simply notes on Article 25 "Right to Take Part in Public Affairs," in "Part 2 Article-by-Article Report," "As stated in previous reports" (paragraph 369).

817. 2. As seen from the above, since the examination of the Third Periodic Report, the Committee has consistently asked for positive explanation and dialogue on how the strict restrictions on election campaigns in Japan comply with the Articles 25 and 19 of the Covenant protecting the freedom of election campaigns, and whether the concern for bribery and ensuring equality in the Government's response satisfies the principle of proportionality. Yet since the Government does not respond directly and faithfully to the request, the Committee has expressed its concern that the restrictions may be a violation of the Covenant, and recommended amending the laws.

The Fifth Periodic Report does not indicate any progress or improvement on this issue. The Government should provide the Committee more detailed information on the restrictions placed on election campaigns in Japan.

D. Position of the JFBA

818. 1. Articles 19 and 25 of the Covenant protect the right of all citizens to vote and be elected "in a genuine periodic elections which shall be by universal and equal suffrage." This right as a matter of course includes the freedom to conduct election campaigns with door-to-door canvassing and distribution of documents⁸³. State parties, therefore have a duty through Article 2 of the Covenant to immediately

⁸³ Paragraphs 12, 21 and 25 of the General Comment 25.

and unconditionally implement free elections, in which the rights included in Articles 19 and 25 are protected. Failure to fulfill the duty cannot be justified by domestic political, social, cultural or economic reasons⁸⁴.

819. 2. In Japan, however, elections campaigns through speeches and documents are severely restricted by punishments in the Public Office Election Law.

For example, all candidates, supporters and voters are banned from conducting door-to-door canvassing. Violation of the prohibition results in imprisonment for a year or less, or a fine of 300,000 yen or less (Articles 138 and 239 of the Public Office Election Law). Distribution of documents calling for support to oneself is also limited, in terms of the kind of documents and in the number of documents for each election. Any other documents cannot be distributed. For example, in elections for Members of the House of Representatives of the Diet, a candidate in the single-seat constituency may distribute only 35,000 postcards and two kinds of flyers. For elections for municipal councils, it is 2,000 postcards for each candidate, and no flyers or brochures calling for support may be distributed. Violation of this provision is punishable by an imprisonment of two years or less or a fine of 500,000 yen or less (Articles 142 and 243 of the Public Office Election Law). Anyone found guilty of these crimes can be additionally punished with a suspension of rights to vote or to be elected for a period of five years or less. If a candidate, who was voted in office, were found guilty, he/she would be disqualified (Article 252 of the Public Office Election Law)⁸⁵.

820. 3. According to the criminal statistics of the National Police Agency, in the period since 1946 until today, 41,697 citizens have been arrested for the crime of door-to-door canvassing and 49,592 for the unlawful distribution of documents. They were convicted and deprived of their civil rights. Since the ratification of the International Covenant on Civil and Political Rights in 1979 alone, 4,780 and 7,434 citizens have been convicted respectively⁸⁶.

821. The fact that so many citizens have been punished and deprived of their qualifications in elections, in which the freedom of expression and speech should be most protected, is a serious issue that should not be allowed in a democratic society.

822. 4. The strict restrictions on election campaigns in Japan have been receiving strong calls for abolishment from early on from some members of constitutional experts, the press and politicians. The policy council on the election system set up by the Government in 1967 issued a report proposing the liberalization of door-to-door

⁸⁴ Paragraphs 13 and 14 of the General Comment 31.

⁸⁵ Annex 4: Public Office Election Law.

⁸⁶ Annex 5: Report "Number of cases and persons in cases of door-to-door canvassing and unlawful distribution of documents."

canvassing and easing the limitations on distribution of documents, but the Government did not prepare any amendment of the Law. Only in October 1993, the Government (under Prime Minister Hosokawa) submitted a draft amendment bill of the Public Office Election Law, which introduced the single-seat constituency as well as liberalized door-to-door canvassing, in the Diet. The draft was adopted in the House of Representatives, but was voted down in the House of Councilors. Later, after consultations in the conference committee of both Houses in March of the following 1994, the amended draft bill which prohibited door-to-door canvassing was adopted, under the agreement of government and opposition parties. As a result, the liberalization of door-to-door canvassing has been left unrealized, and the ban continues to this day.

In the discussions on the issue in the Diet, neither the Government nor the Diet Members explained that with the ratification of the International Covenant on Civil and Political Rights, Japan has the duty to implement within its jurisdiction, the “genuine and free elections” required under the Covenant. It is inevitable that both the Government and the Diet are seen to have no positive enthusiasm in implementing free and genuine elections required under Article 25 of the Covenant.

823. 5. The courts are also extremely reluctant to protect the freedom of election campaigns. Article 21 of the Constitution of Japan protects the freedom of all expressions, including speech and publication. So a considerable number of citizens prosecuted for door-to-door canvassing or unlawful distribution of documents argued that the restrictions under the Public Office Election Law violated Article 21 of the Constitution. In the 1970s to the 1980s, there were a total of ten cases in the district and appeals courts, that decided the defendants were not guilty as the restrictions were against Article 21 of the Constitution. Yet the Supreme Court has repeatedly held that the restrictions under the Public Office Election Law were necessary and unavoidable for the “public welfare” and therefore not against Article 21 of the Constitution, and now it seems unlikely that the courts would issue a judgment in favor of the protection of the freedom of election campaigns⁸⁷.

824. 6. Since Japan ratified the International Covenant on Civil and Political Rights in 1979, there was a case, in which the defendant argued his innocence on the basis of Articles 19 and 25 of the Covenant. It was the case of Mr. Hourri, a postal worker, who was accused of door-to-door canvassing and unlawful distribution of documents in the election of Members of both Houses of the Diet in 1986. This case was taken up by Ms. Evatt in the above question to the Japanese Government during the examination of the Fourth Periodic Report. The concern the Committee Members expressed on the restriction on the rights under the Covenant on the grounds of “public welfare” in the Committee’s Concluding Comments adopted in November 1998 reflected this case.

⁸⁷ Annex 6: Five major Supreme Court judgments on door-to-door canvassing and distribution of documents.

825. 7. However, in spite of the Committee's Concluding Observations, the Hiroshima Appeals Court held the defendant guilty in April 1999. It gave the following reasons for their interpretation of the Covenant. (1) Article 25 of the Covenant does not protect the right of election campaigns, (2) Article 19 of the Covenant protects the right of election campaigns, but the provisions in the Public Office Election Law prohibiting door-to-door canvassing are necessary and unavoidable restrictions for the protection of public welfare, and because of the same reasons that they do not violate Article 21 of the Constitution, do not violate Article 19 of the Covenant⁸⁸.

This judgment plainly indicates that the domestic legal concept of "public welfare" is used as grounds for broad restrictions on the rights under the Covenant.

826. 8. Mr. Hourri appealed, but the Supreme Court dismissed his appeal in September 2002. It simply stated that there was no grounds for appeal, since the provisions of the Public Office Election Law are interpreted as being not in violation of Articles 19 and 25 of the Covenant. There was no explanation on why they do not violate Articles 19 and 25 of the Covenant. How the rights under the Covenant are protected in the country is the major concern of the Human Rights Committee, and the Supreme Court should have explained the reasons why there was no violation of the Covenant⁸⁹.

827. 9. Since then, there was another case raising the question of the contradiction between the Covenant and the Public Office Election Law. It is the Oishi Case included in this report.

828. Mr. Oishi was prosecuted at the Oita District Court for door-to-door canvassing and unlawful distribution of documents. In the trials, the defendant and his lawyers argued that the restrictions under the Public Office Election Law were in violation of Articles 19 and 25 of the International Covenant on Civil and Political Rights, and succeeded in calling Ms. E. Evatt, the former Member of the Human Rights Committee, to be examined as witness. She made the following clear statements. (1) The Human Rights Committee is a body under the treaty given the mandate to interpret the Covenant, and the State Parties should respect the views of the Committee. (2) Both Articles 19 and 25 protect the rights of election campaigns. (3) In considering restrictions on the rights protected under the Covenant, the Committee uses the "principle of proportionality." (4) Under the "principle of proportionality," the existence of the threat or obstacle that needs to be eliminated must be clearly proven, and the permissible restrictions are limited to only those that are necessary and in proportion to the threat. (5) It is not clear whether the free door-to-door canvassing and distribution of

⁸⁸ Annex 7: Hourri Case, Hiroshima Appeals Court Judgment.

⁸⁹ Annex 8: Hourri Case, Supreme Court Judgment.

documents constitute a threat to genuine elections, and the necessity of the restrictions cannot be justified. (6) Mr. Oishi's actions did not cause any threat, and the punishment and sanctions are too extreme, therefore, are not compatible with the "principle of proportionality."

829. However in January 2006, the Oita District Court held that Mr. Oishi was guilty, and sentenced him to a fine of 150,000 yen and a suspension of his civil rights to vote and be elected for three years.

830. The summary of the judgment is as follows. (1) Article 25 of the Covenant does not protect the right of election campaigns, but Article 19 does. (2) The restrictions under the Public Office Election Law is provided for by law, and has the purpose of protecting the "public order" of the free and fair elections. (3) Liberalizing door-to-door canvassing and distribution of documents may create a hotbed for bribery, increase campaign costs, and would infringe on the freedom and fairness of the elections. (4) The restrictions place limitations on merely one of the many methods of campaign, and constitute the minimum level of restriction. (5) Therefore, the restrictions can be justified as being minimum, reasonable in light of the purpose, and necessary⁹⁰.

831. The court's reasoning indicates that it did not correctly understand the "principle of proportionality" that Ms. Evatt explained, and allows restrictions based on "the standard of reasonability." It does not agree with the views of the Human Rights Committee⁹¹.

832. 10. Mr. Oishi appealed, but the Fukuoka Appeals Court revoked the suspension of civil rights for the period of three years in the original judgment, but upheld the 150,000 yen fine. The main points of the judgment are as follows. (1) Article 25 of the Covenant does not protect the freedom of election campaigns, but Article 19 does. (2) The Covenant places no duty on the State Party to implement a particular system of elections. (3) How the election system is designed, and how to restrict election campaigns are left to the legislative discretion of the Diet, taking into consideration the circumstances in each State Party. (4) The assessment of the justification of restrictions on election campaigns should be done taking overall consideration of matters such as whether the restrictions are reasonably related to the purpose of the restrictions, balance of interests that is lost by the restrictions on the one hand and gained on the other, and availability of alternative measures. "Strict standards" of Less Restrictive Alternative (LRA) or the principle of proportionality do not apply. (5) Free door-to-door canvassing and distribution of documents create various problems under the circumstances in Japan, and as the restrictions are reasonable and do not go beyond what is necessary and

⁹⁰ Annex 9: Oishi Case, Oita District Court Judgment.

⁹¹ Annex 10: "Comment on the District Court Judgment," E. Evatt.

unavoidable, it is within the scope of the legislative discretion of the Diet. Therefore there is no violation of Article 19 of the Covenant⁹².

833. The rights under the Covenant may not be restricted under a different standard from those under the Covenant, and the non-fulfillment of a State Party's obligation under the Covenant cannot be justified by its political, cultural and social circumstances. This has been clearly stated by the Human Rights Committee. The Fukuoka Appeals Court judgment is clearly in violation of the obligation under the Covenant. Mr. Oishi appealed, and the case is now pending in the Supreme Court.

<Note> On 28 January 2008, the Supreme Court of Japan dismissed the appeal, ruling that the ban on door-to-door canvassing did not violate articles 19 and 25 of the Covenant.⁹³

834. 11. In the end, the courts in Japan do not respect the views of the Human Rights Committee, and do not give appropriate interpretation to the Covenant. The Oishi Case is a typical example, showing how the rights protected under the Covenant are restricted under the standard different from the one under the Covenant, beyond what is permitted under the Covenant.

835. The Government should immediately amend the Public Office Election Law to liberalize door-to-door canvassing, and remove the limitations on the distribution of documents. Until that happens, the courts should declare in cases involving election campaigns, that free election campaign is a citizens' right fully protected under the Covenant.

⁹² Annex 11: Oishi Case, Fukuoka Appeals Court Judgment.

⁹³ Annex 12: Oishi Case, Supreme Court Judgment.