

Case

A Case concerning the Distribution of a Political Party's Organ Paper by Government Officials

(Supreme Court, P. B. 2, December 7, 2012) Hanrei-jiho No.2174, pp.21-39

Keywords: freedom of expression, political neutrality of a civil servant, Article 21(1) of the Constitution of Japan, Article 19 of the International Covenant on Civil and Political Rights

[Facts]

One of the accused was a former employee of the now-defunct Social Insurance Agency the predecessor of the Japan Pension Service (*Horikoshi* case). The other was a former Assistant Division Chief at the Ministry of Health, Labour and Welfare (*Setagaya* case). They handed out the Japanese Communist Party's (JCP) organ newspaper, with the intention of supporting the JCP, on their day off, far from their workplaces, and without identifying themselves as public servants. They were indicted on charges that these activities were in violation of Article 102 paragraph 1¹⁾ and Article 110 paragraph 1 (xix)²⁾ before it was amended in 2009 of the National Public Service Law (hereinafter referred to as the NPSL) and Rule 14-7 paragraph 6 (7)³⁾ of the Rules of the National Personnel Authority (hereinafter referred to as the RNPA) (hereinafter together referred to as "the Rules"). The only differences between the two cases were the accuseds' respective positions and level of authority in their work places. The accused in the *Horikoshi* case had no discretionary power in his role nor any administrative authority as he did not hold a managerial post, while the accused in the *Setagaya* case held a position where he directly supervised many other government officials.

In the judgment of the first instance, fines of 100,000 yen (ca. \$100) were imposed on both of the accused, suspended for two years. However, in the second instance of the *Horikoshi* case, the Tokyo High Court said that application of the Rules to the accused's

1) The provision reads as follows: "Officials shall not solicit, or receive, or be in any manner concerned in soliciting or receiving any subscription or other benefit for any political party or political purpose, or engage in any political acts as provided for by rules of the National Personnel Authority other than to exercise his/her right to vote."

2) The provision reads as follows: "Any person who falls under any of the following items shall be punished by imprisonment with labor for not more than three years or a fine of not more than one hundred thousand yen: ... (xix) Any person who has violated the restrictions on political acts provided for in paragraph 1 of Article 102;..."

3) The provision reads as follows: "Political acts provided for in Article 102 paragraph 1 of the Law includes the following actions: ... (vii) issuing, editing, and handing out organ papers or other publication of parties or groups or supporting these activities"

activity meant that the Rules' restriction on freedom of political activities by a civil servant went beyond what was necessary and was therefore too extensive. The Rules were contrary to a number of Articles of the Constitution of Japan (the Constitution), including Article 19, which guarantees freedom of thought, Article 21 paragraph 1, which guarantees freedom of expression, and Article 31, which envisages the principle of *nulla poena sine lege* (no punishment without law). Therefore, it found the accused not guilty. Nevertheless, in the second trial of the *Setagaya* case, the court found that the Rules were consistent with the Constitution and denied the appeal. Both cases were appealed in the Supreme Court, by the Prosecutor in the *Horikoshi* case, and by the Defendant in the *Setagaya* case.

[Judgments]

1. Constitutionality of the Rules

The aims of the Rules are to establish political neutrality and the trust of Japanese citizens in the civil service by maintaining the political neutrality of officials in performing their function. The "political activities" prohibited in paragraph 6 (vii) and (xiii) of the RNPA include only the activities which substantially impair the neutrality of civil servants. Whether or not the activities would essentially impair the neutrality should be decided comprehensively based on the post the public official held as well as on the details of the activities in which he/she engaged. The Rules applied in the present cases are necessary and reasonable under the Constitution. Moreover, what Article 102 paragraph 1 of the NPSL entrusts to the RNPA is merely to specifically define the types of political activities mentioned above as objects for restriction. Hence, this entrustment is not prohibited in the Constitution. Furthermore, the existence of criminal punishment on the prohibited activities is not itself unconstitutional. This is because there may be a situation where an administrative disposition such as disciplinary dismissal is not sufficient compared to the significance of the activity. In such situation, imposing a criminal punishment would be appropriate. The accused's activity has greater seriousness than an activity for which administrative measures would be imposed. For these reasons, the Rules are not inconsistent with the Articles of the Constitution, including Article 19, 21 paragraph 1, and 31.

2. Coincidence with the definition of a crime

(a) The *Horikoshi* case (not guilty)

The activity of the accused was carried out by a civil servant who held no managerial position and had no discretionary power. And he did not identify himself as a government worker. Therefore, there is no substantial possibility of harming the political neutrality of a government official.

(b) The *Setagaya* case (guilty)

The activity of the accused may have revealed the personal politics of a government

official who held a managerial position. Hence, the probability that these personal politics would emerge as part of his function is higher and this could affect the function of civil servants who work under his direction and the administration of the organization. Therefore, even taking into consideration certain circumstances, including the fact that the activity was carried out on his day off, the activity falls under the definition of a crime, since it was an act which substantially impaired the neutrality of a civil servant, and a criminal punishment should be imposed.

[Commentary]

In the *Sarufutsu* case,⁴⁾ the precedent jurisprudence on the freedom of political activities of civil servants, the specific circumstances, including the position of a civil servant, and whether the actions occurred either inside or outside of working hours, were not considered. In the present cases, however, it seems that the definition of a civil servant and prohibited activities were interpreted restrictively by using the concept of “comprehensive consideration,” which means to consider the above-mentioned circumstances in deciding whether the activities may have substantially impaired the neutrality of the civil servant. Nevertheless, some problems relating to this issue have still been left unsolved.

In the present cases, the Supreme Court maintained the view that the rights provided for in the Constitution and the International Covenant on Civil and Political Rights (the Covenant) were identical, and held without specific consideration that there was no violation of the Covenant as the Rules were not inconsistent with the Constitution. The Japanese government and all organizations of the State are obliged to observe in good faith international instruments under Article 98 of the Constitution. In the judgment of the second instance of the *Setagata* case, it seems that the court has stated that it is not the UN Human Rights Committee but only Japanese courts that have the power to interpret the Covenant. However, this is clearly erroneous. The authority to interpret the provisions of international treaties is given not only to Japan.⁵⁾ Moreover, the existence of the Human Rights Committee must not be ignored. It is a treaty body of the Covenant which shows guidelines to interpret the provisions in their activities; for example, general comments on the provisions of the Covenant and views in individual complaint procedure. The International Court of Justice held that while it has no binding power, weight should be given to the committee’s interpretation of the Covenant in these documents.⁶⁾ Japanese courts should interpret and apply in good faith the provisions of the Covenant since the Constitution and the Covenant are different, although they provide for similar rights. The Supreme Court judgments in the

4) *Keishū*, Vol. 28 No.9, at 393.

5) Article 31 of the Vienna Convention on the Law of Treaties provides for the way to interpret provisions of international treaties.

6) International Court of Justice, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, *I.C.J. Reports* 2004, at 136.

present cases are reviewed below in light of the provisions of the Covenant outlined in the next paragraph.

Article 19 of the Covenant enshrines the right to freedom of expression, but paragraph 3 of this Article allows the States to limit this right under three conditions; that these restrictions shall be provided for by law, that they shall have legitimate aims, and finally that they shall be consistent with the principle of proportionality. The Committee has shown its concern about restrictions on political activities by public employees⁷⁾ and has pointed out that paragraph 3 should be interpreted restrictively.⁸⁾

Restrictions on freedom of expression shall be prescribed by law. Moreover, the provisions of such law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. In its view, the Committee admitted that ambiguity of a law which restricts freedom of expression might be made clear by administrative rules or case law.⁹⁾ Therefore, restriction of this right would not necessarily be found to be a violation of the Covenant because it was established by an administrative rule. However, in regards to the Rules, the provisions can be read as a restriction imposed on all civil servants generally. Furthermore, the criteria for the concept of “comprehensive consideration” are ambiguous. Hence, it seems that the Rules and present judgments are not as precise as Article 19 paragraph 3 of the Covenant requires.

In the second instance of the *Setagaya* case, the court found that one of the aims of the Rules was the maintenance of public order, which corresponds to one of legitimate aims for restricting freedom of expression enumerated in paragraph 3. However, under the jurisprudence of individual complaint procedure, the Committee has requested States which have alleged existence of a threat to “public order” to concretely prove the nature and the extent of the threat.¹⁰⁾ Nevertheless, since under the Rules and the courts’ jurisprudence it has not been explained how and to what extent the political activities provided for in the Rules could threaten the neutrality of a civil servant, this “threat” remains more abstract than that the committee requires.

Moreover, even when the aim is legitimate, in the case where a measure to pursue this aim has no proportionality, the measure, namely the restriction of freedom of expression, will be an unreasonable infringement of this right. In this regard, the *Vogt* case must be referred to.¹¹⁾ It was examined by the European Court of Human Rights (ECtHR), which is a treaty

7) Concluding observation, Human Rights Committee, Japan, 30 October 2008.

8) General Comment No. 34, Human Rights Committee, 21 September 2011.

9) *Faurisson v. France*, Communication No. 550/1993.

10) See, e.g., *Sohn v. Republic of Korea*, Communication No. 518/1992.

11) European Court of Human Rights, Judgment, *Vogt v. Germany*, 26 September 1995. The Applicant had worked as a German and French teacher at a secondary school and had engaged in various political activities on behalf of the German Communist Party (Deutsche Kommunistische Partei “DKP”). Because of this, she was dismissed from her work of the “charge” that she had failed to comply with her duty of political loyalty to the Basic Law described in certain codes and laws. She had alleged her right to freedom of expression had been infringed upon by this disciplinary sanction.

body of the European Convention of Human Rights (the Convention). While the Convention is a mere regional treaty and Japan is not a contracting party, the Convention and the Covenant were both established based on the Universal Declaration of Human Rights and have influenced each other.

In the *Vogt* case, while ECtHR observed that the aim of the restriction was legitimate, taking the special context of Germany into consideration, it also stated that the word “necessary” in Article 10 paragraph 2 of the Convention¹²⁾ implied the existence of a “pressing social need”. It continued that since the applicant engaged in the activities outside of her workplace, there was no social need to dismiss her from her post, consequently her dismissal was disproportionate to the legitimate aim pursued.

In the *Setagaya* case, there was no evidence that the accused had engaged in the political activity inside of his workplace. Additionally, unlike Mrs. Vogt, who was a candidate in the elections for the Parliament of the Land, he did not identified himself as a civil servant when he engaged in the alleged activity. According to these facts, it is doubtful whether his alleged activities would have damaged the political neutrality of his function under the Rules, and it seems that there was no “pressing social need” to penalize him. Therefore, it is difficult to say that the criminal punishment imposed on him fulfilled the principle of proportionality. Further, it seems that a restriction on a civil servant’s activities outside of work means completely banning him/her from supporting a specific political party.

As mentioned above, the Supreme Court judgments in this case did not justify the Rules in light of international human rights law. The Rules would have been found to be contrary to the Covenant if the Court had interpreted and applied international instruments in good faith.

(NAKAMURA Nana)

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

