

The Problematic Situation of Freedom of Expression in Japan

Japan's Prisoners of Conscience: Protest and Law during the Iraq War. By Lawrence Repeta, Oxford & New York: Routledge, 2023. 238 pp. Hardcover: £120.00
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A “prisoner of conscience,” referred to in the title of the book, is defined by Amnesty International as

someone who has not used or advocated violence or hatred in the circumstances leading to their imprisonment but is imprisoned solely because of who they are (sexual orientation, ethnic, national or social origin, language, birth, colour, sex or economic status) or what they believe (religious, political or other conscientiously held beliefs).

This book provides a chronological account of three peaceful protesters who were labelled as prisoners of conscience by Amnesty International in 2004 after they were arrested and detained for over two weeks (eventually 75 days) for entering an apartment complex in Tokyo to distribute anti-war flyers. The apartment complex they allegedly trespassed (breaking into a residence, Penal Code Article 130) was accessible to the public and flyers were inserted through mail slits on the doors of each apartment. However, the complex is owned by Japan's Defense Agency and resided in by the members of the Self-Defense Forces (SDF) and their families. The distributed flyers criticized the government's decision to deploy the SDF to Iraq in support of the US and called on SDF members to refuse the deployment. The protesters argued that their actions were protected expressive activities under Article 21 of the Constitution of Japan, which guarantees freedom of expression, and that the prosecution violated their constitutional rights. The Hachioji Branch of the Tokyo District Court acquitted them (Chapters 7, 9–12), but the Tokyo High Court overturned the decision and convicted them in 2006 (Chapter 13 (note that prosecutors can appeal under Japanese law)). The Supreme Court upheld the convictions in 2008.

The author, Lawrence Repeta, taught law in Japan for many years and has published numerous books and articles on Japanese law, including freedom of speech. In the Japanese legal community, he is well known for his successful efforts in the 1980s to liberalize note-taking in courtrooms where spectators were prohibited from taking notes. When the presiding judge denied his request for permission to take notes as a spectator, he challenged the constitutionality of the prohibition of note-taking in the courtroom, alleging that it violated Articles 21 and 82 of the Constitution (Article 82 stipulates that trials shall be conducted publicly). In what became known as the Repeta case, the Supreme Court dismissed the appeal, citing the broad discretion of presiding judges in trials. However, the Court stated that note-taking should not be generally prohibited, except under specific circumstances for which such a ban may be justified. This decision led to the lifting of the general ban on note-taking in courtrooms nationwide.

In this book, Repeta vividly narrates the stories of the three protesters and provides detailed descriptions of their criminal proceedings, drawing on his extensive knowledge of the Japanese legal system and thorough research on the facts of these cases. The author provides supplemental information on relevant topics unique to Japan for readers who may not be familiar with the Japanese society or its legal system. Repeta also addresses several controversial legal issues along the way. One such issue is the debate over the constitutionality of the deployment of the SDF in Iraq, which constitutional scholars

heavily criticized as a violation of Article 9 of the Constitution, which renounces war (Prologue, Conclusion). The other is the controversial aspect of the country's criminal procedure, namely prolonged detention after arrest and interrogation without legal counsel (Chapters 2, 6). The book also touches on the issue on the restriction of freedom of speech of civil servants by covering two other cases of flyer posting conducted by government employees who were prosecuted and convicted for engaging in "political acts" prohibited by Article 102 of the National Public Service Act and Rules of the National Personnel Authority 14-7 (Chapters 3, 8, 14, 16). The prohibition on "political acts" has been criticized by constitutional scholars as an excessive restriction on the human rights of public servants. The circumstances in the two cases drew severe criticism because the defendants had merely posted flyers on their days off without revealing their status as public servants. Repeta matter-of-factly presents these issues, but his tone throughout the book aligns with the widely accepted scholarly view that these restrictions violate the constitutional rights of those involved.

Regarding the three prisoners of conscience, Repeta provides a detailed account of the unusually harsh criminal proceedings they faced for mere acts of trespassing (Chapters 2, 7, 9–11, 14). To emphasize the unusualness of the cases, the author notes some factors of the cases that would normally discourage the authorities from pursuing prosecutions: that the premises of the apartment complex were open to the public and non-residents walked through them every day without being arrested; that flyer posting is commonplace in Japan—so common that there is an industry group called the Japan Posting Association; and that residents of the SDF apartment complex would receive flyers from local pizza shops or other merchants through mail slots every day without any one being arrested.

At the same time, Repeta points out a number of factors that may have contributed to the law enforcement's harsh treatment of the cases. One such factor is that the three protesters exercised their constitutional right to remain silent during the interrogation instead of confessing and expressing remorse for their actions. Repeta points out that Japanese authorities typically treat cases leniently as long as suspects confess and express remorse during the interrogation (Chapter 11). He also highlights that the three protesters publicly opposed the government's decision to send the SDF to Iraq during the war. On this point, he refers to leaked SDF documents which indicate that the authorities targeted the three and pushed for their prosecution precisely because of their anti-war messages that were critical of the government's decisions (Chapter 15).

While the book tracks cases of flyer posting, its central theme is the precarious state of freedom of expression in the country, especially for those who are critical of the government. By painting a larger picture of the cases and the chilling effect of the prosecutions, the book successfully conveys the message that the freedom to publicly express criticism of the government in order to persuade others—in immediate cases, members of the SDF—to question government policies is indeed at risk in Japan. Another issue that should be addressed in this context is the double standard of review employed by the Supreme Court in free-speech cases.

The Court has developed two contrasting standards of review for cases involving the right to express one's opinions publicly. One standard applies to expressive activities inside the "public facilities" installed and managed by local governments under the Local Autonomy Act. These facilities are typically enclosed halls or rooms within the confines of buildings owned or managed by the local governments. The Act prohibits local governments from denying permits for the use of public facilities on the basis of the content of the expressive activities to be conducted there. Therefore, the Court has developed a rather strict standard of review for the denial of permits. According to the Court, the permit may not be denied unless (a) there is a risk that the life, body, or property of citizens would be infringed and public safety would be undermined if

the assembly were held in the hall and (b) there is a clear and imminent danger that such a situation would occur (Supreme Court 1995). The Court has frequently ruled in favour of applicants in similar cases.

In contrast, when it comes to cases involving restrictions on expression made elsewhere in public, such as protesting en masse, distributing flyers on the streets, or posting flyers in mailboxes, the Court has often upheld such restrictions by simply balancing competing interests and giving significant weight to governmental interests, as Repeta notes in the book (Chapters 13, 15). These contrasting precedents—including a case in 2023 in which the Court denied the right to hold an assembly in an open-air square in front of a city hall because it did not recognize the space as a public facility—demonstrate the Court's tendency to provide greater protection for expressions made among like-minded people in a closed environment while justifying restrictions on public expressions that have the potential to persuade others who may not necessarily share similar views.

Overall, this book provides an excellent narrative account of the controversial aspects of Japan's legal system and effectively portrays the problematic status of freedom of expression in Japan, which does not necessarily include the right to publicly express one's opinion on controversial government policies, especially when intended to persuade others to question government decisions.

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