

LEGAL RESPONSES TO RACIAL HATE SPEECH IN JAPAN

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Introduction

It has been known that attitudes towards legal regulation of racial hate speech and denialism² differ to a great extent from one country to another, and that there are primarily two contrasting approaches in this respect. On the one hand, a number of European States as well as Canada have criminal law provisions punishing incitement to hatred based on race, national or ethnic origin or religion, many of which were enacted in view of implementing the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)³. The European Court of Human Rights has held that hate speech does not benefit

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² Denialism, also called negationism, is a term used to refer to the argument that denies the existence of historical events, typically Holocaust. Given that the purpose of statements disputing the existence of historical events lies in rehabilitating regime responsible for such acts and to accuse, in turn, the victims of the crimes of falsifying history, the denial of historical facts, as such, may be understood as a form of racial defamation, as the European Court of Human Rights held in an inadmissibility decision (*Garaudy c. France*, No. 65831/01, *Recueil des arrêts et décisions 2003-IX*). Regulations of denialism and of racial hate speech are thus closely related in terms of combating racial discrimination. As shown in the EU Framework Decision mentioned above, fight against denialism tends to encompass the discourse of revisionism denying or grossly understating historical truths that are considered to constitute international crimes.

³ Art.4 of the ICERD requires States to adopt measures to eradicate incitement to racial discrimination and in this end, inter alia, "(a) to declare an offence punishable by law dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, (b) to declare illegal and prohibit organizations, and organized and other propaganda activities, which promote and incite racial discrimination, and to recognize participation in such organizations or activities as an offence punishable by law, and (c) not to permit public authorities or institutions to promote or incite racial discrimination. Obligations under (a) and (b) concern regulation of conducts of private persons". The United Kingdom, for example, enacted the 1965 Race Relations Act to implement the ICERD, followed by subsequent legislations including the 1986 Public Order Act and the 2006 Racial and Religious Hatred Act. On the UK law in the area and the impact of international law, see: S. HALPIN, "Racial Hate Speech: A Comparative Analysis of the Impact of International Human Rights Law upon the Law of the United Kingdom and the United States", 94 *Marquette Law Review* 463 (2010). France, after ratifying the ICERD, introduced a provision, in the law on the freedom of the press (loi du 29 juillet 1881 sur la liberté de la presse), providing that provocation of discrimination, hatred or violence with regard to a person or a group of persons for the reason of origin, belonging or non-belonging to an ethnic group, nation, race or religion, shall be punished (Art.24. The provision as subsequently amended covers provocation of hatred or violence for the reason of sex, sexual orientation, gender identity or handicap). Art.319 of the Canadian Penal Code, introduced to implement the ICERD, prohibits public incitement and willful promotion of hatred against any identifiable group (defined as any section of the public distinguished by colour, race, religion, national

from the protection of freedom of expression under the European Convention on Human Rights⁴, and has in principle upheld restrictions to expression inciting racial hatred⁵. In the Council of Europe, the European Commission against Racism and Intolerance (ECRI), established in 1993 to monitor the situation of racism and to make policy recommendations, takes the position that all member States, at a minimum, must have a prohibition of incitement to national, racial or religious hatred within its criminal law⁶. Many States also have laws criminalizing denial of genocide and other international crimes⁷. In recent years, national law of the EU member States in the area has been oriented by the EU Framework Decision 2008/913/JHA designed to harmonize criminal legislation combating racism and xenophobia⁸. On the other hand, the United States takes a different stance to the limit of the freedom of expression enshrined in the First Amendment of its constitution. In the US, prevailing doctrine refuses content - based regulation of the freedom, including racist expressions, and admits restraint only in the case of the explicit advocacy for imminent violent action that is likely to occur (the Clear and Present Danger requirement)⁹. While a number of European States as well as the US appended declarations and reservations to Art.4 of the ICERD underlining the need to respect the freedom of expression¹⁰, a contrast between

or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability, as subsequently amended) where such incitement is likely to lead to a breach of the peace.

⁴ ECHR *Gündüz v. Turkey*, No. 35071/97, 2003-XI, paras. 40-41.

⁵ “[I]t may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance..., provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued” (ECHR *Erbakan v. Turkey*, Judgment of 6 July 2006, para.56).

⁶ M. KELLY, *ECRI: 10 Years of Combating Racism in Europe, A Review of the Work of the European Commission against Racism and Intolerance*, Strasbourg: Council of Europe, 2004, p. 27.

⁷ Germany, Austria, France, Switzerland, Belgium, Poland, the Czech Republic and Slovakia have laws criminalizing Holocaust denial, and many of them also prohibit contestation or negation of the existence of international crimes defined in line with the Framework Decision mentioned above. Canadian Penal Code prohibits advocating or promoting genocide defined in line with the Genocide Convention (Art.318).

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:EN:PDF>. The Framework Decision requires States to make punishable the conduct of publicly condoning, denying or grossly trivializing certain international crimes (genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court, and the crimes defined in Art.6 of the Charter of the Nuremberg Tribunal. Art.1(1)(a)(b)) when it is carried out in a manner likely to incite to violence or hatred against a group or one of its members defined by reference to race, color, religion, descent or national or ethnic origin (Art.1(1)(c)(d)).

⁹ G. E. CARMI, “Dignity versus Liberty: The Two Western Cultures of Free Speech”, 26 *Boston University International Law Journal* 277 (2008), pp.346-347.

¹⁰ France, for example, declared that “it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts”. The US made a reservation stating that “the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States

the two models is conspicuous¹¹, and the distance is not likely to narrow down easily¹². Between these two models, there are also States which deal with racial hate speech by means of anti-discrimination laws and national human rights institutions. Australia, for instance, with the amendment of the 1975 Racial Discrimination Act in 1995, made offensive behaviour because of race, colour or national or ethnic origin which is likely to offend, insult, humiliate or intimidate another person or a group of people unlawful (Art.18C), and opened the victims of such acts a way to file a complaint to the Australian Human Rights Commission.

In such a landscape of international and national legal responses racial hate speech briefly described above, where does Japan stand? The question seems pertinent and indeed intriguing, given that, while it has commonly been said that racial discrimination is not a prominent issue in Japan¹³, the situation is definitely different these days. In recent years, we have seen a growing rate of blatant hate speech especially against Korean minorities¹⁴. Since the late 2000s, ultra-nationalist groups, such as the one known by the acronym “Zaitokukai”,

does not accept any obligation ..., in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States”(https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2 & chapter=4&clang=_en#EndDec).

¹¹ Such a contrast has often been a subject of comparative study. See, among others, the work of G.E. CARMI, *supra*; R. L. WEAVER, N. DEPPEIRRE and L. BOSSIER, “Holocaust Denial and Governmentally Declared ‘Truth’: The French and American Perspectives”, 41 *Texas Tech Law Review* 495 (2009).

¹² For example, A. CLOONEY and P. WEBB, in their article “The Right to Insult in International Law”, 48.2 *Columbia Human Rights Law Review* 1 (2017), argue that the law should recognize a “right to insult”, that an insult should only be criminalized if it is intended to incite violence or criminal offences *and* it is likely to produce such violence or offences (emphasis in original, in p.52), and that US practice under the First Amendment should guide consideration of insulting speech in international law.

¹³ The Constitution of Japan provides the equality before the law and non-discrimination as to race (Art.14). However, as Japanese society has been considered as a relatively homogenous society, racial discrimination was not a major issue until recently, and textbooks of constitutional law usually spared no more than few pages to the question of racial discrimination.

¹⁴ Korean minorities in Japan are principally descendants of those who had come or had been taken to Japan during 1910-1945 when the Korean Peninsula was under the colonial rule of Japan. Koreans had had Japanese nationality during the colonial era, but were deprived of it by the Japanese government’s unilateral measure in 1951, and have been treated as foreigners (Due to the increase of naturalization and of children of Korean-Japanese couples given Japanese nationality after the amendment of Nationality Act in 1985 from paternal *jus sanguinis* to both-sex *jus sanguinis* - made in order to comply with the Convention on the Elimination of All Forms of Discrimination against Women -, the number of those retaining Korean nationality tends to decrease). In 1991, Japan gave “special permanent resident” status to the descendants of those originating from former colonies (Korea and Taiwan) (Special Act on the Immigration Control of, Inter Alia, Those Who Have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan, Act No. 71 of 1991). For special permanent residents, the condition of forced deportation is alleviated (they may be deported if they commit crimes and are sentenced to imprisonment for the term exceeding seven years, while ordinary foreigners may be deported if they are sentenced to imprisonment for the term exceeding five years). Also, while the requirement to obtain a “re-entry permit” before going overseas is also applied to special permanent residents, a simplified procedure for them was introduced in 2012.

a group that advocates stripping Koreans of what they call “privileges” including the status of special permanent residents, have repeatedly taken to the street to conduct ferocious anti-Korean campaign, holding placards and shouting slogans such as “Kill all Koreans, good or bad!” and “Deport all Koreans to the Korean Peninsula!” with megaphones in major cities nationwide. Japan acceded to the ICERD in 1995, but did not take any legislative measure for implementation. Japan does not have general anti-racial discrimination legislation, which many States put in place in areas of public life such as housing and education, in the first place (in this respect, it is different also from the US which has the Civil Rights Act), and a national human rights institution, established in over 100 States today¹⁵, is also nonexistent. Members of the ICERD Committee were stunned to watch videotaped clips, reproduced during briefing meetings with NGOs in advance of the third examination of Japan’s periodic reports in 2014, of the scenes of demonstrations by Zaitokukai, conducted with the company of police forces who walk side by side with the group (who had duly completed formalities and obtained permission of demonstrations from local public safety commissions) so that the march of the hate group does not degenerate into a violent conflict with other citizens¹⁶. The Committee expressed concern and called on the government to take measures to combat hate speech¹⁷.

While political branches were hardly prepared to the problem, the judiciary showed remarkable responses. In lawsuits using the tort provisions of the Civil Code, courts have not hesitated to invoke the ICERD in interpreting conducts of hate groups as tort, and have ordered compensation. In awarding compensation, courts have also held that the object of the ICERD becomes a basis in evaluating the maliciousness of tort, recognizing that gravity of acts promoting racial discrimination should be reflected on the amount of compensation of damages. Use of the tort provisions as a remedy to racial hate speech has become a major tool

¹⁵ The UN promotes the establishment of independent national human rights institutions with broad mandate on human rights, and the GA Resolution 48/134 (1993) (Paris Principles) sets out principles relating to the status of such institutions. According to the Global Alliance of National Human Rights Institutions (GANHRI), there are well over 100 NHRIs operating around the world today, 69 of which are accredited as being in full compliance with the Paris Principles (<https://nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx>).

¹⁶ The coalition of Japanese NGOs active in combatting racial discrimination (ERD Net), as well as the Japan Federation of Bar Associations, had drafted their alternative reports and sent them to the committee in advance. Then, the ERD Net showed the videotape of hate demonstrations to the members who attended the briefing meeting (<https://www.hurights.or.jp/archives/newsletter/section3/2014/11/post-260.html>).

¹⁷ Concluding observations on the combined seventh to ninth periodic reports of Japan, UN Doc. CERD/C/JPN/CO/7-9 (2014), para.11.

in the field, including a recent judgment concerning hate speech on internet, although such a method is not without disadvantages. On its part, the Diet (parliament) finally moved, in May 2016, to enacting a law (Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan; hereinafter, it may be referred to as the 2016 Act) that provides public authorities' responsibility to implement measures to eliminate discriminatory speech¹⁸. Although the Act does not prohibit racial hate speech as such and is quite lukewarm in its content, it is the first legislation in Japan to specifically address the problem of racial discrimination.

This article provides an up-to-date overview of the legal responses of the Japanese authorities to racial hate speech, focusing especially on court cases which are of significance in terms of international human rights law.

I. Absence of Legislative Provisions to Prohibit Racial Discrimination and the Responses of the Judiciary: Overall Picture

1. Incorporation of human rights treaties into Japanese legal order

Japan adopts the system of so-called automatic incorporation of treaties into domestic legal order, by virtue of Art.98 (2) of the Constitution, which provides that “the treaties concluded by Japan ... shall be faithfully observed”. Treaties ratified by the cabinet are given domestic force of law upon publication of the fact of ratification on official bulletin. On the other hand, if a legislative provision clearly conflicts with treaty obligations, it becomes necessary to amend such a provision when ratifying the treaty. The amendment of the Nationality Act mentioned above, from paternal to both-sex *jus sanguinis*, in order to comply with Art.9 of the CEDAW requiring States to grant women equal rights with men with respect to the nationality of their children, is a case in point. Also, when simply giving a treaty domestic legal force does not suffice to implement treaty obligations, appropriate legislative measures may be judged necessary. The enactment of the Law on Equal Opportunity and Treatment between Men and Women in Employment in 1985 to implement Art.11 (1) (b) of the CEDAW that required States to take measures to ensure the right to the same employment opportunities is such an example. Indeed, when a treaty requires States to take measures to

¹⁸ Act No.68 of 2016. The Act entered into force on 3 June 2016.

eliminate discrimination not only by public authorities but also by private parties, implementing legislation establishing concrete legal regulation to the acts of private parties often becomes indispensable.

As to the hierarchy of norms, it is widely acknowledged that treaties are superior to statutes, including *post facto* statutes enacted after the ratification of treaties. While there are not many cases in which the courts applied provisions of human rights treaties directly by basing their rulings on them, there is increasing number of cases in which the courts invoked the treaty provisions in interpreting domestic law, as referred to below.

2. The Case of the ICERD

The ICERD defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (Art. 1), and prescribes, in Art.2 (1), not only that each State Party ensures that all public authorities and institutions do not engage in act of racial discrimination ((a)), but also that it “shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization” ((d)). Art. 4 specifically addresses the measures to combat racial hate speech inciting to racial hatred, stipulating that States shall undertake to adopt immediate and positive measures designed to eradicate all incitement to racial discrimination and, to this end, while paying due regard to the principles embodied in the Universal Declaration of Human Rights and the rights set forth in article 5 of the Convention¹⁹, that they shall, inter alia, (a) declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and (b) declare illegal and prohibit organizations, and organized and all other propaganda activities, which promote and incite racial discrimination, and recognize participation in such organizations or activities as an offence punishable by law.

¹⁹ Art.5 provides the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, in the enjoyment of a series of civil, political, economic, social and cultural rights.

Japan acceded to the Convention in 1995, but did not take any legislative measures to implement it, on the assumption that existing provisions of law would suffice to give effect to the obligations under the Convention. Also, Japan appended a reservation to Art.4 (a) and (b), stating: “In applying the provisions of paragraphs (a) and (b) of article 4... Japan fulfills the obligations under those provisions to the extent that fulfillment of the obligations is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan, noting the phrase 'with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention' referred to in article 4.”²⁰ Although this reservation does not concern the basic obligation under the main paragraph of Art.4 nor rules out the possibility of legislative measures to implement paras.(a) and (b), Japan did not take any such measures for over two decades²¹ (until the enactment of the 2016 Act).

Under such a circumstance, existing norms in Japanese law on the matter of racial discrimination were, principally: (1) Art.14 of the Constitution on equality before the law, setting forth that “All of 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”, which, as all the other provisions of the Constitution, is essentially directed at the exercise of public power and is not applied directly to the acts of private individuals, and (2) tort provisions of the Civil Code²², especially Art.709, which is a general provision on tort, providing that “A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence”, which could be applied to acts of racial discrimination by private parties by way of interpretation.

Art.709 of the Civil Code has already been relied on by victims of racial discrimination in

²⁰ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsgno=IV-2&chapter=4&clang=_en#EndDec.

²¹ In ratifying the International Covenant on Civil and Political Rights (ICCPR) in 1979, Japan did not append reservation to any of its provisions, including Art.20 providing that “any propaganda for war shall be prohibited by law” and that “any advocacy of national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”, but no legislative measure to implement this provision has been taken either.

²² Act No. 89 of 1896.

areas such as access to commercial establishments. In *Boltz v. A*²³, Ms. Boltz, a Brazilian national, while window-shopping in a jewelry shop, was ousted by the shop owner who learned her nationality. The owner pointed at a notice on the wall stating “Foreigners are strictly not admitted to the store”, demanding her to leave the premise. In this case, the Shizuoka District Court recalled that, while the ICERD requires States to take legislative and other measures addressed to discriminatory acts by individuals and groups, the Ministry of Foreign Affairs explained, when acceding to the Convention, that the implementation of the Convention did not need any new legislative measures. Then the Court went on to say that “if we take it as assumed the observation of the Ministry of Foreign Affairs that no legislative measure is needed, we may consider that the substantive provisions of the Convention operate as an interpretative standard for the elements constituting a tort, in a case such as the present one concerning a claim for compensation of damages deriving from a tort to an individual”. The Court thus interpreted the act of ousting the plaintiff for the sole reason of her nationality as a tort, ordering the owner to pay for moral damages²⁴. In *Arudou et al. v. O*²⁵, the plaintiffs were refused entry to a hot-spring establishment by the owner who had posted a notice of “Japanese Only” at the entrance, and one of the plaintiffs, Mr. Arudou, was refused entry even upon presentation of his identity card (driver’s license) after he acquired Japanese nationality by naturalization. The Sapporo District Court recognized that, while Art.14 of the Constitution, the ICCPR and the ICERD are not directly applied to the relationship between individuals, they may serve as a standard in interpreting various provisions of civil law such as Art.709 of the Civil Code. Then, in this case, taking into account of the fact the distinction of nationality is not necessarily possible by appearances, as well as the fact that the plaintiff who had obtained Japanese nationality was also refused, the Court admitted that “as a matter of substance, the act in question is not a distinction on the basis of nationality whether the person has Japanese nationality but a distinction whether the person’s appearances look like a foreigner, thus amounts to a distinction and restriction based on race, colour, descent, or national or ethnic origin, which, in light of the object of Art.14(1) of the Constitution, Art.26 of the ICCPR and the ICERD, amounts to racial discrimination that is to be eliminated also between individuals”²⁶. This judgment represents a leading case in the implementation of the

²³ Shizuoka District Court, Hamamatsu Branch, judgment of 12 October 1999, LEX/DB 28052148.

²⁴ The amount of compensation awarded was 1,500,000 yen.

²⁵ Sapporo District Court, judgment of 11 November 2002, LEX/DB 28080559. The Court awarded a compensation of 1,000,000 yen.

²⁶ The passages of judgments cited in this paper were translated by the author.

ICERD by the judiciary in suits involving private actor's civil responsibility, in that the Court explicitly utilized the definition of racial discrimination in the ICERD to establish a tort, developing the interpretation of the tort provision in light of the object of superior norms, especially the ICERD.

II. Judicial responses to racial hate speech

The phenomenon of hate speech especially against Korean residents has intensified since the late 2000s²⁷. Korean ethnic schools²⁸ and students attending those schools have been a special target of harassment, in the aftermath of disclosure of the fact that the authorities of the Democratic People's Republic of Korea (DPRK) had abducted some Japanese citizens in the 1970s and several attempts by the DPRK to launch missiles in the direction of Japan. Moreover, stimulated by a territorial dispute between the Republic of Korea (ROC) and Japan over an island as well as lingering controversies over the "comfort women" system by the Japanese military during WWII to which a great number of Korean women fell victims²⁹, hate groups such as Zaitokukai have repeatedly taken to the street to conduct anti-Korean

²⁷ According to a report released by a foundation entrusted by the Ministry of Justice as a response to the observations of the Committee, there were 1,152 confirmed cases of hate speech in Japan during the three and half years ending in September 2015 (Human Rights Education Promotion Center, Public Foundation, Report on Investigation of Results of the Actual Condition of Hate Speech (Mar. 2016), www.moj.go.jp/content/001201158.pdf, p. 33 (in Japanese)).

²⁸ They were founded by the first-generation of Koreans in Japan in the immediate post-WWII period to teach their language and culture to their children.

²⁹ After the first lawsuit demanding compensation by a former "comfort woman" filed in 1991, the government conducted a research and made public the statement in the name of the Chief-Secretary of the Cabinet, Kono Yohei (so-called "Kono Statement") in 1993 recognizing that "[t]he then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women" as well as the fact that "[t]he Korean Peninsula was under Japanese rule in those days, and their recruitment, transfer, control, etc., were conducted generally against their will, through coaxing, coercion, etc." (Digital Museum: The Comfort Women Issue and the Asian Women's Fund, <http://www.awf.or.jp/e6/statement-02.html>). The term "generally" was used for the reason that some of the victims, especially in Korea, were deceived into following recruiters by proposals of jobs in restaurants or factories. The Statement was also significant in that it expressed the government's "firm determination never to repeat the same mistake by forever engraving such issues in our memories through the study and teaching of history", referring to the efforts to teach the facts through education of history. However, the position of the government has substantially retrogressed since then. In particular, the current Abe administration argues that there is no documentary proof that the authorities physically kidnapped or otherwise forcibly collected women. While it is Japan's consistent the view that the matter of reparation was settled by interstate agreements in the past and that no legal responsibility is due, governments of Japan and the Republic of Korea made an agreement, in 2015, in which the former recognizes its "responsibility" and donates lump-sum money for a fund addressed to the rehabilitation of women. But even after this agreement, the Japanese government still maintains its position as to the absence of forceful collection of women, stressing thus the voluntary nature of servitude. In line with such an official position, teaching the facts through education of history has largely been neglected, with the issue almost completely disappearing from school textbooks.

demonstrations, roaring slogans such as “Koreans, kill yourselves by poisoning!”, and “Comfort women are all liars and prostitutes!” in major cities including Tokyo and Osaka where communities of Koreans concentrate. Some of them involved physical attacks to the targeted premises or persons. Also, the groups and their members fully utilized internet sites (live broadcast, Twitter, blogs ...) for their campaign. How can we deal with such acts, in the absence of concrete legislative provisions designed to regulate them? Let us see three major cases in which unlawfulness of racial hate speech was disputed in civil, as well as criminal for two of them, proceedings.

1. The Case of Korean Primary School in Kyoto

The acts of racial harassment against Korean primary school in Kyoto by hate groups (Zaitokukai, and another group professing to recover Japan's sovereignty) in December 2009 developed into both criminal and civil procedures. The school did not have its own schoolyard, and had set up a podium and speakers in a neighboring park for morning gatherings as well as soccer goals with the permission of municipal authorities. While students are studying in classrooms, eleven members of the groups staged demonstrations in front of the school, holding banners of the groups and using megaphones to shout slogans such as “This is a school nurturing spies!”, “Kick Korean schools out of Japan!”, and “Keep a promise and get out of the park! Promises are made by humans, not Koreans!” They also conducted acts of vandalism, moving the podium to the front gate, tipping over the soccer goals and cutting the electricity codes of the speakers. The school filed a criminal complaint as well as civil remedy demanding temporary injunction, but the members repeated similar acts in January and March 2010 (the latter was conducted in spite of a temporary injunction order by the court), shouting slogans such as “Kill Koreans in animal shelters! Dogs are wiser than Koreans!” They also filmed their acts and uploaded the clips on the internet to publicize their performance.

(1) Criminal proceedings

In this case, four members of the Zaitokukai were indicted. The criminal proceedings against them in fact also cover their acts in the Tokushima Teachers' Association Case mentioned below. In the latter case, members of the Zaitokukai including the four involved in the Kyoto

Case as well as their sympathizers intruded into an office of the Teachers' Association of Tokushima Prefecture in April 2010 to conduct acts of harassment, on the pretext that the Association donated a part of the contributions collected for disadvantaged children from the general public to a Korean school. Holding a banner denigrating the Association, they surrounded the two women working in the office and roared jeers such as "A dog of Korea!" and "You are a bullshit sending money to a Korean school!" at them through megaphones. They also threw out papers on the desk, held the arms of one of the women and prevented her from making a phone call to the police for help.

They were convicted of various offenses ("breaking into a residence" (Art.130 of the Penal Code)³⁰, "damage to property" (Art. 261, *ibid*)³¹, "forceful obstruction of business" (Art. 234, *ibid*)³² and "insults" (Art. 231, *ibid*)³³. The prosecution could have resorted to the provision of defamation (Art.230 (1), *ibid*)³⁴ instead of insults, but the use of the former was not retained, in all likelihood due to consideration that, in the case of defamation, unlawfulness of an act could be precluded by the motif of public interest and the proof of truthfulness of facts³⁵, making the task of the prosecution more cumbersome.

Concerning the vociferation, the Kyoto District Court rejected the argument of the defense that it was an act of legitimate political expressions, holding that the act of yelling insulting speech at a high volume by means of megaphones for over 46 minutes in front of the school,

³⁰ Penal Code, Act No. 45 of April 24, 1907. English translation of the Code cited below is taken from the website Japanese Law Translation operated by the Ministry of Justice (<http://www.japaneselawtranslation.go.jp/law/detail/?id=1960>).

Article 130 (Breaking into a residence): "A person who, without justifiable grounds, breaks into a residence of another person or into the premises, building or vessel guarded by another person, or who refuses to leave such a place upon demand shall be punished by imprisonment with work for not more than 3 years or a fine of not more than 100,000 yen."

³¹ Art.261 (Damage to property): "A person who damages or injures property not prescribed under the preceding three Articles shall be punished by imprisonment with work for not more than 3 years, a fine of not more than 300,000 yen or a petty fine."

³² Art.234 (Forceful obstruction of business): "A person who obstructs the business of another by force shall be dealt with in the same manner as prescribed under the preceding Article [=punished by imprisonment with work for not more than 3 years or a fine of not more than 500,000 yen]".

³³ Art. 231 (Insults): "A person who insults another in public, even if it does not allege facts, shall be punished by misdemeanor imprisonment without work or a petty fine."

³⁴ Art.230(1) (Defamation): "A person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished by imprisonment with or without work for not more than 3 years or a fine of not more than 500,000 yen."

³⁵ Article 230-2(1) (Special Provision for Matters Concerning Public Interest): "When an act prescribed under paragraph (1) of the preceding Article is found to relate to matters of public interest and to have been conducted solely for the benefit of the public, the truth or falsity of the alleged facts shall be examined, and punishment shall not be imposed if they are proven to be true."

added to the fact that the defendants caused a tumult by using material force such as displacing the property of the victims, left no room for being admitted. It held: “[G]iven that the honor of the school in the present case, an institution acting under unified will in a society, merits protection separately from the honor of the educational institution operating the school, [...] it is evident that the act constitutes a criminal offence of insults.”³⁶ Although the sentence for the offence of insults alone is quite light (one of the lightest in the Code), the accused cases were sentenced to suspended penal servitude of 18 to 24 months, as their acts also involved other offenses including forceful obstruction of business and breaking into a residence.

This is actually the first case in which the act of racial harassment accompanying hate speech has ever been prosecuted and convicted in Japan. But if we focus on the aspect of speech, the provision resorted to was that of “insults”, as the Penal Code does not have a provision criminalizing the racial hate speech as such. The offense of insults protects the interest of an individual and not that of ethnic groups or persons belonging to such groups (the offense of defamation, likewise, protects the interest of an individual). In this case, the Court applied the provision of insults, on the understanding that the honor of the school is in question. On the other hand, it is clear that this provision cannot be utilized to cover racial hate speech addressed ethnic groups or persons belonging to such groups in general (such as “Koreans”) which is not conducted in a way targeting specific individual or individual organization.

(2) Civil proceedings

The case was also disputed in civil proceedings. The judgments are particularly noteworthy in their reference to the ICERD in interpreting and applying of the tort provision, including in the decision of the amount of compensation for damages for racial discrimination.

(a) Judgment of the Kyoto District Court

In a civil lawsuit filed by the educational institution, the Kyoto District Court ordered to pay a total of over 12 million yen for a series of acts as compensation in damages for tort,

³⁶ Kyoto District Court, judgment of 21 April 2011, LEX/DB 25471643. Appeals were rejected by Osaka High Court on 28 October 2011 (LEX/DB 25480227) and by the Supreme Court on 2 February 2012 (LEX/DB 25480570).

recognizing that the acts amount to racial discrimination in the sense of the ICERD. Significantly, the Court held that, in awarding compensation in damages for racial discrimination, the amount has to be decided so that it would provide effective protection and remedy for the act of racial discrimination, citing the statement of the Japanese government that had been made public before the treaty body, on an occasion of periodic examination of State reports, to the effect that, in criminal proceedings concerning the cases of racism, judges often take the element of maliciousness into their consideration of sentences. The Court held:

“[...] [T]he obstruction of business and slander, into which discriminatory remarks against Koreans residing in Japan were interwoven, were both conducted with the intention of appealing discriminatory ideas against the Koreans to the public, thus amount to exclusion based on ethnic origin as Koreans residing in Japan which has the purpose of impairing the enjoyment for Koreans residing in Japan, on an equal footing, of human rights and fundamental freedoms. Therefore, as a whole, they are nothing short of racial discrimination as provided in the International Convention on the Elimination of All Forms of Racial Discrimination. [...]

In making monetary evaluation of immaterial damages, the seriousness of the damage and the gravity of unlawfulness of the act of infringement are considered. According to the proof No.155 for the plaintiff, the government of Japan, [...] in the Committee on the Racial Discrimination established under the International Convention on the Elimination of All Forms of Racial Discrimination, in response to a question whether the courts in criminal cases consider ‘racial motivation’ of crimes, replied that ‘in cases of racism, judges often refer to the element of malice, which is then reflected on the sentence’; in response, the Committee called on the Japanese government ‘to take additional measures to address expressions of hate and racism and, in particular, to ensure the effective implementation of the provisions of the Constitution, the Civil Code and the Penal Code’. That is, in deciding the sentences in criminal case, racial discrimination as the motivation of the crime being an element aggravating the sentence, it is plainly admitted that the International Convention on the Elimination of All Forms of Racial Discrimination directly influences interpretation and application of law. Similarly, in cases where a tort such as slander equally amounts to racial discrimination, or where a tort is motivated by racial discrimination, it cannot be denied that the International Convention on the Elimination of All Forms of Racial Discrimination

directly influences the interpretation and application of civil law, becoming an element aggravating the amount of compensation for immaterial damages. Also, as stated above, in this case in which the obstruction of business and slander against the plaintiff were conducted as racial discrimination, the Court is under obligation, under Art.2(1) Art.6, to interpret and apply law in compliance with the provisions of the Convention. As a result, monetary evaluation of the immaterial damages by the Court cannot be but expensive in amount.”³⁷

(b) Judgment of the Osaka High Court

In the appeal, the Osaka High Court modified the method of interpretation by the first instance that had relied solely on the ICERD, invoking both the Constitution and the ICERD as standards of interpretation of the Civil Code. On the other hand, the High Court clearly admitted that the object of the Convention becomes the basis in evaluating the maliciousness of tort, maintaining the amount of compensation in damages awarded by the first instance. The Court also rightly evaluated the seriousness of the acts of the defendants aggravated by uploading the films on the internet. In evaluating the immaterial damages incurred by the school, the Court noted the seriousness of the moral damages caused by racial discrimination. The Court also recognized that the school has legal interest to conduct ethnic education to Koreans in Japan, whereas the activities by the appellants abusing the freedom of expression do not enjoy legal protection.

“When racially discriminatory remarks against those who belong to certain groups are made between private individuals, and the remarks lack reasonable grounds and infringe legal interest of others beyond the limit tolerable in society in light of Arts. 13 and 14 of the Constitution and the object of International Convention on the Elimination of All Forms of Racial Discrimination, we should interpret that the requirement that it ‘infringed any right of others or legally protected interest of others’ in Art.709 of the Civil Code is fulfilled, and realize the object of the Convention to eliminate racial discrimination even between private individuals by making the perpetrator compensate for the damages caused.... [T]he object of the Convention to eliminate racial discrimination becomes the

³⁷ Kyoto District Court, Judgment of 7 October 2013, http://www.courts.go.jp/app/hanrei_jp/detail4?Id=83675.

basis in evaluating the maliciousness of tort. Evidently, it should be considered in terms of the gravity of immaterial damages such as the sense of victimization by unreasonable tort and moral damages.

According to the facts, it is clear that the appellants negated the personality of Koreans in Japan³⁸ and the appellee, appealed the legitimacy of discrimination against Koreans in Japan to the public, and claimed, in public places, their view that Koreans in Japan should be excluded from Japanese society. Moreover, in addition to the facts that their acts were persistently repeated for three times, the third demonstration was especially of highly unlawful nature in that it was conducted in violation of the decision of temporary injunction in this case. Furthermore, publicizing the films shooting the scenes of demonstrations in this case by uploading them on movie site on the internet, with titles put from the position of the groups of the appellants [...], making them viewable by unidentified numbers of people, not only aggravated damages by widely disseminating the films but also makes it possible that the damages be reproduced in the future by being conserved in destinations where the films are disseminated. Considering the circumstances as above in total, it is clear that the activities in this case, as a whole, are malicious acts that promote and aggravate social prejudices and the idea of discrimination against the appellee educating Koreans in Japan and their children.

The appellee not only incurred serious impediment to its operation of ethnic education by the above acts of the appellants but also was exposed to unreasonable expressions of hate. As a result, their business has been obstructed, social reputation degraded, and their personal interest greatly damaged [...]. Also, the 134 students enrolled in the school at the time of the incident were, in spite of the fact that they had evidently nothing to be blamed, exposed to scornful and degrading attacks by the appellants only for the reason of their ethnic origin (even if the children had not been present, it is easily presumable that they would have recognized the situation of the incident). It is admitted that the degree of moral damages incurred by them due to unreasonable acts of racial discrimination was significant, and the appellant will have to pay considerable efforts to alleviate the sufferings of those students.

The appellee, as the contents of its personal interest, has the interest to retain the honor,

³⁸ “Zainichi chosen-jin” in Japanese. Its English translation becomes simply “Koreans in Japan” or “Korean residents in Japan”, which would encompass all Koreans without regard to historical background. It is to be noted, however, the term “zainichi chosen-jin” or “zainichi kankoku-jin” in Japanese is meant to refer to Korean descendants of those who had settled in Japan for historical reasons as explained in note 14.

which is an objective evaluation by the society on the personal values such as the *raison-d'être* as an educational institution and its qualification, and to conduct ethnic education of Koreans in Japan as an educational business in the school in this case. On the other hand, the activities in this case obstruct the educational business of the appellee in the school in this case, significantly impairing the honor of the appellee as an educational institution. There is no choice but to say that they are contrary to 'public welfare' in Art.13 of the Constitution, as abuse of the freedom of expression, and do not merit legal protection."³⁹

2. The Tokushima Teachers' Association Case

The perpetrators in this case largely overlap with those of the Kyoto Korean Primary School Case above, but the direct victims are a Japanese national and a professional organization. Condemning that the Teachers' Association of Tokushima Prefecture donated money to a Korean school, members of the Zaitokukai and their sympathizers, sixteen in total, raided a small office of the Association of 28 square meters in April 2010, shouting racist slogans through megaphones. They made one of the two women in the office, chief-secretary of the Association (hereinafter W), a particular target, raging jeers such as "A dog of Korea!", "You are a bullshit sending money to a Korean school!", "Stupid, that is a fraud!," "Take back the Japanese victims kidnapped by the DPRK!", "Get out of Japan, old bat!", "You are sentenced to death!", "Hey, you, an un- Japanese, perform hara-kiri and die!", and "We are going to physically humiliate you!" at her and holding her arms to prevent her from calling the police. During the same month, they also made a demonstration in front of the Tokushima Prefectural Office, shouting similar slogans insulting the Association as well as intimidating phrases targeting W, such as "We are going to W's domicile!", "We are going to look for W's domicile!", and "We are going to physically humiliate her!" They also filmed the scenes of their acts, in which the face of W is clearly recognizable, and uploaded them on the internet.

³⁹ Osaka High Court, Judgment of 7 July 2014, LEX/DB 25504350. Subsequently, the Supreme Court rejected the appeal of the defendants on 9 December 2014 (LEX/DB 25505638).

(1) Criminal proceedings [see above, II-1(1)]**(2) Civil proceedings: the Judgment of the Takamatsu High Court**

In the civil lawsuit filed by the Association and W, the Tokushima District Court found that a series of acts by the members, including publicizing the videotaped clips on the internet, constituted a tort, ordering them to pay compensation in damages⁴⁰. However, this judgment was far from satisfactory in that it did not take the aspect of racial discrimination of the acts into consideration. The Court did not adopt the argument of the plaintiffs on this point, considering that the remarks of the defendants simply contained criticism to the activities of the Association as well as the authorities of the DPRK and Korean schools and fell short of contents directly inciting to or promoting discrimination against Koreans.

In the appeal, the Takamatsu High Court significantly modified the original judgment, clearly recognizing the element of racial discrimination of the acts and reflecting that element on the amount of compensation⁴¹. The High Court recognized that, in light of the past activities of the defendants including the demonstrations against Kyoto Korean Primary School as well as their remarks in the present case, they have regarded Koreans in Japan as an evil existence, detesting them and considering that Koreans in Japan should be placed inferior to the Japanese, holding thus a sense of discrimination against Koreans in Japan. “In light of the background above, it is recognized that a series of acts of the defendants in the first instance⁴² is aimed at widely informing the public that those who support Koreans in Japan, an object of discrimination by the defendants, will be attacked by the defendants and incur various damages, and thus bringing about a chilling effect to the activities supporting them”⁴³.

The Court then amply referred to the ICERD, reproducing the provisions of Arts. 1 (definition of racial discrimination), 2(1) (the obligation of States to take measures to eradicate all forms of racial discrimination) and 6 (the right of the victim of racial discrimination to seek from competent tribunals just and adequate reparation or satisfaction for any damage):

⁴⁰ Tokushima District Court, Judgment of 27 March 2015, LEX/DB 25506170. The amount of compensation awarded was 660,000 yen to the Association and 1,650,000 yen to W.

⁴¹ Takamatsu High Court, 25 April 2016, LEX/DB 25543016.

⁴² Abbreviated as ‘defendants’ in this citation (note by the author).

⁴³ Takamatsu High Court, 25 April 2016, *supra*.

“This International Convention on the Elimination of All Forms of Racial Discrimination, while having domestic force of law as a form of national law, provides international responsibility of the State, and is not designed to directly regulate relations between private individuals but exclusively relations between public authorities and individuals, just as Arts.13, 14(1) of the Constitution, in light of the contents of its provisions. However, the object of the Convention must be noted and respected in interpreting and applying positive law such as Art.709 of the Civil Code in the present case. That is, the object of the International Convention on the Elimination of All Forms of Racial Discrimination, that racial discrimination is to be eliminated, provides the basis of maliciousness of the act which the Convention prohibits as ‘racial discrimination’ and demands measures to bring it to an end, and must be adequately taken into account in evaluating the unlawfulness of the tort in question and the degree to which the tort is to be condemned”.

Applying such an understanding to the present case, the Court found that a series of acts including the uploading the videotaped clips on the internet, aimed at giving a chilling effect to the activities to support Koreans in Japan and indeed brought about such an effect through a rush of telephone calls of harassment to the office of the Association and of comments slandering the plaintiffs on the internet, amounts to distinction or exclusion “which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms” for minorities defined in Art.1 of the ICERD, and that it thus deserves strong condemnation. In addition, the Court recognized that the insulting remarks against W which significantly infringe the dignity for women as well as intimidating remarks insinuating sexual assault are also to be strongly condemned. On the basis of the high degree of unlawfulness of the acts thus established, and in light of the gravity of damages for the victims including PTSD from which W has suffered, the Court then awarded a compensation of 1,036,000 yen to the Association and 3,330,250 yen to W, almost doubling the amount awarded by the court of first instance⁴⁴.

⁴⁴ The appeal by the defendants was rejected by the Supreme Court on 1 November 2016 (LEX/DB 25544985, 25554986).

3. The Case of Defamation to a Female Journalist (Part 1: Civil Proceedings against the Hate Group and Its Representatives)

The judgments of this case basically follow the jurisprudence of other cases such as the ones examined above, but they have novelties in that the case principally concerned hate speech unfolded on internet sites. Two separate suits were filed, one against the members of a hate group who disseminated hate speech through live broadcast as well as twitter and the other against the operator of blogsite. In both suits, civil responsibility of the defendants was recognized, taking also into account the characteristics of internet communication. Also, the aspect of “multiple discrimination” of the speech, composed of racial discrimination and discrimination against woman, was also recognized in both suits, becoming the first case in which such a concept was admitted by the judiciary. The second suit, i.e. the one against the operator, will be dealt with below in III-1, as the judgment of the first instance was handed down after the enactment of the 2016 Act.

In this case, the plaintiff, a Korean resident in Japan, was a freelancer journalist writing principally articles on the internet (hereinafter Ms. L). In May 2013, the defendants, representatives of the Zaitokukai, after refusing an offer of interview from Ms. L, conducted a series of personal attacks on Ms. L degrading her ethnicity, physical appearances and professional activities as described below through an internet platform that carries live broadcasts as well as Twitter. They also threw similar remarks at her during street demonstrations in a downtown of Kobe City, pointing at her who was watching the demonstrations nearby and insulting her in public.

(1) Judgment of the Osaka District Court

In this case, the plaintiff filed a suit against the Zaitokukai and its two representatives for a tort by defamation and insults. First, concerning defamation, the Osaka District Court recalled the jurisprudence of the Supreme Court on the issue as follows⁴⁵:

“Expressions that degrade the social reputation of a person, regardless of the fact that they indicate a fact or express an opinion or comment, damage that person’s honor. Whether or

⁴⁵ Osaka District Court, Judgment of 27 September 2016, LEX/DB 25544419.

not an indication of a fact or an expression of an opinion or comment in a given expression degrades the social reputation of a person is to be judged by interpreting the meaning and content, on the basis of a common attention and reading of the expression in question made by ordinary readers (Judgment, Second Small Chamber, Supreme Court, 20 July 1956, *Minshu*, vol.10, No.8, p.1059). [...] In general, as to the tort of defamation by an expression of an opinion or comment, if that act concerns a fact involving public interest, has exclusively the purpose of promoting public interest, and when the truthfulness of the material parts of facts on which the opinion or comment is based is proven, that act is devoid of unlawfulness, unless it exceeds the scope of an opinion or comment by lending itself to personal attack for example (Judgment, Second Small Chamber, Supreme Court, 24 April 1987, *Minshu*, vol.41, No.3, p.490; Judgment, First Small Chamber, Supreme Court, 21 December 1989, *Minshu*, vol.43, No.12, p.2252).”

Applying the established jurisprudence as above to the present case, the Court held that the remarks such as “A woman with beard, a rare creature in the world”, and “a Korean writer spreading a bunch of lies”, as a whole, had a main purpose of denigrating her, not of exclusively promoting public interest, and also exceeds the scope of an opinion or comment by lending itself to personal attack.

Second, concerning insults, the Court held that remarks persistently made against the plaintiff during street demonstrations such as “Everyone, the Korean old-bat here is an anti-Japan journalist!”, “The old-bat who detests Japan to the core is this old-bat in pink!”, and “Don’t stare at us with that face like a Korean soup!” are, “on account of the manner and contents of the expressions, amount to an act of insults exceeding the limit tolerated in terms of conventional wisdom of society, unlawfully infringes upon the personality rights of the plaintiff”⁴⁶. Also, the remarks such as “A white radish if she stands, a fat pumpkin if she sits, and the way she walks is houthuynia” and “Korean old-bat”, calling the plaintiff by her name and broadcast live “on internet that an unidentified number of people can browse”, were equally held to amount to an act of insults unlawfully infringing upon the personality rights of the plaintiff “on account of the manner and contents of the expressions”.

In awarding the compensation, the Court, in addition to the maliciousness of the acts of

⁴⁶ Osaka District Court, Judgment of 27 September 2016, LEX/DB 25544419.

defamation and insults made either on the internet or a busy street as well as high degree of moral damages caused by repetitive and persistent remarks, took the object of the ICERD into consideration.

“Added to the above, the defendant Zaitokukai, of which the defendant C is a representative, a group conducting activities with a view to propagate anti - Korean sentiment in Japan by publicizing criminal acts by Koreans and to exclude Koreans from Japan. It is also observed that the defendant C has repeated remarks abominating Koreans in the present case, such as ‘Koreans residing in Japan, get out of Japan’. It is also clear that each remark of the defendant C amounting to the above tort was made, on account of its contents and backgrounds, with an intention of promoting and proliferating discrimination against Koreans, on the basis of his own view according to which Koreans residing in Japan including the plaintiff should be excluded from the society of this country. In light of the object and purpose of the International Convention on the Elimination of All Forms of Racial Discrimination which hold that racial discrimination is to be eliminated (the International Convention on the Elimination of All Forms of Racial Discrimination, main paragraph of Art.2(1) and Art.6), the point that the above tort (defamation and insults) was conducted with the intention contrary to the object of the Convention as above must be taken into consideration in calculating the amount of compensation for damages”.

The Court thus awarded the compensation of 770,000 yen for damages to be paid jointly by the defendants and the group, based on Art.709 of the Civil Code for the former and by an analogous application of Art.78 of the Act on General Incorporated Associations and General Incorporated Foundations⁴⁷ for the latter.

⁴⁷ Act No. 48 of 2006. Art.78 provides: “A general incorporated association shall be liable to provide compensation for damages caused to a third party by its representative director or other representatives in the course of performing their duties.”

(2) Judgment of the Osaka High Court

The Osaka High Court upheld the judgment of the first instance, rejecting appeals from both parties⁴⁸. The Court not only affirmed most of the findings by the original judgment including the amount of compensation, but also added that “the above tort (defamation and insults) was conducted against the plaintiff in the first instance, taking note of the fact that she is a woman and using expressions denigrating her as to her appearances and so on, amounts to multiple discrimination including discrimination against women”. Thus the Court recognized that a series of remarks constituted multiple discrimination of racial discrimination and discrimination against women. This is the first case in which the notion of multiple discrimination, increasingly utilized in international human rights law in recent years⁴⁹, made its way to a judicial finding in Japan. The Supreme Court rejected the appeal from the defendants in the first instance, making the judgment of the High Court final and binding⁵⁰.

III. Legislative Measure: Enactment of the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan

The Diet of Japan, overwhelmingly occupied by members of the LDP, the conservative ruling party, has long been reluctant to enact any anti-racial discrimination act. However, the rage of demonstrations of hate groups that became increasingly alarming finally led to a creation of a nonpartisan group of parliamentarians to examine possible legislative measures, breaking a long period of immobility of the legislature. As a result, in May 2016, the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan was passed in the Diet, and entered into force the following month.

⁴⁸ Osaka High Court, Judgment of 19 June 2017, LEX/DB 25448757.

⁴⁹ The Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 32 (2009), recalls that, while the principle of enjoyment of human rights on an equal footing is integral to the prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin in the ICERD, “[t]he ‘grounds’ of discrimination are extended in practice by the notion of ‘intersectionality’ whereby the Committee addresses situations of double or multiple discrimination – such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention” (UN Doc.CERD/C/GC/32, para.7).

⁵⁰ Supreme Court, Second Small Chamber, Decision of 29 November 2017.

This Act is composed of seven articles, and instead of directly prohibiting racial hate speech as such, it sets out “the basic principles” for efforts towards the elimination of discriminatory speech and “clarify the responsibilities” of public authorities, national and local (Art.1), to implement measures to eliminate such speech. Also, the scope of Act as expressed in its title is somewhat awkward, as a result of the fact that the bill had to go through a scrutiny of members of the ruling party who wanted to make the law as modest as possible (rather than setting forth an outright objective to eradicate racial hate speech against any race or group of persons of another colour or ethnic origin). Still, with all such limits and deficiencies, the Act represents the first legislation in Japan to specifically address the problem of racial discrimination, in the absence of general anti-racial discrimination law. As shown below, this development on the front of legislation has already had some impact on the practice of administrative and judicial authorities.

1. The Act as an implementation measure of the ICERD

The Act declares, in its preamble, that discriminatory speech and behavior against people who are from or whose ancestors were from outside of Japan and who are legally residing in Japan and is not tolerated. The preamble states:

“In recent years in Japan, unfair discriminatory speech and behavior are being practiced to incite the exclusion of persons and their descendants, who are residing lawfully in Japan, from local communities in our country by reason of such persons originating from a country or region other than Japan, therefore imposing tremendous pain and suffering on such persons and their descendants, and causing serious rifts in the local community. Obviously, such unfair discriminatory speech and behavior should not exist, and tolerating such a situation is not permissible in light of Japan’s position in the international community. It is therefore declared that such unfair discriminatory speech and behavior will not be tolerated, and, accordingly, this Act is to be enacted to spread awareness among the general public and to promote their understanding and cooperation through further human rights education and awareness-raising activities, and to strengthen efforts to eliminate unfair discriminatory speech and behavior.”

This preamble does not mention the ICERD, but the backgrounds leading to the passage of the Act clearly point to the fact that the need to take measures to eradicate racial hate speech as urged by human rights treaty bodies including the ICERD Committee was a principal force behind it on a normative level. The website of the Ministry of Justice, on a page entitled “Promotion activities focusing on hate speech: Stop! Hate Speech”, explains that the Act was enacted in response to the rise of racial hate speech and the concluding observations of treaty bodies urging Japan to take appropriate measures⁵¹. Also, supplementary resolutions passed in the relevant committees of the both houses of the Diet, mentioned below, explicitly refer to the ICERD, in view of promoting the application of the Act in line with the object and purpose of this Convention.

The Act defines “unfair discriminatory speech and behavior against persons originating from outside Japan” as “unfair discriminatory speech and behavior to incite the exclusion of persons originating exclusively from a country or region other than Japan or their descendants and who are lawfully residing in Japan (hereinafter referred to in this Article as ‘persons originating from outside Japan’) from the local community by reason of such persons originating from a country or region other than Japan, such as openly announcing to the effect of harming the life, body, freedom, reputation or property of, or to significantly insult, persons originating from outside Japan with the objective of encouraging or inducing discriminatory feelings against such persons originating from outside Japan” (Art.2). This definition shows that the Act is addressed only to discriminatory speech and behavior to incite the exclusion of “persons originating exclusively from a country or region other than Japan or their descendants and who are lawfully residing in Japan [...] from the local community”, i.e. mostly Koreans and their descendants, and does not cover such speech against, for example,

⁵¹ “In recent years, ‘hate speech’ - discriminatory expression and behavior aimed at specific ethnic groups or nationalities - has become a matter of grave concern. Such language or behavior not only causes feelings of anxiety and repugnance, but could also violate the victims’ dignity as human beings and fuel discriminatory attitudes. Recently, the hate speech has been widely reported in the media, on the Internet and elsewhere, illustrating a rise in social concern. Ways of dealing with hate speech were recommended to the government in ‘Concluding Observations on the Sixth Periodic Report of Japan’ by the UN Human Rights Committee in July 2014 and ‘Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan’ by the UN Committee on the Elimination of Racial Discrimination in August of the same year. In response, the ‘Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan’ was enacted by the National Diet of Japan and brought into force on Friday, June 3rd, 2016. Meanwhile, the human rights organizations of the Ministry of Justice are actively engaged in public awareness-raising and PR campaigns, using the methods shown below, to make it clearly understood that this kind of hate speech is not acceptable” (http://www.moj.go.jp/ENGLISH/m_jinken04_00001.html).

foreign nationals in irregular situations. While an urgent need to respond to recent waves of hate demonstrations against Koreans is understandable, such a narrow scope of the Act must be criticized, as States parties to human rights treaties are required to ensure rights to all individuals under their jurisdiction regardless of their status in terms of immigration law.

In relation to this, it is to be noted that an unduly restrictive interpretation that would make discriminatory speech to persons other than those designated in the Act is de-legitimized by two supplementary resolutions⁵² passed at the time of the enactment of the Act. The one by the Committee on Judicial Affairs of the House of Councilors (the upper house) states that “(i) The interpretation of Article 2 of this Act that certain form of discriminatory speech and behavior may be allowed as long as it is not the ‘unfair discriminatory speech and behavior against persons originating from outside Japan’ is not correct, and any form of discriminatory speech and behavior shall be appropriately dealt with in view of the intent of this Act, and the spirit of the Japanese Constitution and the International Convention on the Elimination of All Forms of Racial Discrimination”⁵³. In a similar vein, the other resolution, by the Committee on Judicial Affairs of the House of Representatives (the lower house), states that “(i) In view of the intent of this Act, and the spirit of the Japanese Constitution and the International Convention on the Elimination of All Forms of Racial Discrimination, and with the basic awareness that it is not correct to believe that certain form of discriminatory speech and behavior may be allowed as long as it is not the ‘unfair discriminatory speech and behavior against persons originating from outside Japan’ provided for in Article 2, all discriminatory speech and behavior shall be dealt with appropriately”⁵⁴. Given that the Act is intended to be an implementing legislation of the ICERD, and that it represents the first step setting forth a policy framework in the fight against racial discrimination in Japan, it is important that the Act be interpreted and applied in a way that would better ensure the realization of the object and purpose of the Convention.

⁵² Such resolutions are sometimes adopted in Japan to clarify the legislative intent that is not explicitly set forth in an act itself.

⁵³ The Ministry of Justice, "Promotion activities focusing on hate speech: Stop! Hate Speech", http://www.moj.go.jp/ENGLISH/m_jinken04_00001.html.

⁵⁴ *Ibid.*

2. Pillar of the Act: Responsibilities of the National Government and Local Governments

As for the acts of private parties, instead of prohibiting “unfair discriminatory speech and behavior” defined above, the Act only provides a general principle addressed to the public, calling on them to “endeavor to contribute to the realization of a society” free from such speech and behavior (Art.3). The focus of the Act rather is on obliging the national and local governments to take positive measures to eliminate discriminatory speech and behavior. Art.4 provides, in this respect, that “The national government has the responsibility to implement measures relating to efforts to eliminate unfair discriminatory speech and behavior against persons originating from outside Japan, and to give necessary advice in order to promote measures relating to efforts to eliminate unfair discriminatory speech and behavior against persons originating from outside Japan being taken by the local governments, and to take other measures” (para.1), and that “The local governments shall endeavor to take measures in accordance with the actual situation of the region, taking into account the sharing of appropriate roles with the national government with respect to the efforts to eliminate unfair discriminatory speech and behavior against persons originating from outside Japan” (para.2) in a broad wording. This Article represents a central pillar of this Act, and basic measures to be taken by the authorities are provided in Chapter II, in Arts.5 (Preparation and Maintenance of a Consultation System), 6 (Enhancement of Education) and 7 (Awareness-raising Activities).

Art.5 provides that the national as well as local governments shall respond adequately to “consultations” relating to unfair discriminatory speech and behavior and develop a “necessary system so as to prevent and resolve disputes in this regard”. The term “consultations” here is quite weak, compared to “complaints”, for example, and such an approach is actually in line with a traditional method of the Japanese government to the questions of human rights that relies on non-coercive, purely advisory mechanism⁵⁵. But the

⁵⁵ In addition to promotional activities such as poster-making and human rights speech contest, the Human Rights Bureau and the Legal Affairs Bureaus of the Ministry of Justice, supported by volunteers appointed by the Minister of Justice, operate human rights counselling service. These organs, when they find the fact of infringement of rights based on their investigation, may take appropriate measures such as conciliating between the parties, giving the author of the complaint appropriate legal advice, addressing recommendations or instructions requesting the person who has infringed upon another’s rights to improve their conduct, requesting administrative authorities concerned to take appropriate measures, launching

law probably could not have gone further, given that it does not explicitly prohibit discriminatory speech and behavior conducted by individuals in the first place. On the other hand, Art.5 does mention a need to develop a system to “prevent and resolve disputes”, and it remains to be seen whether this provision may lead to a development of mechanism more meaningful and effective than the current human rights counselling. Arts.6 and 7 concern promotional measures in the field of educational and other activities, which could be regarded as part of such measures required under Art. 7 of the ICERD.

IV. Effects of Legislation: Administrative and Judicial Responses after the Enactment of the Act

Despite the considerable modesty of Act in its scope and contents, the enactment of this law represents an important step on the level of policy of national as well as local governments. After the passage of the Act, the overall objective of the Act to eliminate racial hate speech against Korean minorities has been conveyed to administrative as well as judicial authorities in various ways.

1. An Example of Steps by Local Governments

Kawasaki City in Kanagawa Prefecture is one of the cities where a large population of Koreans resides, frequently becoming a stage of racist demonstrations by hate groups. Already on May 31, 2016, i.e. after the enactment of the Act but before its entry into force, the City announced that it would not permit a group that had planned racist demonstrations the use of municipal parks. The mayor made a statement as follows, referring to the Act:

“Our City is a town has developed on the basis of multicultural coexistence, in which people have recognized each other's difference as assets, and it is highly regrettable and deplorable that demonstrations of hate speech have been conducted in our City.

awareness-raising activities among the parties or in the region concerned, and eventually, filing criminal complaints in serious cases (<http://www.moj.go.jp/ENGLISH/HB/hb.html>). However, cases leading to criminal complaint are quite rare, and the overwhelming majority of complaints only lead to non-binding “recommendations”, “instructions” or “awareness-raising activities” which depend on the goodwill of those concerned. Being themselves part of the Ministry of Justice, they also lack institutional independence, and cannot be regarded as a national human rights institution in terms of international human rights law.

In response to the fact to that the willingness of the national government was clearly expressed by the enactment of the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan, our City has carefully examined measures to take suitable to the local situations, taking various opinions into account. As a result, in light of the fact that the applicant in this case made speech as provided in the Act in the past, the City reached the conclusion in view of protecting the safety and dignity of citizens from unfair discriminatory speech, judging that there is extremely high probability that similar speech would be conducted this time too.”⁵⁶

2. An Example of a Judicial Decision of Injunction to Demonstrations

Also, in a case in which a social welfare institution operating cultural exchange facilities of foreigners and Japanese in Kawasaki City had demanded a decision or temporary injunction of racist demonstrations in areas within 500 meters from its office, the Yokohama District Court accepted the application and issued a decision ordering injunction on June 2, 2016, again ahead of the entry into force of the Act. The decision reads as follows:

“Everyone acquires evaluation from society on his or her morality, virtue, reputation and credibility by acting freely while forming the personality through peacefully living in housing as a basis of life, and the right to live peacefully in the housing, the right to act freely, the right to retain honor and reputation shall be strongly protected as personal rights deriving from Art. 13 of the Constitution, and shall equally be guaranteed to those who lawfully reside in Japan. And, the right of those who originate from the countries or areas outside of Japan or their descendants who lawfully reside in Japan, such as Koreans in Japan involved in this case, not to be discriminated against for the reason of their origin from the countries or areas outside of Japan and not to be excluded from local communities in Japan forms the basis necessary to act freely, acquire honor and reputation and retain them while living peacefully in housing which is the basis of life in local communities in Japan and forming the personality. Thus the right should be strongly protected, as a prerequisite in enjoying personal rights as mentioned above.

⁵⁶ Comments by the Mayor on the Decision Not To Give Permission to the Application for the Permission of Acts in the Parks, http://www.city.kawasaki.jp/templates/press/cmsfiles/contents/0000077/77502/houdou_happyouisyoyou.pdf (translation by the author).

In particular, given that the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination to which Japan is a party and Article 14 of the Constitution prohibit discrimination based on race, and the fact that the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan was enacted and will entry into force soon, it must be said that the protection of the right is extremely important”⁵⁷.

3. The Case of Defamation to a Female Journalist (Part 2: Civil Proceedings against the operator of a blogsite)

The second case filed by Ms. L is against an operator of a blog “Hoshu Sokuho [Conservative News Flash]”. Between July 2013 and July 2014, the defendant carried a total of 45 blog articles in which he put together the contents relating to Ms. L posted on other websites such as Ni-Channeru [Channel 2]⁵⁸. These articles cited the postings and comments by third parties concerning articles, tweets and other remarks made by Ms. L, as well as contents carried on Ms. L’s tweet, adding some phrases, and, for some of the articles, adding processing such as aggrandizing the size of letters and coloring them. The 45 blog articles also contained portraits and pictures of Ms. L which he reproduced from the Ni-Channeru site.

In the judgment of 16 November 2017, the Osaka District Court found a tort for multiple grounds⁵⁹. First, as to defamation, the Court, on the basis of the established jurisprudence by the Supreme Court (cited above in relation to the Tokushima Case), recognized that 11 articles out of 45 included expressions degrading the social reputation of the plaintiff, by giving an impression that she defends criminal acts, she is making argument that runs contrary to the interest of Japan in order to profit the DPRK or ROC or that she degrades the image of Koreans residing in Japan. Secondly, as to insults, the Court found that 43 articles included contents amounting to insults exceeding the limit tolerated by conventional wisdom of the society, by using words such as “This bitch is really crazy”, “Stupid, leftist Korean”, “Parasite old-bat”, “Cockroach”, “Human-like creature” and “Agent of the DPRK”. Thirdly, the Court found that 37 articles “significantly insult the plaintiff, for the reason that she is a

⁵⁷ Yokohama District Court, Decision of 2 June 2016, Kawasaki Branch, *Hanrei Jiho*, No.2296, p.14.

⁵⁸ It is a site notorious in Japan for its ultra-rightist, racist and xenophobic contents.

⁵⁹ Osaka District Court, Judgment of 16 November 2017 (unpublished as of the time of writing. The author obtained it from the lawyer for the plaintiff).

Korean residing in Japan, and incites to exclude her from local communities of Japan, thereby includes the contents that amount to racial discrimination contrary to the object and purpose of Art.14 (1) of the Constitution, the Act on the elimination of discriminatory speech⁶⁰ and the International Convention on the Elimination of All Forms of Racial Discrimination (Arts.1 and 2 of the Act on the elimination of discriminatory speech, and Art.1(1), main paragraph of Art. 2(1) and Art.6 of the International Convention on the Elimination of All Forms of Racial Discrimination)". Fourthly, the Court also recognized that 32 articles, conspicuously insulting her for her gender, age and appearance, included contents amounting to discrimination against women.

While the contents of expressions used by the defendant had much in common with other perpetrators of hate speech, a peculiar issue that singles out this case is that it concerned the responsibility of an operator of a blogsite who carried articles by using remarks made by third parties. The Court affirmed that the defendant not only simply cited phrases carried on other sites but added processing on his own, such as changing the order of responses and tweets, aggrandizing and coloring letters, and putting titles, making the contents more easily accessible to a wide range of readers other than the original sites used and the twitter of the plaintiff. "Considering these circumstances as a whole, it is judged that the act of carrying each article of the blog in this case acquired a new signification distinct from the other threads such as Ni-Channeru from which the blog had cited." Thus the Court admitted that the acts of the defendant "infringed the personality rights of the plaintiff deriving from Art.13 of the Constitution, independently from the acts of posting comments on the thread of Ni-Channeru or Twitter".

The Court rejected grounds precluding unlawfulness of defamation submitted by the defendant⁶¹, and in so doing, held that the conditions to apply these grounds to internet speech are not fundamentally different. Rejecting the submission that expressions on the internet deserve stronger protection of law than those on conventional media, the Court held:

⁶⁰ It refers to the 2016 Act.

⁶¹ One of them is that the act concerns a fact involving public interest and has exclusively the purpose of promoting public interest, as held by the Supreme Court in the judgments cited above. Another is a doctrine of exchanges of speech, according to which when a person made a remark damaging the honor of another person in order to defend his or her legitimate interest, its unlawfulness is precluded, provided that such an act does not exceed the limit considered appropriate in comparison to that of the counterpart in its manner and contents (Supreme Court, The Third Chamber, Judgment, 14 April 1963, *Minshu*, vol.17. No.3, p.476).

“However, considering that ordinary readers do not necessarily take expressions on the internet as information inferior in credibility, that damages for defamation by information carried on the internet, which is immediately accessible to an unidentified number of persons, may sometimes become serious, and that there is no guarantee that an adequate recovery of such damages by means of refutation on the internet may be made, it is difficult to interpret that the unlawfulness is precluded under more relaxed conditions [than held above]”. Thus the Court found a tort involving insults, racial discrimination and discrimination against women gravely damaging the interest of the plaintiff as follows, referring also to an aspect of multiple discrimination:

“As the expressions involving insults, racial discrimination and discrimination against women, repetitively using insulting or impertinent expressions, attack the personality of the plaintiff by caricaturizing her mental state, intellectual capacity, race, gender, age or appearances and incite to excluding the plaintiff from local communities of Japan, the degree to which these expressions damaged the sentiment of honor, peace of life as well as dignity as woman is significant. In particular, it should also be taken into consideration that, in this case, expressions based on multiple discrimination were repeatedly made”.

Thus the Court ordered the defendant to pay a total of 2 million yen in damages.

Concluding remarks

In Japan, under the circumstances that concrete legislative provisions prohibiting racial hate speech are nonexistent, the judiciary has responded positively to the claims of victims demanding compensation for damages in tort, interpreting the tort provision in the Civil Code in the light of the ICERD including in the decision of the amount of compensation awarded. On the other hand, it remains true that tort litigation is far from an ideal method of effective remedies for racial hate speech, given the indirectness of tort provision (cumbersomeness of interpreting and applying the general provision to acts of hate speech) as well as burden of proof incurred on plaintiffs. It is evident that effective remedies, and also prevention, of hate speech requires decent legal framework including legislative provisions prohibiting racial hate

speech⁶². In this regard, the new law in Japan enacted in 2016, the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan, is not satisfactory in that it does not prohibit racial hate speech as such. However, by providing the responsibility of the national and local governments to implement measures to eliminate discriminatory speech and behavior, it does express the willingness to eliminate hate speech against ethnic minorities as a national - and local-level policy objective. As shown above, the enactment of the Act has already given impact on a number of administrative and judicial decisions.

To conclude, it goes without saying that, in parallel with a construction of appropriate legal framework, efforts in the fields of teaching, education, culture and information with a view to combating prejudices which lead to racial discrimination, as required in Art.7 of the ICERD, are fundamental. The prevalence of racial hate speech targeting “comfort women”, for example, amply demonstrates that the phenomenon is actually a part of the “war of memory”, and that refusal to recognize historical guilt is exploding in the form of attack and debasement of the victims (degrading the victims as liars becomes the only way to maintain “the honor of Japan” for some). It is hard to deny, in this context, that the successive government’s negligence in the area of history education - in spite of the fact that efforts to pass on the facts to future generations through history education was expressed in the Kono Statement in 1993 - , added to its position to understate the fact of human rights violation, has contributed to the rise of such hate speech against the victims. The surge of hate speech is thus prompting us to reflect on the way in which we approach the question of historical conscience too.

⁶² The ICERD Committee has reiterated that Art.4 of the Convention necessitates legislative measures for its implementation. Recently, for example, the Committee stated that “[a]rticle 4 comprises elements relating to speech and the organizational context for the production of speech, serves the functions of prevention and deterrence, and provides for sanctions when deterrence fails. The article also has an expressive function in underlining the international community’s abhorrence of racist hate speech, understood as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society”, and that “[a]s article 4 is not self-executing, States parties are required by its terms to adopt legislation to combat racist hate speech that falls within its scope” (General recommendation No. 35: Combating racist hate speech, UN Doc. CERD/C/GC/35(2013), paras.10,13).