

Hate Speech and Legal Restrictions in Japan

Kyōto District Court, decision of 7 October 2013¹

Ōsaka High Court, decision of 8 July 2014²

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I. FACTS

The Plaintiff was an educational corporation which established and ran schools for children of Korean residents whose home country was North Korea. The defendants were the so-called *Zainichi tokken o yurusanai shimin no kai* [the citizens' group that will not admit special privileges for Korean residents in Japan] (hereinafter referred to as "*Zaitoku-kai*") and nine individual persons who had joined *Zaitoku-kai*'s propaganda activities.

Because of the lack of its own schoolyard the plaintiff school had used the adjoining public park X for physical training, club activities, sports meetings, and ceremonies without a permission of Kyōto City since 1960. However, there had been complaints

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1 Kyōto District Court, 7 October 2013, in: Hanrei Jihō 2208 (2014) 74. It is also available at http://www.courts.go.jp/app/files/hanrei_jp/675/083675_hanrei.pdf. For an analysis of this judgment, see Y. NASU, *Ōki na igi o motsu Kyōto chisai hanketsu: kono kuni no hō-seido no genkai mo akiraka ni* [The significance of the judgment by the Kyōto District Court: the limits of our legal system became also clear] in: *Journalism* 282 (2013) 110.

2 Ōsaka High Court, 8 July 2014, Daiichi Hōki, D1 Law 28223025. The Supreme Court dismissed the appeal from the defendants on 9 December 2014, and therefore, the Ōsaka High Court decision became final.

about the Korean school's use of the park X from the citizens in the neighborhood since May 2009. Kyōto City issued an administrative guidance requesting the plaintiff to remove its equipment, and the plaintiff promised that they would do so by the end of January 2010. Yet the plaintiff school held a sport meeting on 4 October 2009 and the neighbors complained about usage of fire, illegal parking, noise and so forth. On 13 November *Zaitoku-kai* received an email complaining about the plaintiff school, and therefore the defendants decided to stage protest actions.

The protest actions consisted of two parts: propaganda activity and release of its video film to the Internet. There were three protest actions and each of them was announced on the Internet beforehand in order to call for participation. The first propaganda activity was held on Friday afternoon when students were at school. Eleven people shouted their protests with loudspeakers in front of the school gate and resorted to force, such as cutting the wiring of the school's electric speaker in the park X. The words uttered were "You have been occupying the park illegally for 50 years", "Japanese citizens cannot use this park", "The school ground is also an illegal occupation", "(Koreans) robbed our ancestors of this ground, (Koreans) took this ground by raping (Japanese) women at the time of war because there were no (Japanese) men around", "This is an act of invasion, by North Korea", "This is a North Korean spy training institute", "*Chōsen Yakuza* [Korean Gangsters]", "Kick out Korean schools from Japan!", "Get out here!", "Destroy this Korean school", "A promise is made between human beings. A promise cannot be made between a human being and a Korean" and the like. In spite of the teachers' efforts to prevent students from hearing those roars, they were too loud and the students in the lower classes burst into tears from fear. The video film of this demonstration was uploaded to the Internet.

The second propaganda activity was held on Thursday and the school let the students take trips as extracurricular lessons in order to avoid a situation in which they would be faced with the propaganda activity. About thirty people with a propaganda vehicle and loudspeakers loudly shouted slogans. The defendants repeated such utterances as "We Japanese will never forgive this dirty, evil Korean school which took away the smiles from Japanese children (who otherwise could have been playing in the park)!", "In the period of unstable public order after the war these Koreans wore the uniforms of the former Japanese military, of the army and the navy, and got riotous and did things such as robberies of land, money and goods, rape, bank robbery, massacre, attack on police stations and the like!", "Dispose of Koreans at the public health center!"³, "Dogs are cleverer!". Other participants also shouted "Get out of here!", "Beat them to death!". The video of this propaganda activity was uploaded to the Internet.

The third propaganda activity was held on Sunday around the park X, against the Court's injunction prohibiting the defendants from carrying out the propaganda activity

3 This utterance may be based on the fact that animals such as dogs and cats without masters are killed ("disposed of") in the public health center.

within a 200 m radius from the north school gate. The defendants made very loud speeches, with the help of loudspeakers of the propaganda vehicles, using slogans like “The Korean school is not a school!”, “Why do we have to give free textbooks to a merely private organization without any authorization by the government by using our tax money?”, “Cockroaches, maggots, go back to the Korean Peninsula!”, “Cockroach Koreans, get out of here!”. The video of this propaganda activity was also uploaded to the Internet.

The plaintiff claimed for damages caused by the defendants’ tortious acts of carrying out their propaganda activities and their releasing the videos on the Internet. In addition the plaintiff made an injunction claim that the defendants stop such activities based on the personal right of a corporation.

II. JUDGMENTS

Kyōto District Court, decision of 7 October 2013

There were six legal issues recognized in this case: (1) *Zaitoku-kai*’s capacity to be a party in a civil case as an association that is not a juridical person under Art. 29 of the Code of Civil Procedure⁴, (2) the influence of the International Convention on Elimination of All Forms of Racial Discrimination (CERD)⁵ on a civil case with regard to racial discrimination, (3) whether the propaganda activities and public release of videos are tortious acts under Art. 709 of the Civil Code⁶, (4) the defendants’ liability as joint tortfeasors under Art. 719 of the Civil Code, (5) *Zaitoku-kai*’s and another defendant’s liability as an employer under Art. 715 of the Civil Code, and (6) whether the injunction is permissible.

The Court affirmed all the points above. In the light of freedom of expression the points (2), (3) and (6) will be focused on below.

1. Regarding the International Convention on Elimination of All Forms of Racial Discrimination (CERD)

The Court acknowledged the obligations of a state party of CERD and the role of the Court in determining the amount of damages according to CERD as follows.

4 *Minji soshō-hō*, Law No. 109/1996, as amended by Law No. 30/2012.

5 International Convention on Elimination of All Forms of Racial Discrimination (1966), 660 U.N.T.S. 195.

6 *Minpō*, Law No. 89/1896, as amended by Law No. 94/2013; Engl. transl.: <http://www.japaneselawtranslation.go.jp/law/detail/?re=02&yo=%E6%B0%91%E6%B3%95&ft=2&ky=&page=3> (translation of the amendment, Law No. 78/2006, translated on 1 April 2009).

“Art. 98 para. 2 of the Constitution of Japan⁷ states that the treaties concluded by Japan shall be faithfully observed, and therefore, the treaty which was ratified and promulgated is assumed to have legal effects as a sort of law which is superior to domestic law, unless that treaty needs to be embodied as a domestic law”.

“CERD 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 para. 1), and demands that States Parties ‘condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms’, and that ‘each State Party 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’ (Art. 2 para. 1 main part and (d))”.

“Moreover, States Parties of CERD ‘shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals [...], against any acts of racial discrimination [...] as well as the right to seek [...] just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination’ (Art. 6). [...] From the above, it is understood that CERD not only makes States Parties bound by obligations as states under international law, but also gives such obligations directly to the national courts of States Parties. Therefore, the courts in Japan are obliged to interpret national law according to CERD.

[...] in respect of damages, the Japanese courts can order the tortfeasor to pay damages to the aggrieved party under Art. 709 of the Civil Code, only when concrete damages arose due to racial discrimination acts. [...] [i]f a racial discrimination act caused immaterial loss and therefore it is possible to order the tortfeasor to pay damages to the aggrieved party under Art. 709 of the Civil Code, the Japanese courts shall decide the amount of damage of such immaterial loss suitable to the rules of the treaty based on the obligations bound by CERD [...] [i]f an immaterial loss occurred due to a racial discrimination act, its compensation which the court orders the tortfeasor to pay is assumed to be the amount which is effective to give a protection from and a remedy for racial discrimination acts.”

2. *Whether the Defendants’ Protest Actions were Tortious Acts*

a) *The Defendants’ Protest Actions as Tortious Acts under Art. 709 of the Civil Code*

The Court held that the propaganda activities were an obstruction of education business, and that the acts of video release constituted defamation. The Court stated, “it is obvious

7 The Constitution of Japan, Constitution November 3, 1946; Engl. transl.: <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&x=0&y=0&co=01&ia=03&ky=%E6%86%B2%E6%B3%95&page=20> (translated on 1 April 2009).

that those propaganda activities were carried out as a whole [...] in order to appeal to the public for the sense of discrimination against Korean residents in Japan". The Court found the defendants' utterances to be discriminatory acts against Korean residents, the purpose of which is to prevent Korean residents from living in the Japanese society on an equal footing with Japanese and other foreigners. The Court noted that

"since both the obstruction of business and the defamation caused by the activities at issue [...] were acts of exclusion based on the national origin of Korean residents in Japan and the purpose was to infringe the Korean residents' human rights and fundamental freedom as equals, they can, as a whole, only be understood as racial discriminations as defined by Art. 1 para.1 of CERD".

The Court held that the obstruction of business and the defamation through the propaganda activities were tortious acts under Art. 709 of the Civil Code, and at the same time illegal acts as racial discrimination.

b) No Justifiable Cause for being Exempted from Illegality and Liability of Defamation

The Court noted that a justifiable cause for defamation could be acknowledged only if a speech act had the purpose of promoting public interest, regardless of whether such an act was connected with the indication of facts or commenting on facts. According to the Court, the illegality of defamation is denied if a statement is related to matters of public interest and it has been published with the sole purpose of advancing the public interest, as well as if the statement is proved to be true. However, in case that the fact is not proved to be true, such an act does not constitute a tort, if the actor reasonably believed that the facts were true.⁸ Concerning the present case, the Court pointed out that acts of expression to promote public interest could not be coercive with the use of physical force as the said propaganda activities. The Court held that the propaganda activities had no justifiable cause to be exempted from liability of defamation according to the judicial precedent. .

c) Damages

The Court awarded about JPY 12,000,000 [ca. € 80,000] in total as damages to the plaintiff.

3. Injunction

The Court stated that a juridical person had moral interests, such as reputation or doing business peacefully, which deserved legal protection as much as a natural person. Therefore, according to the Court, the plaintiff school is able to claim for an injunction to prevent further infringement of their rights based on moral interests of a juridical person

⁸ Supreme Court, 23 June 1966, Minshū 20, 1118; Supreme Court, 9 September 1997, Minshū 51, 3804.

if there is a concrete danger of further obstruction of business and defamation similar to the propaganda activities in this case.

With regard to the defendants' argument that this injunction was a prior restriction of speech which was subject to very strict scrutiny according to the *Hoppō Jānaru* case,⁹ the Court noted that the plaintiff's injunction claim did not require to stop the defendants' act of expression, but to limit the place of expression to exclude a 200 m radius from the school gate, as well as to restrict only the act of expression which would lead to obstruction of business or defamation. Therefore, the injunction was permitted by the Court.

Ōsaka High Court, decision of 8 July 2014

The Ōsaka High Court dismissed the appeal from the defendants. The Court gave an additional reference to the relationship of Art. 13 (the right to pursue happiness), Art. 14 (equality under the law), and Art. 21 (freedom of expression) of the Constitution, CERD, and Art. 709 of the Civil Code. The Court stated that CERD regulated the relationship between public authority and private individuals as did Art. 13 and Art. 14 para. 1 of the Constitution, and therefore CERD could be applied not directly to the relationship between private individuals, but through a specific article such as Art. 709 of the Civil Code. According to the Court, if a racist speech is addressed to a specific group of people and if such a speech lacks any rational reasons and infringes others' legal interests beyond the socially permitted degree in light of Art. 13, Art. 14 para. 1 of the Constitution and CERD, it fulfills the requirements of Art. 709 of the Civil Code ("infringed any right of others, or legally protected interest of others"), although private individuals' expression is in general protected by Art. 21 of the Constitution. As a consequence, through the tortfeasor paying damages for the loss, the purpose of CERD should be achieved between private individuals.

Moreover, the Court acknowledged the appellee's moral interest as a juridical person to offer national/ethnic education to Korean residents in Japan.

III. COMMENTS

1. *Background*

This case was the first case in Japan in which the Court found hate speech illegal. The chauvinist movement of right-wing-affiliated groups has been expanding these days partly in response to various issues between Japan and South Korea, North Korea or China, such as territorial issues and awareness of history.¹⁰ Especially the radical movement

⁹ Supreme Court, 11 June 1986, Minshū 40, 872.

¹⁰ Public Security Intelligence Agency, Review and Prospect of Internal and External Situations Annual Report 2013 (2014) 63–65, available at <http://www.moj.go.jp/content/000122119.pdf>.

against Koreans is problematic in Japan with regard to its aggression and its use of extreme form of racist utterances. Korean residents with special permanent residential status are those Koreans who once became Japanese citizens in consequence of the Japanese annexation of Korea in 1910, but whose Japanese nationality was renounced according to the San Francisco Peace Treaty in 1952, as well as their descendants residing in Japan. Today their legal status is one of foreign residents with special permanent residential status based on the Special Act on Immigration Control¹¹ without Japanese nationality, therefore, with limited rights, such as having no voting rights. The right-wing-affiliated groups use the Internet to call for participation in their protest activities.¹² Those activities have been held in so-called Korean towns in Tōkyō and Ōsaka.¹³ *Zaitoku-kai*, the most influential right-wing citizens' group was involved in this case.

The international society has observed the development of racist demonstrations and rallies against Koreans in Japan. Japan acceded to CERD in 1995 and is therefore obliged to submit regular reports to the Committee. Recently, the Committee on the Elimination of Racial Discrimination adopted the concluding observations on the combined seventh to ninth periodic reports of Japan¹⁴ and showed serious concerns about racist speeches and Japan's lack of national law to combat it.¹⁵

11 *Nihon-koku to no heiwa jōyaku ni motozuki nihon no kokuseki o ridatsu shita mono-tō no shutsunyū-koku kanri ni kansuru tokureihō* [The Special Act on Immigration Control of, Inter Alia, Those who have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan], Law No. 71/1991. The number of Korean special permanent residents was 369,249 out of 373,221, the total number of foreign special permanent residents in December 2013, and the ratio of Korean residents was approximately 99 %. For the official statistics in December 2013, see <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001118467>.

12 Recently right-wing, nationalistic and jingoistic comments by right-wing people on the Internet, so-called "*netto uyoku/neto uyo*" has become salient in Japan. Cf. Kōichi Yasuda, *Netto to aikoku: zaitoku-kai no "yami" o oikakete* [The Internet and patriotism: trace the darkness of *Zaitoku-kai*], (Tōkyō, 2012).

13 "Counter-demonstrations" criticizing right-wing-affiliated groups as racist appeared and scuffles frequently occurred between those two groups. Public Security Intelligence Agency, *supra* note 10, 65.

14 Seventh, Eighth, and Ninth Combined Periodic Report by the Government of Japan under Article 9 of the International Convention on Elimination of All Forms of Racial Discrimination JAPAN (2013) (CERD/C/JPN/7-9), in http://tbinternet.ohchr.org/layouts/treatybody_external/Download.aspx?symbolno=CERD/C/JPN/7-9&Lang=en.

15 Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan on 29 August 2014 (CERD/C/JPN/CO/7-9), see the website of the United Nations Human Rights, Office of the High Commissioner for Human Rights, http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/JPN/CERD_C_JPN_CO_7-9_18106_E.pdf. The Human Rights Committee on International Covenant on Civil and Political Rights (1966) also released its concluding observations on the sixth periodic report of Japan (CCPR/C/JPN/6) and expressed concern at hate speech and the insufficient legal protection in the Criminal and Civil Codes. Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Japan on 20

Although Japan acceded to CERD, she reserved paragraphs (a) and (b) of Art. 4, which require States Parties to punish by law “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination”, and to prohibit “organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination”.¹⁶ The reasons for these reservations are concerns that such punishments may restrict the freedom of expression and association guaranteed under Art. 21 of the Constitution and may violate the principle of legality (*nulla poena sine lege*) stipulated under Art. 31 of the Constitution.¹⁷

In accord with the government’s reservation of paragraphs (a) and (b) of Art. 4 of CERD, Japan has neither a special law to prohibit and punish hate speech or incitement to hatred, nor comprehensive legislation prohibiting racial discrimination, which would enable victims to seek legal remedies. Therefore, other than the remedy under Art. 709 of the Civil Code, possible legal instruments to punish racial hate speech within the present legal structure are, according to the government,¹⁸ provided by the Penal Code,¹⁹ that is, Art. 230 (defamation), Art. 231 (insults), Art. 233 (damage to credit; obstruction of business), but only if the content of such a speech would defame or damage the credit of specific individuals or organizations. In addition, if such an act of expression has a message threatening a specific individual, it is punished under Art. 222 (intimidation) of the Penal Code, or Art. 1, Art. 1-3 of the Act on Punishment of Violence and Other Acts (collective intimidation, habitual intimidation).²⁰

Under these circumstances the decision of the Kyōto District Court drew attention as to how the Court dealt with this case without any special law restricting hate speech.

August 2014 (CCPR/C/JPN/CO/6), in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FJPN%2FCO%2F6&Lang=en.

16 CERD Art. 4 [States Parties]

(a) Shall 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 also the provision of any assistance to racist activities, including the financing thereof.

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.

17 For the reason of the reservations of (a) and (b) of Art. 4 of CERD by the government, see the website of the Ministry of Foreign Affairs, <http://www.mofa.go.jp/mofaj/gaiko/jinshu/top.html>.

18 Second Periodic Reports of States Parties due in 1999 JAPAN (2000) (CERD/C/350/Add.2) 19, in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2F350%2FAdd.2&Lang=en.

19 *Keihō*, Law No. 45/1907, as amended by Law No. 54/2007; Engl. transl.: <http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=%E5%88%91%E6%B3%95&x=0&y=0&ia=03&ky=&page=1> (translated on 1 April 2009).

20 *Bōryoku kōi tō shobatsu ni kansuru hōritsu* [Act on Punishment of Violence and Other Acts], Law No. 60/1926, as amended by Law No. 156/2004.

2. *Implications and Limits of the Judgments*

a) *Scope of the Civil Remedy*

The Kyōto District Court dealt with this hate speech case as a tort case under Art. 709 of the Civil Code and ordered the defendants to pay a large amount of damages for immaterial loss, taking the international treaty CERD into account. The tortious acts acknowledged by the Court were obstruction of business and defamation. Above all, the Court noted clearly that the defendants' utterances constituted an exclusion based on the national origin of Korean residents and therefore racial discrimination as defined in Art. 1 para.1 of CERD. In short, the Court held the defendants' hate speech illegal to be racial discrimination. In the context of the Japanese legal culture appearing in politics, the judiciary, and academic opinions, which respects freedom of expression to a maximum degree, this decision which judged the content of the speech and found it to be illegal racial discrimination is an epoch-making decision. It may give victims of hate speech legal remedies in similar cases as well as restrain such extreme propaganda activities with racial discriminatory utterances.

However, there is a limit with regard to the scope of the decision. As the Court itself stated, it can only judge cases in which a racist speech was addressed to specific individuals or organizations and therefore immaterial loss occurred to those specific individuals or organizations. According to the Court, if such a racist speech was directed at the whole discriminated group, and caused no specific individual damages, the court cannot order the responsible party to pay damages to the people belonging to such a group, since this is beyond the permissible interpretation of Art. 709 of the Civil Code. Such an interpretation of Art. 709 without an amendment by the legislator, the Court stated, would be against the principle of separation of the three powers stipulated in the Constitution. In this sense, the scope of the remedy which the Court presented in this case is limited, since many cases of hate speech, such as radical demonstrations or rallies on the street of Korean towns are not directed at specific individuals or organizations. The remedy under civil law is not effective to cover most cases of hate speech.

b) *Moral Interest to Offer National/Ethnic Education for Korean Residents*

Although the plaintiff school made a full argument that their right to implement national/ethnic education as a personal right was infringed by the defendants' acts, the Kyōto District Court did not include this in the defendants' tortious acts. However, the Ōsaka High Court acknowledged the school's claim and noted that the appellee's moral interest as a school offering national/ethnic education for Korean residents was infringed by the appellants' activities. The High Court also pointed out that those propaganda activities did not only obstruct the educational business, but also impaired the social environment in which the national/ethnic education was given to Korean residents.

The acknowledgment of the appellee's moral interest as a juridical person to implement national/ethnic education for Korean residents can be considered as a further effort

of the Court to protect minorities from racial discrimination. The High Court, however, did not develop a full argument to base this appellee's moral interest on the Constitution or International Human Rights or on the educational right of minorities.²¹ Therefore, the position of the educational right of minorities is still not clear, although providing a legal foundation for the educational right of minorities may be one of the most effective means to enhance equality in Japan, by raising public awareness of foreigners' right to national/ethnic education.

3. *Is Hate Speech Free? Justifications for Legal Restrictions*

Although there is no official definition, hate speech could be defined in general as any form of expression which spreads, incites, promotes or justifies hatred against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and so forth. Since it denies the dignity of a person or a group, damages the social value of equality, and enhances hatred and discrimination in society, hate speech is also considered as hate crime to be punished or restricted, especially when it is likely to provoke violence. On the other hand, as the word "speech" included in its name indicates, hate speech is understood as belonging to speech, to which the Constitution accords the highest value in a democratic society. Therefore, opinions are split on whether hate speech should be legally restricted, and if so, under civil law or penal law; or whether hate speech as an expression should not be restricted at all. For each position a specific analogy is adopted to justify it.

Possible justifications for legal restriction of hate speech in Japan, where freedom of expression enjoys the highest protection among the fundamental rights under the Constitution, will be examined below.

a) *Hate Speech as Defamation*

As the Kyōto District Court noted, if the court has found a speech to be "defamation", that speech is not protected. Defamation brings about criminal liability as well as civil liability. Art. 230 (1) of the Penal Code regulates defamation and Art. 230-2 (1) gives immunity in case of the purpose of public interest.²² Whether a speech is defamation or not depends on whether it is related to matters of public interest and has been published

21 Regarding educational right of minorities, the plaintiff school based their claim on Art. 27 of the International Covenant on Civil and Political Rights as well as on Art. 29, para. 1 (c) and Art. 30 of the Convention on the Rights of the Child (1989).

22 Art. 230 (1) of the Penal Code states that 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 three years or a fine of not more than 500,000 yen; Art. 230-2 (1) states that 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.

with the sole purpose of advancing the public interest. Moreover, the condition of the proof of truth for immunity under Art. 230-2 is lessened for the purpose of balancing between the protection of an individual's reputation under Art. 13 and freedom of speech under Art. 21 of the Constitution. That is, even though the defendant cannot prove that the statement is true, if there are reasonable grounds to believe it is true, the case does not constitute defamation.²³ This interpretation of Art. 230-2 also applies to defamation as tortious act under Art. 709 of the Civil Code.²⁴

The defendants in this case asserted that their speech was related to matters of public interest as well as conducted solely for the benefit of the public, and therefore should be protected. They also claimed that there was no negligence since there were reasonable grounds to believe that the statements were true. The Kyōto District Court found the defendants' acts to be illegal, stating that the defendants' speech was not conducted with the sole purpose of advancing the public interest, since their acts were racial discrimination which would be never conducted in order to advance the public interest.

Although the Court used the defamation doctrine to restrict the defendants' hate speech by determining the illegality of the acts with denying their purpose of advancing the public interest, the doctrinal framework of defamation is, in fact, not fully suitable to determine the illegality of hate speech. One of the important elements to consider a speech as defamation is whether such a statement is true or not. That is, if the statement regarding matters of public interest is true, it does not constitute defamation. However, hate speech has its devastating effects on the addressee, regardless of whether such a speech is true or not. On the contrary, true statements or statements which are believed to be true injure the addressee even more severely. For example, if the defendants' statement that the plaintiff school is not a school because of its lack of official approval,²⁵ this statement is true based on the present legal political system in Japan. It confirms that the plaintiff school is not an official school and thus does not deserve the same treatment as other official schools in Japan. In other words, it justifies exclusion. Therefore, the illegality of hate speech cannot be judged by the truth of the statement under the doctrine of defamation. It should be judged by the harm caused by the speech, which discriminates against socially vulnerable groups, and which denies human dignity and equality of the people belonging to such groups in a society. Therefore, defamation is fundamentally not an appropriate legal instrument to protect people from hate speech, that is, a discriminatory act.

23 Supreme Court, 25 June 1969, Keishū 23, 975.

24 Supreme Court, 23 June 1966, Minshū 20, 1118.

25 Korean schools are not designated schools which have a public nature under Art. 1 of *Gakkō kyōiku-hō* [School Education Act], Law No. 26/1947 and Art. 6 para. 1 of *Kyōiku kihon-hō* [Basic Education Act], Law No. 120/2006, but are classified in the category of the miscellaneous schools under Art. 134 of the School Education Act.

b) *Speech as Act*

Why does hate speech have power to injure and degrade the addressee? A theorist who is against restriction of hate speech thinks that hate speech is (merely) a speech, which should be combated by further speech in the marketplace of ideas.²⁶ In the judgment of the Kyōto District Court, however, speech was often mentioned as a “*hyōgen kōi* [speech act]” and acknowledged as a racial discriminatory act. In order to restrict hate speech, that speech is treated as an “act” or at least, the aspect of “act” is more focused on.

Then, the next question is how we analyze the aspect of “act” in hate speech. For example, if a banner is hung overhead in the soccer stadium, with a message, “JAPANESE ONLY”, it almost definitely means to exclude foreigners with a discriminatory intention, regardless of whether the author of this message really meant it.²⁷ The message “Japanese only” is a speech, but at the same time an act to exclude non-Japanese from the stadium. Because of the critical political situation between Japan and neighbouring Asian countries, the proliferation of racial discriminatory demonstrations, as well as its inevitable association with the expression, “Whites Only”²⁸, the receivers of this message understand it as racial hatred against foreign supporters and players.

As this example indicates, the power of hate speech is possible only in/through the constitutive meaning system which enables the message to convey a specific degrading meaning in the specific historical and cultural context.²⁹ In Japan, words such as “Koreans should die!”, “Kill Koreans!” gain such devastating power to demean and deny the dignity of Korean residents, as well as pose an actual threat to Korean residents because those words are associated with the brutal history and remind Koreans of their people’s death in the past. Those words destroy the peaceful life and self-respect of Korean residents, and moreover, they create a racist social environment.

26 Marketplace of ideas can be traced back to the dissenting opinion of Justice Holmes in *Abrams v. United States*, 250 U.S. 616, 630 (1919), “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

27 “*Sabetsu ōdan-maku Urawa ni genbatsu*” [A severe punishment on the soccer team, J1 Urawa because of a discriminatory banner], *Asahi Shinbun Chōkan* (Nagoya), 14 March 2014, 35. The concern about this incident was also expressed by the Human Rights Committee on International Covenant on Civil and Political Rights. Human Rights Committee, (CCPR/C/JPN/CO/6), *supra* note 15, 4.

28 For an analysis of the sign of “Whites Only”, see C. R. LAWRENCE III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in: Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder et al. 1993) 62.

29 The argument of this performative capacity of hate speech finds its roots in the speech acts theories of J.L. AUSTIN, *How To Do Things With Words* (Cambridge, Mass. 1962); J. SEARLE, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge 1969). Judith Butler developed the speech acts theory to discuss hate speech issues, but she denies its legal regulation. See J. BUTLER, *Excitable Speech: A Politics of the Performative* (New York 1997).

This power of hate speech taken into consideration, the legal theory may need to change its direction from the speech supremacist view to hate speech regulation on the ground that hate speech is an act of discrimination incompatible with democracy.

c) Foundation of Democracy

Art. 21 of the Constitution states that freedom of assembly, association, speech, press and all other forms of expression are guaranteed. Freedom of expression is considered to be essential for individual self-fulfillment and autonomy as well as for the representative democracy and self-government.³⁰ Therefore freedom of expression is highly valued by legal academics in Japan, so that it enjoys stronger protection than other freedoms, such as economic freedoms.³¹ Among all the forms of expression, freedom of assembly, including demonstrations, is taken as one of the most important fundamental human rights in a democratic society,³² since it is an effective means for citizens to develop their thoughts and personality, exchange opinions and information, as well as express their opinions to the public.³³

The importance of freedom of expression is universally recognized in other democratic societies too. However, what if a person denies democratic values? If it is not a person, but a bigger association which denies democratic values? If it is a political association? What if a group of people deny the dignity and equality of a racial minority group as a whole through their expression of exclusion in the public forum? If their racist practice creates and spreads undemocratic environment in a society? Should a democratic society tolerate such racist expression and practice? Does this mean that a democratic society is destined from the beginning to accept those undemocratic beliefs, thoughts, and expressions as long as it holds the ideal of toleration, hoping that such an undemocratic group remains a minority group whose racist opinions would not survive in the marketplace of ideas?

The above raised questions are very difficult to answer, since they are about fundamental questions on democracy, such as the conflict between equality and freedom of expression, as well as the dilemma of a democratic society, whether it should accept the contradicting thoughts and practices against democracy itself. However, recognition of history as well as sincerity based on such recognition could give a democratic state some clues. That is, if a state recognizes that extreme forms of denial of human dignity based on racial hatred occurred in the past, the state knows that democratic values are not simply there, but that they should be protected and asserted by the state. In other words,

30 N. ASHIBE, *Kenpō* 5th ed. (Tōkyō 2011), 170; S. MATSUI, *The Constitution of Japan: A Contextual Analysis* (Oxford 2011), 196.

31 *Id.*

32 ASHIBE, *supra* note 30, 205.

33 Supreme Court, 1 July 1992, *Minshū* 46, 437.

a democratic state cannot be neutral about its own existence, if it sincerely acknowledges its past.

In this respect, Japan can learn from Europe how to deal with hate speech in order to protect human dignity and democratic values while respecting freedom of expression, especially from Germany, which takes a viewpoint-based approach to restricting speech different from the United States.³⁴ Germany criminalizes an act of incitement of popular hatred under Sec. 130 of the German Criminal Code (*Volksverhetzung*).³⁵ Under this section, for example, Holocaust denial is punishable, since it denies each of the Jews the personal worth and therefore it is a continuing discrimination against them as a group.³⁶ If the law is a significant tool for a state to express its embracement of equality and democracy,³⁷ Japan should consider possibilities of legal restrictions of hate speech.³⁸

SUMMARY

This paper introduces a recent case regarding hate speech and discusses legal issues as to how to deal with forms of speech that racially vilify others in Japan. The case, decided by the Kyōto District Court and, on appeal, by the Ōsaka High Court, concerns the racist propaganda activities targeted at a Korean school conducted by a right-wing group. The courts of first and second instance acknowledged those activities as tortious acts under Art. 709 of the Civil Code in light of the International Convention on Elimination of All Forms of Racial Discrimination and awarded the plaintiff school a substantial amount of damages. The decisions are significant, since they were the first judgments which found hate speech to constitute an act of illegal racial discrimination and awarded damages to the plaintiff within the Japanese legal context, where freedom of speech is highly valued and no antidiscrimination laws against hate speech exist.

34 M. TODD, Do We Still Need Human Dignity: A Comparative Analysis of the Treatment of Hate Speech in the United States and Germany, *University of Baltimore Journal of Media Law and Ethics* 1 (2009) 267. For the hate speech issue in EU law, see U. BELAVUSAU, Fighting Hate Speech Through EU Law, *Amsterdam Law Forum* 4 (2012) 20. See the following hate speech cases of the European Court of Human Rights, *Vona v. Hungary* (Application no. 35943/10), 9 July 2013; *Féret v. Belgium* (Application no. 15615/07), 16 July 2009. See also *Staatkundig Gereformeerde Partij v. the Netherlands* (Application no. 58369/10), 10 July 2012 (ECHR gave priority to democracy over freedom of expression of the political party which excluded women based on its religious belief).

35 § 130 StGB.

36 90 BVerfGE 241 (1994).

37 M. J. MATSUDA, Public Response to Racist Speech: Considering the Victim's Story, in: Matsuda et al., *supra* note 28, 49.

38 Legal study and debates on hate speech have already started in Japan. See for example, S. KIM ed., *Heito supīchi no hōteki kenkyū* [Legal study of hate speech] (Kyōto, 2014); O. SAKURABA, *Doitsu ni okeru minshū sendō-zai to kako no kokufuku* [Volksverhetzung und Vergangenheitsbewältigung in Deutschland] (Tōkyō, 2012).

However, there are limits in the judgments, especially because the scope of civil remedies is too narrow in order to effectively combat racial discrimination in the form of speech. Now it is the time for Japan to consider establishing a comprehensive legislation prohibiting racial discrimination or a law punishing incitement of popular hatred in order to protect and assert its democratic values.

ZUSAMMENFASSUNG

Der Beitrag analysiert einen Fall zum Problem der „hate speech“ und setzt sich mit der Art und Weise auseinander, wie rassistischer Diffamierung in Japan begegnet werden kann. Die Entscheidungen des DG Kyōto und als Berufungsinstanz des OG Ōsaka betrafen rassistische Propagandaaktivitäten seitens einer rechtsextremen Gruppierung, die sich gegen eine koreanische Schule richteten. Die beiden Gerichte der ersten und zweiten Instanz ordneten diese Aktivitäten als unerlaubte Handlung im Sinne der deliktischen Generalklausel in Art. 709 des Zivilgesetzes ein, welche sie im Lichte der UN-Rassendiskriminierungskonvention auslegten, und sprachen der Schule als Klägerin eine beträchtliche Schadenersatzsumme zu. Den Entscheidungen kommt erhebliche Bedeutung insofern zu, als sie erstmals nach japanischem Recht „hate speech“ als unerlaubte Rassendiskriminierung anerkannten und der Klägerin Schadenersatz zusprachen, obwohl das japanische Recht der Meinungsfreiheit überragende Bedeutung beimisst und über keine speziellen Vorschriften gegen rassistische Diffamierung verfügt. Allerdings sind dieser Rechtsprechung insbesondere dadurch Grenzen gesetzt, dass der Anwendungsbereich der zivilrechtlichen Haftungsnormen zu eng ist, um rassistische Äußerungen in allen Fällen effektiv bekämpfen zu können. Es ist daher an der Zeit, dass Japan über umfassendere rechtliche Regelungen nachdenkt, die rassistische Diskriminierung verbieten oder Volksverhetzung unter Strafe stellen, um auf diese Weise seine demokratischen Werte zu bewahren und durchzusetzen.

(Die Redaktion)

