Hate Speech Regulations in Japan: Surrounding the Hate Speech Elimination Act

KAWANISHI Akihiro

Public Administration and Judicial Affairs Division, Research and Legislative Reference Bureau, National Diet Library

Abstract

In 2016, the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan (below, the "Hate Speech Elimination Act") was enacted. This paper gives a general outline of the background to its enactment and the state of its enforcement, primarily from the perspective of the legal system.

One factor behind the enactment of the Hate Speech Elimination Act is that Japan is a signatory to the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (below, "ICERD"), which stipulate that the laws of signatory states must prohibit the incitement of discrimination (Japan has applied a reservation to the said regulation under ICERD); the institutions that implement each of these international agreements demand the enforcement of this regulation. In addition, litigation concerning threatening actions accompanied by hate speech has included cases in which extremely large compensation for damages has been ordered as a result of evaluating their illegality with reference to the purpose of ICERD. Local public bodies have also enacted ordinances covering hate speech. In response to the above trend, the national government studied the enactment of a law to deal with hate speech and enacted the Hate Speech Elimination Act in 2016. The process of deliberations concerning the bill focused on two contentious issues: that it did not prohibit hate speech and that the objects of hate speech are limited to "Persons Originating from Outside Japan."

In response to the enactment of the Hate Speech Elimination Act, certain movements have appeared, as judicial decisions referring to the Hate Speech Elimination Act have been made and regional public bodies have formulated guidelines for the authorization of the use of public facilities for gatherings where hate speech will be uttered. In addition, the national government is promoting certain policies.

International human rights organizations, on the other hand, are demanding further efforts, such as the enactment of a law comprehensively prohibiting discrimination, and although the number of demonstrations concerning hate speech temporarily fell, it has remained level since. In the future, it will be necessary to search for the ideal hate speech policy while considering its relationship with the freedom of expression.

Introduction

This paper presents a brief outline, primarily from the perspective of the legal system, of the background to the enactment and state of enforcement of the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan (Law No. 68 of 2016; below, the "Hate Speech Elimination Act"), which was enacted in 2016. Legal responses to hate speech in foreign countries have already been discussed in this Journal.[1]

This paper describes the handling of hate speech regulations under the framework of international human rights treaties to which Japan is a signatory. It also gives an outline of judicial decisions prior to the enactment of the Hate Speech Elimination Act and ordinances enacted by regional public bodies before summarizing the background to the enactment and the contents of the Hate Speech Elimination Act. It then presents the state of enforcement of the Hate Speech Elimination Act, focusing on judicial judgments, national government policies, responses from local public bodies, and investigations by international human rights organizations. It also touches on the existing domestic legal system through an explanation of government reports to international human rights organizations, judicial decisions, etc.

I Framework of international human rights treaties

1 *The International Covenant on Civil and Political Rights (ICCPR)*

The International Covenant on Civil and Political Rights[2] (Treaty No. 7, 1979; below, "ICCPR") Article 20 paragraph 2 stipulates that, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." In Article 19 of the ICCPR, paragraph 2 states that all persons shall have "the right to freedom of expression," and paragraph 3 stipulates that the exercise of

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1 OGASAWARA Miki, "Hate Speech Regulations in the U.S., U.K., Germany and France (Bei Ei Doku Futsu ni okeru Heito Supichi Kisei)," *The Reference*, No. 784, 2016.5, pp. 29-43.

2 International Covenant on Civil and Political Rights. Adopted by the U.N. General Assembly on December 16, 1966. Came into force on March 23, 1976.

this right may be subject to certain restrictions, but these shall only be such as are [1] provided by law and [2] necessary for respect of the rights or reputations of others or for the protection of national security, public order (*ordre public*), public health, or morals.

When the Japanese Government adopted the ICCPR in 1966, at a session of the General Assembly of the United Nations, it expressed its misgivings about this regulation, stating, "As regards paragraph 2 of Article 20 of the same draft Covenant, this provision may endanger freedom of thought, expression, and religion, which are the foundation of any democratic society."[3] However, when it entered into the treaty in 1979, it did not apply a reservation[4] to this paragraph. On this point, the government explains that it did not apply a reservation since legal action concerning this paragraph is unnecessary because "it cannot be said that situations in which a concrete violation of legal interests caused by actions that are stipulated under this paragraph and cannot be regulated by the existing legal system generally occur." It also added that there was no danger of any concrete violation of legal interests at present, concluding that enforcing this paragraph "would probably not result in restrictions on the freedom of expression itself."[5]

2 *The Human Rights Committee*

The Human Rights Committee established pursuant to Article 28 of the ICCPR (below, the "Human Rights Committee") has the authority, under Article 40 of the ICCPR, to request reports from the "States Parties to the Covenant" and to study the reports that are submitted. Moreover, under the same Article, the Human Rights Committee shall "transmit its reports, and such general comments as it may consider appropriate to the States Parties" (below, "General Comments") to the States Parties.

The Government of Japan has submitted reports to the Human Rights Committee six times, and in its reports, it refers to the state of enforcement of the provisions of Article 20 paragraph 2 of the ICCPR. In its first report of 1980, it stated that equality was regulated by law under Article 14 of the Constitution, and that measures to support the elimination of discrimination, hostility, and violence were undertaken in various fields under the

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[3] United Nations General Assembly, 21st Session: 1496th Plenary Meeting, A/PV.1496, Friday, 16 December, 1966, p. 4 (stated by AI Kume, Japanese delegate to the United Nations).

[4] "A unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (Vienna Convention on the Law of Treaties (Treaty No. 16, 1981), Article 2 1(d)). With regard to human rights treaties, it is argued that the right to make a final judgment on the admissibility of a reservation should not be the signatories to the treaty; rather, it should be the organization enforcing the treaty. (SAKAMOTO Shigeki, "Reservation (Ryuho
)," The Institute of International Law ed., *Encyclopedic Dictionary of International Law*, 2nd edition, Sanseido, 2005, pp. 876–877).

[5] Minutes of the 87th session of the National Diet, House of Representatives, Committee on Foreign Affairs, No. 5, March 23, 1979, pp. 5-6 (speech by Prince KAYA Harunori, Head of the United Nations Bureau of the Ministry of Foreign Affairs).

criminal law, school law, labor law, and so on; thus, in a case where an action that could not be regulated under existing law appeared to cause concrete injury, further legal measures would be studied, within limits that did not harm the public welfare,[6] while the freedom of expression assured by the Constitution would be fully considered. Similar declarations were made in the second to the fourth reports.[7]

The fifth report of 2006 stated, more concretely, with regard to the advocacy that was the object of Article 20 paragraph 2 of the ICCPR, that if an action harmed the reputation or credit of a specified person or group, it was punishable under the Criminal Code (Law No. 45 of 1907) as defamation of character, criminal contempt or damage to credit, or interference with a person's duties, and if it involved threatening action against a specified individual, it was punishable as a crime of intimidation under the criminal law or as group intimidation or habitual intimidation under the Act on Punishment of Physical Violence and Others (Law No. 60 of 1926). It also referred to activities such as enlightenment guidance, etc., given by the Human Rights Bureau of the Ministry of Justice and, in particular, reported that in response to the distribution of discriminatory expressions on the internet, which was then a serious problem, various efforts, including the demand for the removal of specific cases, were being undertaken.[8] In the sixth report of 2012, to supplement its previous report, it reported that it was helping to spread awareness of the "Guideline to Provision of Internet Connectivity Services"[9] formulated by the Telecommunications Carriers Association and other guidelines concerning problems on the internet.[10]

In the Concluding Observations of the Sixth Periodic Report of Japan, issued on August 20, 2014, in response to the report from Japan, the Human Rights Committee declared its concern with the spread of racially discriminatory speech and behavior, and it requested that all necessary measures be taken to prohibit all propaganda advocating racial superiority or hatred that stirred up discrimination, hostility, or violence; to prevent racially

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6 "Consideration of reports submitted by States parties under article 40 of the Covenant: Initial reports of States parties due in 1980: Addendum: Japan," CCPR/C/10/Add.1, 14 November 1980, p. 11.

7 "Consideration of reports submitted by States parties under article 40 of the Covenant: Second periodic reports of States parties due in 1986: Addendum: Japan," CCPR/C/42/Add.4, 24 March 1988, p. 21; "Consideration of reports submitted by States parties in accordance with article 40 of the Covenant: Third periodic reports of States parties due in 1991: Addendum: Japan," CCPR/C/70/Add.1, 30 March 1992, paras. 195-196; "Consideration of reports submitted by States parties in accordance with article 40 of the Covenant: Fourth periodic reports of States parties due in 1996: Addendum: Japan," CCPR/C/115/Add.3, 1 October 1997, paras. 181-183.

8 "Consideration of reports submitted by States parties under article 40 of the Covenant: Fifth periodic report of States parties due in 2002: Japan," CCPR/C/JPN/5, 25 April 2007, paras. 327-329.

9 Guideline to Provision of Internet Connectivity, 2001.3.16. Telecommunications Carriers Association website

10 "Consideration of reports submitted by States parties under article 40 of the Covenant: Sixth periodic report of States parties: Japan," CCPR/C/JPN/6, 9 October 2012, para. 279.

discriminatory attacks; to investigate and prosecute suspects thoroughly; and, when they were found to be guilty, to punish the guilty persons appropriately.[11]

In addition, the Human Rights Committee, in its General Comment No. 34 of 2011, stated that inasmuch as Article 19 and Article 20 of the ICCPR were compatible and mutually complementary, restrictions that were legitimized under Article 20 had to satisfy the essential conditions pursuant to Article 19 paragraph 3.[12]

3 *The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

The International Convention on the Elimination of All Forms of Racial Discrimination[13] (Treaty No. 26 of 1995; below, "ICERD") defines "racial discrimination" in Article 1 paragraph 1 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." In addition, Article 4 stipulates that "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination." The same Article also states that "with due regard to the principles embodied in the Universal Declaration of Human Rights"[14] and other fundamental rights (the rights expressly set forth in Article 5), the States Parties shall do the following: (1) Shall declare to be an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, as well as the provision of any assistance to racist activities, including the financing thereof (Article 4[a]); (2) shall declare illegal and prohibit organizations, and any propaganda activities, organized or otherwise, that promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law (Article 4[b]); and (3) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination (Article 4[c]). Article 2, in addition to the obligations of such public organizations as the States Parties to eliminate discrimination, stipulates that "Each State Party shall prohibit

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[11] "Concluding observations on the sixth periodic report of Japan," CCPR/C/JPN/CO/6, 20 August 2014, para. 12.
[12] "General comment No. 34," CCPR/C/GC/34, 12 September 2011, para. 50.
[13] International Convention on the Elimination of All Forms of Racial Discrimination. Adopted by the General Assembly of the United Nations on December 21, 1965. Came into force on January 4, 1969.
[14] Universal Declaration of Human Rights. Adopted and Proclaimed by the General Assembly of the United Nations on December 10, 1948.

and bring to an end, (by all appropriate means, including legislation as required by circumstances), racial discrimination by any persons, group or organization" (Paragraph 1[d]).

Japan applied the following reservation to Article 4 (a) and (b) when entering into the ICERD in 1995: "In applying the provisions of paragraphs (a) and (b) of article 4 of the [said Convention] 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."[15] In explaining its reasons for this reservation, the Government of Japan says that paragraphs (a) and (b) of the Article, "present an extremely broad concept, including actions of various forms in a variety of situations, so that it is necessary to conduct extremely meticulous studies to clarify if regulating them all under the Criminal Law might illegally restrict freedom of assembly, association, and expression, etc., which are ensured by the Constitution, or improperly have a chilling effect on appropriate speech, such as cultural evaluations, political evaluations, and so on," and that "it is necessary to conduct extremely meticulous studies to find out if applying these concepts as constituent elements of the criminal law might blur the boundaries between actions that are covered by criminal law and actions that are not, resulting in violation of the principle of legality (*nulla poena sine lege*)."[16]

4 *Committee on the Elimination of Racial Discrimination*

The Committee on the Elimination of Racial Discrimination formed under Article 8 of the ICERD (below, "Committee on the Elimination of Racial Discrimination") shall, under Article 9 of the ICERD, "study reports submitted by the States Parties periodically or in response to a request by the Committee on the Elimination of Racial Discrimination and may make suggestions or recommendations of a general nature" (below, "General Recommendations").

The Government of Japan has issued four reports to the Committee on the Elimination of Racial Discrimination (one of these will be discussed later, in IV4[1]). The first and second periodic reports of 2000 first explained the reservation that Japan applied, then reported that the actions regulated by the provisions of Article 4(a) of the ICERD are, under

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[15] "Depository: Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination." United Nations Treaty Collection website. First and second periodic reports on ICERD (provisional translation) IV. No. 4, January 2001. Based on the Web page of the Ministry of Foreign Affairs.

[16] Minutes of the 134th session of the National Diet, House of Representatives, Committee on Foreign Affairs, No. 6, November 21, 1995, p. 2 (speech by ASAKAI Kazuo, Head of the Global Issues Department, Foreign Policy Bureau, Ministry of Foreign Affairs).

certain conditions, punishable under the criminal law and under the Act on Punishment of Physical Violence and Others, and that regulation of the information field is covered by the Broadcasting Law (Law No. 132 of 1950), the Canon of Journalism[17] formulated by the Japan Newspaper Publishers & Editors Association, and the "Guideline to Provision of Internet Connectivity Services" formulated by the Telecommunications Carriers Association. The reports also mentioned that actions stipulated under Article 4(b) could, under certain conditions, be covered by the application of the Anti-Subversive Activities Law (Law No. 240 of 1952), but there has never been such a case.[18]

In response to these reports, the Committee on the Elimination of Racial Discrimination issued a recommendation stating that Article 4 of the ICERD had an obligatory character and was in conformity with the right to freedom of opinion and expression, urging Japan to conduct a review with a view to withdrawing its reservation. The committee also stated that it was confident that it was necessary to enact a law stipulating that racial discrimination is unlawful in order to comply with Articles 4 and 5 of the ICERD.[19]

The third, fourth, fifth, and sixth government reports of 2008 also generally repeated the contents of the previous reports and, with regard to events since the previous reports, mentioned the addition of gang rape crime and the increase in the statuary penalty for murder under a reform of the criminal law, as well as the operation of the Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders (Law No. 137 of 2001; below, "Providers Liability Law"). In response to the Committee on the Elimination of Racial Discrimination's recommendation of the withdrawal of the reservation, it stated that "[T]he Government of Japan does not believe that in present-day Japan, racist thoughts are disseminated and racial discrimination are fanned to the extent that would warrant consideration of enactment of laws to administer punishment by retracting the above reservation even at the risk of unduly stifling legitimate speech."[20]

In response to this report, the Committee on the Elimination of Racial Discrimination

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[17] "The Canon of Journalism (Shimbun Rinri Koryo)," Nihon Shimbun Kyokai (Japan Newspaper Publishers & Editors Association) website. The present canon of journalism was enacted on June 21, 2000, but the first canon of journalism was enacted on July 23, 1946.

[18] "Reports submitted by States parties under article 9 of the Convention: Second periodic reports of States parties due in 1999: Addendum: Japan," CERD/C/350/Add.2, 26 September 2000, paras. 72-90.

[19] "Consideration of Reports submitted by States parties under article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan," CERD/C/304/Add.114, 27 April 2001, paras. 10-11.

[20] "Reports submitted by States parties under article 9 of the Convention: Third to sixth periodic reports of States parties: Japan," CERD/C/JPN/3-6, 16 June 2009, paras. 37-43. Translation: "Third to sixth periodic reports of States parties: Japan (Jinshu-Sabetsu Teppai Joyaku Daisankai, Daiyonkai, Daigokai, Dairokukai, Seifu Hokoku) (Tentative translation)," August 2008, p. 13. Ministry of Foreign Affairs website

advised that the government conduct a verification, including a narrowing of the range of the reservation, and if possible, a withdrawal of it. It also recommended that the government correct shortcomings in the law in order to enact completely the provisions prohibiting discrimination under Article 4 of the ICERD.[21]

The seventh, eighth, and ninth government reports of 2013 also presented contents almost identical to those of the preceding reports but added new information, including a statement regarding the motives for racial discrimination in assessments of culpability, stating that "[T]he Government of Japan recognizes … that the court takes it into consideration in sentencing," and that the Tokyo Regional Court issued a decision on May 28, 2009,[22] as a court judgment in a case related to the said Article.[23] This judgment was given in response to the assertion by the plaintiff that in the notification specifying the position of "Long-Term Resident" in the Immigration Control and Refugee Recognition Act (Law No. 319 of 1951),[24] the inclusion of the principle that good conduct is an essential condition for a decision to grant residence status placed persons of Japanese ancestry who are Long-term Residents in a remarkably disadvantaged status compared with other foreigners who had residence status and was a contravention of Article 14 paragraph 1 of the Constitution and of Article 2 paragraph 1(a) and Article 4(c) of the ICERD. The judgment ruled that this did not constitute the practice, encouragement, or incitement of racially discriminatory actions or treatment, and is not a contravention of the regulations as asserted by the plaintiff.

The Committee on the Elimination of Racial Discrimination responded to this report by urging the government to study the withdrawal of the reservation and to take appropriate steps to revise its legislation, in particular its Penal Code. In addition, it recommended that the government deal firmly with declarations of hatred and racial discrimination and with racially discriminatory violence and incitement of hatred at demonstrations and gatherings; that it take appropriate measures to deal with hate speech in the media, including the

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[21] "Consideration of Reports submitted by States parties under article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan," CERD/C/JPN/CO/3-6, 6 April 2010, para. 13.

[22] Decision by the Tokyo District Court, May 28, 2009.

[23] "Reports submitted by States parties under article 9 of the Convention: Seventh to ninth periodic reports of States parties due in 2013: Japan," CERD/C/JPN/7-9, 10 July 2013, paras. 83-95. Translation: "Seventh to ninth periodic reports of States parties due in 2013: Japan (Jinshu-Sabetsu Teppai Joyaku, Dainanaka, Daihachikai, Daikyukai Seifu Hokoku (tentative translation)," January 2013. p. 19. Ministry of Foreign Affairs website

[24] The case that disputed the partial revision of the stipulation of position in the bottom box of "Long-Term Resident" in Attached Table 2 under the provisions of Article 7 paragraph 1 item 2 of the Immigration Control and Refugee Recognition Act (Notification No. 172 of the Ministry of Justice of 2000), which is a revision of the stipulation of position in the bottom box of "Long-Term Resident" in Attached Table 2 under the provisions of Article 7 paragraph 1 item 2 of the Immigration Control and Refugee Recognition Act (Notification No. 132 of the Ministry of Justice of 2006).

internet; that it conduct criminal investigations of individuals or groups that are responsible for behavior such as hate speech, indicting such groups or individuals as necessary; and that it take suitable punitive measures against public figures or politicians who spread hate speech or incite hatred.[25]

In its General Recommendation No. 35 of 2013, "Combating racist hate speech," the Racial Discrimination Election Committee pointed out that a comprehensive legal system against racial discrimination, including a civil code, administrative law, and criminal law, is indispensable to combating hate speech effectively. It also made a number of general recommendations concerning the application of Article 4 of the ICERD, providing a list of matters to be considered concerning punishment under the provisions of the said Article, including the content and form of speech; economic, social, and political conditions; and the position or standing of the person uttering the speech.[26]

5 *Universal Periodic Review*

A Universal Periodic Review (UPR) is a periodic review by the Human Rights Council[27] formed under the United Nations in 2006 of the state of human rights in member states of the United Nations. In addition to referring to reports submitted by reviewed countries, this review is based on reports submitted by international human rights organizations concerning the reviewed countries that the Office of the United Nations High Commissioner for Human Rights summarizes, as well as condensed versions of reliable information submitted by non-governmental organizations and other concerned parties that the same U.N. office prepares. Reviews are conducted by a task force of the Human Rights Council, with member states of the United Nations participating in discussions.[28]

The first and second UPR resulted in a report asking Japan to study or introduce a legal system that prohibits racial discrimination.[29]

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[25] "Concluding observations on the combined seventh to ninth periodic reports of Japan," CERD/C/JPN/CO/7-9, 26 September 2014, paras. 10-11.

[26] "General recommendation No. 35: Combating racist hate speech," CERD/C/GC/35, 26 September 2013.

[27] "60/251 Human Rights Council," which was formed under United Nations General Assembly decision 60//251 adopted on March 15, 2006. United Nations, General Assembly Official Records, Sixtieth Session Supplement No. 49, A/60/49, Volume 3, 2007, pp. 2-5.

[28] "Outline of the UPR (Universal Periodic Review)," 2018.3.7. The Ministry of Foreign Affairs website; "Basic facts about the UPR." Office of the United Nations High Commissioner for Human Rights website

[29] "Report of the Working Group on the Universal Periodic Review: Japan," A/HRC/8/44, 30 May 2008; "Report of the Working Group on the Universal Periodic Review: Japan," A/HRC/22/14, 14 December 2012.

II Legal response before the Hate Speech Elimination Act

Judicial decisions referring to the ICERD were made before the enactment of the Hate Speech Elimination Act in cases where foreigners residing in Japan were belittled or the expulsion of foreigners residing in Japan was advocated and appeared to be accompanied by actual demonstrations of force. Before the enactment of the Hate Speech Elimination Act, the City of Osaka in Osaka Prefecture had already enacted an ordinance concerning hate speech.

1 *Kyoto No.1 Korean Elementary School case*

(1) Outline of the case

It has been pointed out that this case was the trigger for legal discussions of hate speech in Japan.[30] The following is based on facts acknowledged in a judicial decision by the Kyoto District Court on October 7, 2013.[31]

The Kyoto No. 1 Korean Elementary School is an educational facility where teaching is conducted in the Korean Language, which is attended by children of North Korean residents in Japan and is equivalent to a Japanese elementary school and kindergarten.
From December 2009 until March 2010, members of "Citizens against the special privileges of Korean residents in Japan" (below, "Zaitokukai") and members of the "Committee Aiming for the Restoration of Sovereignty," which included those who also belonged to the former, demonstrated three times around the Kyoto No. 1 Korean Elementary School. The demonstrations asserted that "[T]he park adjoining the school was illegally occupied as an athletic field," and this was accompanied by disparaging statements directed at North Korean residents of Japan and the school through loudspeakers, as well as activities advocating the expulsion from Japan of North Koreans resident in Japan. A video taken of the demonstration was publicized over the internet.

During the demonstration in December 2009, the demonstrators constantly bombarded people connected to the school, whom they confronted in front of the school's south gate, with angry shouts, both with and without loudspeakers, and during intervals asserted their position loudly in unison. During the demonstration in January 2010, a procession of right-wing campaign vehicles moved around the school.

Because the March 2010 demonstration was announced in advance by a call for participants over the internet, the educational corporation that operated the Kyoto No. 1 Korean Elementary School asked the Kyoto District Court for a provisional disposition prohibiting the demonstration; the provisional disposition was taken, prohibiting the

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[30] KIM Sang-gyun, "Revision of the Criminal Law, Possibility of revising the Hate Speech Elimination Act," *Law Seminar* (Hogaku Semina), No. 757, 2018.2, p. 18.
[31] October 7, 2013 Decision by the Kyoto District Court, *Case Reports* (Hanrei Jiho), No. 2208, p. 74.

demonstration within 200 meters of the school. Regardless of the provisional disposition, the same month, a demonstration parade moved from the center of the City of Kyoto to a point only about 100 meters from the school.

Subsequently, the Kyoto No. 1 Korean Elementary School amalgamated with another school under a new name, Kyoto Korean Elementary School.

(2) The criminal action

The Kyoto No. 1 Korean Elementary School reacted to the demonstration of December 2009 by submitting an accusation on a charge of forcible obstruction of business to the Kyoto Police Headquarters in the same month. Four key participants in the demonstration were arrested and indicted in August 2010. The Kyoto District Court acknowledged on April 21, 2011, that the demonstration obstructed the operations of the school and insulted the school and the educational corporation that operates the school, actions that constituted crimes of forcible obstruction of business, criminal contempt, and malicious destruction of property[32] and, for three of the four who were arrested, included the crimes of breaking into a building occupied by the Tokushima Prefectural Teachers Union and forcible obstruction of business in April 2010 (discussed below). The four were given sentences ranging from two to one-year imprisonment with hard labor suspended for four years.[33] One of the accused appealed the sentence, and a final appeal was made to the Supreme Court, but it was rejected.[34]

(3) The civil action

On June 28, 2010, the school corporation that managed the Kyoto No. 1 Korean Elementary School initiated a lawsuit in the Kyoto District Court against the Zaitokukai and nine people who took part in the demonstrations, demanding compensation for damage and asserting that the three demonstrations and release of the video of the demonstration to the public were illegal actions and that similar activities be enjoined on the basis of the personal rights of the corporation.

The Kyoto District Court delivered a decision partially acknowledging the compensation for damage and the request to enjoin the actions (below, "Kyoto District Court Decision") on October 7, 2013.

The Kyoto District Court decision concluded that "Courts in Japan are obligated under the ICERD to interpret law so that it complies with the provisions of the ICERD" because

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[32] An electric cord linking the speaker and control panel that the school corporation owned and managed was cut and damaged during the demonstration.

[33] Kyoto District Court Decision of April 21, 2011. ("LEX/DB Internet TKC Law Information Database" [fee charged] Document No. 25471643).

[34] Verdict on appeal: Osaka High Court Decision of October 28, 2011. ("LEX/DB Internet TKC Law Information Database" [fee charged] Document No. 25480227). Final appeal decision: Supreme Court First Petty Bench Decision of February 23, 2012. ("LEX/DB Internet TKC Law Information Database" [fee charged] Document No. 25480570).

in relation to judgments by courts under the ICERD, Article 2 paragraph 1 of the ICERD demands that each State Party take measures to prohibit and end racial discrimination, and Article 6 of the ICERD demands that each State Party "shall ensure effective protection and remedies … against any acts of racial discrimination" through its courts. In addition, the decision stated that it was not possible for this to be interpreted as meaning that in cases where an individual had not specifically been injured, an act of racial discrimination that had occurred was an illegal act under Article 709 of the Civil Code (Law No. 89 of 1896), and that in cases where an act of racial discrimination had caused specific injury and corresponded to an illegal act under the said Article, the amount of compensation for injury should be acknowledged so that it conformed with the provisions of the ICERD.

The Kyoto District Court decision acknowledged that, on the basis of the above concepts, the demonstrations and release of the video in this case were crimes of obstruction of business and defamation of character of the school corporation and declared that these acts of obstruction of business and defamation of character "[b]oth weaved in discriminatory utterances against North Korean residents of Japan with the intention of spreading discriminatory attitudes against North Korean residents of Japan among the general public, and had the intention of expelling people based on their ethnic origin as North Korean residents of Japan, and of preventing the enjoyment of human rights and basic freedoms in the position of equality of North Korean residents of Japan; therefore, it can only be said that, overall, it corresponds to racial discrimination under the provisions of Article 1 paragraph 1 of the ICERD." To set the amount of compensation, the Court ruled that because these unlawful acts were tinged with unlawfulness equivalent to racial discrimination, as a result of the obligation that the Court bore under the ICERD, "the monetary assessment of intangible injury by the court must be a high amount"; it approved compensation of a total of 11 million yen as the intangible injury portion (it also approved tangible injury and legal expenses).

In addition, the Kyoto District Court approved the interdiction of acts such as the defendants proceeding to the Kyoto No. 1 Korean Elementary School and forcefully demanding interviews, or public demonstrations criticizing and maliciously slandering the plaintiff (the school corporation) within a radius of 200 meters of the school. It also explained that because the corporation merited the legal protection of a person, considering the profits of management of its daily work, earned honorably and peacefully, and considering the fact that the defendant ignored the injunction of March 2010 against conducting demonstrations after the activity in this case, it recognized the concrete danger of obstruction of business and defamation of character by some of the defendants. In addition, in response to the defense's assertion that because the interdiction was a prior restriction of an act of expression, it had to satisfy extremely strict requirements, as charged

in the Hoppo Journal case,[35] the Kyoto District Court rejected the argument, stating that this interdiction was limited in area and merely restricted an act of expression that could be an obstruction of business or defamation of character.

The defendant appealed, but the Osaka High Court rejected the appeal in its decision of July 8, 2014 (below, "Osaka High Court decision").[36]

The Osaka High Court decision deleted the part of the Kyoto District Court decision concerning a court's obligation under the provisions of the ICERD and explained the relationship between the ICERD and unlawful acts under Article 709 of the Civil Code as follows. First, although the ICERD has legal validity within Japan as a form of domestic law, it does not directly regulate relationships between individuals, so its purpose should be realized while harmonizing other constitutional principles with the principle of freedom of contract by interpreting and applying individual provisions of Article 709, etc., of the Civil Code. Second, the decision referred to the fact that generally, an act of expression by an individual citizen is guaranteed as freedom of expression under Article 21 paragraph 1 of the Constitution, and concluded that "when, in a case where racial discriminatory speech has been made between individual citizens against all people belonging to a specified group, the above speech should be recognized as lacking rational reason, as exceeding the range that can be allowed socially, and as harming the legal benefits of others with reference to the purports of Article 13 and Article 14 paragraph 1 of the Constitution and of the ICERD," it satisfies the required conditions under Article 709 of the Civil Code, so that the purpose of the ICERD should be realized between individual citizens through compensation for injury based upon it.

The defendants appealed the Osaka High Court decision to the Supreme Court, but the Supreme Court decided to reject the final appeal on December 9, 2014.[37]

(4) Evaluations of the civil action decision

The Kyoto District Court decision is considered to have been the first court case to recognize the unlawfulness of hate speech.[38] Previous judicial decisions had considered

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[35] Decision by the Grand Bench of the Supreme Court of June 11, 1986 (Civil Code, Vol. 40, No. 4, p. 872). Because there is a risk of a prior interdiction of an act of expression easily spreading widely and being abused, it shall be approved only under strict clear required conditions, and charged that its use shall be limited to times when [1] "the content of the expression is not true and is clearly not completely intended for the common good" and [2] "the injured party suffered an injury that is serious and from which the party will have remarkable difficulty recovering."

[36] Osaka High Court Decision of July 8, 2014, *Case Reports* (Hanrei Jiho), No. 2232, p. 34.

[37] Decision of the Supreme Court Third Petty Bench of December 9, 2014. ("LEX/DB internet TKC law information database" [fee charged], Document No. 25505638).

[38] "Case in which sound truck propaganda that defamed the school corporation of a Korean school is recognized as hate speech, and it is admitted that its unlawful character contravenes the ICERD, with approval of a request for compensation for injury and an interdiction by the school," *Law Reports* (Hanrei Jiho), No. 2208, March 1, 2014, p. 74.

the ICERD the standard for judgment of an unlawful action.[39]

The Kyoto District Court decision did not apply the concept of "hate speech" and grounded its decision of unlawfulness not on Article 4 of the provisions of the ICERD but on the fact that it was racial discrimination under Article 1 paragraph 1 of the ICERD. This point is probably a result of Japan having applied a reservation to Article 4, but the reservation does enforce the obligation under the same Article, albeit only in cases where it does not infringe upon the freedoms of assembly and association, freedom of expression, or the assurance of other rights under the Constitution of Japan. The Kyoto District Court decision acknowledges that Article 4 is compatible with these rights in a judgment of domestic law, and the same Article can be grounds for unlawfulness.[40]

In addition, the Kyoto District Court decision held that under Article 2 paragraph 1 and Article 6 of ICERD, the Court was directly obligated to interpret the law so that it complied with the ICERD, but the Osaka High Court decision removed this obligation from the decision, holding that the ICERD did not directly regulate relationships between individual people; it thus based its interpretation of unlawfulness not on one provision of the ICERD but on the purport of the ICERD. With regard to this point, the Kyoto District Court's recognition of the convention-compatible interpretation obligation has been evaluated as a watershed opinion, demonstrating a clear awareness that courts have a role in bearing the expectation of realizing international law through judicial redress to the injured party.[41] Another view holds that the Kyoto District Court's decision applying the prohibition and ending of racial discrimination by member states prescribed by the provision of Article 2 paragraph 1 of the ICERD without referring to the relativization based on other principles is distinctly different from the position of indirect application, which goes through a process of relativization based on other principles when applying the substantive value of a code addressed to a state between individual people.[42] Another view holds that the Osaka High Court decision increased its validity as a decision in conformity with the case in question by eliminating flaws such as the overreach, jump of logic, etc., seen in the Kyoto District Court decision and replacing these with the established case

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[39] Shizuoka District Court, Hamamatsu Branch decision of October 12, 1999, *Law Reports* (Hanrei Jiho), No. 1718, p. 92; Sapporo District Court Decision of November 11, 2002, *Law Reports* (Hanrei Jiho), No. 1806, p. 84.

[40] TERAYA Koji, "Hate Speech Case: Demonstrations at the Korean School and ICERD, International Law 4," *Jurist* (Jurisuto), No. 1466 (Special Number), (Explanation of important decisions of 2014), 2014.4, p. 293.

[41] SAITO Tamitomo, "Case Introduction: Discriminatory Acts between Individuals and Domestic Application of ICERD: Case of the Demand for Interdiction of Sound-truck Propaganda," *International Human Rights* (Kokusai Jinken), No. 25, 2014, p. 113.

[42] FUKUSHIMA Rikihiro, "ICERD and Compensation for Injury and Interdiction against Hate Speech," *Commentaries on New Cases Watch* (Shin-Hanrei Kaisetsu Watch), Vol. 19, 2016.10, p. 29.

doctrines or meticulous fact-finding.[43]

In addition, these decisions dealt with cases in which an individual person was caused concrete injury, and there has been discussion about the point that they did not refer to racially discriminatory speech that did not cause concrete injury to an individual person. The Kyoto District Court decision stated that it is not possible to approve a request for compensation for damage in cases where an individual was not concretely injured and that "it would be impossible to do this without new legislation." The Osaka High Court also quoted this statement. On this point, one view is that it again clarified the limits of the legal system in Japan,[44] while another view is that "it is a bitter suggestion for legislation by a court that unavoidably exposed a shortcoming of domestic law."[45] Another view focuses on the fact that in Germany, judgments as to whether an injury has occurred are made with the criterion being whether the insulting effects of an expression affect the honor of individual members of a group, in order to argue that a case where a discriminatory expression occurred in a specified place, assuming that this expression defamed the reputations of individuals of a minority group who were in that place, can be the object of redress under Article 709 of the Civil Code.[46]

2 *Tokushima Prefectural Teachers Union case*

(1) Overview of the case

Because part of the money collected through street fund-raising by the Tokushima Prefectural Teachers Union was contributed to the Shikoku Korean School through the Japanese Trade Union Confederation, on April 14, 2010, members of the Zaitokukai and others demonstrated inside the offices of the Teachers Union and on the street in front of its offices. The Teachers Union instituted litigation against the persons who conducted the demonstration on the 21st of the same month. This litigation was tried, along with the Kyoto No. 1 Korean Elementary School criminal case, and on April 21, 2011, the Court announced a guilty verdict regarding the crimes of unlawful entry into a building and forcible obstruction of business.

(2) The civil action

On August 6, 2010, the Tokushima Prefectural Teachers Union and its executives initiated

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[43] SAITO Tamitomo, "Trends in Domestic Law Surrounding Hate Speech Countermeasures and International Law: Challenges Facing and Suggestions Concerning Effective Realization of Human Rights Treaties," *Discussion Jurist* (Ronkyu Jurisuto), No. 19, 2016, Autumn, p. 95.

[44] NASU Yuji, "Case of Approval of Compensation for Injury and an Interdiction Assuming that a Demonstration against an Ethnic School was an Unlawful," *Commentaries on New Cases Watch* (Shin-Hanrei Kaisetsu Watch), Vol. 14, 2014.4, p. 18.

[45] SAITO, *op. cit.*, (41), p. 114.

[46] UEMURA Miyako, "Relief for expression of hatred (Constitution 9)," *Jurist* (Jurisuto), No. 1466 (Special Number), (Explanation of important decisions in 2014), 2014.4, p. 27.

a litigation requesting compensation for injury from the Zaitokukai and people who conducted the demonstration on the grounds that the protest activity obstructed the business of the Teachers Union and violated the peace of the private life and the personal rights of the executives of the Teachers Union, who were subjected to jeers in the office and whose reputations were defamed.

During the court case, the plaintiffs argued that the demonstration was a malicious act filled with hatred based on a racially discriminatory ideology. The Tokushima District Court, which was the court of first instance, partially accepted the plaintiffs' demands but did not accept the above argument.[47] In contrast, the Takamatsu High Court, which was the appellate court, declared in its judgment of April 25, 2016[48] (below, the "Takamatsu High Court decision"), that this demonstration was racial discrimination as defined by Article 1 of the ICERD, deserving of harsh criticism; acknowledged that it was extremely unlawful; and increased the amount of compensation from that ordered by the court of first instance. The following is a summary of the judgment by the Takamatsu High Court. Comparing the speech and behavior in this demonstration, the speech and behavior in the Kyoto Korean School case, and the state of behavior, etc., of the Zaitokukai, it acknowledged that the defendants held discriminatory attitudes toward North Koreans resident in Japan. Given the background, the fact that the demonstrators made discriminatory statements about North Koreans resident in Japan and aggressively criticized the plaintiffs by shouting the phrases "tools of the Koreans" and "Korean dogs" can be perceived as "actions intended to make it widely known that they (people who support North Koreans resident in Japan) will be attacked by and caused to suffer various injuries by the defendants, having a chilling effect on such support activities." The ICERD does not directly regulate relationships between individual people, but its purpose must be fully heeded and respected even when interpreting and applying the positive law under Article 709 of the Civil Code. The demonstration and other actions were intended to have the above chilling effects, and after they were conducted and a video of the demonstration was posted publicly on the internet, the office of the plaintiff (the Teachers Union) was inundated with harassing phone calls, so it can be easily surmised that the demonstration effectively achieved its purpose. It can thus be concluded that this corresponds to behavior that "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms" of a minority group defined by Article 1 of the ICERD.

The Takamatsu High Court decision was appealed to the Supreme Court but was rejected.[49]

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[47] Tokushima District Court decision of March 27, 2015. ("LEX/DB Internet TKC Law Information Database" [fee charged], Document No. 25506170).
[48] Takamatsu High Court decision of April 25, 2016. ("LEX/DB Internet TKC Law Information Database" [fee charged], Document No. 25543016).
[49] Supreme Court third petty bench decision of November 1, 2016. ("LEX/DB Internet TKC Law Information Database" [fee charged], Document No. 25544985).

3 *Enactment of the Osaka City Ordinance*

On January 18, 2016, Osaka City enacted the Osaka City Ordinance on Dealing with Hate Speech (Ordinance No. 1 of 2016; below, the "Osaka City Ordinance").

Osaka City is home to many foreign residents, including both North Koreans and South Koreans, and a survey has shown that the number of demonstrations accompanied by hate speech in Osaka Prefecture, which includes Osaka City, is second only to the number in Tokyo.[50] Under such circumstances, in July 2014, then City Mayor HASHIMOTO Toru announced a policy to study countermeasures, unaccompanied by penal regulations, against hate speech through a third-party committee. In September of the same year, the Mayor consulted with the Osaka City Advisory Council on the Promotion of Human Rights Policies. After opinions were solicited concerning the outline of the proposed ordinance, prepared in response to the February 2015 report from the Advisory Council, the proposed ordinance was submitted to the City Council in May of the same year. However, the City Council observed that this would involve enacting an ordinance before similar actions by the national government and discussed the rights and wrongs of a system of contributing the costs of litigation concerning hate speech, resulting in the matter being carried over into the next session. In January 2016, the city submitted a revised bill with a provision concerning support for litigation removed, in response to concerns expressed by the City Council, which adopted the bill in the same month.[51]

The Osaka City Ordinance defines hate speech as any expressive action that belittles or maliciously slanders the person who is its target or makes the person feel threatened for the purpose of excluding individuals or groups with specified attributes related to a race or ethnicity from society, to restrict their rights or freedoms, or to stir up hatred, discrimination or violence, with the aim of making large, unspecified numbers of people aware of its content (Article 2).

The city also took several measures to prevent hate speech. The first was education concerning the violations of human rights through hate speech (Article 3). The second involved taking the steps necessary to prevent the proliferation of expressive actions that the Mayor considered to be equivalent to hate speech and publicly announcing the names or titles of person who engaged in this type of expressive action (Article 5). This measure was taken in response to requests by citizens or under the authority of the Mayor or others, but the opinion of the Osaka City Hate Speech Investigation Committee had to be taken

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[50] According to the Center for Human Rights Education and Training, "Report on a Fact-Finding Survey of Hate Speech." (2015 Ministry of Justice Contract Survey Research Project), 2016.3, p. 38, from April 2012 to September 2015, there were 440 cases of demonstrations and sound-truck propaganda in Tokyo and 164 in Osaka Prefecture.

[51] With regard to the background, see HATA Hiromi, "Osaka City Ordinance Concerning Action to Deal with Hate Speech (Vol. 1)," *Local Government Practice Seminar* (Jichi Jitsumu Semina), No. 667, January 2016, pp. 54-58; HATA Hiromi, "Osaka City Ordinance Concerning Action to Deal with Hate Speech (Vol. 2)," *Local Government Practice Seminar* (Jichi Jitsumu Semina), No. 668, February 2018, pp. 56-57.

into consideration (Article 6). This committee was formed by up to five members (Article 8).

The city also stipulated that the application of the Osaka City Ordinance had to be carried out carefully to prevent the improper infringement of the freedom of expression or other freedoms and rights of citizens (Article 11).

III Enactment of the Hate Speech Elimination Act

1 *Racial Discrimination Elimination Promotion Bill*

In response to the appearance of hate speech, recommendations from international human rights bodies, judicial decisions, etc., on May 22, 2015, opposition Diet members submitted the Bill Concerning the Promotion of Measures to Eliminate Discrimination based on Race, etc. (189th Session of the House of Councilors, Bill No. 7) to the House of Councilors. This bill stipulated the basic principle of the prevention of discrimination for reasons of race, etc.; the obligation of the national government and regional public bodies to prevent such discrimination; basic policies and measures to achieve this objective; and the establishment of an Advisory Council on policies to prevent racial discrimination in the Cabinet Office.

This bill defined race, skin color, descent, and ethnic or racial origins as “race, etc.” and stipulated that the rights or interests of other persons must not be infringed upon by unfair discriminatory treatment of a specified person because of that person’s race, etc., nor by unfair discriminatory speech and behavior, such as insulting or harassing a specified person because of that person’s race, etc. The bill also included speech and behavior other than that directed at a specified person among the objects of prohibition by stipulating that openly directing unfair discriminatory speech and behavior at unspecified persons with shared attributes, such as race, etc., for the purpose of causing said persons to feel remarkable anxiety or inconvenience or for the purpose of furthering or inducing unfair discriminatory treatment by reason of the said attributes must not occur. The bill defined the behavior that was the object of this prohibition as “discrimination for reasons of race, etc.”

This bill was submitted to the Committee on Judicial Affairs of the House of Councilors on June 24, 2015. The purpose of the bill was explained to this committee on August 4, and questions were asked on August 6 of the same year. The bill was carried over to the 189th Diet. Later, the bill was voted down by the plenary session of the House of Councilors on May 13, 2016, when the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan Bill discussed below was adopted.

2 *Enactment of the Hate Speech Elimination Act*

(1) Background

In March 2016, the Ministry of Justice published a report on a fact-finding survey[52] concerning hate speech, undertaken as a contracted research project, and stated that it could no longer be claimed that hate speech during demonstrations and sound-truck propaganda activities was a minor problem. On April 8 of the same year, Diet members from the ruling Liberal Democratic Party and the Clean Government Party submitted a bill, Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan, to the House of Councilors (190th Session of the House of Councilors, Bill No. 6).

This bill was proposed because, in recent years, unfair discriminatory speech and behavior against persons from outside Japan had forced such persons and their descendants to endure great suffering, and at the same time had caused severe divisions in local societies. Moreover, continuing to disregard such a state of affairs was inappropriate given the position that Japan occupied in international society.

The bill was referred to the Committee on Judicial Affairs of the House of Councilors on April 13, 2016, and after a revised version of the Bill was adopted, the revised bill was passed by a majority of votes in a plenary session of the House of Councilors on May 13 of the same year. It was referred to the Judicial Committee of the House of Representatives on May 18 and was adopted by a plenary session of the House of Representatives on the 24th of the same month. The Hate Speech Elimination Act was promulgated and came into force on June 3 of the same year.

(2) Overview of the Act

The Hate Speech Elimination Act first defined the "unfair speech and behavior against persons originating outside of Japan" to be eliminated as unfair speech and behavior publicly endangering the lives, persons, freedom, reputation, or property of persons from outside of Japan or their descendants residing lawfully in Japan (below, "Persons originating from outside of Japan"), or aiming to encourage or induce discriminatory consciousness against them. This included markedly disdaining persons originating outside of Japan in order to incite the exclusion of such persons from local society on the basis of their origins (Article 2). It also stipulated the fundamental principle concerning the elimination of unfair discriminatory speech and behavior against persons originating from outside of Japan and the responsibilities and basic policies of the national government and local government bodies.

As a fundamental principle, it demanded that efforts be made to deepen citizens'

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[52] Center for Human Rights Education and Training, *op. cit.*, (50).

understanding of the need to eliminate improper speech and behavior against persons originating from outside of Japan and at the same time to contribute to the realization of a society in which such discriminatory speech and behavior did not occur (Article 3).

As for the responsibilities of the national government, these entailed implementing policies to undertake to eliminate unfair discriminatory speech and behavior against persons originating from outside of Japan and taking measures such as guidance on policies that local government bodies should implement (Article 4 paragraph 1). It stipulated that local government bodies should strive to devise policies adapted to actual conditions in their respective regions in their efforts to eliminate unfair discriminatory speech and behavior against persons originating from outside of Japan, based on an appropriate division of roles with the national government (paragraph 2 of the same Article).

As for basic policies, these were stipulated as (1) provision of a consultation system (Article 5), (2) complete education (Article 6), and (3) public awareness creation activities (Article 7). Each policy was to be implemented by the national government, and local government bodies were expected to strive to implement them.

With regard to efforts related to unfair discriminatory speech and behavior in supplementary resolution paragraph 2, which was added to the revised bill, these were to be considered as necessary in light of the actual state of unfair discriminatory speech and behavior against persons originating from outside of Japan after its enforcement.

(3) Supplementary resolutions

Supplementary resolutions to this bill were decided by the judicial committees of both the House of Councilors and the House of Representatives.

The supplementary resolutions of the Judicial Committee of the House of Councilors[53] demanded that the national government and local government bodies pay particularly close attention on three issues. First, that it was an error to believe that discriminatory speech and behavior would be permissible if it was not "improper speech and behavior against persons originating from outside Japan" under Article 2; the purpose of this law was such that action be appropriate, taking account of the spirit of the Constitution of Japan and of the ICERD. Second, although the contents and frequency of unfair discriminatory speech and behavior against persons originating from outside of Japan differed between regions, local government bodies where severe cracks have appeared in regional society should, like the national government, steadily implement policies concerning efforts to eliminate such speech and behavior. Third, policies should be implemented in relation to eliminating activities on the internet that encouraged or induced unfair discriminatory speech and behavior against persons originating from outside of Japan.

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[53] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 13, May 12, 2016, pp. 7-8.

The supplementary resolutions of the Judicial Committee of the House of Representatives[54] generally agreed with these three points and added one more: It demanded that in addition to unfair discriminatory speech and behavior against persons originating outside Japan, efforts be made to clarify the actual state of unfair discriminatory treatment and to study measures needed to eliminate these.

(4) Disputed points in the deliberations

There were several major disputed points in the deliberations concerning this bill.
First, the bill did not prohibit unfair discriminatory speech and behavior. With regard to this point, the proposers of the bill held that restricting the content of expression risked placing a chilling effect on expressive behavior and that public authorities should not enter an area related to the freedom of expression and freedom of conscience of individuals; thus, they did not include a provision prohibiting unfair discriminatory speech and behavior.[55] In addition, they explained that as a law laying down basic legal doctrine, it would have a certain degree of impact when a court was judging unlawfulness[56] and that it would be counted on to act as a norm when making judgments to take administrative actions, such as permitting road use.[57] This explanation was criticized on the basis that it might be completely ineffective at causing persons with no intention of attempting to eliminate hate speech from halting hate speech.[58]

The next point was that the object of the bill was "unfair discriminatory speech and behavior against persons originating outside Japan." Persons originating outside Japan would not include people originating inside Japan, such as the Ainu people, and because legally residing is an essential condition, it does not include illegal residents. The proposers of the bill stated that the only objects of the bill were persons originating outside of Japan, in light of the legislative fact that the problem of hate speech at the time was targeted at North Koreans and South Koreans who were residents of Japan. They also explained that illegal residents were not made objects of the bill because if immigration control was properly performed, there would be no such people.[59] In response, it was pointed out that demonstrations that included hate speech actually did call for the expulsion and

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[54] Minutes of the Judicial Committee of the 190th session of the House of Representatives, No. 19, May 20, 2016, p. 30.
[55] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 8, April 19, 2016, pp. 2-3 (stated by NISHIDA Shoji, Member of House of Councilors).
[56] *ibid*., p. 3 (stated by YAKURA Katsuo, Member of House of Councilors).
[57] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 10, April 26, 2016, p. 22 (stated by NISHIDA Shoji, Member of House of Councilors).
[58] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 13, *op. cit*., (53), p. 7 (stated by OGAWA Toshio, Member of House of Councilors).
[59] Minutes of the Judicial Committee of the 190th session of the House of Representatives, No. 19, *op. cit*., 54, p. 26 (stated by YAKURA Katsuo, Member of House of Councilors and NISHIDA Shoji, Member of House of Councilors).

condemnation of foreigners illegally resident in Japan,[60] that demonstrations targeted at the Ainu people did take place,[61] and that in order to clarify the intention of the ICERD, it was not appropriate for the targets to be the only persons originating outside Japan.[62] Therefore, as stated above, the supplementary resolutions adopted by the Judicial Committees of the House of Councilors and House of Representatives held that it was an error to interpret the bill as meaning that any kind of discriminatory speech and behavior was permissible if the targets were not persons originating outside of Japan, and that the purport of the law was to be dealt with appropriately, in light of the spirit of the Constitution and the ICERD.

The definition of "unfair discriminatory speech and behavior" was also disputed. The words, "markedly disdaining persons originating outside of Japan" was added to Article 2 in the revised bill, but this was an illustration, and ultimately, only "inciting exclusion from local society" was found to be "unfair discriminatory speech and behavior"; uncertainty was expressed as to whether intimidation or disdain might be removed. In response, the proposers of the bill explained in their defense that it was interpreted as including the context preceding and following it, which was interpreted as including intimidation and disdain with the purpose of harassment.[63]

IV Trends after the Enactment of the Hate Speech Elimination Act

The Hate Speech Elimination Act was enacted in expectation that it would stipulate policies that the national government and local government bodies would implement and at the same time would have a certain impact on judicial decisions. The following is an overview of examples of cases of judicial decisions, policies of the national government, and responses of local government bodies following the enactment of the Hate Speech Elimination Act. It is followed by a brief discussion of the impact on actual conditions with reference to the state of investigations by international human rights organizations that have urged hate speech countermeasures.

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[60] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 10, *op. cit*., 57, p. 28 (stated by ARITA Yoshifu, Member of House of Councilors).
[61] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 8, *op. cit*., (55), p. 8 (stated by ARITA Yoshifu, Member of House of Councilors).
[62] Minutes of the Judicial Committee of the 190th session of the House of Councilors, No. 13, *op. cit*., (53), p. 7 (stated by NIHI Sohei Member of House of Councilors).
[63] *ibid*., pp. 23 (stated by OGAWA Toshio, member of the House of Councilors, and by YAKURA Katsuo, member of the House of Councilors).

1 *Provisional disposition ruling on an injunction against a hate demonstration in Kawasaki City*

(1) Overview of the case

In this case, a social welfare corporation with its office in the Sakuramoto District of Kawasaki Ward, Kawasaki City, Kanagawa Prefecture, requested the provisional disposition of an injunction against a demonstration scheduled to take place in the Sakuramoto District on June 5, 2016, immediately after the enforcement of the Hate Speech Elimination Act. The Sakuramoto District has a high concentration of North Korean and South Korean residents of Japan. The organizers of the demonstrations had conducted two demonstrations—in November 2015 and January 2016—in Sakuramoto District during which they had shouted "Kick out the Koreans." Local residents who protested against these demonstrations gathered and the route was changed so that the demonstrators did not reach the part of Sakuramoto District where the North Korean and South Korean residents were concentrated. The sponsors of the demonstrations announced on the internet that they would hold a third demonstration similar to the first two on June 5, 2016, so on May 30, the social welfare corporation mentioned above requested a provisional disposition from the Kawasaki Branch of the Yokohama District Court.

On the date of the hearing, June 2, 2016, with the demonstration sponsors absent, the Court decided to issue the provisional disposition prohibiting discriminatory speech and behavior within 500 meters of the office of the social welfare corporation that had requested the provisional disposition.[64]

(2) Contents of the decision

The decision recognized the facts as described above in the overview of the case, then considered the existence of the right to demand an injunction against discriminatory speech and behavior as the right to be protected, as well as the existence of and need for protection of the petitioners' rights to be protected. They then approved the prior injunction against the demonstration. There were several ideas taken into consideration concerning the existence of the right to request the injunction.

To begin with, concerning the question of whether discriminatory speech and behavior is unlawful behavior, the decision stated that the "right to live peacefully in one's residence" was strongly protected by personal rights originating in Article 13 of the Constitution. Assuming that the right of persons originating outside of Japan to neither be discriminated against nor excluded from local society on the basis of their origins was premised on the enjoyment of their personal rights and is powerfully protected, its protection was held to

[64] For an overview of the case and contents of the decision, see Special report on judicial precedents: Decision on the request for an order of a provision disposition to prohibit a hate demonstration in Kawasaki City, *Case Reports* (Hanrei Jiho), No. 2296, August 1, 2016, pp. 14-22.

be extremely important considering the fact that Article 1 paragraph 1, Article 2 paragraph 1, and Article 6 of the ICERD and Article 14 of the Constitution prohibited discrimination for reasons of race, etc., and that the Hate Speech Elimination Act had been enacted and its enforcement was imminent. The decision also stated that the sentiments, feelings, or beliefs that persons originating outside of Japan held concerning their own ethnic group, native country, and region were the foundations of the formation of their characters and were the most fundamental source of respect for individuals, and these must not be unlawfully infringed upon, but mutually respected. So, discriminatory speech and behavior covered by Article 2 of the Hate Speech Elimination Act constituted unlawful behavior, comprising unlawful infringement on personal rights.

Next, with regard to the question of whether or not this unlawful act was the object of the right to request removal of a disturbance and the right to request the prevention of a disturbance, in a case where, despite being aware of or easily made aware of people living peacefully in their residences, when others infringed to a remarkable degree on such people's personal rights to live peacefully in their residences by demonstrating or loitering nearby and shouting loudly, it would be appropriate to interpret the right to request removal of such a disturbance under personal rights as including the right to request the interdiction of discriminatory speech and behavior. Moreover, when issuing a prior injunction, it was necessary to reconcile this with the freedom of assembly and freedom of expression under Article 21 of the Constitution, and assuming that it was appropriate to consider the degree of unlawfulness in the correlation of the type and character of the rights that were infringed with the form of and degree of infringement of the infringing behavior, the Court approved the request for removal of disturbance based on personal rights by weighing the personal right to live in peace with the discriminatory speech and behavior and considering the fact that it would be remarkably difficult to restore rights after the fact from the infringement upon personal rights. This personal right was regarded as being possessed similarly by a corporation and by a natural person, and a corporation would also have the right to request prevention of a disturbance based on personal rights.

With regard to the existence of and the need to preserve the protected rights of the social welfare corporation that made the request, the decision pointed out and acknowledged several points. First, the social welfare corporation provided welfare services mainly to North and South Koreans resident in Japan, was admired by society for devoting itself to social welfare and possessed the personal right to conduct its social welfare activities in peace. Second, its Representative Director had South Korean citizenship and a relatively high percentage of its employees and users were North Koreans and South Koreans, so discriminatory speech and behavior concerning North and South Korean citizens resident in Japan realistically threatened to cause remarkable injury by infringing on the personal rights of this social welfare corporation office to conduct its activities peacefully. Third, it was recognized that the sponsors of the demonstration were aware of this fact or could easily have become aware of this fact.

(3) Discussions of the decision

This decision was the first case of a judicial decision concerning a hate demonstration after the enactment of the Hate Speech Elimination Act, and some evaluate it as a decision made in response to the fact that the Hate Speech Elimination Act was intended as a guideline to interpretations in judicial decisions.[65] Another view opined that the fact that the decision acknowledged that the right of persons originating outside of Japan to neither be discriminated against nor be excluded from local society solely because of their origin outside of Japan was premised on their enjoyment of personal rights indicated the significance of the Hate Speech Elimination Act.[66]

With regard to the range of this decision, it has been pointed out that the fact that the hate demonstration was carried out in a district with a high concentration of North Korean and South Korean citizens who were resident in Japan was not the basis for the judgment of unlawfulness, even though this was absorbed into the evaluation of the infringement of the rights of the petitioner. Moreover, the fact that the demonstration occurred in the district where they were concentrated permits an acknowledgment that the malicious slander was directed at residents of the district, and it is easily recognizable that this constituted a concrete infringement on rights of local residents, including the petitioner. According to this view, for cases in districts with a concentrated community, the assertions of multiple local residents can be counted on to earn a similar judgment from a court, whereas for cases of a similar demonstration in, for example, a bustling shopping district, it would be difficult to determine that malicious slander had been directly aimed at residents of the district, and it would be "necessary to weigh interests considering the characteristics of the district in each case."[67]

Even in this decision, which was made after the enactment of the Hate Speech Elimination Act, the object of regulation was infringement of the personal rights of specified people, and it has been pointed out that hate speech directed against an undetermined large number of people characterized by a specified attribute is not regulated.[68]

2 *Policies of the national government*

As stated above, the Hate Speech Elimination Act stipulates that the national government provide a consultation system and conduct educational and public awareness promotion

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[65] UEDA Kensuke, "Case of Order of Provisional Disposition to Prohibit a Hate Demonstration, Precedent Select Monthly," *Jurisprudence Classroom* (Hogaku Kyoshitsu), No. 433, October 2016, p. 153.
[66] KIM, *op. cit.*, (30), p. 20.
[67] MORI Toru, "Practice and Theory of Constitutional Litigation (Part 1), Case of Order of Provisional Disposition to Prohibit a Hate Demonstration," *Case Reports* (Hanrei Jiho), No. 2321, April 11, 2017, pp. 3-9.
[68] KIM, *op. cit.*, (30), pp. 20-21.

activities.

With regard to consultation systems, the Ministry of Justice was providing consultation on human rights before the enactment of the Hate Speech Elimination Act, but beginning in April 2017, the languages in which telephone consultations on human rights were conducted were expanded from English and Chinese to include Korean, Tagalog, Portuguese, and Vietnamese.[69]

With regard to education, on June 20, 2016, the Ministry of Education, Culture, Sports, Science and Technology issued a notification to prefectural boards of education, and the Presidents of national, public, and private universities, etc., to inform them that enforcement of the Hate Speech Elimination Act was stipulated for educational activities under Article 6 and that supplementary resolutions had been made, requesting "that you take care to appropriately respond to this law."[70] In addition, the Ministry of Education, Culture, Sports, Science and Technology conducted public awareness activities, such as explaining the purpose of the Hate Speech Elimination Act, and educational activities—at conferences that gathered persons in charge of human rights education in prefectural boards of education—undertaken to eliminate unfair discriminatory speech and behavior.[71]

As for public awareness promotion activities, beginning before the enactment of the Hate Speech Elimination Act, the Ministry of Justice had been conducting publicity activities through newspaper advertising, posters, pamphlets, internet advertising, and so on.[72] Since the enactment of the Act, the Ministry has conducted public awareness activities around demonstrations and sound-truck propaganda activities, prepared and distributed booklets to increase awareness among the general public, and distributed information about the Hate Speech Act translated into foreign languages.[73] With regard to hate speech on the internet, the Commentary on the Model Provisions of Contracts and Agreements Concerning Dealing with Unlawful and Harmful Information formulated by the Telecommunications Carriers Association[74] was revised in March 2017 in response to

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[69] "Ministry of Justice Adds Korean and Vietnamese to the Six Languages Used for Telephone Human Rights Consultations," *The Nikkei*, March 19, 2017.

[70] Director of the Social Education Division, Lifetime Learning Policy Bureau, Ministry of Education, Culture, Sports, Science and Technology et al., "Concerning the Enforcement of the Law Concerning the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan (Notification)," (Shakyo No. 1 of June 20, 2016). Osaka Prefecture website

[71] The Ministry of Justice and the Ministry of Education, Culture, Sports, Science and Technology eds., *Human Rights Education and Awareness White Paper 2017* (Jinken Kyoiku Keihatsu Hakusho Heisei 29 Nen-ban), 2017, p. 44.

[72] Public Awareness Activities Focused on Hate Speech. Ministry of Justice website

[73] The Ministry of Justice and the Ministry of Education, Culture, Sports, Science and Technology eds., *op. cit*., (71), p. 45; Main Points of the Minutes of Hate Speech Countermeasure Experts Committee to the Human Rights Education and Awareness Central Bureaus and Agencies Liaison Committee (September 30, 2016). Ministry of Justice website

[74] Commentary on Model Provisions of Contracts and Agreements Concerning Dealing with Unlawful and Harmful, Revision of March 15, 2017. Telecom Services Association website

the enactment of the Hate Speech Elimination Law with the support of the Ministry of Internal Affairs and Communications and the Ministry of Justice.[75] In addition, local government bodies have been presented by the Ministry of Justice with concrete examples of hate speech as reference information.[76]

In addition, when the Hate Speech Elimination Act came into force, the National Police Agency issued notifications to prefectural police explaining the purposes and providing an overview of the law, before asking them to contribute to efforts to eliminate improper discriminatory speech and behavior by (1) promoting education of police personnel in line with the purpose of the law, (2) responding positively to requests for cooperation with publicity and public awareness promotion activities from the Ministry of Justice, and (3) dealing strictly with hate speech or unlawful activities accompanying it when encountered.[77]

3 *Response of local government bodies*

(1) Kawasaki City guidelines to authorizing the use of public facilities

The problem was whether authorization to use a public facility could be refused by local government bodies as a hate speech countermeasure because such use would be for a gathering at which hate speech would be uttered. While, on the one hand, the Hate Speech Elimination Act demanded that local government bodies strive to take measures to eliminate unfair discriminatory speech and behavior, Article 244 paragraph 2 of the Local Autonomy Act (Law No. 67 of 1947) stipulates that "Residents shall not be prohibited from using a public facility without a legitimate reason."

Thus, the point under dispute is whether the fact that unfair discriminatory speech and behavior will occur in a public facility is "a legitimate reason" for refusing the use of the facility.

On May 30, 2016, after the enactment of the Hate Speech Elimination Act but before this law came into force, "in order to preserve the safety of and respect for citizens from unfair discriminatory speech and behavior,"[78] Kawasaki City rejected a request for

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[75] The Ministry of Justice and the Ministry of Education, Culture, Sports, Science and Technology, *op. cit.*, (71), p. 56.

[76] "Hate Speech Elimination Act, Examples of Improper Speech and Behavior for Local Governments Agonizing over Response to the Ministry of Justice," *The Nikkei*, February 5, 2017.

[77] Director of the Security Bureau of the National Police Agency, Chief Cabinet Secretary of the National Police Agency, "Concerning the Enforcement of the Law Concerning the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan (Notification)," (Keisatsucho: Heibikihatsu, No. 147, etc., of June 3, 2016). National Police Agency website

[78] "Comment by the Mayor Concerning the Rejection of Approval in Response to a Request for Permission for Activity in a Public Park (May 31, 2016)," Kawasaki City, *Guidelines for Authorizing the Use of Public Facilities under the Act on the Promotion of Efforts to Eliminate*

authorization for an activity inside a public park by a group that planned a hate demonstration. The Kawasaki City Consultative Committee on the Promotion of Human Rights Policies responded to a July 13 request from the Mayor of Kawasaki City for a priority debate on "matters related to hate speech countermeasures" by submitting the "opinion concerning hate speech countermeasures" on December 27 of the same year. This opinion held that the first matter that had to be dealt with was the need for rapid formulation of guidelines for the use of public facilities. In response to this opinion, draft guidelines were prepared, public comments on them were solicited in June and July of 2017, and the guidelines were enacted on November 9 of the same year.[79]

The guidelines began by stating the principle that "Even when it is considered to be a case where it is possible to restrict the use of a public facility, care must be exercised to ensure that the freedom of expression is not excessively restricted." In addition, when a request for permission to use a public facility had been made, "In a case where the danger of unfair discriminatory speech and behavior has been concretely confirmed with reference to objective facts" (speech and behavior conditions), it would be possible to "issue an admonition," "give conditional permission," "prohibit use," or "withdraw permission." These actions were to be taken selectively according to their relevance to "a case where it is clearly shown by reference to objective facts that there is a danger that if this party, etc., is allowed to use the facility, other users will be seriously inconvenienced" (inconvenience condition), and to the likelihood that unfair discriminatory speech and behavior will occur. In other words, in a case where it was judged not highly likely that unfair discriminatory speech and behavior would occur, but could occur, it was possible to issue an admonition to prevent unfair discriminatory speech and behavior, and in cases where such a likelihood was high but it could not be said that it was certain, it would be possible to give "conditional permission," meaning conditional on unfair discriminatory speech and behavior not occurring. When the inconvenience condition was recognized, it would be possible to either prohibit use or withdraw permission after hearing the views of a third party.[80]

These guidelines were expected to come into force within six months if their enactment.

(2) Operation and review of the Osaka City Ordinance

The Osaka City Ordinance was fully enforced on July 1, 2016, but there have only been

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Unfair Discriminatory Speech and Behavior against Persons Originating from Outside, November 2017, p. 18.

79 Kawasaki City, *ibid*.

80 In relation to the third party, it was stipulated that "it be established as a subcommittee of the Kawasaki City Consultative Committee on the Promotion of Human Rights Policies, that is, a body established by the Mayor." (*ibid*., p. 6).

four incidents announced as cases that were hate speech.[81] With regard to this point, criticism has been leveled at the prolongation of investigations as a result of an inadequate investigation committee and systems in the city bureaus that administer investigations.[82]

In addition, the cases that were announced were all expressive behavior over the internet and made by people not using their real names, so the actual names of the persons who uttered the expressions considered to be hate speech have not been announced. It is feared that were Osaka City to obtain the perpetrators' real names from the operators of the web sites where the expressions were posted or from the operators or the employees of the telecommunications businesses (below, "providers, etc.") this might infringe upon the Telecommunications Business Act (Law No. 86 of 1984). With regard to this problem, on April 28, 2017, the Osaka City Mayor submitted an inquiry to the Osaka City Hate Speech Investigation Committee concerning "measures that can be taken by the city to obtain information about the names or titles of persons who perform expressive activities from operators of web sites where such expressions have been posted."[83] The Investigation Committee gave the following answer on January 17, 2018.

The Osaka City ordinance would be infringing on Article 4 of the Telecommunications Business Act and on the Provider's Liability Act if it added a provision that obligated providers, etc., to provide personal information or if it affected judgments concerning such a provision. Consideration was given to Osaka City taking action against providers, etc., in order to have them voluntarily provide personal information on behalf of victims to reduce the burden on the victims of specifying the persons who made the expressions constituting hate speech, but this could not be counted on to be effective. Therefore, what Osaka City could do was to ask the national government to add measures to the Providers Liability Act to reduce the burden on victims or to deal with unfair expressive behavior carried out using an internet posting site.[84]

However, litigation demanding rescissory action of the expenditure of public funds based on the Osaka City Ordinance was initiated in the Osaka District Court on September 19, 2017, on the grounds that the Osaka City Ordinance vaguely defined hate speech and infringed on the freedom of expression.[85]

Amidst the criticism related to the freedom of expression and the prolongation of

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[81] "Concerning the operation of the Osaka City Ordnance Concerning Action to Deal with Hate Speech," June 28, 2017. Osaka City website

[82] TAJIMA Yoshihisa, "State of Operation and Challenges to the Osaka City Ordnance Concerning Action to Deal with Hate Speech," *Law Seminars* (Hogaku Semina), No. 757, February 2018, pp. 32-33.

[83] Mayor of Osaka, "About Matters Concerning Enforcement of the Osaka City Ordnance Concerning Action to Deal with Hate Speech (Inquiry)," Oshimin 99, April 28, 2017.

[84] Osaka City Hate Speech Investigation Committee, "Measures that Can be Taken by Osaka City to Obtain the Names or Titles of Persons who Expressed Hate Speech from Operators of Websites Where Such Expressions Have Been Posted (Answer)," January 2018.

[85] "Hate Speech Ordnance 'unconstitutional,' Citizens Take Legal Action Against Osaka City," *Sankei Shimbun*, (Osaka Edition) September 20, 2017.

investigations and other matters concerning its effectiveness, another view of the Osaka City Ordinance is that it established temporary measures possible under the present legal system and had to be constantly verified and revised as an ordinance with the character of a trial.[86]

4 *Investigations by international human rights organizations*

(1) Committee on the Elimination of Racial Discrimination

The government submitted the 10th and 11th periodic reports to the Committee on the Elimination of Racial Discrimination in June 2017.

The periodic reports stated that the Hate Speech Elimination Act came into force in June 2016 and described its contents in detail.[87] With regard to the application of Article 4 of the ICERD, it reported that in response to the enactment of the Hate Speech Elimination Act, the National Police Agency had instructed prefectural police to promote police activities to achieve the purposes of the Hate Speech Elimination Act, that criminal penalties had been ordered in the Kyoto No. 1 Korean Elementary School Case, and that the Ministry of Justice was conducting public awareness promotion activities concerning hate speech. In addition, since judicial decisions related to the application of the ICERD, it cited the Kyoto No. 1 Korean Elementary School Case decision by the Osaka High Court and the Tokushima Teachers Union Case decision by the Takamatsu District Court.

With regard to these periodic reports, in the future, information will be obtained from NGOs, etc., and investigated by the Committee on the Elimination of Racial Discrimination.

(2) UPR

In November 2017, the third UPR, an investigation of reports by governments, was conducted by the Task Force of the United Nations Human Rights Council. It was mentioned in a report submitted in August of that year that the Japanese Government had declared that the Hate Speech Elimination Act that came into force in June 2016 would not permit unfair discriminatory speech and behavior,[88] and the opening of the UPR introduced the enforcement of Hate Speech Elimination Act by stating that it did not permit unfair discriminatory speech and behavior.[89] While there were statements welcoming the

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[86] MATSUMOTO Kazuhiko, "Osaka City Ordnance Concerning Action to Deal with Hate Speech," *Jurist* (Jurisuto), No. 1513, December 2017, pp. 81-86.

[87] "Consideration of reports submitted by States parties under article 9 of the Convention: Tenth and eleventh periodic reports of States parties due in 2017: Japan," CERD/C/JPN/10-11, 25 September 2017, paras. 105-107.

[88] "National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21," A/HRC/WG.6/28/JPN/1, 31 August 2017, para. 55.

[89] "Statement by Government Representative Okamura concerning the Third UPR investigation of Japan (Geneva on November 14)." Ministry of Foreign Affairs website

Act's enforcement, reports were adopted by the task force of the Human Rights Council,[90] including recommendations made by other countries on greater efforts to fight hate speech (Australia), full concern for recommendations by the United Human Rights Council on the subject of hate speech (South Korea), and the enactment of an all-encompassing law concerning discrimination based on race or ethnicity, etc. (Holland Germany).[91]

5 *Change in actual conditions*

According to the National Police Agency, demonstration parades by the Zaitokukai and other right- wing citizens groups occurred about 120 times in 2014 and 70 times in 2015, but in 2016, when the Hate Speech Elimination Act came into force, this number fell to about 40. However, such demonstrations occurred about 50 times in 2017, which was an increase on 2016.[92]

In Conclusion

By showing the demand for hate speech countermeasures based on the prohibition, etc., of hate speech backed up by criminal penalties within the framework of international human rights treaties, this paper has confirmed that prior to the Hate Speech Elimination Act, judicial judgments based on the purpose of the treaties were made and that local government bodies were already searching for means to deal with hate speech. Under such circumstances, the Hate Speech Elimination Act states its basic principles and was enacted as an Act demanding implementation through policies of the national government and local government bodies. The enactment and enforcement of the Hate Speech Elimination Act is presumed to have affected national government policies, actions of local government bodies, and judicial judgments.

However, hate speech continues in the form of demonstrations accompanied by hate speech, and international human rights organizations have asked Japan to enforce countermeasures that include the enactment of an all-encompassing discrimination prohibition law. Some hold the persuasive view that in order to protect freedom of expression and other basic rights, hate speech countermeasures must be considered cautiously in order to prevent the excessive regulation of speech, and legal scholars also

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[90] "Report of the Working Group of the Universal Periodic Review: Japan," A/HRC/37/15, 4 January 2018.

[91] With regard to cases of all-encompassing discrimination prohibition laws in other countries, see FUJITO Yoshitaka, "Aspects of All-encompassing Discrimination Prohibition Laws: Germany, Sweden, United Kingdom," *Building a Society of Diversity* (Research Materials), 2016-3, 2017, pp. 45-48.

[92] National Police Agency, Security Bureau, *Review of and Prospects for Public Safety 2014*, 2014, p. 24; *ditto*, 2015, p. 28; *ditto*, 2016, p. 42; *ditto*, 2017, p. 25.

debate the issue of more appropriate countermeasures.[93]

The Universal Declaration on Human Rights, written following the experience of World War II, states that "All human beings are born free and equal in dignity and rights" (Article 1). It continues, "They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Article 1). We are truly striving to find ways to apply our respective powers of reason and consciences, as well as a spirit of goodwill, in the face of the difficult challenge of creating a free and equal society without hate speech while ensuring the freedom of expression.

KAWANISHI Akihiro, *Hate Speech Regulations in Japan: Surrounding the Hate Speech Elimination Act* (Research Materials), 2019e-3, Tokyo: Research and Legislative Reference Bureau, National Diet Library, 2019.

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[93] With regard to the state of discussion under constitutional law, see KOTANI Junko, "Regulation of Hate Speech Based on Racism and Constitutional Theory," *Law Seminars* (Hogaku Semina), No. 757, February 2018, pp. 12-17, and other reports referenced by this report.