

A COMMENT ON HATE SPEECH REGULATION  
IN JAPAN AFTER THE ENACTMENT OF THE  
HATE SPEECH ELIMINATION ACT OF 2016

|       |   |
|-------|---|
| メタデータ | 言語: eng<br>出版者:<br>公開日: 2017-05-26<br>キーワード (Ja):<br>キーワード (En):<br>作成者: Kotani, Junko<br>メールアドレス:<br>所属: |
| URL   | <a href="https://doi.org/10.14945/00010174">https://doi.org/10.14945/00010174</a>                         |

---

論 說

---

A COMMENT ON HATE SPEECH REGULATION  
IN JAPAN AFTER THE ENACTMENT OF THE  
HATE SPEECH ELIMINATION ACT OF 2016

*Junko Kotani\**

INTRODUCTION

In May 2016, the Diet, Japan's national legislature, passed the so-called Hate Speech Elimination bill, which came into effect soon after on June 3.<sup>1</sup> The new law narrowly defines hate speech and declares it inappropriate and impermissible, but it does not criminalize or illegalize hate speech, nor does it have a built-in structure through which the law can be enforced. Despite the lack of an enforcement mechanism, however, the new law seems to have brought about some changes. It seems to have changed the attitude of the national and local governments and to have been functioning in a way that controls the tone of hate speech expressed in the public sphere.

---

\* Professor, Faculty of Humanities and Social Sciences, Shizuoka University. This paper was presented at the symposium on Humanities Concerns and Practices in Social Sciences: Comparative Studies between Taiwan and Japan which was held at National Chengchi University in Taipei, Taiwan, in March, 2017. I would like to thank Professor Craig Martin of Washburn University School of Law for his comments on this paper.

<sup>1</sup> Honpo-gai shushinsha ni taisuru hutouna sabet suteki-gendou no kaishou ni muketa torikumi ni kansuru houritsu [The Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan][hereinafter Hate Speech Elimination Act], Law No. 68 of 2016, *translated in* <http://www.moj.go.jp/content/001199550.pdf>.

This paper attempts to outline recent developments concerning hate speech regulation in Japan. First, I briefly describe the background of the new law: the circumstances that moved the Diet to enact the law. Second, I explain the basic legal structure surrounding hate speech regulation in Japan: the international laws, the constitutional law, and court cases related to hate speech. Third, I examine the Hate Speech Elimination Act and describe its definition of hate speech and its scope. And last, I comment on the effects of the new law both on hate speech on the Internet and on the street.

I use the term “hate speech” loosely in this paper to describe a broad range of expressions of racial hatred. Moreover, because the term “racial discrimination” has been used to describe any distinction “based on race, color, descent, or national or ethnic origin” in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>2</sup> I refer to hate speech against people of Korean or Chinese background as racist hate speech.

## I. HATE SPEECH IN JAPAN?

As racism began to resurface in Western societies after World War II, the United Nations adopted the ICERD in 1965. In response to this effort by the international community, most Western nations enacted domestic laws to regulate racist speech. In Japan, however, hate speech did not come to be regarded as a social or political problem until less than a decade ago, when we began to see the abrupt rise of vicious hate speech targeting people of Korean or Chinese background in the public sphere. At center stage was an anti-Korean and anti-Chinese group called Zaitoku-kai. They marched on the streets of the Korean communities in Tokyo and Osaka, chanting extremely racist remarks and waving the Rising Sun

---

<sup>2</sup> International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec 21, 1965.

Flags, which represented the military of Imperial Japan during World War II. They filmed these rallies and broadcast them on the Internet to promote hatred against people of Korean or Chinese descent. Eventually, the national media began to cover these incidents, and the public began to voice their concern, saying, “we have to stop this” or “we have to regulate this.” The call for the regulation of racist rallies and their use of vulgar language was so strong that it moved the Liberal Democratic Party (LDP) to act, although this conservative party had not been a strong supporter of anti-racial discrimination legislation. In April 2016, the LDP submitted the Hate Speech Elimination bill to the Diet, and it soon became law and came into effect on June 3.

It was not just on the streets that we began to encounter crude racism. Much bigotry and hatred have been seen on the Internet as well. There are several websites operated by racist groups, which they use as tools for spreading the idea of Japanese ethnic supremacy and for soliciting donations for their cause. These sites, however, may not necessarily be the most effective device for disseminating racist ideas in Japan. The readers’ comment sections of some news sites seem to be working as effective tools for circulating racist ideas as well. To be fair, the news sites themselves are not racist or ethnocentric, and their readers’ comment sections are provided to the general public as neutral forums for exchanging opinions: to promote the free exchange of ideas. The comment sections of some of the sites, however, often become filled with racist comments and advocate the idea of Japanese ethnic supremacy. And because issues surrounding the relationship between Japan and both Korea and China have long been highly political and controversial, some of the hate speech targeting Koreans or Chinese therefore can be categorized as political speech. This makes the debate over regulation of racist speech all the more complex and controversial in Japan.

## II. LEGAL STRUCTURE FOR COMBATING HATE SPEECH IN JAPAN

In a democratic society, the government cannot regulate certain types of speech simply because it does not approve of the message contained in the speech. To maintain and preserve democracy, freedom of speech must be vigorously protected. People should be able to criticize the government or its policies without fear of being prosecuted. Also, to ensure that the rights of every single person are protected regardless of his or her political affiliation or personal preferences, freedom of speech must be vigorously safeguarded, even for those who hold opinions we find offensive. In this context, we must protect the right of racist speakers to speak out even if we find their messages offensive or harmful.

In the international community, however, certain types of racist hate speech have been recognized as special kinds of speech that *must* be regulated. Hate speech is considered to cause serious harm to the dignity and fundamental human rights of the targeted groups and individuals. Hate speech is often said to disrupt the social order or social harmony. Throughout human history, we have witnessed too many tragic cases of genocide that began with the incitement of racism. In this context, the international community has decided that narrowly defined hate speech must be regulated. Article 4 of the ICERD of 1965 requires member states to criminalize the dissemination of ideas based on racial superiority or hatred as well as incitement to racial discrimination and violence.<sup>3</sup> It also requires the

---

<sup>3</sup> “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 color 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 and, to this end, 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, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence

criminalization of racist organizations. Article 20 of the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966, requires member states to prohibit by law any advocacy of racial hatred that constitutes incitement to discrimination, hostility, or violence.<sup>4</sup>

Japan signed the ICCPR in 1978, two years after it came into force, but it was not until 1995 that Japan acceded to the ICERD. Following the “strong instruction by Prime Minister Murayama” at the time,<sup>5</sup> Japan acceded to the ICERD with a reservation with respect to Article 4, declaring that Japan officially reserved the right *not* to accept any obligation of the Convention that would contradict the idea of freedom of speech protected by the Constitution of Japan.<sup>6</sup> In regard to hate speech regulation, the Japanese government had repeatedly insisted that racism in Japan was not serious enough to require new anti-racism legislation.<sup>7</sup> Yet in response to the increasing hate speech incidents in the country, the UN Committee on the Elimination of Racial Discrimination urged Japan to “tackle racist

---

or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

<sup>4</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec 16, 1966.

<sup>5</sup> Reply by Foreign Minister Yohei Kohno to the Committee of Foreign Affairs of the House of Representatives, Nov. 21, 1995, <http://kokkai.ndl.go.jp/SENTAKU/syugiin/134/0110/13411210110006.pdf>.

<sup>6</sup> Japan’s reservation to ICERD is as follows: “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.”

<sup>7</sup> Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan to the Committee on the Elimination of Racial Discrimination, Sept. 26, 2014.

hate speech without impeding upon the right to free speech.”<sup>8</sup>

Freedom of speech is guaranteed by Article 21 of the Constitution of Japan.<sup>9</sup> Leading constitutional scholars have supported the idea of robust freedom of speech as seen in the United States and insisted that the Supreme Court should adopt strict scrutiny for content-based regulations of speech. The Court, however, has always deferred to the decisions of the legislative branch and has never once invalidated a speech law on its face. It would therefore be safe to say that if the national Diet enacts new legislation to criminalize hate speech, it would likely survive judicial scrutiny.

Along this line, I must also refer to the *Kyoto North Korean School* cases, which began in 2009, in which hate speech was sanctioned under the scheme of existing domestic laws and international treaties. The cases arose from a series of protests carried out by members of the racist group *Zaitoku-kai* in front of a school for children of North Korean descent in Kyoto. *Zaitoku-kai* held at least three rallies outside the school, using loudspeakers and sound trucks to chant insults that were extremely rough and vulgar. They filmed their own protests and publicized the videos on the Internet. They also damaged school property. The government prosecuted some of the members for forcible obstruction of business (Penal Code, art. 234), damage to property (art. 261), and insult (art. 231), and the government won in the criminal case.<sup>10</sup> The school also brought civil suits against

---

<sup>8</sup> Press Release, Committee on the Elimination of Racial Discrimination considers report of Japan, OHCHR Press Release (Aug. 21, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14957>.

<sup>9</sup> NĪHONKOKU KENPO [KENPO][CONSTITUTION], art. 21, para. 1. “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.” Although Japanese Constitutional scholars have supported the idea of strong protection of free speech, we are divided over the constitutionality of hate speech regulation.

<sup>10</sup> Kyoto Chiho Saibansho [Kyoto Dist. Ct.] April 21, 2011, Hei 22 (wa) no. 1257, Hei 22 (wa) no. 1641; Osaka Koto Saibansho [Osaka High Ct.] Oct. 28, 2011, Hei 23 (u) no. 788; Saiko Saibansho [Sup. Ct.] Feb. 23, 2012, Hei 23 (a) no. 2009.

the members of *Zaitoku-kai*, and the courts granted damages in the amount of approximately twelve million Japanese yen on behalf of the school.<sup>11</sup>

Although these cases involved the destruction of property, the courts cited international conventions and decided that the racist speech at the rallies amounted to criminal insult in the criminal case and civil tort in the civil case. However, I must emphasize that this was one of the rare hate speech cases where a specific school was directly targeted by racist remarks in a very aggravated way. The courts were able to rule in favor of the victim because the victim was a specific school. Under Japanese criminal law, insult or defamation can be applied to hate speech only when the speech targets a specific person(s) or an association(s). Similarly, under the Japanese Civil Code, a person or an association can bring a civil suit against racist speakers to recover damages, but as the court in the Kyoto cases made clear, damages can be granted only when a specific person(s) or association(s) is directly targeted by the alleged hate speech. There is little or no room for damages to be granted in other cases where a general group of people of a certain race is targeted. Racist hate speech in most instances, including racist speech on the Internet, is directed toward a general group of people of Korean or Chinese background, and so the logic of the *Kyoto* decisions cannot be applied to those types of hate speech. In short, under the current legal scheme, we cannot regulate hate speech targeting *Korean people* or *Chinese people* in general.

### III. HATE SPEECH ELIMINATION ACT (2016)

The new Hate Speech Elimination Act is quite unique in its definition of hate

---

<sup>11</sup> Kyoto Chiho Saibansho [Kyoto Dist. Ct.] Oct 7, 2013, Hei 22 (wa) no. 2655; Osaka Koto Saibansho [Osaka High Ct.] July 8, 2014, Hei 25 (ne) no. 3235; Saiko Saibansho [Sup. Ct.] Dec 9, 2014, Hei 26 (o) no. 1539, Hei 26 (ju) no. 1974.

speech.<sup>12</sup> It creates the new concept of “unfair discriminatory speech and behavior” and defines this as speech that “incites the exclusion of persons” who originate from outside Japan and lawfully reside in Japan, by making statements that have the effect of harming their life, body, freedom, reputation, or property or by severely insulting them in public with the intent to encourage or induce discriminatory feelings against them.

*Race or ethnicity* is a term you do not find in the text of the Act. The only reference to “race” can be found in supplementary resolutions by the Committees of Judicial Affairs of both the upper and lower houses of the Diet, where they declare that any form of discriminatory speech and behavior shall be appropriately dealt with “in view of the intent of this Act, and the spirit of the Japanese Constitution and the International Convention on the Elimination of All Forms of Racial Discrimination.” But these are merely supplementary resolutions by the committees and not a formal part of the law. At any rate, with this unique definition of “unfair discriminatory speech,” the law does not address racist ideas and it does not apply to racist speech targeting Korean or Chinese people who live outside of Japan or to such speech as targets Japanese citizens with a multiracial background.

Despite the lengthy definition of unfair discriminatory speech and behavior, the law does not criminalize or prohibit such speech and behavior.<sup>13</sup> It declares

---

<sup>12</sup> *Hate Speech Elimination Act*, *supra* note 1, art. 2.

<sup>13</sup> *Hate Speech Elimination Act*, *supra* note 1, art. 1, states that “the purpose of this Act is to set out the basic principles for efforts towards their elimination, and to clarify the responsibilities of the national government, etc., as well as to set out and promote the basic measures.” Article 3 establishes the basic principles to tackle with “unfair discriminatory speech” and makes it obligations of people to have better understanding of the necessity to eliminate such speech and to help make our society free from such speech. Articles 4 to 7 are all short and simple, declaring the obligations of national and local governments to make plans to tackle hate speech.

that unfair discriminatory speech and behavior are inappropriate and impermissible, but it only does so in the preamble. The preamble of a law, however, is not a part of the legally binding or operative text of the law. The main articles of the law, which are legally binding, only stipulate the basic principles related to efforts to be made toward the elimination of unfair discriminatory speech. The law sets up abstract obligations on the part of the national and local governments to implement measures to eliminate unfair discriminatory speech and behavior—for instance, to organize consultation systems and to enhance educational activities. It is, then, merely what we call a “principle law,” which does nothing more than declare the basic principles for confronting a complex issue.

Although the law does not criminalize or bar hate speech, it can function as a guideline for the courts and the government when dealing with hate speech “that incites exclusion of persons” who originate from outside Japan. And that is what seems to have been happening for the last several months. Kawasaki City, located near Tokyo, cited the new law and denied the permit a racist group had applied for to hold a racist rally in a Korean community in Kawasaki.<sup>14</sup> A district court also cited this law as a basis for issuing a provisional disposition injunction to prevent the execution of a racist rally near a private facility that catered to the diverse community in Kawasaki.<sup>15</sup> In these instances, the law functioned as a guideline for the authority to control the dissemination of extremely vulgar racist

---

<sup>14</sup> Asahi Shimbun, Heito Dantai no Kouen Shiyou Hukyoka Shobun wo Happyou, Kawasaki-shi [Kawasaki City Announces Denial of Permission for Hate Group’s Park Use](May 31, 2016, 11:42AM), <http://digital.asahi.com/articles/ASJ503QY5J50ULOB01B.html>.

<sup>15</sup> Yokohama Chiho Saibansho Kawasaki Shibu [Yokohama Dist. Ct. Kawasaki Branch] June 2, 2016, Hei 28 (wo) no. 42. Although the use of public parks and streets are subject to the permit by the local government, Japanese Supreme Court has reiterated the importance of public demonstrations in democratic society and assured the permit system to be administered in a way to maximize the freedom of speech. In practice, permits are almost never denied based on the content or message of the speech.

speech in the communities where the targeted groups lived and worked.

#### IV. COMMENTS

Hate speech on the Internet is dealt with in the same manner as hate speech in the real world. In the previously mentioned *Kyoto North Korean School* cases, the courts took into consideration the legal effects of the publication of videos of the racist rallies along with the legal effects of the actual rallies. And, in September 2016, a court in an online defamation case granted damages for racist defamation of a resident Korean journalist.<sup>16</sup> Both are cases where a specific person or association was directly targeted, and therefore legal relief was possible. In other words, they were decided under the traditional legal scheme of insult or defamation, not the new scheme under the new law.

Perhaps more interesting is the Twitter case in October, 2016. In response to a complaint made by a Korean woman residing in Japan, the Ministry of Justice formally requested that Twitter delete some of the racist Tweets that targeted her as an individual who was active in the anti-racism movement. The request by the Ministry was based on the human rights protection procedure stipulated in the internal code of the Ministry,<sup>17</sup> and it does not have legal binding force. Twitter, Inc., nevertheless obliged and deleted some of the offensive Tweets.<sup>18</sup> In this instance, the new law, which does not have an enforcement structure or legally binding force, motivated the government to request Twitter to remove racist Tweets.

As I explained, the Hate Speech Elimination Act is merely a basic principle

---

<sup>16</sup> Osaka Chiho Saibansho [Osaka Dist. Ct.] Sept. 27, 2016, Hei 26 (wa) no. 7681; Hei 27 (wa) no. 5836.

<sup>17</sup> Jinken shinpan jiken chousa shori kitei (Instruction) [Rules of Investigation Processing of Human Rights Violation Cases], Ministry of Justice Instruction No. 2 of 2004.

<sup>18</sup> Asahi Shimbun, Sabetsuteki Tweet 4-ken no Sakujo Kakunin [Four Discriminatory Tweets Deletion Confirmed] (Nov. 12, 2016, 5:00AM), <http://digital.asahi.com/articles/DA3S12654591.html>.

law without an enforcement structure. But ever since it became law in June of last year, it seems to have led to a change in the attitude of the government in dealing with racist hate speech. Another example of such a shift is that, right after the law came into effect, the National Police sent a directive to prefectural police headquarters to assure that the principles of the law would be observed by the entire police force.<sup>19</sup> I have heard that police officers in the past guarded racist demonstrators to make sure the freedom of those demonstrators was not interfered with by anti-racist protesters, but now police officers guard anti-racist protesters against racist demonstrators.<sup>20</sup>

It is probably safe to say that the attitudes of the national and local governments have changed following the enactment of the law and that the governments now rely on it to act in favor of the victims of hate speech. Although I am not certain whether I should welcome this trend without reservation as a constitutional scholar who believes in strong freedom of speech, the law does seem to have been working for the last several months to offer some protection to the most vulnerable members of our society.

---

<sup>19</sup> Honpou-gai shusshinsha ni taisuru hutouna sabetsuteki-gendou no kaisho ni muketa torikumi no suishin ni kansuru houritsu no shikou ni tsuite (tsutasu)[In Regard to the Enforcement of the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan (Circular)], June 3, 2016.

<sup>20</sup> Q&A HATE SPEECH KAISHOU-HOU 46 (Yasuko Morooka et al. eds., Gendai Jinbun Sha 2016).