

Proceed with Caution: Hate Speech Regulation in Japan

by JUNKO KOTANI*

Introduction

The Hate Speech Elimination Act¹ came into force in Japan in June 2016, amid heated debates over the appropriate role that the government should play in confronting the vulgar racist hate speech that had been spreading throughout the country. At the center of the controversy was a nationalist group called Zaitoku-kai.² They marched on the streets in the areas of Tokyo and Osaka where people of Korean heritage owned businesses or resided.³ They chanted extremely racist remarks while waving the flag of the rising sun, which represented the military forces of Imperial Japan during World War II. The group filmed their rallies and uploaded the videos to the Internet. Many people began to voice their concerns over such blatant display of hatred and demanded that lawmakers take effective measures to prevent such expression. A heated debated followed: Should we regulate the hurtful and harmful verbal

* Professor, Faculty of Humanities and Social Sciences, Shizuoka University. LLB (Keio University), LLM (Keio University). I would like to thank Professor Setsuo Miyazawa for his generous support.

1. Honpōgai shushinsha ni taisuru futō na sabetsuteki gendō no kaishō ni muketa torikumi ni kansuru hōritsu [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 (Japan) [hereinafter Hate Speech Elimination Act], *translated in* <http://www.moj.go.jp/content/001199550.pdf>. Prior to the national legislation, Osaka City enacted an ordinance to denounce hate speech. Ōsaka shi heito supiichi e no taisho ni kansuru jōrei [Osaka City Ordinance on Treatment of Hate Speech], Osaka City Ordinance No. 1 of January 18, 2016 (Japan), *available in* Koji Higashikawa, *Japan's Hate Speech Laws: Translations of the Osaka City Ordinance and the National Act to Curb Hate Speech in Japan*, 19 ASIAN-PAC. L. & POL'Y J. (forthcoming).

2. Zainichi-Tokken o Yurusanai Kai (Zaitoku-kai) is an organization founded with the purpose of informing the public of the “problems” regarding the “privileges” afforded to the people of Korean heritage in Japan and pressuring the government to abolish such “privileges.” Kyōto Chihō Saibansho [Kyoto Dist. Ct.] Oct. 7, 2013, Hei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan).

3. See, e.g., Tomohiro Osaki, *Nationalism Rearing Ugly Head with Greater Frequency*, JAPAN TIMES, May 23, 2013, <https://www.japantimes.co.jp/news/2013/05/23/national/social-issues/nationalism-rearing-ugly-head-with-greater-frequency/>.

attacks targeting people with different racial or ethnic backgrounds from their own? Would such a law infringe upon freedom of speech?

In response to the public outcry, the Diet passed the Hate Speech Elimination bill in May 2016, which came into effect soon after on June 3.⁴ The law narrowly defines hate speech and declares it inappropriate and impermissible, but it does not criminalize or illegalize such speech, nor does it have a built-in system through which the law can be enforced. Because of its unenforceable nature, the law has been criticized as inadequate and ineffective by human rights advocates.⁵

In this Article, I argue that while the Constitution of Japan may not forbid criminalization of narrowly defined hate speech, legislative history on the issues pertaining to racial discrimination suggests that we proceed with extreme caution in advocating for immediate legislation of racist hate speech. A few things should be noted at the outset. First, many of the Koreans came to reside in Japan as a result of the Japanese occupation of Korea in the early 20th century,⁶ which continues to be a controversial political issue in Japan. There have also been ongoing diplomatic disputes between Japan and the Republic of Korea (South Korea) or the Democratic People's Republic of Korea (North Korea).⁷ As a result, some of the hate speech directed at the Koreans in Japan may be categorized as political speech. Second, Japan, along with the United States, is one of the few advanced nations that do not have a law that criminalizes racist hate speech targeting groups of people that are identifiable by race or ethnicity.⁸ Third, both the Japanese and U.S. governments have expressed concerns over the

4. See *infra* text accompanying notes 37–39.

5. See also Editorial, *Make Hate Speech Law Stronger*, JAPAN TIMES, June 10, 2017, <https://www.japantimes.co.jp/opinion/2017/06/10/editorials/make-hate-speech-law-stronger/>.

6. For the complicated history of the resident Koreans in Japan, see Shigenori Matsui, *The Challenge to Multiculturalism: Hate Speech Ban in Japan*, 49 UBC L. REV. 427, 439–44 (2016). As of June 2017, the number of “resident aliens” in Japan with South Korean nationality is 535,873 (including 299,488 with “special permanent resident” status) and with North Korean nationality, 31,674 (including 31,049 with the same status). Hōmushō Hōseibu [Jud. Sys. Dep’t, Ministry of Just.], *Zairyū Gaikokujin Tōkei [Statistics of Resident Aliens] (June 2017) (Japan)*, <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001196143>. “Special permanent status” is defined in *Nihonkoku to no heiwa jōyaku ni motozuki Nihon no kokuseki o ridatsu shitamono tō no shutsunyūkoku kanri ni kansuru tokureihō [Special Act on the Immigration Control of, Inter Alios, Those Who Have Lost Japanese Nationality on the Basis of the Treaty of Peace with Japan]*, Law No. 71 of 1991, art. 3 (Japan).

7. Dispute over the ownership of islands, “comfort women” issues, abduction of Japanese citizens, etc. See, e.g., Choe Sang-Hun & Motoko Rich, *Japan Recalls Ambassador to South Korea to Protest ‘Comfort Woman’ Statue*, N.Y. TIMES, Jan. 6, 2017, <https://www.nytimes.com/2017/01/06/world/asia/japan-south-korea-ambassador-comfort-woman-statue.html>; Martin Fackler, *Japan Places Pressure on South Korea Amid Islets Dispute*, N.Y. TIMES, Aug. 27, 2012, <https://cn.nytimes.com/world/20120827/c27japan/en-us/>.

8. See *infra* text accompanying notes 20–31.

conflict between freedom of speech and regulation of hate speech and filed reservations in regard to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”),⁹ which calls on member nations to criminalize such speech.¹⁰ Fourth, Japan, unlike the U.S., does not have any statute prohibiting racial discrimination by private entities in the field of employment or in public accommodations. For instance, even if a store owner posts a sign that says, “Japanese only” on the door of their store, or a business owner discriminates against an employee because of his ethnicity, they are not directly breaking any statutory provisions.¹¹ It is with this background that the new law came into effect and it is with this background that I make my arguments in this Article.

In Part I and II, I briefly explain the international laws that demand criminalization of hate speech and the constitutional protection of freedom of speech in Japan. In Part III, I focus on the legislature’s response to the increasing hate speech incidents: the Hate Speech Elimination Act. Part IV analyzes the leading cases in hate speech issues, namely, the *Kyoto Korean Elementary School* cases. In Part V, I describe the provisions of Japanese penal, civil, and administrative laws that may be applied to hate speech incidents. I then present my response to Professor Craig Martin’s arguments¹² in Part VI. In this paper, I use the term “hate speech” to describe a broad range of expressions of racial hatred and the term “race” to include national or ethnic origin, as defined in article 1 of the ICERD.¹³

9. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

10. See *infra* text accompanying note 17.

11. Each case may constitute a tort. See, e.g., Shizuoka Chihō Saibansho Hamamatsu Shibu [Shizuoka Dist. Ct. Hamamatsu Div.], Oct. 12, 1999, Hei 10 (wa) no. 332, 1718 HANREI JIHŌ [HANJI] 92 (Japan). Discriminatory treatment in the workplace based on the worker’s nationality, creed, social status, or sex is prohibited by articles 3 and 4 of Rōdō kijun hō [Labor Standards Act], Law No. 49 of 1947 (Japan), translated in <http://www.japaneselawtranslation.go.jp/law/detail/?id=2236&vm=04&re=02&new=1>, and chapter II of Koyō no bun’ya ni okeru danjo no kintō na kikai oyobi taigū no kakuho tō ni kansuru hōritu [Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment], Law No. 113 of 1972 (Japan), translated in <http://www.japaneselawtranslation.go.jp/law/detail/?id=60&vm=04&re=02&new=1>.

12. Craig Martin, *Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada*, 45 HASTINGS CONST. L.Q. 455 (2018); Martin was a fellow participant in the symposium at UC Hastings in September 2017 on hate speech laws in Japan.

13. ICERD, *supra* note 9, art. 1, sec. 1 (“the term ‘racial discrimination’ shall mean 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”).

I. International Standards

In the international community, certain types of racist hate speech have been recognized as special kinds of speech that *must* be regulated.¹⁴ Hate speech is considered to cause serious harm to the dignity and fundamental human rights of the targeted groups and individuals.¹⁵ Hate speech is often said to disrupt the social order or social harmony.¹⁶ The U.N. General Assembly adopted the ICERD in 1965 and its article 4 requires member states to (a) criminalize dissemination of racist ideas and incitement to racial discrimination or violence against any race or group of persons of another color or ethnic origin; (b) criminalize organizations and propaganda activities that promote and incite racial discrimination; and (c) *not* permit public authorities or public institutions to promote or incite racial discrimination.¹⁷ A year later in 1966, the U.N. General Assembly adopted the International Covenant on Civil and Political Right (“ICCPR”), which entered into force in 1976.¹⁸ Article 20(2) of the ICCPR requires member states to prohibit by law “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁹

The international community can be categorized into roughly three groups with respect to their attitudes toward hate speech. The first group is the countries with statutes that criminalize hate speech. A vast majority of advanced nations belong to this group and have implemented the requirements of the ICERD.²⁰ The second group is the nations with hate speech laws that do not criminalize the act of publishing hate propaganda but make it illegal to have such propaganda published.²¹ A typical country in this category establishes a human rights committee with the authority to

14. Preambles of both the ICERD and the preceding G.A. Res. 1904 (XVIII), United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963), stipulate that “any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination either in theory or in practice.”

15. *See, e.g.*, R. v. Keegstra, [1990] 3 S.C.R. 697, 746–47 (Can.) (discussing the harm of hate propaganda “done to members of the target group” by way of “words and writings that willfully promote hatred” that “constitute a serious attack on persons belonging to a racial or religious group”).

16. *See, e.g., id.* at 747 (discussing hate propaganda’s “influence upon society at large”: “serious discord between various cultural groups in society”).

17. ICERD, *supra* note 9, art. 4(a)-(c).

18. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *adopted* Dec 19, 1966 [hereinafter ICCPR].

19. ICCPR, *supra* note 18, at art. 20(2). Japan has not filed a reservation regarding this article.

20. *See, e.g.*, Public Order Act 1986, c. 64, § 18 (UK); Criminal Code, R.S.C., 1985, c. C-46, § 319 (Can.); Strafgesetzbuch [StGB][Penal Code], § 130 (Ger.); Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 20, 1881 on the Freedom of the Press] art. 24 (Fr.).

21. *See, e.g., Racial Discrimination Act 1975*, 18C (Austl.).

order deletion or suspension of publication, or dissemination of hate speech.²² Some jurisdictions have both criminal law and human rights law to control hate speech.²³ The third is the group of nations without any hate speech law *per se*. The United States and Japan are regarded as nations belonging to this group.

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.²⁴ Three years earlier in 1992, the U.S. Supreme Court found unconstitutional a city ordinance that prohibited the display of a symbol that one knows or has reasons to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender in *R. A. V. v. City of St. Paul*.²⁵ In 1994, the U.S. ratified the ICERD with a reservation with respect to article 4, declaring its intention to reserve its right not to accept any obligation to restrict freedom of speech protected by its Constitution.²⁶ A year later in 1995, Japan, under “very strong instruction by the Prime Minister Murayama” at the time—and partly influenced by the fact that the U.S. had filed a reservation regarding article 4—acceded to the ICERD with a reservation with respect to paragraphs (a) and (b) of article 4, declaring that “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.”²⁷

The Japanese government since then has retained its position that racist thoughts were not disseminated, and racial discrimination was not incited in the country to the extent that a new legislation was necessary at the risk of unduly stifling legitimate speech.²⁸ In response to the increasing hate speech

22. *Id.* at 19, 20.

23. *See, e.g.*, Human Rights Act 1993, s. 61 (N.Z.) (civil remedy provision); s. 131 (criminal provision) (N.Z.).

24. According to the Japanese government, the accession was delayed because it required time to balance the ICERD and the guarantee of fundamental human rights including freedom of speech. Shūgiin Gaimu Iinkai Gijiroku [Minutes of H. of Rep. Comm. on Foreign Aff.], Nov. 21, 1995, <http://kokkai.ndl.go.jp/SENTAKU/syugiin/134/0110/13411210110006a.html> (Japan).

25. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

26. 103 CONG. REC. S7634 (daily ed. June 24, 1994) (Senate’s advice and consent).

27. *See* Shūgiin Gaimu Iinkai Gijiroku [Minutes of H. of Rep. Comm. on Foreign Aff.], *supra* note 24; for the official reasons for filing reservations about article 4, *see* Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention (2nd Periodic Report of States Parties due in 1999, Addendum: Japan, Jan. 13, 2000), U.N. Doc. CERD/C/350/Add.2, paras. 72–90 (2000) [hereinafter Report 1–2].

28. Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention (7th to 9th Periodic Report of States Parties due in 2013,

incidents in the country, in 2014 the UN Committee on the Elimination of Racial Discrimination noted the prevalence of racist hate speech and lack of anti-discrimination legislation in Japan and encouraged the government to “tackle racist hate speech without impeding upon the right to free speech.”²⁹ The committee further urged Japan to “take appropriate measures to: (a) firmly address manifestations of hate and racism, as well as incitement to racist violence and hatred during rallies; (b) take appropriate steps to combat hate speech in the media, including the Internet.”³⁰ Japan enacted the Hate Speech Elimination Act in 2016 and reported to the Committee of the progress, but it is still considered inadequate by the U.N. standard because it fails to criminalize such speech.³¹

II. The Guarantee of Freedom of Speech, Article 21 of the Constitution of Japan

Article 21, paragraph 1, of the Constitution of Japan provides that “freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed.”³² Leading academics in Japan have supported the idea of strong freedom of speech as seen in the United States and advocated for strict scrutiny of content-based regulations of speech.³³ The Supreme Court of Japan, however, has never adopted strict scrutiny or any other strict standard to review speech regulation; and in each case in which the constitutionality of a law restricting speech was facially challenged, the Court has upheld the law.³⁴ The Supreme Court has never once invalidated a law restricting speech on its face in Japan. The Court in most typical cases would balance freedom of speech against “welfare of the

Addendum: Japan, Jan. 14, 2013) U.N. Doc. CERD/C/JPN/7-9 (July 10, 2013) [hereinafter Report 7–9].

29. High Comm’r for Hum. Rts., *Committee on the Elimination of Racial Discrimination Considers Report of Japan* (Aug. 21, 2014).

30. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined 7th to 9th Periodic Reports of Japan, U.N. Doc. CERD/C/JPN/CO/7-9 (2014).

31. Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties Under Article 9 of the Convention (10th and 11th Periodic Reports of States Parties due in 2017, Addendum: Japan, June 29, 2017), CERD/C/JPN/10-11 (Sept. 25, 2017) [hereinafter Report 10–11]; some members of the working group of the U.N. Human Rights Council urged Japan to criminalize hate speech on Nov. 14, 2017. Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review (Japan), U.N. Doc. A/HRC/WG.6/28/L.12 (draft).

32. NIHONKOKU KENPŌ [CONSTITUTION], art. 21, para. 1 (Japan).

33. TOSHIHIKO NONAKA ET AL., KENPŌ I [CONSTITUTION I] 355–363 (5th ed. 2012) (Japan).

34. See SHIGENORI MATSUI, CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 197–211 (2011).

public”³⁵ to uphold the restriction, as seen in the case regarding the constitutionality of article 175 of the Penal Code, which prohibits distribution of obscene publications.³⁶

It would therefore be safe to say that a law criminalizing or illegalizing narrowly defined hate speech would likely survive judicial scrutiny, while it is not clear if such an outcome would be perceived by constitutional scholars as a relief or as another disappointment. Despite the high odds of a more stringent law passing judicial scrutiny, the Diet in 2016 chose to “tackle” hate speech by implementing the Hate Speech Elimination Act, which does not criminalize or illegalize hate speech.

III. The Response by the Legislature: The Hate Speech Elimination Act (2016)

Perhaps the most noteworthy characteristic of the Hate Speech Elimination Act is its unique definition of hate speech. Instead of using the terms commonly used in international treaties or statutes of other nations, the Act creates a new concept of “unfair discriminatory speech and behavior against persons originating from outside Japan” and defines this in article 2 as:

unfair discriminatory speech and behavior to incite the exclusion of persons originating exclusively from a country or region other than Japan or their descendants and who are lawfully residing in Japan (hereinafter referred to in this Article as ‘persons originating from outside Japan’) from the local community by reason of such persons originating from a country or region other than Japan, such as openly announcing to the effect of harming the life, body, freedom, reputation or property of, or to significantly insult, persons originating from outside Japan with the objective of encouraging or inducing discriminatory feelings against such persons originating from outside Japan.³⁷

35. “Welfare of the public” is a concept stipulated in articles 12 and 13 of the Constitution of Japan to which the Court often refers to justify the restriction of human rights. Article 12 stipulates that “the freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare” and article 13, the “right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.” Nihonkoku Kenpō [CONSTITUTION], *supra* note 32, at art. 12, 13.

36. Saikō Saibansho [Sup. Ct.], Mar. 13, 1957, Shō (a) no. 1713, 11 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3, 997 (Japan) (freedom of publication is restricted by welfare of the public; maintenance of a minimum standard of sexual morality undoubtedly constitutes the substance of welfare of the public).

37. Hate Speech Elimination Act, *supra* note 1, at art. 2.

To put it somewhat more coherently, “unfair discriminatory speech and behavior” are expressive activities that “incite the exclusion of persons” who originate from outside Japan yet 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 that you do not find in the text of the law. The only reference to “race” can be found in the supplementary resolutions by the Committee of Judicial Affairs of both the upper and lower houses of the Diet.³⁸ 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.” However, these are merely supplementary resolutions by the committees and, while they may serve as guidelines in interpreting the text of the statute, they are not a formal part of the statute. Moreover, the law’s unique definition of “discriminatory speech and behavior” only covers hate speech toward legal residents in Japan and omits racist speech that targets people who do not have legal resident status or who are Japanese citizens with multiracial backgrounds.

Despite the lengthy definition of “unfair discriminatory speech and behavior,” the law does not criminalize or illegalize such speech and behavior. It declares that unfair discriminatory speech and behavior are “inappropriate” and “impermissible,” but it only does so in the preamble—part of a law that is neither legally binding nor operative. 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. Article 3 declares abstract responsibility on the part of the general public to “further their understanding of the need to eliminate unfair discriminatory speech and behavior” and to “endeavor to contribute to the realization of a society free from unfair discriminatory speech and behavior.” Articles 4 through 7 declare abstract obligations on the part of the national and local governments to implement measures to “eliminate unfair

38. Sangiin Hōmu Iinkai [H. of Councillors Comm. on Jud. Aff.], Honpōgai shushinsha ni taisuru futō na sabetsuteki gendō no kaishō ni muketa torikumi ni kansuru hōritsuan ni taisuru futai ketsugi [Supplementary Resolution for the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan], May 12, 2016 (Japan), *translated in* <http://www.moj.go.jp/content/001199551.pdf>; Shūgiin Hōmu Iinkai [H. of Rep. Comm. on Jud. Aff.], Honpōgai shushinsha ni taisuru futō na sabetsuteki gendō no kaishō ni muketa torikumi ni kansuru hōritsuan ni taisuru futai ketsugi [Supplementary Resolution for the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan], May 20, 2016 (Japan), *translated in* <http://www.moj.go.jp/content/001199555.pdf>.

discriminatory speech and behavior” (art. 4); to organize consultation systems to prevent and resolve disputes regarding unfair discriminatory speech and behavior (art. 5); to implement and enhance “educational activities” in order to eliminate unfair discriminatory speech and behavior (art. 6); and to “spread awareness” among the general public about the need to eliminate unfair discriminatory speech and behavior (art. 7).³⁹

There are only seven articles in this Act, and none criminalizes or illegalizes unfair discriminatory speech and behavior. The Act is, then, merely what we call a “principle law,” which declares the basic principles for confronting a complex issue but does nothing more. While the law has made some impact on the treatment of public display of hatred in society, as I will refer to in Parts V and VI, the law has not changed the statutory structure regarding hate speech in the country.

IV. The Response by the Judiciary: The *Kyoto North Korean School Cases*

Certain types of hate speech indeed could be regulated without any new legislation that specifically criminalizes or illegalizes hate speech. The leading cases in this regard are the *Kyoto Korean School* cases in which a series of hate speech was sanctioned in both criminal and civil cases under the scheme of existing laws with reference to international treaties.⁴⁰

The cases arose from a series of demonstrations carried out by members of Zaitoku-kai and another group with similar racist agendas in front of an elementary school for children of North Korean descent in Kyoto in 2009 and 2010.⁴¹ Alleging that the school had been illegally occupying the public park adjacent to its premises, the group carried out at least three rallies outside the school using loudspeakers to chant insulting remarks.⁴² The protesters filmed their own rallies and posted the videos to the Internet. They also damaged school property.⁴³ Because of the intensity of the demonstrations, the school was forced to make changes in its regular curriculum to transfer children to secure locations and fortify its security measures in order to avoid confrontations with the protesters.⁴⁴

39. Hate Speech Elimination Act, *supra* note 1, at arts. 4–7.

40. See *infra* text accompanying notes 41–59.

41. Kyōto Chihō Saibansho [Kyoto Dist. Ct.] Oct 7, 2013, Hei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan). Description of the facts of the *Kyoto* cases is based on the text of the judgement of this court.

42. *Id.*

43. Kyōto Chihō Saibansho [Kyoto Dist. Ct.], *supra* note 41.

44. Kyōto Chihō Saibansho [Kyoto Dist. Ct.], *supra* note 41.

The government prosecuted some of the protesters for *forcible obstruction of business* (Penal Code, art. 234), *damage to property* (Penal Code, art. 261), and *insults* (Penal Code, art. 231).⁴⁵ Despite the allegation by the defendants that the remarks were of a political nature and that the subject matter of the remarks was of urgent political importance, the Kyoto District Court in 2011 acknowledged that the defendants had yelled out the insulting remarks for forty-six minutes in front of the gate of the school, which created chaos “in a manner that could not be tolerated,” and decided that the remarks constituted criminal insult.⁴⁶ The defendants were also convicted of *forcible obstruction of business* and *damage to property*. The decision was confirmed by the Osaka High Court in 2011⁴⁷ and the Supreme Court in 2012.⁴⁸

The school brought civil suits against the protesters and their organizations for the damages caused by the three protests and the subsequent uploading of the videos to the Internet.⁴⁹ The Kyoto District Court described the protests as “extremely excessive and senseless” and decided that they constituted a tort by obstructing the operation of the school and “placing the people involved in great fear and a chaotic situation.”⁵⁰ The court held that the series of actions by the defendants not only amounted to

45. Kyōto Chihō Saibansho [Kyoto Dist. Ct.] Apr. 21, 2011, Hei 22 (wa) no. 1257, Hei 22 (wa) no. 1641 (Japan), available at LEX/DB 25471643.

46. Remarks of the defendants listed by Kyoto District Court include; “Kick them out of Japan, the training institution for Korean spies: Korean School”; “During the war, when men weren’t around, they raped and slaughtered women and stole this land”; “Kick out the worthless Korean Schools from Japan”; “Kick them out”; “Get out of Japan”; “These are kids of spies”; “Korean yakuza”; “You slaughtered Japanese people and stole this land”; “Promises are made between human beings. Promises between human beings and Koreans won’t stand.” *Id.* Although either “Kankoku” (South Korea) or “Kita-Chōsen” (North Korea) is the commonly used Japanese term for the English term “Korea,” the protesters used the term “Chōsen,” a term often used by racists, which I translated into “Korea” in the text above.

47. Ōsaka Kōtō Saibansho [Osaka High Ct.] Oct. 28, 2011, Hei 23 (u) no. 788 (Japan), available at LEX/DB 25480227.

48. Saikō Saibansho [Sup. Ct.] Feb. 23, 2012, Hei 23 (a) no. 2009 (Japan), available at LEX/DB 25480570.

49. Kyōto Chihō Saibansho [Kyoto Dist. Ct.], *supra* note 41.

50. The court listed the following remarks by the defendants in addition to the ones listed in the criminal case: “Get out”; “Korean School, tear it down”; “We let you live in Japan. See? Obey the law”; “Kick out the vicious Koreans from Japan”; “We the Japanese people would never forgive the dirty, brutal Korean school that stole the smiles from the Japanese children”; “Dispose of the Koreans at the Health Office”(note that the Health Offices are responsible for disposal of stray animals in Japan); “Dogs are smarter”; “Korean schools are not schools”; “Cockroaches, scumbags, go back to Korean Peninsula”; “Angry, angry Koreans, go back to Kim Jong-il”; “Kyoto cannot be stained with the stench of Kimchi”; “Cockroach Koreans, go away now”; “Discriminated by Japan, and angry, angry Koreans, every single one, go back to Korean Peninsula.” *Id.*

a tort (Civil Code, art. 709⁵¹) but also “bore illegality” that falls under the “racial discrimination provided in the article 1, section 1, of the ICERD” and granted damages in the amount of approximately 12 million Japanese yen and a provisional disposition injunction against future protests.⁵² Regarding the reasons for the extraordinarily large amount of damages for a tort case, the court explained that it was obliged by the ICERD to increase the damages for acts of racial discrimination.⁵³

The Osaka High Court, denying the logic that the acts of protesters were illegal under the ICERD, stated that those international treaties do not directly apply to private entities, and that the principles of the treaties should be realized through the interpretation of article 709 of the Civil Code.⁵⁴ The High Court nevertheless upheld the prior decision, including the large amount of damages awarded through the scheme traditionally used for article 709 torts. The Supreme Court affirmed the decision in 2014.⁵⁵

Although these cases involved destruction of property, the courts decided that the protesters’ racist insults amounted to criminal insults in the criminal cases, and civil torts in the civil cases.⁵⁶ It must be noted, however, that the hate speech in the *Kyoto* cases was not the kind of hate speech that commonly takes place in society. In the *Kyoto* cases, a specific school was the direct target of extremely crude racist remarks made in an aggravated manner. As a result, the school’s operations were seriously disrupted, which prompted the courts to rule in favor of the school. Under Japanese criminal law, insult or defamation liability theories can be applied to hate speech only when the speech targets a specific person or association.⁵⁷ Similarly, under the Japanese Civil Code, while a person or an association can file for damages against persons using racist speech, damages will be granted only when a specific person or association is directly targeted by the alleged hate speech, as the District Court in the *Kyoto* civil case made clear.⁵⁸ Little or no damages will be granted when a general group of people of a certain race

51. Minpō [Minpō] [Civ. C.] art. 709 (Japan).

52. Kyōto Chihō Saibansho [Kyoto Dist. Ct.], *supra* note 41.

53. *Id.*

54. Ōsaka Kōtō Saibansho [Osaka High Ct.] July 8, 2014, Hei 25 (ne) no. 3235, 2232 HANREI JIHŌ [HANJI] 34 (Japan). *See* text accompanying notes 86–90 for article 709 torts in Japan.

55. Saikō Saibansho [Sup. Ct.] Dec 9, 2014, Hei 26 (o) no. 1539 (Japan), *available at* LEX/DB 25505638. Saikō Saibansho [Sup. Ct.] Dec 9, 2014, Hei 26 (ju) no. 1974 (Japan), *available at* LEX/DB 25505638.

56. *See supra* text accompanying notes 45–55.

57. Daishin’in [Great Ct. of Jud.] Mar. 24, 1926, Tai 14 (re) no. 2138, 5 DAISHIN’IN KEIJI HANREISHŪ [DAIHAN KEISHU] (Hōsōkai) 117 (Japan).

58. Kyōto Chihō Saibansho, Hei 22 (wa) no. 2655, 2208 HANJI 74.

is targeted.⁵⁹ Racist hate speech, in most cases, is directed toward a general group of people with a specific ethnic background. Therefore, the logic of the *Kyoto* decisions does not apply. In other words, under current laws, it is not easy to regulate hate speech targeting general groups of people with specific ethnic backgrounds.

V. Hate Speech Regulation Under the Current Legal Scheme

How capable, or incapable, are existing laws of regulating hate speech? I will briefly outline the provisions of existing laws that could be applied to certain types of hate speech.

A. Penal Code

1. *Defamation (art. 230), Insults (art. 231), and Threats (art. 222)*

Some of the hate speech may meet the *structural elements* (the elements necessary for a conviction under the Japanese Penal Code) of defamation, insults, or threats.⁶⁰ Libel and slander are not differentiated in Japan. Defamation under article 230 of the Penal Code covers both published and verbal defamation, and applies to cases where an offender states facts in public that damage the social reputation of the targeted person or association.⁶¹ The penalty for an article 230 offense is imprisonment for not more than three years or a fine of not more than 500,000 yen.⁶² Article 231, which covers insults, is similar, except that it does not require the speaker to state facts when he or she insults a person or association in public.⁶³ The penalty for an article 231 offense is misdemeanor imprisonment or a petty fine.⁶⁴

Both the defamation and insults provisions could be applied to hate speech that targets a specific person or an association in public, as seen in

59. Kyōto Chihō Saibansho, Hei 22 (wa) no. 2655, 2208 HANJI 74.

60. KEIHŌ [PEN. C.] art. 230-31, 222, (Japan). The Japanese government also lists these provisions as possible tools to control hate speech in its periodic reports to the Committee on the Elimination of Racial Discrimination. Report 1–2, *supra* note 27, at paras. 76-80; Comm. on the Elimination of Racial Discrimination, Reports Submitted by States Parties under Article 9 of the Convention (3rd to 6th Periodic Reports due in 2007, Japan, Aug. 19, 2008) U.N. Doc. CERD/C/JPN/3-6 (June 16, 2009) paras. 39-40; Report 7–9, *supra* note 28, at para. 86; Report 10–11, *supra* note 31, at para. 127.

61. KEIHŌ [PEN. C.] art. 230, para. 1 (Japan).

62. *Id.*

63. KEIHŌ [PEN. C.] art. 231 (Japan). For instance, if a person says, “You are a fool,” to a specific person in public, it might constitute an insult, but not defamation, because the remark is composed of only an insult but no additional facts. However, if a person says, “You are a fool because you did not do this,” it could constitute both an insult and defamation, because it is composed of both a degrading remark (i.e., “you are a fool”) and a fact (i.e., “you did not do this”).

64. *Id.*

the *Kyoto* cases. On the other hand, neither defamation nor insult theories can be applied when hate speech targets a general group of people comprising a certain race or ethnicity.⁶⁵ Furthermore, even if the case satisfies all the structural elements of the defamation provision, there is a unique risk in prosecuting a racist speaker for a defamation offense. Under articles 230-232 of the Penal Code, there is no criminal liability if the defamatory statement in question was a matter of public interest; was made solely for the benefit of the public; and was made with a reasonable belief that it was true.⁶⁶ Because of this “truth” exception, prosecuting racist speakers under the defamation provision would inevitably grant racist speakers the chance to “prove” in open court that their racist ideas are true.⁶⁷ The insults clause, on the other hand, does not carry such a “truth” exception. It is thus easier to get a conviction under the insults provision than by alleging defamation, but it should also be noted that the penalty for insults is significantly less than the one for defamation.⁶⁸

The structural elements for threats (art. 222) require a speaker to intimidate a person by informing them of their intent to harm their life, body, reputation, or property.⁶⁹ Since the threat must be made toward the life, body, reputation, or property of the targeted person, this provision cannot be employed in hate speech cases that do not target a specific person or association.

2. *Forcible Obstruction of Business (art. 234)*

In the *Kyoto* criminal case, the racist protesters were also convicted for forcible obstruction of business (art. 234).⁷⁰ Article 234 applies to cases where a person obstructs business of another by force.⁷¹ It applies to obstruction by either physical or expressive activities. While Article 234 may apply to cases where private enterprises or public institutions are targeted by hate speech, it does not apply to cases that do not involve businesses of such entities.⁷² Hate speech in the *Kyoto* case directly targeted

65. Daishin'in, Tai 14 (re) no. 2138, 5 DAIHAN KEISHU (Hōsōkai) 117.

66. KEIHŌ [PEN. C.] art. 230–2, para. 1 (Japan).

67. For a similar argument in the United States, see Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 924 (1963).

68. See *supra* text accompanying notes 62–64.

69. KEIHŌ [PEN. C.] art. 222, para. 1 (Japan).

70. Kyōto Chihō Saibansho [Kyoto Dist. Ct.] Apr. 21, 2011, Hei 22 (wa) no. 1257, Hei 22 (wa) no. 1641 (Japan), available at LEX/DB 25471643.

71. KEIHŌ [PEN. C.] art. 234 (Japan).

72. Daishin'in [Great Ct. of Jud.] Feb. 15, 1925, Tai 14 (re) no. 1936, 5 DAISHIN'IN KEIJI HANREISHŪ [DAIHAN KEISHU] (HŌSŌKAI) 30 (Japan).

a specific school and seriously obstructed its operation, forcing the school to evacuate the students and strengthen its security measures, and it is for this reason that the court found the defendants in violation of article 234. Most of the hate speech in Japan, however, does not target specific businesses and thus does not implicate article 234.

3. *Incitement of Genocide or Other Crimes?*

Japanese laws do not prohibit incitement of genocide. Moreover, under the Japanese Penal Code, inducement of other crimes, for instance to induce another person to “kill all people of race X,” cannot be prosecuted unless the induced crime is actually carried out.⁷³ While it is feared that the messages to “kill all people of race X” would eventually convince a recipient of the messages to resort to violence toward the people of race X, they have not directly induced violence and therefore no prosecution for inducement of crimes has been made in the context of hate speech.⁷⁴

As we have seen, while some cases of hate speech may meet the *structural elements* of defamation, insults, threat, forcible obstruction of business, or inducement of crimes, most cases of hate speech that verbally attack a general group of people of a specific ethnicity without immediate violent results do not meet the *structural elements* of these crimes and thus remain beyond the reach of the criminal justice system.

B. Regulating Demonstrations/Protests (Public Safety Ordinances)

Can the government control racist rallies by limiting the use of public streets and parks by racist groups? In Japan, public safety ordinances of local governments require the protestors to obtain a permit from the local public safety commission before they carry out any protests on the streets and in public parks.⁷⁵ Public demonstrations have long been considered by constitutional scholars as one of the important forms of expression for people without wealth or power in a democratic society.⁷⁶ Based on this

73. KEIHŌ [PEN. C.] art. 61, para. 1 (Japan).

74. There were reportedly a large number of minor violence and harassment incidents against Korean school students wearing traditional chima-chogori uniforms in Japan in the 1990s until the schools changed the dress code to avoid confrontations. See, e.g., Naoko Yamagishi, *Violence Against Korean Students; Hiding Behind Japanese Name Not Answer*, DAILY YOMIURI, July 15, 1994, at 3; Richard Lloyd Parry, *Terror Attacks on Koreans Rise in Japan*, INDEP., Nov. 14, 1998, at 18.

75. Titles of the ordinances vary. See, e.g., Shūkai, shūdan kōshin oyobi shūdan shii undō ni kansuru jōrei [Ordinance regarding Meetings, Mass Marching, and Mass Demonstrations] Tokyo Metropolitan Gov't Ordinance No. 44, July 3, 1950, http://www.reiki.metro.tokyo.jp/reiki_honbun/g1012205001.html (Japan).

76. NONAKA ET AL., *supra* note 33, at 370.

understanding, it is inarguably recognized that the permits cannot be denied because of the messages of the planned demonstrations.⁷⁷ The authorities are expected to issue permits almost automatically irrespective of the intended messages of the demonstrators except in some cases where some adjustments were required in terms of time, place, or manner.⁷⁸

Although the Hate Speech Elimination Act does not criminalize or illegalize hate speech, it could function as a guideline for local governments and courts to regard a racist rally as “inappropriate” and “impermissible” if it intends to incite exclusion of people who originate from outside Japan. Indeed, soon after the Diet passed the Hate Speech Elimination Bill, Kawasaki City, located near Tokyo, cited the soon-to-be enacted Act and denied the permit for a racist rally in a racially diverse community in the city planned by a known racist group.⁷⁹ A district court also cited the Act 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.⁸⁰ In these instances, the law seems to have functioned as a guideline for the city and the court to control the dissemination of extremely vulgar racist speech in the communities where the targeted groups lived and worked.

C. Denying the Use of Public Facilities (Local Autonomy Act)

In Japan, local governments operate public halls in various sizes in order to provide the residents with an affordable forum for conferences, assemblies, or other expressive activities.⁸¹ In light of the importance of freedom of speech, the Local Autonomy Act prohibits local governments from exercising discretion in deciding who can and cannot use these facilities based on the contents of the expressive activities.⁸² The exception is when (a) there is a risk that the life, body, or property of citizens would be infringed and public safety would be undermined if the assembly were held at the hall and (b) there is clear and imminent danger that such a situation would occur.⁸³

77. NONAKA ET AL., *supra* note 33, at 370.

78. NONAKA ET AL., *supra* note 33, at 370. *But see* Saikō Saibansho [Sup. Ct.] July 20, 1960, Shō 35 (a) no. 112, 14 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 9, 1243 (Japan).

79. *Kawasaki Bars Event as Likely Hate Speech*, JAPAN NEWS, June 1, 2016, at 3.

80. Yokohama Chihō Saibansho Kawasaki Shibu [Yokohama Dist. Ct. Kawasaki Branch] June 2, 2016, Hei 28 (wo) no. 42, 2296 HANREI JIHO 14 [HANJI] (Japan).

81. Chihō Jichi Hōu [Local Autonomy Act], Law No. 67 of 1947, art. 244, para. 1 (Japan) (obligating local governments to provide residents with public halls in order to promote public welfare).

82. *Id.* at paras. 2–3.

83. Saikō Saibansho [Sup. Ct.] Mar. 7, 1995, Hei 1 (o) no. 762, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 3, 687 (Japan).

Local government facilities have been utilized by racist groups to promote and disseminate racist ideas, stirring up yet another controversy over the role of the government in confronting hate speech. In November 2017, Kawasaki City proposed a new guideline for the use of public facilities for racist assemblies.⁸⁴ It carefully sets up the procedural protection for freedom of speech yet authorizes the city to deny use of facilities if the purpose of the applicant is to incite elimination of people as defined in the Hate Speech Elimination Act; and the plausibility of the occurrence of such activity is specifically high based on the objective facts surrounding the application.⁸⁵

D. Civil Compensation (Civil Code 709 and 710)

One may be able to bring about a civil suit against a racist speaker to recover damages under article 709 (Damages in Torts) or 710 (Compensation for Damages Other than Property) of the Civil Code.⁸⁶ Under article 709, if a person intentionally or negligently infringes another person's legal rights or legally protected interests, he or she is liable to compensate any damages resulting in consequence.⁸⁷ Article 710 requires damages other than those to property to be compensated as well.⁸⁸ In the *Kyoto* civil case, the court acknowledged the infringement of the school's legally protected interests by a series of racist insults made by protesters and granted monetary compensation and a provisional disposition injunction.⁸⁹ However, as the court made clear in its opinion, its ruling was possible only because a specific school was directly targeted in a very aggravated manner and there would have been little or no room for damages to be granted in other cases where a general group of people of a certain race is targeted.⁹⁰

84. Kawasaki Shi [Kawasaki City], Honpōgai Shusshinsha ni taisuru futō na sabetuteki gendō no kaishō ni muketa torikumi no suishin ni kansuru hōritsu ni motozuku “ōyake no shisetsu” riyō kyōka ni kansuru gaidorain [A Guideline regarding Use Permit for “Public Facilities” Based on the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan], Nov. 2017 (Japan), <http://www.city.kawasaki.jp/templates/press/cmsfiles/contents/0000092/92460/gaidorainn.pdf>.

85. *Id.* at 3–8.

86. Minpō [Minpō] [Civ. C.] art. 709, 710 (Japan).

87. Minpō [Minpō] [Civ. C.], *supra* note 86, at art. 709.

88. Minpō [Minpō] [Civ. C.], *supra* note 86, at art. 710.

89. Kyōto Chihō Saibansho [Kyoto Dist. Ct.] Oct 7, 2013, Hei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan).

90. *Id.*; Osaka District Court in 2016 granted damages to a resident Korean journalist in a case in which Zaitoku-kai and its leader defamed her in racially derogatory terms. Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2016, Hei 26 (wa) no. 7681 (Japan), available at LEX/DB 25544419. The decision was confirmed by Osaka High Court in 2017 (Ōsaka Kōtō Saibansho [Osaka High Ct.] June 19, 2017, Hei 28 (ne) no. 2767 (Japan), available at LEX/DB 25448757).

E. The Hate Speech Elimination Act

Despite its unenforceable nature, the Hate Speech Elimination Act has made some impact on judicial decisions and administrative practices. As noted in Part V, Kawasaki City referred to the Act to deny a permit for a racist rally in a racially diverse community in the city and a district court cited the Act as basis for issuing a provisional disposition injunction for a planned racist rally near a private facility that catered to the same community.⁹¹ The Act's impact on the administration is seen in the practice of the police force as well. Right after the law came into effect, the National Police sent a directive to prefectural police headquarters to ensure that the principles of the law would be observed by the entire police force.⁹² Another example is the reaction of the Ministry of Justice in a racist tweet case in 2016. In response to a complaint made by a Kawasaki City resident of Korean nationality who was active in the antiracism movement and as a result targeted by racist tweets, the Ministry requested that Twitter, Inc., delete some of the racist tweets that had targeted her. The Ministry's request was based on the human rights protection procedure stipulated in the internal code of the Ministry⁹³ and does not have legal binding force. Twitter, Inc., nevertheless obliged and deleted some of the tweets.⁹⁴ In this instance, the new law seemed to have moved the government (and also the social media company) to make an official request (and on the part of the social media to oblige to such a request) to delete racist tweets.

Despite its unenforceable nature, the Act seems to have brought about some changes in the government's stance regarding racist hate speech since its enactment. Although I am not certain whether this speech-restrictive trend should be welcomed without reservation, the law does seem to have been offering some protection to the most vulnerable members of our society for over a year.

and by the Supreme Court on Nov. 29, 2017. See *Heitosupiichi Zaitoku-kai haiso kakutei: Saikōsai Jōkoku shirizokeru* [*Hate Speech, Zaitoku-kai 's Defeat Confirmed: Supreme Court Dismisses the Appeal*], ASAHI SHIMBUN (Japan), Dec. 1, 2017, at 2.

91. See *supra* text accompanying notes 79–80.

92. Honpōgai Shusshinsha ni taisuru futō na sabetsuteki gendō no kaishō ni muketa torikumi no suishin ni kansuru hōritsu no shikō ni tsuite (tsūtasu) [*In Re* Enforcement of the Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan], circular by Directors Gen. of Security Bureau & Commissioner-Gen.'s Secretariat of the Nat'l Police Agency, June 3, 2016 (Japan), <https://www.npa.go.jp/pdc/notification/keibi/biki/keibikikaku20160603.pdf>.

93. Jinken shinpan jiken chōsa shori kitei (kunrei) [Rules of Investigation Processing of Human Rights Violation Cases], instructions by Ministry of Justice No. 2 of 2004 (Japan), <http://www.moj.go.jp/content/000002021.pdf>.

94. *Sabetsuteki Tweet 4-ken no Sakujo Kakumin* [Deletion of Four Discriminatory Tweets Confirmed], ASAHI SHIMBUN, Nov. 12, 2016, at 33.

VI. Adopting a New Hate Speech Law—a Response to the Argument Put Forth by Craig Martin

As I have explained so far, it is difficult under the current legal structure to legally sanction hate speech that does not immediately result in violence or that does not directly target a specific person or business. I agree with Professor Martin in that certain types of hate speech are so harmful that they justify legal sanction.⁹⁵ It is especially harmful when it targets the Korean residents in Japan, who have long been discriminated against both publicly and privately. For the last few years, more and more materials that show the harm of hate speech—a collection that should serve as legislative facts for lawmakers—are being accumulated to support the enactment of legislation to curb the impact of public display of vicious racism which violate the legally protected interests of the victims.⁹⁶ I still argue, however, that we should be cautious in advocating for criminalization of hate speech in Japan.

Professor Martin asserts that the Diet's track record does not necessarily indicate the speech-protection intent of the lawmakers.⁹⁷ I agree. The lack of an enforcement structure in the Act may not be the reflection of the genuine intent of the lawmakers to protect freedom of speech for all speakers of all opinions. A closer look at the circumstances surrounding the enactment of the Act may offer another perspective. A year before the ruling party submitted the Hate Speech Elimination Bill to the Diet, the minority party had submitted a bill on Promotion of Elimination of Racial Discrimination to the Diet.⁹⁸ The majority bill uniquely defined the “discriminatory speech and behavior” without using term such as race or ethnicity, whereas the minority's bill defined hate speech with those terms that are universally used in the international treaties or statutes of other nations.⁹⁹ While the minority bill did not criminalize such speech or contain an enforcement structure, either, it clearly made illegal the “unfair discriminatory speech and behavior” that insulted or harassed others on the

95. Martin, *supra* note 12.

96. See, e.g., HŌMUSHŌ JINKEN YŌGO KYOKU [MINISTRY OF JUST. HUM. RTS. BUREAU], HEITO SUPICHI NI KANSURU KIKITORI CHŌSA [A SURVEY ON HATE SPEECH] (2016) (Japan); JINKEN KYŌIKU KEIHATSU SUISHIN SENTAA [CTR. FOR HUM. RTS. EDUC. & TRAINING], HEITO SUPICHI NI KANSURU JITTAI CHŌSA HŌKOKUSHO [A REPORT ON THE ACTUAL CONDITIONS OF HATE SPEECH] (2016) (Japan).

97. Martin, *supra* note 12.

98. Jinshu tō o riyū to suru sabetsu no teppai no tame no shisaku ni kansuru hōritsu an [A Bill regarding Promotion of Efforts to Elimination of Discrimination based on Race et. al], submitted to the House of Councillors on May 22, 2015.

99. *Id.* at art. 2.

bases of their race or ethnicity.¹⁰⁰ With these two bills on its agenda on the morning of May 13, 2016, the members of the House of Councillors of the Diet first cast their votes and turned down the minority party's bill before casting their votes again and passing the majority party's bill.¹⁰¹ Looking at this process, it might not be too off the point to suggest that the intent of the majority lawmakers had not necessarily been to denounce racism or ethnocentrism. Moreover, in this context, urging the same majority members to enact a new law to criminalize hate speech may lead to another disappointment for the proponents of hate speech law, precipitating a slippery slope and ending up with new sweeping legislation proscribing hate speech against, say, war heroes or politicians.¹⁰²

Conclusion

For the last several years, Japan's conversation on measures to confront racism has centered on hate speech regulation. Hate speech, however, is just one aspect of more deeply rooted problems of racism in our society. Moreover, while the nation that we looked to during the process of accession to the ICERD does not have a hate speech law, the U.S. indeed *has* established other legal mechanisms to control racial discrimination or racist actions. In Japan, not only has racist speech *not been illegal*, but also racial discrimination *has not been illegal* either in the workplace or in public.¹⁰³ There is no penalty enhancement clause for hate crimes, either.

In order to confront racism, the first step a nation can take might be to outlaw racially discriminatory *actions* by private entities in public settings. In this context, a law banning racist hate speech may not be regarded as the least restrictive alternative to confront public displays of racism. Because of this and other reasons I stated in this Article, I argue that while the constitutional principles may accommodate (or even support) the enactment of a law proscribing narrowly limited hate speech, one should be cautious in advocating for such a law in Japan.

100. Jinshu tō o riyū to suru sabetsu no teppai no tame no shisaku ni kansuru hōritsu an [A Bill regarding Promotion of Efforts to Elimination of Discrimination based on Race et al.], *supra* note 98, at art. 3.

101. Sangiin Honkaigi Gijiroku [Minutes of H. of Councillors Plenary Session], May 13, 2016, <http://kokkai.ndl.go.jp/SENTAKU/sangiin/190/0001/19005130001026a.html>. Since the minority's bill had been submitted by members of the House of Councillors (the upper house), it never made it to the House of Representatives.

102. *See, e.g., Curbing Hate Speech*, JAPAN TIMES, Oct. 7, 2014 (reporting that a member of the ruling party called for restrictions on demonstrations near the Diet building while discussing measures to confront hate speech against Korean residents).

103. *See supra* note 11 and accompanying text.
