

THE INTERNALIZATION OF INTERNATIONAL
HUMAN RIGHTS LAW: THE CASE OF HATE
SPEECH IN JAPAN

AYAKO HATANO*

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I. INTRODUCTION

Hate speech—discriminatory expression and behavior aimed at specific ethnic groups or nationalities—has recently become a social phenomenon in Japan.¹ Hate speech became particularly visible in Japan in 2013, when large nationalist groups took to the streets in major cities, including in Tokyo and Osaka, to express their hatred of Koreans residing within the country. Waving Japanese national flags and swastikas, demonstrators shouted such phrases as “you Koreans are cockroaches!” and advocated for the extermination of “all Koreans,

* LL.M., 2017, New York University School of Law (Fulbright Scholar) and Visiting Scholar at the U.S.-Asia Law Institute. The author thanks the editors of the *NYU Journal of International Law & Politics* for their helpful comments and revisions. All translations are provided by the author. All opinions and errors remain strictly my own.

1. While there is no established definition of hate speech, in accordance with the framework of relevant international human rights treaties, it can be defined as a manifestation of discrimination, hostility, or hatred on the basis of race, ethnicity, language, religion, nationality, origin, and gender, instigation thereto, and instigation of violence. See International Convention on the Elimination of All Forms of Racial Discrimination arts. 1, 2, 4, *opened for signature* Mar. 12, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights art. 20, Dec. 19, 1966, 999 U.N.T.S. 171; U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35: Combating Racist Hate Speech, ¶ 15, U.N. Doc. CERD/C/GC/35 (Sept. 26, 2013). For the purpose of this Comment, the author focuses on the discriminatory expression and behavior aimed at specific ethnic groups or nationalities.

good or bad.”² Data from the Japanese Ministry of Justice show that between April 2012 and September 2015 there were at least 1,152 hate-based demonstrations.³ Ethnic Korean residents in Japan, targeted in those hateful demonstrations, are called “*Zainichi* Koreans,” referring to those who came or were brought to Japan during Japan’s colonial rule of the Korean peninsula and to their descendants.⁴ In recent years, heightened political tensions between Japan and South Korea and between Japan and North Korea have led the long-existing prejudice and discrimination against *Zainichi* Koreans to surface in Japanese society.⁵ The number of street protests and demonstrations against *Zainichi* Koreans as well as anonymous

2. CTR. FOR HUMAN RIGHTS EDUCATION AND TRAINING, MINISTRY OF JUSTICE, HEITO SUPICHI NI KANSURU JITAI CHOSA HOKOKUSHO [REPORT OF THE SURVEY ABOUT ACTUAL CONDITION OF HATE SPEECH] 62 (2016), <http://www.moj.go.jp/content/001201158.pdf> (Japan) [hereinafter CTR. FOR HUMAN RIGHTS REPORT]. This report is the result of the survey and research conducted by the Center for Human Rights Education and Training entrusted by the Japanese Ministry of Justice. It includes research on media coverage of hate speech in Japan, with a list of news articles about hate speech from January 2012 to December 2012 in major Japanese news sources. See also Julian Ryall, *Japan Conservatives: ‘Hate Speech Goes Too Far’*, DEUTSCHE WELLE (Sept. 7, 2013), <http://www.dw.com/en/japan-conservatives-hate-speech-goes-too-far/a-16938717>; YASUKO MOROOKA, HEITO SUPICHI TOWA NANIKAI [WHAT IS HATE SPEECH] 2 (2013).

3. CTR. FOR HUMAN RIGHTS REPORT, *supra* note 2, at 33. See also Yuki Nikaido, *haito spiich 3 nen han de 1152 ken—seifu ga hatsu no chosa [1152 Hate Speech Cases in 3.5 Years—The Japanese Government Held a Survey for the First Time]*, ASAHI SHIMBUN (Mar. 29, 2016), <http://archive.fo/pNdO3>; *Haito spiich kanren demo 1152 ken [Hate Demonstrations Are Revealed 1152 cases—Ministry of Justice Held a Survey for the First Time]*, NIHON KEIZAI SHINBUN (Mar. 30, 2016), https://www.nikkei.com/article/DGXLASDG30H74_Q6A330C1CR8000/.

4. “*Zainichi* Koreans” literally means “Koreans to stay in Japan.” Some of these individuals have acquired Japanese nationality, while others are still foreign residents with special legal status in Japan. See MIKI Y. ISHIKIDA, MINORITY PEOPLE AND DISADVANTAGED GROUPS IN JAPAN 55–57 (2005) (describing the legal status of Koreans in Japan); Soo Im Lee, *Diversity of Zainichi Koreans and Their Ties to Japan and Korea 2* (Afarasian Research Ctr., Working Paper No. 8, 2012), <http://afrasia.ryukoku.ac.jp/publication/upfile/WP008.pdf> (describing historical background of *Zainichi* Koreans).

5. Tomomi Yamaguchi, *Xenophobia in Action: Ultrationalism, Hate Speech, and the Internet in Japan*, 117 RADICAL HIST. REV. 98, 100–01 (2013); see also Lee, *supra* note 4, at 4–11. For a general history of *Zainichi* Koreans living in Japan and ethnic tensions, see generally YASUNORI FUKUOKA, LIVES OF YOUNG KOREANS IN JAPAN 3–12, 21–41 (2000).

discriminatory postings online have significantly increased, facilitated by the spread of Internet access.⁶

The growing prevalence of hate speech rallies and online vitriol against ethnic minorities has drawn both domestic and international criticism, particularly by human rights NGOs and the United Nations human rights bodies. In 2014, the U.N. Human Rights Committee and the U.N. Committee on the Elimination of Racial Discrimination (CERD) recommended that the Japanese government take measures to curb hate speech.⁷ In response, the Japanese government enacted

6. Yamaguchi, *supra* note 5, at 98 (pointing out the notable surge of online xenophobic discourse since 2000); see also John Boyd, *Hate Speech in Japan: To Ban or Not to Ban*, AL JAZEERA (Mar. 19, 2015), <http://www.aljazeera.com/indepth/features/2015/03/hate-speech-japan-ban-ban-150310102402970.html>; see generally, KOICHI YASUDA, NETTO TO AIKOKU [THE INTERNET AND PATRIOTISM] (2012) (describing how right-wing groups use the Internet media extensively and strategically for communicating ideas and organizing their movement, and for how racist and xenophobic movements have spread through the Internet media).

7. Human Rights Comm., Concluding Observations on the Sixth Periodic Report of Japan, U.N. Doc. CCPR/C/JPN/CO/6 (Aug. 20, 2014) [hereinafter Sixth Periodic Report]. On July 23, 2014, the U.N. Human Rights Committee, having examined the Japanese government's periodic report, adopted its concluding observations, stating:

The State [i.e., Japan] should prohibit all propaganda advocating racial superiority or hatred that incited discrimination, hostility or violence, and should prohibit demonstrations that are intended to disseminate such propaganda. The State party should also allocate sufficient resources for awareness-raising campaigns against racism and increase its efforts to ensure that judges, prosecutors and police officials are trained to detect hate and racially motivated crimes. The State party should also take all necessary steps to prevent racist attacks to ensure that the alleged perpetrators are thoroughly investigated, prosecuted and, if convicted, punished with appropriate sanctions. *Id.* ¶ 12.

In its recommendations to Japan, the committee also noted that hate speech and other behavior inciting racial violence and hatred during rallies and in the media, including the Internet, are “not always properly investigated and prosecuted” by Japanese authorities. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan, ¶ 11, U.N. Doc. CERD/C/JPN/CO/7-9 (Aug. 29, 2014) [hereinafter Combined Seventh to Ninth Periodic Reports]. Further, the Committee:

encourage[d] the State party to review its position again and consider withdrawing its reservation to subparagraphs (a) and (b) of article 4. Recalling its general recommendations No. 15 (1993) and No. 35 (2013) on combating racist hate speech, the Committee rec-

its first law against hate speech, entitled “Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan” (Hate Speech Dissolution Act), in May 2016 and initiated campaigns to raise public awareness about hate speech in general.⁸ This was Japan’s first law to curb hate speech,⁹ although critics say the law is too weak because it contains an overly narrow definition of victim¹⁰ and does not legally ban hate speech.¹¹ Nonetheless, the law is reported to be effective, with fewer rallies and less racist invective following its enactment.¹²

commend[ed] that the State party take appropriate steps to revise its legislation, in particular its Penal Code, in order to give effect to the provisions of article 4. *Id.* ¶ 10

The Committee called on Japan to firmly address hate speech during demonstrations, investigate and prosecute individuals and organizations responsible for such acts, and punish public officials and politicians who disseminate hate speech. Sixth Periodic Report, *supra*, ¶ 12. Further, the Committee recommended that Japan should also “address the root causes” of racist hate speech and “strengthen measures of teaching, education, culture and information,” with a view to combating prejudices, which lead to racial discrimination, and promoting understanding, tolerance and friendship among nations and among racial or ethnic groups. Combined Seventh to Ninth Periodic Reports, *supra*, ¶ 10(e).

8. Honpougai syusshinsya ni taisuru futon a sabetuteki gendo no kaishonimuketa torikumi no sokushin ni kansuru houritsu [Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan] Law No. 68 of 2016, <http://www.moj.go.jp/content/001199550.pdf> (Japan).

9. The phrase “unfair discriminatory speech and behavior against persons originating from outside Japan” in the act is considered by Japan’s Ministry of Justice to be equivalent to what is known as “hate speech.” See *Promotion Activities Focusing on Hate Speech*, MINISTRY OF JUSTICE, http://www.moj.go.jp/ENGLISH/m_jinken04_00001.html (last visited Dec. 3, 2017).

10. Saito Tamito, *Heito supiiichi taisaku wo meguru kokunaihou no doukou to kokusaihou* [The Situation of Domestic Law and International Laws over the Measure Against Hate Speech], 19 Q. JURIST 91, 93–94 (2016). The law aims to protect specifically “persons originating exclusively from a country or region other than Japan or their descendants and who are lawfully residing in Japan,” which includes Koreans resident in Japan but does not cover all minorities in Japan which were also targeted by hateful demonstration. Law No. 68 of 2016, art. 2 (Japan).

11. Tamito, *supra* note 10, at 93–94.

12. *A Year After Enactment of Hate Speech Law, Xenophobic Rallies Down by Nearly Half*, JAPAN TIMES (May 27, 2017), <https://www.japantimes.co.jp/news/2017/05/22/national/social-issues/year-enactment-hate-speech-law-xenophobic-rallies-nearly-half/#.WhSvI4anFph> (noting that according to the

Before these recent efforts, the Japanese government had long refrained from taking legal measures against hate speech, despite rampant hate rallies. Japan, like the United States, provides strong protections for freedom of expression under Article 21 of the Constitution.¹³ Japan has made reservations on Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which calls for the criminalization of hate speech, claiming the provision may be in conflict with freedom of speech under the Constitution.¹⁴ Japan has also claimed that racial discrimination in Japan is not a large enough problem that legal action is necessary. For example, despite the recommendation by CERD in 2010 that urged Japan to adopt “specific legislation to outlaw direct and indirect racial discrimination,”¹⁵ a report by the Japanese government submitted to the CERD in 2013 stated, “The Government of Japan does not believe that, in present-day Japan, racist thoughts are disseminated and racial discrimination is incited, to the extent that . . . legislation to impose punishment against dissemination of racist thoughts and other

National Police Agency, “[t]he number of xenophobic rallies in which ultra-right-wing groups use discriminatory language has dropped by nearly half in the 11 months since the Diet enacted a law to deter hate speech). Additionally, one city prohibited hate rally organizers from using a park shortly after the enactment of the law, and some municipalities are preparing stricter guidelines and ordinances. *Id.*

13. Nihonkoku Kenpo [KENPO] [CONSTITUTION], art. 9 (Japan) (“Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.”).

14. International Convention of the Elimination of All Forms of Racial Discrimination, Declarations and Reservations-Japan, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Japan ICERD Reservations] (“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. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, ¶9, U.N. Doc. CERD/C/JPN/CO/3-6 (Mar. 16, 2010).

acts should be considered even at the risk of unduly stifling legitimate speech.”¹⁶

The Japanese government has not enacted *comprehensive* legislation prohibiting hate speech or racial discrimination. Of course, in cases where illegal acts fall under the Torts in the Civil Code, liability for damages is incurred by those who have performed such acts.¹⁷ Discriminatory acts are also punishable when they violate the current criminal code such as defamation,¹⁸ insults,¹⁹ and forcible obstruction of business.²⁰ However, none of these categories apply to the cases of hate speech in question. The crime of “forcible obstruction of business” is not directly applicable to mere speech which does not constitute hindrance of business activities.²¹ Defamation and insults are only punishable where a victim can be specifically identified, and these categories do not apply to general groups such as ones categorized by race, nationality, and ethnicity.²² Hate

16. MINISTRY OF FOREIGN AFFAIRS OF JAPAN, SEVENTH, EIGHTH, AND NINTH COMBINED PERIODIC REPORT BY THE GOVERNMENT OF JAPAN UNDER ARTICLE 9 OF THE INTERNATIONAL CONVENTION ON ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 20 (2013), <http://www.mofa.go.jp/files/000023045.pdf>.

17. MINPO [CIV. C.] art. 709 (Japan). Moreover, the non-discrimination clause in the Constitution, NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 14, and international treaties such as the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 1, can be considered in the interpretation of the Civil Code if the issue is about discrimination.

18. KEIHO [PEN. C.] 1907, art. 230, no. 1 (Japan) (“A person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished by imprisonment with or without work for not more than 3 years or a fine of not more than 500,000 yen.”).

19. KEIHO [PEN. C.] 1907, art. 231 (Japan) (“A person who insults another in public, even if it does not allege facts, shall be punished by misdemeanor imprisonment without work or a petty fine.”).

20. KEIHO [PEN. C.] 1907, art. 234 (Japan) (“A person who obstructs the business of another by force shall be dealt with in the same manner as prescribed under the preceding Article.”).

21. *Id.*

22. See Daishin'in [Sup. Ct.] Mar. 24, 1926, no. 5 DAISHIN'IN KEIJI HANREISHU [DAIHAN KEISHU] 117 (Japan) (describing the object of these crimes is to protect the “honor of people” in which people includes “natural person,” “corporation (legal person),” and “organization without corporate status,” but they do not include general groups). See also Takahiro Akedo, *Heito supūichi taisakuho “yoto an” ni tsuite kangaeu—“tekiho kyōju” yoken ha naze okashimoka* [Thinking About the Anti-Hate Speech Law Proposal by the Ruling Par-

speech targeting minorities in Japan, even if derogatory and insulting, is thus generally not prohibited.

Why did the Japanese government change its attitude about anti-hate speech legislation to accommodate the U.N. human rights bodies' recommendations in 2014? What happened between 2013, when Japan made its reservations to ICERD, and 2016, when Japan passed its first law against hate speech?

One significant event was the judicial rulings in the Kyoto Korean School Case.²³ In this case, a school for children with ethnic Korean roots in Japan known as Kyoto Chosen No.1 Elementary School ("Kyoto Korean School") was attacked by ultra-nationalistic groups who shouted racist and xenophobic slogans near the elementary school, damaged school property, and posted video footage of the demonstrations in 2009 and 2010.²⁴ On October 7, 2013, the Kyoto District Court unprecedently ordered those ultra-nationalist groups to stop their hateful protests against the Kyoto Korean School and pay the school a high level of compensation for the protests.²⁵ The ruling was upheld in the Osaka High Court on July 8, 2014,²⁶ and was then affirmed by the Supreme Court on December 9, 2014.²⁷

This Comment examines the Kyoto Korean School case and its effect on the subsequent enactment of the Hate Speech Dissolution Act. It analyzes these developments from the perspective of the internalization of international law and the emergence of national obedience to international human

ties—Why the "Legal Resident" Condition Is Inappropriate], SYNODOS (Apr. 25, 2016), <http://synodos.jp/politics/16944>.

23. Kyoto Chihou Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa) no. 2655, 2208 HANREI JIHO [HANJI] 74 (Japan).

24. *Id.* See also Morooka, *supra* note 2, at 18–20; IL-SONG NAKAMURA, RUPO KYOTO CHOSEN GAKKO SHUGEKI JIKEN: "HEITO KURAIMU" NI KOSHITE [REPORTAGE KYOTO KOREAN SCHOOL ATTACK CASE: FIGHTING AGAINST "HATE CRIME"] 1–20, 111–31 (2014).

25. Daishin'in [Sup. Ct.] Mar. 24, 1926, no. 5 DAISHIN'IN KEIJI HANREISHU [DAIHAN KEISHU] 117 (Japan); see also NAKAMURA, *supra* note 24, at 214–18.

26. Osaka Koutou Saibansho [Osaka High Ct.] Jul. 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHO [HANJI] 34 (Japan).

27. Saiko Saibansho [Sup. Ct.], Dec. 9, 2014, 2208 HANREI JIHO [HANJI] 74 (Japan).

rights law.²⁸ This Comment seeks to provide the latest example of the internalization of international human rights law by focusing on a case which had a significant impact on the social movement against hate speech and on the institutionalization of international norms into domestic law and society.²⁹ This analysis also explains domestic channels of influence on the internalization of international law. Notably, this Comment examines how a society can move from a textual internalization of international norms to “internalization on the ground,” in the sense of a genuine social acceptance of human rights norms.

II. THE KYOTO KOREAN SCHOOL ATTACK CASE

On December 4, 2009, men flying the Japanese flag stood in front of the Korean School in Kyoto shouting, “Spies of North Korea, get out of Japan!” Those men were members of ultra-nationalist groups including “the Association of Citizens against the Special Privileges of *Zainichi* Koreans”

28. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 626 (2004) (analyzing mechanisms used to influence the behavior of states that are implementing international human rights law with particular focus on acculturation); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1406 (1999) [hereinafter Koh, *How Is International Human Rights Law Enforced?*] (claiming that international human rights law is not just enforced by nation-states but by people with commitment to human rights through a transnational legal process of “interaction, interpretation, and internalization”) [hereinafter Koh, *International Human Rights Law*]; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (identifying transnational legal process as public and private actors interacting to bring about that internalization of the rules of transnational law); Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS 441, 441 (2009) (“call[ing] the process of appropriation and local adoption of globally generated ideas and strategies vernacularization”).

29. Professor Koh calls this process “social internalization.” Koh, *How Is International Human Rights Law Enforced?*, *supra* note 28, at 1401. Professor Merry calls the process of appropriation and local adoption of globally generated ideas and strategies “vernacularization.” Levitt & Merry, *supra* note 28, at 446.

(“*Zaitokukai*”),³⁰ which had been staging intimidating demonstrations and employing xenophobic street propaganda to target ethnic minorities in Japan.³¹ As the marchers shouted through their bullhorns, their hateful words were heard by the more than 130 elementary school students and children in the school building.³² Many children were brought to tears from fear, which prevented classes from continuing.³³ The demonstration escalated as *Zaitokukai* and other members started to violently pull down soccer goals in the local park used by Korean students and to detach school equipment such as platform and speakers.³⁴ Similar demonstrations around the school with even more protesters were held on January 14 and March 28, 2010.³⁵ On June 28, 2010, the Kyoto Korean School filed a civil lawsuit at the Kyoto District Court against the *Zaitokukai* and eight participants of these demonstrations from other groups, demanding the ban of hateful demonstrations around the school and damages for the past three demonstrations.³⁶

The Kyoto District Court ruled that the hateful rallies were not protected free speech and that the actions of *Zaitokukai* members and other activists were not only illegal as tort under Civil Code Art. 709,³⁷ but also actions that “consti-

30. The group’s name in Japanese is 在日特権を許さない市民の会 [*Zainichi tokken wo yurusanai shimin no kai*], and it is called “*Zaitokukai*” for short.

31. Kyoto Chiho Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa7) no. 2655, 2208 HANREI JIHO [HANJI] 74, 81 (Japan); MOROOKA, *supra* note 2, at iii. NAKAMURA, *supra* note 24, at 1–14.

32. NAKAMURA, *supra* note 24, at 10–12; *see also* Osaka Koutou Saibansho [Osaka High Ct.] Jul. 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHO [HANJI] 34, 41 (Japan).

33. NAKAMURA, *supra* note 24, at 10–12 (noting how parents rushed to block the marchers from entering the school and teachers led the children in songs to drown out the insults, but they could not stop them from continuing to shout brutal words at the students).

34. *Id.* at 16.

35. Kyoto Chiho Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa7) no. 2655, 2208 HANREI JIHO [HANJI] 74, 8–12 (Japan); *see also* MOROOKA, *supra* note 2 at 19–20.

36. NAKAMURA, *supra* note 24, at 13. Almost one hundred lawyers passionate about minority, immigrant, and foreigners’ rights joined the lawyers’ team for the Kyoto Korean School on an almost pro bono basis. *Id.*

37. Kyoto Chiho Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa7) no. 2655, 2208 HANREI JIHO [HANJI] 74, 66–68 (Japan). Article 709 of

tute racial discrimination as defined by the ICERD (Art. 1(1)).”³⁸ The court approved the plaintiff’s claim, holding that the defendants were no longer allowed to stage protests near the school and ordering them to pay the unprecedented amount of 12.26 million yen (approximately \$110,000) in compensation.³⁹ The court explained that “the amount of compensation should be enough to ensure effective protection and remedy against the racial discrimination” under Article 6 specifically addressed to national courts.⁴⁰ The Kyoto District Court wrote that the national courts have a direct obligation to interpret domestic laws so that they conform with the ICERD.⁴¹ The court ruled that when a tort is racially discriminatory or racially motivated, the intangible damage the court determines would be “aggravated based on the direct influence of the ICERD on the interpretation of Civil Code.”⁴² *Zaitokukai* and other protesters appealed the case to Osaka High Court.⁴³

On July 8, 2014, the Osaka High Court affirmed the decision of the Kyoto District Court, stating that the ideals of the ICERD should be realized even among private persons through the interpretation of the Constitution and related legislations.⁴⁴ The appellants, *Zaitokukai* and other ultra-nationalists, claimed their demonstrations should be protected by freedom of expression as they believed that it was in the public interest to criticize “the (unfair) privileges of *Zainichi* Koreans” and the biased media.⁴⁵ The Osaka High Court rejected these arguments and held that the protestors intended to stir up discriminatory attitudes among the public, that this was not for the public benefit, and that it was clear that their actions were

the Civil Code states, “A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.” Minpo [Minpo] [Gv. C.] ART.709 (JAPAN).

38. Kyoto Chiho Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa7) no. 2655, 2208 HANREI JIHO [HANJI] 74, 133-146 (Japan).

39. *Id.* at 74.

40. *Id.* at 138-41.

41. *Id.* at 137.

42. *Id.* at 157-58.

43. Osaka Koutou Saibansho [Osaka High Ct.] Jul. 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHO [HANJI] 34 (Japan).

44. *Id.* at 38.

45. *Id.* at 39.

beyond the scope of freedom of speech protections.⁴⁶ In response, the protestors appealed to the Supreme Court.⁴⁷

The Japanese Supreme Court issued a groundbreaking ruling affirming the decisions of the Kyoto District Court and the Osaka High Court with the unanimous agreement of a panel of five Supreme Court judges.⁴⁸

III. THE COURT'S DECISION AS THE INTERNALIZATION OF INTERNATIONAL LAW

The Kyoto District Court's decision is significant not just as the first judgment on hate speech in Japan, but also as a unique reference point of international human rights law. The decision has thus attracted both domestic and international attention among scholars in the context of the internalization of the international law. Koji Teraya, International Human Rights Law Professor at the University of Tokyo, notes that even though the Kyoto District Court drew on the immaterial damage caused by the act to find the damages in tort under Article 709 of the Civil Code—and that in this sense the judgment fell within the existing framework—the ruling is still significant for the interpretation of domestic law in light of international law for two major reasons.⁴⁹

First, this ruling is groundbreaking in light of Japan's difficulty with the domestic implementation of a number of the provisions of the treaties it has ratified, as it directly refers to an international human rights treaty to interpret Civil Code 709, rather than provisions of the Constitution.⁵⁰ Japanese

46. *Id.* at 40.

47. Saiko Saibansho [Sup. Ct.] Dec. 9, 2014, 2208 HANREI JIHO [HANJI] 74 (Japan).

48. *Id.* at 74; see also John Boyd, *Hate Speech in Japan: To ban or Not to ban?*, AL JAZEERA (Mar. 19, 2015), <http://www.aljazeera.com/indepth/features/2015/03/hate-speech-japan-ban-ban-150310102402970.html>.

49. Teraya Koji, *Heito supichi jiken* [*Hate Speech Case*], 1466 JURIST 292, 292–93 (2014). To apply international law in Japanese national courts, domestic effect and domestic applicability (direct applicability or self-executing) are important. Article 98(2) of the Constitution of Japan provides that “treaties concluded by Japan and established laws of nations shall be faithfully observed.” NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 98. Consequently, these treaties enter the domestic legal system without the need of special legislative procedures.

50. Although the plaintiff's arguments in the complaint refer to Article 13 of the Constitution (i.e., “right to life, liberty, and the pursuit of happi-

courts have been relatively unresponsive to international legal claims in domestic litigation and either denied the direct effect of international human rights law or ignored such claims altogether. The courts have often been criticized by human rights advocates for not seriously considering international human rights treaties ratified by Japan in their judgments. Yuji Iwasawa, Professor of International Law at the University of Tokyo and current chairperson of the UNHRC, for example, points out that Japanese courts have dismissed arguments based on international human rights law or the recommendations of international organizations.⁵¹ While the courts have made some decisions based on the provisions of international treaties, the courts remain “generally reluctant to adjudicate on the basis of international human rights law.”⁵² Japanese courts, instead, “often restrict their interpretation of the Japanese Constitution, ignoring arguments based on international human rights law.”⁵³

Professor Iwasawa explains, “Japanese courts are reluctant to deal with international law because of their unfamiliarity with this new branch of law.”⁵⁴ Also, as Professor Teraya points out, Japanese courts have believed the standard of human rights protection that international human rights treaties require are already realized in the protections guaranteed by the Japanese Constitution.⁵⁵ In the Kyoto Korean School case, however, the court found a more direct and concrete standard for the interpretation of domestic law in international human

ness”), NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 13 (Japan), and Article 26 (i.e., “the right to an equal education”), NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 26 (Japan), the court does not mention them in the rulings. See Osaka Koutou Saibansho [Osaka High Ct.] Jul. 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHO [HANJI] 34 (Japan).

51. YUJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 288–306 (1998); see also DANA ZARTNER, *COURTS, CODES, AND CUSTOM: LEGAL TRADITION AND STATE POLICY TOWARD INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW*, 241–44 (2014).

52. *Id.* at 294.

53. *Id.* at 294; see also Takashi Ebashi, *Kenri Hoshō Kihan to shiteno Kenpo to Kokusai Jinken Kiyaku [The Constitution and the International Covenants on Human Rights as Norms to Guarantee Rights]*, 1037 JURIST 109.

54. IWASAWA, *supra* note 51, at 288.

55. Teraya, *supra* note 49.

rights law than in the Constitution.⁵⁶ It is particularly unprecedented for a Japanese court to use the violation of ICERD to determine the amount of compensation, a finding that follows from the CERD General Recommendation No. 26: “[T]he right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.”⁵⁷

The second major reason for the Kyoto Korean School case’s significance offered by Professor Teraya is that even though the ruling did not use the term “hate speech,” the court still found that the conduct amounted to racial discrimination under the ICERD.⁵⁸ It is possible that the court used this definition because the existing domestic laws and the Constitution do not have a concrete definition of racial discrimination. This may be a case in which, lacking relevant domestic law, the court can more easily use international human rights law. Timothy Webster, Associate Professor of Transnational Law at Case Western Reserve University, notes that “judges hesitated to apply international legal provisions against private persons in the 1980s and 1990s, but this seems to have changed with a recent series of racial discrimination lawsuits.”⁵⁹ Webster points out this development is in part because Japan had not introduced any new legislation to implement ICERD after its ratification in 1995.⁶⁰ According to Professor Webster, in the absence of domestic legislation, judges can

56. Kyoto Chiho Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa7) no. 2655, 2208 HANREI JIHO [HANJI] 74, 63-64 (Japan).

57. Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination: Fifty-Sixth Session (6-24 March 2000), Fifty-Seventh Session (31 July-25 August 2000)*, annex V(B), U.N. Doc. A/55/18 (2000).

58. Teraya, *supra* note 48, at 292–93. Notably, the reason why the court does not use the specific definition under Article 4 of ICERD, but uses the general definition under Article 1, may be due to the Japanese reservation of Article 4 of the Convention. See Japan ICERD Reservations, *supra* note 14.

59. Timothy Webster, *International Human Rights Law in Japan: The View at Thirty*, 23 Colum. J. Asian L. 241, 267 (2010).

60. *Id.*

step in to fill this legislative void and “make bold and often unprecedented applications of international law.”⁶¹ Further, “without legislative guidance on point, individual judges decide whether the narratives they hear, and the evidence supporting those narratives constitute *illegal acts* of racial discrimination.”

Even though the Kyoto District Court ruling neither drastically changes the existing framework nor creates a new standard, it indicates a shift in the Japanese courts towards internalizing international human rights law.

Also notable is the social impact of the rulings in the Kyoto Korean School case, as these decisions have publicly revealed racial discrimination in Japan. It is now difficult for the government to deny the existence of rampant racial discrimination in Japanese society. The Kyoto District Court’s ruling was covered in the national newspapers and broadcast on television nationwide, drawing public attention to the problem of hate speech.⁶² The conclusions of the Kyoto Korean School decision that the hate demonstrations constituted “racial discrimination” on the terms of universal human rights law contributed to transforming the anti-hate speech movement into a nation-wide movement against racial discrimination that included not only ethnic Korean residents but also Japanese people.⁶³ Indeed, human rights advocates who fought for the enactment of anti-hate speech law emphasize that the court rulings assisted their efforts by making the issue of hate speech highly visible.⁶⁴

The Parliamentary League for the Enactment of the Basic Law against Racial Discrimination (*Jinshusabetsu Teppai Kihonho o Motomeru Giinrenmei*) was formed in April 2014.⁶⁵ In May

61. *Id.*

62. CTR. FOR HUMAN RIGHTS REPORT, *supra* note 2, at 79–86 (citing more than thirty newspaper articles and TV news, including most major and impactful news media, that covered the Kyoto District Court decision on the Kyoto Korean School Case).

63. Kyogho Cho, Han Reishizumu undo to Zainichi Korean [Anti-Racism Movement and *Zainichi* Korean], in AKEDO ET AL., “GENDAI NIHON NI OKERU ANCHI REISHIZUMU UNDO” KYODO KENKYU CHUKAN HOUKOKUSHO [MID-TERM REPORT OF JOINT RESEARCH PROJECT “ANTI-RACISM MOVEMENT IN MODERN JAPAN”] 55, 58–64 (2015).

64. MOROOKA, *supra* note 2, at 20.

65. The league is represented by Ogawa Toshio, a Democratic Party of Japan (DPJ) legislator and former Minister of Justice during the DPJ admin-

2015, the Parliamentary League submitted a bill to outlaw racist acts and hate speech to the House of Councilors.⁶⁶ Though the proposed law was hampered in the Diet due to the certain opposition, “more than one hundred local governments across the country have formally criticized hate speech and made it harder to use public areas for hate rallies,” which has been “another sign of the momentum behind Japan’s anti-hate speech movement.”⁶⁷ Behind these passionate legislators are the tenacious and ardent efforts of civil society organizations that have conducted passionate advocacy, engaging with both domestic lawmakers and the U.N. human rights treaty bodies.⁶⁸ Two reports were subsequently issued: “Concluding Observations on the Sixth Periodic Report of Japan” by the U.N. Human Rights Committee in July 2014⁶⁹ and “Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan” by the U.N. Committee on the Elimination of Racial Discrimination in August of the same year.⁷⁰ Both reports urged the Japanese Government to take action against

istration. Legislators from the DPJ, Social Democratic Party (SDP), Japanese Communist Party, Japan Restoration Party, and the Komeito Party from the ruling coalition have participated in this league. Daiki Shibuichi, *Countering Japan’s Hate Speech Groups*, E. ASIA F. (May 12, 2016), <http://www.eastasiaforum.org/2016/05/12/countering-japans-hate-speech-groups>.

66. *See id.*

67. Daniel Krieger & Noriko N. Kitano, *Japan Combats Rise in Hate Speech*, AL JAZEERA (Nov. 30, 2015), <http://america.aljazeera.com/articles/2015/11/30/japan-encounters-rise-in-hate-speech.html>.

68. NGO Network for the Elimination of Racial Discrimination Japan (ERD Net), a nationwide network of NGOs and individuals working for issues relating to racism and racial discrimination, reported in detail the issue of “hate speech” to the U.N. Committee on the Elimination of Racial Discrimination (CERD) for examination in addition to the Japanese government’s report. *See* NGO NETWORK FOR THE ELIMINATION OF RACIAL DISCRIMINATION JAPAN (ERD NET), CIVIL SOCIETY REPORT ON THE IMPLEMENTATION OF THE ICERD (2014), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/JPN/INT_CERD_NGO_JPN_17538_E.pdf. The International Movement Against All Forms of Discrimination and Racism is the facilitating organization of the network. *See ERD Net Reported Racial Discrimination in Japan to the Committee on the Elimination of Racial Discrimination (CERD)*, INT’L MOVEMENT AGAINST ALL FORMS OF DISCRIMINATION & RACISM (July 9, 2014), <http://imadr.org/erd-net-reported-racial-discrimination-in-japan-to-the-committee-on-the-elimination-of-racial-discrimination/>.

69. Sixth Periodic Report, *supra* note 7.

70. Sixth Periodic Report, *supra* note 7.

hate speech.⁷¹ These resulted from civil society's passionate advocacy to bring local issues into the international realm.⁷² As local, national, and international condemnation of hate speech grew, efforts to crack down on hate speech also expanded. As the Kyoto Korean School case proceeded, the increasing violence of the hate speech movement led to rising concern and interest among lawmakers.⁷³

Further, the importance of local community should not be forgotten. In particular, *Zainichi* Koreans in the Sakuramoto area of the City of Kawasaki played an important role in lawmaking.⁷⁴ Sakuramoto, which is home to many *Zainichi* Koreans, was targeted by numerous hate demonstrations aiming to "purify Japan starting from Kawasaki."⁷⁵ The area has had a long history of Koreans and Japanese people living together, and local residents fought back against hate speech. Kan Ija, a forty-two year-old, third-generation Korean resident of Sakuramoto and one of the leaders of the anti-hate speech movement, spoke in support of anti-hate speech legislation at an official hearing of the legal committee at the House of Councillors on March 22, 2016.⁷⁶ She provided information about the negative effects of hate speech on the local community and advocated for legislation against hate speech based on universal human rights.⁷⁷ This desperate voice of a direct victim moved the lawmakers, including the conservative party, to visit Sakuramoto and listen to local people's serious concerns and victims' trauma on March 31,

71. Sixth Periodic Report, *supra* note 7, ¶12; Sixth Periodic Report, *supra* note 7, ¶ 11.

72. See *supra* notes 67–68 and accompanying text.

73. Akedo, *supra* note 22. See also YUICHIRO UOZUMI ET AL., HEITO SUPICHI KAISHOHO—SEIRITSU NO KEII TO KIHONTEKI NA KANGAEKATA [THE HATE SPEECH ACT—BACKGROUND OF APPROVAL AND BASIC POINT OF VIEW] 2 (2016).

74. See generally KANAGAWA SHIMBUN, "JIDAI NO SHOTAI" SHUZAIHAN, HEITO DEMO WO TOMETA MACHI—KAWASAKI SAKURAMOTO NO HITOBITO [A TOWN WHERE HATE DEMONSTRATIONS ARE CEASED—PEOPLE IN SAKURAMOTO, KAWASAKI] (2016) (describing how the local community in Sakuramoto district in Kawasaki City fought back against hate groups which targeted Sakuramoto, a place where many *Zainichi* Korean people have lived for many years).

75. *Id.* at 18.

76. *Id.* at 103.

77. *Id.* at 103–12.

2016.⁷⁸ After the visit, the chair of the Committee on Judicial Affairs of House of Councillors said, “I understand the hate speech destroyed everyday [lives] of people[,] and we need to work on extermination of the hate speech.”⁷⁹ Even a notably conservative politician from the Liberal Democratic Party seemed to have been shocked at hearing the voice of local people, saying:

I understand *Zainichi* Korean people want to live as they are, not hiding their ethnic roots. This is a common ground of everyone, not only *Zainichi* Koreans, but also all Japanese and all people. In our society, it is intolerable to neglect the act to harm the dignity of a human being.⁸⁰

On April 8, 2016, a week after the visit, the ruling coalition of the Liberal Democratic Party and the Komeito Party submitted “the Draft Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan.”⁸¹ This led to a consensus among the lawmakers to pass the first anti-hate speech law.

IV. CONCLUSION: THE DYNAMIC PROCESS OF INTERNALIZING INTERNATIONAL LAW

The internalization of international human rights norms in the judiciary, in combination with the recommendations of the U.N. human rights treaty bodies, seems to have served as a tailwind for those lawmakers and civil society organizations aiming to make anti-hate speech law. The Japanese government, which had not previously supported such legislation, finally changed its attitude and in 2016 enacted the Hate Speech Dissolution Act, Japan’s first anti-hate speech legisla-

78. *Id.* at 112–15; *see also* HEITOSUPICHI O YURUSANAI KAWASAKI SHIMIN NETTOWAKU, KONZETSU! HATE TO NO TATAKAI : KYOUSEI NO MACHI KAWASAKI KARA [FIGHT FOR EXTERMINATION OF HATE SPEECH: FROM KAWASAKI, CITY OF DIVERSITY] 75 (2017).

79. KANAGAWA SHIMBUN, *supra* note 74, at 112; *see also* HEITOSUPICHI O YURUSANAI KAWASAKI SHIMIN NETTOWAKU, *supra* note 78, at 74.

80. KANAGAWA SHIMBUN, *supra* note 74, at 115–16 (quoting the words of Shoji Nishida, a conservative Japanese politician of the Liberal Democratic Party, a member of the House of Councillors in the Diet (national legislature), after his visit to Sakuramoto).

81. YUICHIRO UOZUMI ET AL., *supra* note 73, at 2.

tion.⁸² The internalization process in this case was a combination of bottom-up, local human rights movements and progressive developments in international human rights law.⁸³

The Kyoto Korean School case provides a model of how international human rights norms are being internalized in judiciary, particularly when there are no effective or concrete domestic laws to address the issue. The changing attitudes of judges in Japan, who have shown a greater fidelity to international human rights obligations than they did a generation ago, will need more detailed research to be fully understood.

82. Honpougai syusshinsya ni taisuru futon a sabetuteki gendo no kaishonimuketa torikumi no sokushin ni kansuru houritsu [Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons Originating from Outside Japan] Law No. 68 of 2016, <http://www.moj.go.jp/content/001199550.pdf> (Japan).

83. Koh distinguishes “‘international legal process’ or horizontal reasons for compliance, which tend to function at a government-to-government level” from “‘vertical’ explanation, which focuses on the relationship between the international and the domestic legal systems.” Koh, *International Human Rights Law*, *supra* note 28, at 1406.