

CAN STRATEGIC HUMAN RIGHTS LITIGATION COMPLEMENT SOCIAL MOVEMENTS? A CASE STUDY OF THE MOVEMENT AGAINST RACISM AND HATE SPEECH IN JAPAN

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I. INTRODUCTION

“You Koreans are cockroaches! Spies of North Korea, get out of Japan!” “You stink like kimchi! Go back to the Korean peninsula!”, shouted large men flying the Japanese national flags in front of the elementary school for ethnic Korean children in Kyoto on December 4, 2009. Those men are members of ultra-nationalist groups including “the Association of Citizens against the Special Privileges of *Zainichi* Koreans” (*Zainichi Tokken wo Yurusanai Shimin no Kai* [在日特権を許さない市民の会] or hereafter “*Zaitokukukai*” for short) which have been staging intimidating demonstrations employing xenophobic and hateful street propaganda targeting ethnic minorities in Japan.¹ As the marchers shouted

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¹ *Zaitokukai* is an ultra-nationalist civic group in Japan, which was established in 2006 for protesting alleged “special privileges” afforded to ethnic Korean residents in Japan. The precise number of *Zaitokukai* members is unknown but it is claimed that it has 14,000 members in their website as of April 2014. YASUKO MOROOKA (師岡康子), HEITO SUPICHI TOWA NANIKI (ヘイトスピーチとは何か) [WHAT IS HATE SPEECH] 4–7 (2013); IL-SONG NAKAMURA (中村一成), RUPO KYŌTO CHŌSEN GAKKŌ SHŪGEKI JIKEN HEITO KURAIMU NI KŌSHITE (ルポ 京都朝鮮学校襲撃事件ヘイトクライムに抗して) [REPORTAGE KYOTO KOREAN SCHOOL ATTACK CASE: AGAINST HATE CRIME] 20–22. See also, KŌICHI YASUDA (安田浩一), NETTO TO AIKOKU (ネットと愛国) [INTERNET AND PATRIOTISM] (2012). “*Zainichi* (在日),” a term that literally means “staying/being in Japan,” is commonly shorthand for ethnic Koreans who came or were brought from the Korean peninsula to Japan during Japan’s colonial rule, and their descendants, while the scope of *Zainichi* Koreans varies depending on contexts. *Zainichi* Koreans are usually with permanent residency status in Japan or Japanese citizenship. More than 320, 000 *Zainichi* Koreans with permanent

through their bullhorns, hateful words were spread loudly and heard by around 150 elementary students and teachers in the school building, bringing many of the children to tears from confusion and fear.² The demonstration escalated and *Zaitokukai* and other members started to violently pull down soccer goals in the local park used by the students of the Korean school and detach school equipment such as platform and speakers.³ After the first raid by those nationalist groups, there were two more attacks against the school on January 14 and March 28 in 2010, with more people shouting derogatory words unbearably loudly.⁴ Several children have since complained of stomach pains and stress as well as panicked with strong fear when they hear loud noises.⁵ Other students expressed fear and mistrust towards the Japanese society which generated hateful speech against them.⁶ The attacked Korean school (Kyoto No. 1 Korean Elementary School, hereafter “Kyoto Korean School”) filed a criminal complaint and a civil lawsuit against the demonstrators in 2010.⁷

residency status reside in Japan as of June 2018. The Nat'l Statistics Ctr., *Foreign Residents Statistics*, <https://www.e-stat.go.jp/en> [<https://perma.cc/UN9W-8593>] (last visited Mar. 7, 2018). *Zainichi* Koreans established Korean schools in Japan to teach Korean history, language and culture to their children to maintain their ethnic identity. See Soo im Lee, *Diversity of Zainichi Koreans and Their Ties to Japan and Korea*, AFRASIAN RES. CTR., RYUKOKU U. (2012), <http://afrasia.ryukoku.ac.jp/publication/upfile/WP008.pdf> [<https://perma.cc/LZ6F-XWD3>] (last visited Mar. 7, 2018).

² NAKAMURA, *supra* note 1, at 1–20; Human Rights Now, *Fact-finding Report: The Realities of Hate Speech Against Korean Residents in Japan* (Nov. 2014), at 6, <http://hrn.or.jp/eng/wp-content/uploads/2015/12/Hate-Speech-report-English-translation.pdf> [<https://perma.cc/X449-GTU9>]; see also NGO Network for the Elimination of Racial Discrimination Japan (ERD Net), *The Issue of Hate Speech in relation to Article 4 (a) and (b) of ICERD and Indications of Systematic and Massive Racial Discrimination in Japan that may lead to Conflict and Genocide*, submitted to the Committee on the Elimination of Racial Discrimination (CERD), on June 18, 2014, for its consideration of 7th to 9th periodic reports of Japan (CERD/C/JPN/7-9), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/JPN/INT_CERD_NGO_JPN_17539_E.pdf [<https://perma.cc/97W2-T8R8>] (last visited Mar. 7, 2019).

³ *Id.*

⁴ NAKAMURA, *supra* note 1, at 119, 127. There were around 40 people in the second demonstration on January 14, 2010 and around 100 participants in the third demonstration on March 28, 2010.

⁵ NAKAMURA, *supra* note 1, at 69–71.

⁶ *Id.*

⁷ For criminal cases, see Kyōto Chihō Saibansho [Kyoto Dist. Ct.], April 21, 2011, Hei 22 (wa) no. 1257 and Hei 22 (wa) no. 1641; Ōsaka Kōtō Saibansho [Osaka High Ct.], Oct. 28, 2011, Hei 23 (u) no. 788; Saikō Saibansho [Sup. Ct.], Feb. 23, 2012, Hei (a) no. 2009. For civil cases, see Kyōto Chihō Saibansho [Kyoto Dist. Ct.], Oct. 7, 2013, Hei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan); Ōsaka Kōtō Saibansho [Osaka High

This series of attacks against the Kyoto Korean School in 2009 and in 2010 was an opening volley, signaling the start of openly xenophobic public demonstrations using hateful speech which have seen quick and serious growth in Japan.⁸ Behind the hate speech against ethnic minorities, particularly against ethnic Korean residents in Japan, there is a long-existing, visible and invisible prejudice and discrimination with a complex social, historical, and political background.⁹ However, this long-existing discrimination towards *Zainichi* Koreans has come to the surface in Japanese society with heightened political and societal tension between Japan and the Korean peninsula in recent years.¹⁰ Furthermore, along with the

Ct], July 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHŌ [KANJI] 34 (Japan); Saikō Saibansho [Sup. Ct.], Dec. 9, 2014, Hei 26 (o) no. 1539, Hei 26 (ju) no. 1974. In this paper, “the Kyoto Korean School case” refers to the civil case when it is in a singular form.

⁸ While there is no established definition of hate speech, for the purpose of this study, hate speech is defined as a manifestation of discrimination, hostility or hatred on the basis of race, ethnicity, language, religion, nationality, origin, gender, and other identities, instigation thereto, and instigation of violence. See G.A. Res. 260 (III), the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) (Dec. 9, 1948). G.A. Res. 2106 (XX), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Dec. 21, 1965). G.A. Res. 2200A (XXI), the International Covenant on Civil and Political Rights (ICCPR) (Dec. 16, 1966). UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 35: Combating Racist Hate Speech (Sep. 26, 2013). This paper focuses on discriminatory expression and behavior aimed at specific ethnic groups or nationalities with wider definition of “racial discrimination” under Article 1 of the ICERD. While the immediate target of hate speech may be a single person or a group, its harm can extend to entire communities by promoting discrimination and intolerance in society. For harmful effects of hate speech, see JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012); MOROOKA, *supra* note 1, at 50–61. Japanese NGOs also report that the hate propaganda against the Kyoto Korean School changed children’s attitudes about their identities negatively with long-standing trauma. See Human Rights Now, *supra* note 2.

⁹ Since the opening decade of the twentieth century when Japan seized Korea as a colony, there have been a number of hate speech and hate crimes against ethnic Koreans as well as discriminations in various areas such as employment, residency, marriage and financial services. See Ryuta Itagaki, *The Anatomy of Korea-phobia in Japan*, 35(1) *JAPANESE STUD.* 49–66 (2015).

¹⁰ It includes the incidents such as Korean supporters booing the Japanese team in the 2002 Korea-Japan Soccer World Cup and North Korean abductions of Japanese citizens recognized in 2002, which seemed to influence to raise popular nationalism in Japan. A comic book with strong anti-Korean content published in 2005 became a big seller and was followed by a series of anti-Korean xenophobic publications, which led to create anti-Korean social sentiments in wider public discourse. This trend was strengthened by the recurring territorial disputes between Japan and South Korea in 2012 and a number of North Korean missile tests since 2012, as well as an issue over the exclusion of Korean schools from the tuition-waiver programme after the conservative government took power in 2012. MOROOKA, *supra* note 1, at 4–5; see Rumi Sakamoto & Matthew Allen, “Hating ‘The Korean Wave’”

spread of the Internet, anonymous discriminatory postings against *Zainichi* Koreans have significantly increased.¹¹ Right-wing groups use the Internet and social media extensively and strategically for communicating ideas and organizing their movement.¹² Heavily influenced by online discourse, nationalistic activists targeted and attempted to marginalize *Zainichi* Koreans and other minority groups whom they consider to be a threat to Japan.¹³ The xenophobic demonstrations and hate propaganda of *Zaitokukai* and other ultranationalist groups have spread via the Internet to thousands of people.¹⁴ The rise of *Zaitokukai* has led to the spread of anti-Korean rallies across Japan, which draws dozens to hundreds of supporters to the radical fringe. Since 2009, hate propaganda by *Zaitokukai* and other similar groups has been further increasing not only on the Internet but also on the streets of major cities in Japan.¹⁵ The demonstrators have marched with imperialist Japanese and Nazi flags, calling Koreans parasites and criminals, and called for their death¹⁶,

Comic Books: A Sign of New Nationalism in Japan?, 5(10) THE ASIA-PACIFIC J. JAPAN FOCUS (2007).

¹¹ See Tomomi Yamaguchi, *Xenophobia in Action: Ultranationalism, Hate Speech, and the Internet in Japan*, 117 RADICAL HIST. REV. 98–99 (2013) (pointing out the notable surge of online xenophobic discourse since 2000).

¹² See generally, YASUDA, *supra* note 1. 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> [<https://perma.cc/L8L9-K3S4>].

¹³ See Yamaguchi, *supra* note 11.

¹⁴ NAKAMURA, *supra* note 1, at 21; MOROOKA, *supra* note 1, at 50–61; Daniel Krieger & Noriko Norica-Panayota Kitano, *Japan Combats Rise in Hate Speech*, Aljazeera Am. (Nov. 30, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/11/30/japan-encounters-rise-in-hate-speech.html> [<https://perma.cc/TH2T-XMTA>].

¹⁵ MOROOKA, *supra* note 1, at 2–4. According to Morooka, recent xenophobic activism that became a social problem differs from the past in that people who had posted discriminative statement online started to take a collective action publicly on the street. They also uploaded videos of recorded demonstrations on the Internet, to reproduce and spread their xenophobic claims, and continuously incite discrimination.

¹⁶ In those demonstrations, they mobilized more than 200 people at each time in Osaka and Tokyo. In Osaka, a 14-year-old Japanese girl screamed that she hated Koreans and that they should all be killed in a massacre like Nanjing Atrocities, prompting cheers of approval by members and followers of *Zaitokukai*. The video of her shouting was subtitled in several languages and posted on YouTube, generating shock and anger in Japan and abroad. Eric Johnston, *Politicians Silent on Curbing Hate Speech*, THE JAPAN TIMES (July 10, 2013), <http://www.japantimes.co.jp/news/2013/07/10/national/social-issues/politicians-silent-on-curbing-hate-speech/> [<https://perma.cc/66S6-FSDQ>].

which was reported to be observed more than 1,152 times between April 2012 and September 2015.¹⁷

The Japanese authorities responded to the situation, starting an anti-hate speech campaign in 2014 and conducted a survey on the situation of hate speech in Japan in 2015.¹⁸ Though the government had long been reluctant to take legal measures to curb hate, the National Diet, in 2016, enacted the first anti-hate speech law in Japan, “Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan (hereafter “Hate Speech Elimination Act”).¹⁹ Many local municipalities also developed anti-hate speech regulations and ordinances.²⁰

¹⁷ Center for Human Rights Education and Training (人権教育啓発推進センター), *Heito Supīchi ni Kansuru Jittaichōsa Hōkokusho* (ヘイトスピーチに関する実態調査報告書) [*Report of the Survey about Actual Condition of Hate Speech*], MINISTRY OF JUST. (Mar. 2016), <http://www.moj.go.jp/content/001201158.pdf> [<https://perma.cc/DZ3K-6EQC>] [hereinafter Ctr. for Human Rights Report]. See also Yuki Nikaido (二階堂友紀), *Heito Supīchi 3 nen han de 1152 ken—Seifu ga Hatsu no Chōsa* (ヘイトスピーチ、3年半で1152件：政府が初の調査) [*1152 Hate Speech Cases in 3.5 Years—The Japanese Government Held a Survey for the First Time*], ASAHI SHIMBUN (Mar. 29, 2016, 5:19 PM), <http://archive.fo/pNdO3> [<https://perma.cc/9MEE-2EWT>]; *Heito Supīchi Kanren Demo 1152 ken Hōmushō Hatsu no Jittai Chōsa* (ヘイトスピーチ関連デモ 1152件 法務省、初の実態調査) [*Hate Demonstrations Are Revealed 1152 Cases—Ministry of Justice Held a Survey for the First Time*], NIHON KEIZAI SHIMBUN (Mar. 30, 2016, 8:43 PM), https://www.nikkei.com/article/DGXLASDG30H74_Q6A330C1CR8000/ [<https://perma.cc/4P9N-THFK>]. Martin points out it is likely “a conservative estimate, and the number of instances of lower levels or more individual forms of hate speech is likely several multiples of this number.” Craig Martin, *Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada* 45 HASTINGS CONST. L. Q., 455, 461.

¹⁸ Interview with a government official from the Ministry of Justice, see *infra* note 24 and accompanying text.

¹⁹ Ministry of Justice, HONPŌGAI SYUSSHINSYA NI TAISURU FUTŌ NA SABETSUTEKI GENDŌ NO KAISHŌ NI MUKETA TORIKUMI NO SOKUSHIN NI KANSURU HŌRITSU (本邦外出身者に対する不当な差別的言動の解消に向けた取組の推進に関する法律) [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), <http://www.moj.go.jp/content/001199550.pdf> [<https://perma.cc/D59V-X66X>]. “Unfair discriminatory speech and behavior against persons originating from outside Japan” in the act is considered to be equivalent to what is known as “hate speech” as indicated in the website of Japanese Ministry of Justice. Ministry of Justice, *Promotion Activities Focusing on Hate Speech*, http://www.moj.go.jp/ENGLISH/m_jinken04_00001.html [<https://perma.cc/7FWZ-YYG6>] (last visited June 3, 2017).

²⁰ Eric Johnston, *Osaka Enforces Japan’s First Ordinance Against Hate Speech, Threatens to Name Names*, THE JAPAN TIMES (July 1, 2016), <http://www.japantimes.co.jp/news/2016/07/01/national/crime-legal/osaka-enforces-japans-first-ordinance-hate-speech-threatens-name-names/> [<https://perma.cc/Q4SA-5UJK>].

The Kyoto Korean School cases and their progeny, intertwined with the social movement against hate speech and racism, are said to help the development of these anti-hate speech policies and legislation.²¹ The question then arises: were the Kyoto Korean School cases successful as strategic human rights litigation with significant positive legal and social change on the issue of racial discrimination in Japan? If so, why did the cases become so successful in causing change? This study, based on the framework of strategic human rights litigation in previous studies, intends to respond to these questions, by analyzing how the Kyoto Korean School cases have influenced the anti-racism and counter-hate speech movement in Japan, and have contributed to the change in law, policy, and society. In particular, this article examines the internalization of universal human rights norms in the cases and the subsequent movement, which may be interpreted as a way of “vernacularization” of human rights norms in the local context.²² This article is aimed at providing a new perspective to explain the Japanese recent anti-racism movement in the framework of strategic litigation and its international implication. Currently, there are already a number of studies on the constitutional relationship between freedom of speech and hate speech regulations, as well as studies on hate groups and anti-racism groups and their movement, through legal, philosophical, sociological analysis.²³ However, there are hardly any studies that

²¹ Interview with a programme coordinator of the International Movement Against All Forms of Discrimination and Racism (IMADR), an international human rights NGO, and the member of Anti-Racism Project (ARP), a counter-racism civic group, *see infra* note 24 and accompanying text.

²² *See generally* Peggy Levitt & Sally Merry, *Vernacularization on The Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 9(4) GLOBAL NETWORKS (2009) (calling the process of appropriation and local adoption of globally generated ideas and strategies “vernacularization”).

²³ For legal analysis, *see* MOROOKA, *supra* note 1; Yuji Nasu (奈須祐治), *Waga Kuni ni Okeru Heito Supīchi no Hōtekikisei no Kanōsei—Kinnen no Haigaishugi Undō no Taitō wo Fumaete* (わが国におけるヘイト・スピーチの法的規制の可能性——近年の排外主義運動の台頭を踏まえて) [*Possibility of Legal Regulation of Hate Speech in Our Country—Based on the Rise in Recent Years of the Xenophobic Movement*], 707 HŌGAKU SEMINAR (法学セミナー) 25 (2013); Masato Ichikawa (市川正人), *Hyōgen no Jiyū to Heito Supīchi* (表現の自由とヘイトスピーチ) [*Freedom of Expression and Hate Speech*], 2 RITSUMEIKAN HŌGAKU (立命館法学) (2015); AKIRA MAEDA (前田 朗), NAZE IMA HEITO SUPICHI NANOKA: SABETSU, BŌRYOKU, KYŌHAKU, HAKUGAI (なぜ、いまヘイト・スピーチなのか—差別、暴力、脅迫、迫害) [*WHY NOW HATE SPEECH: DISCRIMINATION, VIOLENCE, INTIMIDATION, PERSECUTION*] (2013); SHINJI HIGAKI (桧垣伸次), HEITO SUPICHI NO KENPOUTEKI KOUSATSU: HYŌGEN NO JIYŪ NO JIRENMA (ヘイト・スピーチ規制の憲法学的考察: 表現の自由のジレンマ) [*A CONSTITUTIONAL CONSIDERATION ABOUT HATE*

analyze the Kyoto Korean School cases and following anti-hate speech movements from the viewpoint of strategic human rights litigation. This empirical analysis aims to highlight the new aspects of the recent Japanese social and legal change in terms of racial discrimination.

Furthermore, this analysis would provide a useful case study for the debate over strategic human rights litigation. There has been a long contentious debate about the promise and limits of litigation as a strategy for a social change. This paper aims to examine this recent dynamic anti-racist and counter-hate movement in Japan in light of the debate over strategic human rights litigation and social movement, which can reveal a new perspective to understand the strategic litigation as a way of ensuring that the rights of discriminated minorities are considered in law, policy, and practice.

As for research methodology, this paper employs socio-legal approaches using interviews with various actors in the movement including *Zainichi* Korean residents in Japan, government officials, lawyers, NGO staff, people in counter-action against hate speech, and local community organizers as well as information from newspapers and legal records. Interviews and background research were designed and conducted by the researcher from June 2016 to November 2017 and the interviews were semi-structured, conducted in the form of face-to-face interviews or through on-line telecommunication tools.²⁴

SPEECH REGULATION: DILEMMA OF FREEDOM OF SPEECH]. For studies on hate groups and anti-hate groups in Japan, see Yamaguchi, *supra* note 11; YASUDA, *supra* note 1; NAOTO HIGUCHI (樋口直人), NIHONGATA HAIGAIYUJI —ZAITOKUKAI, GAIKOKUJIN SANSEIKEN, HIGASHI AJIA CHISEIGAKU (日本型排外主義—在特会・外国人参政権・東アジア地政学) [JAPANESE XENOPHOBIA: ZAITOKUKAI, THE RIGHT OF FOREIGNERS TO PARTICIPATING IN POLITICS, EAST-ASIA GEOPOLITICS] (2014); Takahiro Akedo et al. (明戸 隆浩他), “*Gendai Nihonni Okeru Hanreishizumu Undō*” *Kyōdō Kenkyū Chūkan Hōkokusho* (「現代日本における反レイシズム運動」共同研究中間報告書) [*Mid-term Report of Joint Research Project on “Anti-racism Movements in Contemp. Japan”*] (2015), http://researchmap.jp/?action=common_download_main&upload_id=93169 [perma.cc/LZY4-GXVP]; Daiki Shibuichi, *The Struggle Against Hate Groups in Japan: The Invisible Civil Society, Leftist Elites and Anti-Racism Groups*, 19(1) SOC. SCI. JAPAN J., 71, 71–83 (2016).

²⁴ There are more than 20 interviews were conducted in formal and informal ways but this paper mainly refers to the information obtained from following interviews: Interview with a program coordinator of the International Movement Against All Forms of Discrimination and Racism (IMADR), an international human rights NGO, on July 27, 2016; Interview with a government official at Human Rights Protection Bureau, Ministry of Justice on July 29, 2016; Interview with Shiki Tomimasu, a lead counsel of the group of lawyers for the Kyoto Korean School, on November 13, 2016; Interview with Suzuki (name changed) and Tanaka (name changed), project members of Anti-Racism Project (ARP), a counter-

The information obtained in the interviews is analyzed in the context of social mobilization or social research as this study seeks to contribute to the burgeoning field of strategic litigation.

Following this Introduction as Part I, Part II outlines the definition and debate over strategic human rights litigation as well as honing the research questions of this paper in light of the framework of strategic litigation. Part III overviews the Kyoto Korean School cases and analyzes its influence as well as the reasons for its “success” in the context of the strategic litigation debate. Part IV concludes that the strategic litigation can be a strong driver for a change in law, policy and social awareness when litigation is not solely a conservative strategy dominated by elites but is rather a cooperative process comprising of lawyers, plaintiffs, civil society, local communities, and even international human rights bodies.

II. DEBATE OVER STRATEGIC HUMAN RIGHTS LITIGATION

A. *Kyoto Korean School Cases as Unintended Strategic Human Rights Litigation*

What is strategic human rights litigation? The legal community actually lacks an agreed-upon definition of strategic litigation.²⁵ For the purpose of this study, strategic human rights litigation is defined as the use of litigation to seek significant changes in legislation, policies, practices, or influencing public opinion and awareness to promote and protect human rights.²⁶

racism civic group, on November 24, 2016; Kang-ija Choi, a *Zainichi* Korean living in Kawasaki and a staff member at Kawasaki Fureaikan, a community center of Kawasaki City, on August 21, 2017; Takao Yamada, a member of the secretariat of “Kawasaki Citizen’s Network against Hate Speech,” on August 21, 2017; Interview with Sangyun Kim, a criminal law scholar and a parent of Kyoto Korean School students, on September 28, 2017.

²⁵ Catherine Corey Barber, *Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organizations*, 16(3) THE INT’L J. OF HUM. RTS. 411 (2012). However, this paper does not aim to further explore the definition or concept of strategic litigation.

²⁶ Those litigations for policy formulation in Japan may include the women’s rights movement and litigations in the 1950s-1980s; the eruption of anti-pollution protest and four big pollution diseases cases since the 1960s and other environmental litigations; and the anti-discrimination movement by *Buraku* people (a historically discriminated outcast group in Japan). See FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (2009). Recent example may include a variety of criminal and civil lawsuits which have been brought to justice following the earthquake, Tsunami and the nuclear disaster in Fukushima in 2011.

This article deals with the Kyoto Korean School cases as strategic litigation which has contributed to a change in law, policy and social sentiment on racial discrimination in Japan. However, within this definition, a caveat should be raised in calling the litigation for the Kyoto Korean School “strategic.” The initial intention of the lawyers for the Kyoto Korean school and their clients was rather to protect the children of the school, and they did not aim to combat hate speech and racial discrimination in general or further make anti-hate speech legislation via taking carefully selected cases to court. It is however also true, as described later in this paper, that the lawyers and plaintiffs acted not only to defend their safety and seek sanctions or remedies for their individual case but also to embrace their “dignity” as *Zainichi* Koreans and the value of “ethnic education”,²⁷ which shows they also fought for social values in addition to individual punishment or compensation. Furthermore, it is also true that the lawyers in this litigation used methods characteristic to strategic litigation by choosing to have a direct impact on society with media communication, which in turn led to the expansion of the anti-hate speech movement and maybe further the desired impact of the litigation as well. Also, some lawyers in the litigation joined advocacy movements against hate-speech, even after the case closed. In the end, the Kyoto Korean School litigation worked as a *de facto* strategic litigation which led to changes in law and policy practice advancing human rights, through raising public awareness. In this sense, the Kyoto Korean School case may be categorized as “unintended strategic human rights litigation”, with interesting characteristics of modern strategic litigation as the process and the result of the case spreading throughout and beyond the country through the Internet and the impact wider than the lawyers predicted.

B. Pros and Cons over Strategic Human Rights Litigation

Though litigation is generally seen as a powerful means of advocacy, whether going to the courts helps or harms social movement and change is a burning question for scholars and

²⁷ See NAKAMURA, *supra* note 1, at 103–107.

practitioners siding with them.²⁸ Among law and society scholars, there has been a contentious debate about the promise and limits of litigation as a strategy for social change.

Proponents of litigation for social change contend that strategic litigation can have a big impact on driving social movement for change since a court decision normally has more strength to change legal policies. Standing up for litigation in efforts to bring about social change also provides individuals with symbolic recognition and personal dignity.²⁹ Moreover, if they win, strategic litigation provides legitimacy to the movement's claims while embarrassing the movement's opponents, as well as most often with financial remedies.³⁰ Also, litigation can attract public attention, creating issues around which to organize the movement in addition to networking with allies.³¹

On the other hand, opponents raise negative aspects of strategic litigation, claiming that litigation may not always be the best or most appropriate option. A traditional critique is that strategic litigation is an elitist movement, motivated by lawyers as part of privileged groups in society.³² In other words, litigation is a movement of the "haves" who come out ahead in court, which shore up the existing legal system.³³ That often leads to a critique that litigation strategy de-radicalizes the message of the movement as the court-centered activism will legitimize the system and prevent radical challenges to the status quo by asking for a legally viable remedy rather than what movement participants want.³⁴ In the end, pessimists argue that even when social movement litigation succeeds, litigation fails to produce meaningful change on the ground, resulting in legal victories which bring about only incremental change and are

²⁸ See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011).

²⁹ See *id.*; DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 4 (2003).

³⁰ MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10, 139 (1994).

³¹ *Id.*

³² JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 23–24 (1978). STUART A SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5–6 (2nd ed. 2004).

³³ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 137–38 (1974).

³⁴ Albiston, *supra* note 28; SCHEINGOLD, *supra* note 32.

easily dismantled.³⁵ The cost of litigation is another concern. Legal rights impose material and psychological costs on those who claim them. Some argue litigation drains resources and diverts energy from more effective and productive strategies.³⁶ Moreover, if lost, it results in an enormous loss of resources with no formal legal remedy. In addition to its ineffectiveness and high cost, strategic litigation is criticized for its risk of being counterproductive. Individual litigation can narrow issues and atomize collective grievances, undermining broader collective action.³⁷ Litigation may also mobilize opponents, counter-movements, and produce a backlash.³⁸ In the case of a loss, the strategy de-legitimizes the movement or its objective and potentially denigrates the movement's collective identity.

Previous scholars provide some frameworks to organize this contentious debate about the promise and limits of litigation as a strategy for social change. Based on NaJaime's framework of internal and external effect of strategic litigation, Albiston organizes the effects of the litigation into the typology shown in the table in the annex.³⁹ According to NeJaime, internal effects have to do with the movement itself and external effects relate to the broader public as a target or observer of the movement's strategy.⁴⁰ This typology offers a checklist to look for the effects of litigation in a systematic way. This paper, based on this analytical framework, will examine the internal and external effects of the Kyoto Korean School cases on the social movement against hate speech, as well as the reasons behind it.⁴¹

³⁵ CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 11–17 (2010); see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 10–12, 420–29 (2nd ed. 2008).

³⁶ MICHAEL W. McCANN & HELENA SILVERSTEIN, RETHINKING LAW'S ALLUREMENTS: A RELATIONAL ANALYSIS OF SOCIAL MOVEMENT LAWYERS IN THE UNITED STATES 261–92 (1998); SCHEINGOLD, *supra* note 32; ROSENBERG, *supra* note 35.

³⁷ MICHAEL W. McCANN, TAKING REFORM SERIOUSLY: ON PUBLIC INTEREST LIBERALISM 200 (1986); SCHEINGOLD, *supra* note 32, at 6.

³⁸ ROSENBERG, *supra* note 35, at 155–56. See also Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 477 (2000).

³⁹ See Table 1; Albiston, *supra* note 28, at 5.

⁴⁰ See NeJaime, *supra* note 28, at 988–94. As external actors, this paper mainly examines the general public, civil society organizations, counter-movements, and the government.

⁴¹ The evaluation of the value and impact of strategic litigation is another important issue. See OPEN SOCIETY JUSTICE INITIATIVE, STRATEGIC LITIGATION IMPACTS: ROMA SCHOOL DESEGREGATION (2016); JESSICA MONTELL, LEARNING FROM WHAT WORKS:

Table 1. Effects of Litigation Strategies on Social Movements

	Internal Effects	External Effects
Positive Effects on the Movement	<p>Raise consciousness and develop oppositional consciousness (positive constitutive or meaning-based change as well as instrumental change)</p> <p>Form a collective identity</p> <p>Attract financial resources and participants to the movement</p>	<p>Increase bargaining power</p> <p>Attract publicity and public attention</p> <p>Provide legitimacy to the movement's claims</p> <p>Provide a legal remedy</p> <p>Provide recognition and dignity to individuals</p> <p>Make allies</p>
Negative Effects on the Movement	<p>Drain resources and divert energy from more effective strategies</p> <p>Potentially demobilize participants if the litigation is unsuccessful</p> <p>(negative constitutive or meaning-based change as well as instrumental change)</p>	<p>Mobilize opponents, counter-movements, and backlash</p> <p>Shore up the legal system; reinforce unjust system</p> <p>Fail to produce meaningful change on the ground, resulting in symbolic victory only</p>

Source: Albiston, *supra* note 28 at 5; modified by the author.

III. THE KYOTO KOREAN SCHOOL CASES

A. Case Brief

After the first attack on December 21, 2009, the Kyoto Korean School filed criminal charges against *Zaitokukai* and other demonstrators to the Kyoto District Public Prosecutors Office for

STRATEGIC ANALYSIS OF THE ISRAEL-PALESTINE HUMAN RIGHTS COMMUNITY (2015); SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA, PUBLIC INTEREST LEGAL SERVICES IN SOUTH AFRICA: PROJECT REPORT (2015).

defamation⁴², forcible obstruction of business⁴³ and damage to property.⁴⁴ However, it failed in stopping the second demonstration on January 14, 2010.⁴⁵ The Kyoto Korean School sought the court to issue a restraining order, which was granted on March 24, 2010.⁴⁶ However, that provisional court order to ban *Zaitokukai* from demonstrating within 200 meters of the School did not stop the third hate demonstration on March 28, 2010.⁴⁷ All the demonstrations were filmed and immediately uploaded online by *Zaitokukai* for dissemination.⁴⁸ On June 28, 2010, the Kyoto Korean School filed a civil lawsuit at the Kyoto District Court against the participants of these demonstrations, demanding the ban of hateful demonstrations around the School and damages for the past three demonstrations. On October 7, 2013, the court approved the plaintiffs' claims for compensation of a weighted amount of damages and ordered *Zaitokukai* to pay around 12.26 million yen (approximately US\$110,000).⁴⁹ The Kyoto District Court also ruled that the hateful rallies are not protected free speech and the group was no longer allowed to stage protests near the school.⁵⁰ The court held that the actions of *Zaitokukai* members and other activists who shouted hate

⁴² KEIHŌ [PEN. C.] art. 230(1) (Japan), translated by Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/> [<https://perma.cc/C7C5-C8N4>]: 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. This complaint was changed to “insult (KEIHŌ [PEN. C.] art. 231(Japan))” later.

⁴³ KEIHŌ [PEN. C.] art. 234 (Japan), translated by Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/> [<https://perma.cc/4CED-88MW>]: A person who obstructs the business of another by force shall be dealt with in the same manner as prescribed under the preceding Article.

⁴⁴ KEIHŌ [PEN. C.] art. 261 (Japan), translated by Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/> [<https://perma.cc/QE5R-KEVH>]: A person who damages or injures property not prescribed under the preceding three Articles shall be punished by imprisonment with work for not more than 3 years, a fine of not more than 300,000 yen or a petty fine. The criminal proceeding ended up at the Supreme Court, in which Kyoto Korean School prevailed in 2012.

⁴⁵ NAKAMURA, *supra* note 1, at 111–125. Around 40 demonstrators and more than 100 police officers surrounded the school. The police did not stop the demonstrations, ditto in the third demonstration.

⁴⁶ NAKAMURA, *supra* note 1, at 125–127.

⁴⁷ NAKAMURA, *supra* note 1, at 127–131.

⁴⁸ Yamaguchi, *supra* note 11, at 109.

⁴⁹ Kyōto Chihō Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan).

⁵⁰ An injunction was issued against the defendants' street propaganda activities within 200 meters of the school.

speech slogans near the school and posted video footage of the demonstrations online were “illegal” as they constitute a tort under Article 709 of the Civil Code and “racial discrimination” as defined by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The court also emphasized it should be considered to weigh the compensation that those actions were conducted with “an objective of excluding the Korean residents based on their ethnic backgrounds and hindering them from the enjoyment of human rights and basic freedom through inciting discrimination against Korean residents”.⁵¹ The court also referred to the obligation specifically addressed to national courts to ensure effective protection and remedies against racial discrimination under Article 6 of the ICERD as well as Article 2 (1) to seek for the authorities to prohibit racial discrimination by all appropriate means, including legislation. On July 8, 2014, the Osaka High Court affirmed the decision of the Kyoto District Court, stating that the principle of the ICERD should be realized even among private persons through interpreting the law in light of the purpose of the ICERD.⁵² The Court rejected the argument of *Zaitokukai* which asserted that their remarks were commentaries on facts in the public interest, and therefore were not illegal, racial discrimination nor defamation, and held that *Zaitokukai* intended to stir a discriminative consciousness with the public which was not for the public benefit. On December 9, 2014, the Japanese Supreme Court rejected the appeal of *Zaitokukai* and upheld the groundbreaking ruling of the Osaka High Court with the unanimous agreement of a panel of five Supreme Court judges, forcing *Zaitokukai* to pay the school an extraordinary amount of 12.26

⁵¹ Kyōto Chihō Saibansho [Kyoto District Ct.] Oct. 7, 2013, Heisei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan); MINPŌ [CIV. C.] art. 709 (Japan), translated by Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/law/detail/?id=2057&vm=&re=> [https://perma.cc/5XHE-MGFK]: 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; Article 1(1) of the ICERD. Japan ratified the ICERD in 1995.

⁵² Ōsaka Kōtō Saibansho [Osaka High Ct.] Jul. 8, 2014, Heisei 25 (ne) no. 3235, 2232 HANREI JIHŌ [HANJI] 34 (Japan). It denied the direct application of the ICERD to private entities. See Ayako Hatano, *The Internalization of International Human Rights Law: The Case of Hate Speech in Japan*, 50 N.Y. U. J. OF INT’L L. & POL. 637 (2018).

million yen in compensation for protests that took place in 2009 and 2010.⁵³

In a separate criminal case, some of the acts of the demonstrators were charged on August 31, 2010, for crimes of insult for their derogatory speech, damage to property as they broke the school properties in the park and forcible business obstruction on the grounds that group members had disrupted school lessons.⁵⁴ In 2011, Kyoto District Court sentenced the imprisonment of members for one to two years with a four years' stay of execution.⁵⁵ This was confirmed in the Osaka High Court in 2011.⁵⁶

B. The Impact of Strategic Litigation

What are the effects of the Kyoto Korean School cases on the anti-hate speech movement, as well as policy, law, practice, jurisprudence and public sentiment? The lawsuits, particularly the first Kyoto District Court ruling in October 2013, seem to have had a huge impact, not only on the parties involved but also on media and society in general. This section analyzes the impacts of the Kyoto Korean School litigation in light of the framework of strategic litigation.

⁵³ 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.

⁵⁴ These criminal charges were examined jointly with the similar case of the same people in Tokushima prefecture in which *Zaitokukai* targeted the teacher's union providing financial aid to Korean Schools in Shikoku. For this case, they were also charged and convicted for breaking into a building. *See* KEIHŌ [PEN. C.] art. 130, translated by Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/> [<https://perma.cc/3ZQD-N4UN>]: A person who, without justifiable grounds, breaks into a residence of another person or into the premises, building or vessel guarded by another person, or who refuses to leave such a place upon demand shall be punished by imprisonment with work for not more than 3 years or a fine of not more than 100,000 yen.

⁵⁵ Kyōto Chihō Saibansho [Kyoto Dist. Ct.], Apr. 21, 2011, Hei 22 (wa) no. 1257 and Hei 22 (wa) no. 1641.

⁵⁶ Ōsaka Kōtō Saibansho [Osaka High Ct.], Oct. 28, 2011, Hei 23 (u) no. 788. One of the suspects appealed to the Supreme Court but the appeal was rejected. The probations of some demonstrators were revoked when they were convicted in another hate demonstration case against Rohto Pharmaceutical Co. in 2012.

1. Raised Consciousness in the *Zainichi* Korean Community

The process of the legal actions itself has changed the consciousness of the people associated with the Kyoto Korean School, which can fall in the “positive” and “internal” effect of strategic litigation.⁵⁷ After the first attack by *Zaitokukai*, teachers and people related to the Kyoto Korean School were initially unwilling to bring the case to court.⁵⁸ They expressed their distrust towards Japanese society and authorities who have discriminated against *Zainichi* Koreans for a long time⁵⁹, and towards the police who appeared at the school gate in all three demonstrations but did not stop them. The attitude of the police recalled their ethnic trauma in which the Japanese government and police were always confronting them, strengthening their negative attitude to the Japanese justice system.

In the Kyoto Korean School cases, cause lawyers played a key role in changing the consciousness of the *Zainichi* Korean plaintiffs.⁶⁰ Sangyun Kim, a criminal law professor in Kyoto, is a *Zainichi* Korean whose three sons attended the Kyoto Korean School under *Zaitokukai* attacks. He was consulted by the teachers and parents of the school on how to respond to the incident at a parent-teacher association

⁵⁷ See Table 1.

⁵⁸ NAKAMURA, *supra* note 1, at 81–110.

⁵⁹ Among *Zainichi* Korean people, there has been a widespread distrust of the Japanese justice system, nurtured and strengthened by long-standing discrimination, a series of unfavorable rulings against the rights of *Zainichi* Koreans. For example, in the 1980s, a Korean man sued the Japanese government, alleging the law to force *Zainichi* Koreans to be fingerprinted to prove their identity violated his Constitutional rights but the Supreme Court of Japan held that the law did not violate the Constitution. Saikō Saibansho [Sup. Ct] Dec. 15, 1995, Heisei 2 (a) no. 848, 49(10) SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 842 (Japan). It was also hard for *Zainichi* Koreans to gain employment, especially as public employees, since Japan sets some limit for public employment of non-Japanese nationals. In 2005, in a case in which a *Zainichi* Korean woman was rejected for a managerial position exam at a public health center, even though she was born and had lived all her life in Japan, the Supreme Court held that it was constitutional for local governments to make managerial positions only available to Japanese nationals. Saikō Saibansho [Sup. Ct.] Jan. 26, 1998, Heisei 10 (gyo tsu) no. 93, 59(1) SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 128 (Japan). Moreover, since the 1980s, every time Japan’s relations with North Korea grew tense, there have been many incidents of verbal abuse, harassment, and violence against Korean schools. An example from the mid-1990s is an incident where female students in Korean schools across Japan were attacked and had their ethnic school uniforms cut with box-cutters (a suspects has not been found nor arrested). Most recently, the withdrawal of the governmental subsidies and exclusion of the Korean Schools from the tuition waiver program became an issue, as well as the exclusion of *Zainichi* Koreans from the pension scheme.

⁶⁰ NAKAMURA, *supra* note 1, at 81–110.

meeting at the school. However, even Kim himself did not believe a lawsuit to be the best measure.⁶¹ As doubters of strategic litigation point out, a legal battle might further endanger the victims and drag them into the long and exhausting legal process which might worsen their suffering in a traumatic experience. If the plaintiff lost or the accused were deemed innocent, that could provide legitimacy or recognition to the hate demonstrators as well as drain energy and financial resources from the *Zainichi* Korean plaintiffs. It was his friend, public cause lawyer Hiroto Endo, who pushed him forward. Endo, shocked after watching the video of the demonstrations that *Zaitokukai* uploaded online, insisted on the need for legal action—“We should not be silent without taking legal action. It is, of course, important to protect the Korean School and children there, but burying this incident underground is definitely not for the Japanese society as well. I terribly feel sorry as a Japanese. Let’s work on it together!”⁶² His cooperation and strong motivation with a sense of mission led the Kyoto Korean School litigation to a strategic human rights lawsuit with significance not only for the victims but for the society as a whole. The cause lawyers who gathered from across the country, hearing about the incidents through a lawyers’ mailing list, also encouraged the Kyoto Korean School to take legal measures. Almost 100 lawyers passionate about the rights of minorities, immigrants and foreigners joined the group of counsels for the Kyoto Korean School on the almost pro bono basis. Shiki Tomimasu was one of them and later went on to become the lead counsel of the group.⁶³

Most of the parents of the children in the Kyoto Korean School showed a negative response when Kim, Endo and other lawyers suggested legal measures.⁶⁴ Tomimasu mentions, “Initially, the parents and teachers at the Kyoto Korean School did not even want to listen to the lawyers, saying that ‘discrimination is always there and we cannot change it. We should endure it, keeping quiet without rocking the boat.’”⁶⁵ However, Kim and other lawyers

⁶¹ Interview with Sangyun Kim, *supra* note 24. NAKAMURA, *supra* note 1, at 84–86.

⁶² NAKAMURA, *supra* note 1, at 86–90.

⁶³ NAKAMURA, *supra* note 1, at 91–93.

⁶⁴ Parents of the children in the Kyoto Korean School were conscious of protecting their children and started a mailing list for information sharing and conducted vigilance patrols, but they still hesitated to take a legal action. NAKAMURA, *supra* note 1, at 104.

⁶⁵ Interview with Shiki Tomimasu, *supra* note 24.

gradually reminded the Korean School teachers and parents that *Zainichi* Koreans also had “the right to learn, the right to life, and the right to live here” and persuaded them to take legal measures to protect those inherent rights.⁶⁶ One of the plaintiffs said, “We have become used to being harassed and enduring it. But it is not how things should be. Otherwise, we will not leave a good future for our kids. This is what they taught us.”⁶⁷ The long process towards legal action with cause lawyers, though it was challenging, began to change the consciousness of those *Zainichi* Korean people, who had been accustomed to being silenced in the face of continuous discrimination and suppression.

The cause lawyers’ efforts convinced the Kyoto Korean School to file a criminal complaint against the demonstrators on December 21, 2009, for forcible obstruction of business, damage to property and defamation. However, despite the filing, *Zaitokukai* conducted the second demonstration, with more participants than in the first. Even though the court issued a provisional injunction—a restraining order prohibiting *Zaitokukai* from conducting demonstrations around the Korean School, the *Zaitokukai* group ignored the disposition and conducted the third demonstration.⁶⁸ The fact that those legal actions were not effective in stopping the hateful rallies brought the Korean teachers and parents to despair and deepened their distrust of the Japanese legal system again.

However, there were two turning points in changing the mindset of the *Zainichi* Koreans from the Kyoto Korean School. The first point came when the police asked them if they would like to remove “defamation” from their criminal complaint in order to speed up the investigation. The counsel group explained that if they removed the complaint of defamation, the police would be able to arrest members of *Zaitokukai* who were obviously committing forcible obstruction of business and damage to property. However, the Korean School chose to retain defamation, considering it was important to assert and protect the “dignity” of the school children rather than claiming mere material damage.⁶⁹

⁶⁶ NAKAMURA, *supra* note 1, at 104.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 157–159, 161–163. It was, however, “downgraded” by the prosecutor a charge of “insult” (lesser crime than defamation. KEIHŌ [PENAL CODE] art. 231 (Japan), translated in Japanese Law Translation, <http://www.japaneselawtranslation.go.jp/>

The second turning point was when the lawyers and the Kyoto Korean School discussed whether to file a civil suit in response to the order from the court.⁷⁰ The group of lawyers for the Korean School proposed to emphasize the importance of “ethnic education” in their argument as the basis for claiming a large compensation for damages. The discussion made the teachers at the Korean School and parents of the school children aware of the importance of protecting their ethnic identity including their language, culture, and dignity under attack. “Their attitudes have gradually changed so that they advocate the importance of ethnic education by themselves and move to protect their dignity through the litigation,” mentioned Tomimasu.⁷¹

The process of the lawsuit also seemed a mutual understanding process between lawyers and plaintiffs.⁷² Tomimasu says, “through the process of legal actions, the lawyers themselves could deepen their understanding of *Zainichi* Korean culture, identity, and their situation. Thus, although it was a lawsuit initiated by the team of lawyers, in the process, we could see the lawyers and plaintiffs, *Zainichi* Korean and Japanese exchanging ideas and expressing their feelings, which created a relationship based on trust, and brought about a change in consciousness in both parties.”⁷³

Zainichi Korean plaintiffs also felt they were accepted as members of Japanese society, with a new trust in justice as a result of the successful trial with the judgment clearly showing that *Zainichi* Koreans are also under the same rules and have the same human rights as other Japanese.⁷⁴ In light of the framework of strategic litigation, this case had a significant influence in raising awareness and consciousness of their rights, as an internal effect of strategic litigation, among plaintiff, *Zainichi* Korean communities, and perhaps also among the lawyers involved. The victory in the trial, of course, was important in giving legitimacy to the plaintiff’s argument with remedies as an external effect of the litigation, but the discussion and process before filing the lawsuits was also essential for the people

[<https://perma.cc/4CED-88MW>]: 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.

⁷⁰ The Korean School received a prosecution order from the court then. If one who asked temporary proposition to the court gets a prosecution order, one should decide whether to file a lawsuit within a certain period (usually within about a month).

⁷¹ Interview with Shiki Tomimasu, *supra* note 24.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

involved, in which they became deeply aware of their rights and developed a new trust in the Japanese judiciary and society.

2. Increased Media and Public Attention

“At the start of the proceedings, the media paid almost no attention to the Kyoto Korean School cases,” said Tomimasu.⁷⁵ However, the counsels for the Korean school had a clear intention to use the media strategically and bring public attention to the problem: “We held press conferences at every milestone of the proceedings to share the information with the press. We thought that the power of the media was necessary to alert the general public to that hate speech could be a criminal case to mobilize the police action. We wanted to change the trend or social atmosphere from one which generally permitted or tolerated such hateful street demonstrations.”⁷⁶

The case started to get more attention from the media around August 2010 when the demonstrators were finally arrested in 8 months after the criminal complaint of the Kyoto Korean School.⁷⁷ Higuchi also shows with data the arrest of *Zaitokukai* and other nationalist group members attracted media attention and helped spread the name of *Zaitokukai* in public in 2010 and media initiated to start using the word “hate speech” associated with *Zaitokukai* after the big xenophobic demonstration of *Zaitokukai* in Tokyo in February 2013.⁷⁸ The Kyoto Korean School cases were covered in the national newspapers and broadcast on television nationwide, including the most major and impactful news media, drawing public attention to the problem of hate speech.⁷⁹ The data from the Ministry of Justice’s survey also shows the rulings of Kyoto Korean School case in October 2013 at the Kyoto District Court and in July 2014 at the Osaka High Court clearly attracted huge media and public attention (Chart 1).⁸⁰ The data also revealed the number of news articles on

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* They were also indicted for their acts against Tokushima Prefectural Teachers Union, as stated in the following sections of this article.

⁷⁸ Naoto Higuchi (樋口直人), *Heito ga Ihō ni Narutoki: Heito Supīchi Kaishōhō Seitei wo Meguru Seiji Katei* (ヘイトが違法になるとき ヘイトスピーチ解消法制定をめぐる政治過程) [*When Hate Becomes Illegal: Analyzing Policy Processes to Enact the Anti-Hate Speech Law in Japan*] 62 LEVIATHAN 96, 102–104 (2018).

⁷⁹ Ctr. for Human Rights Report, *supra* note 17, at 61–125.

⁸⁰ *Id.* at 125.

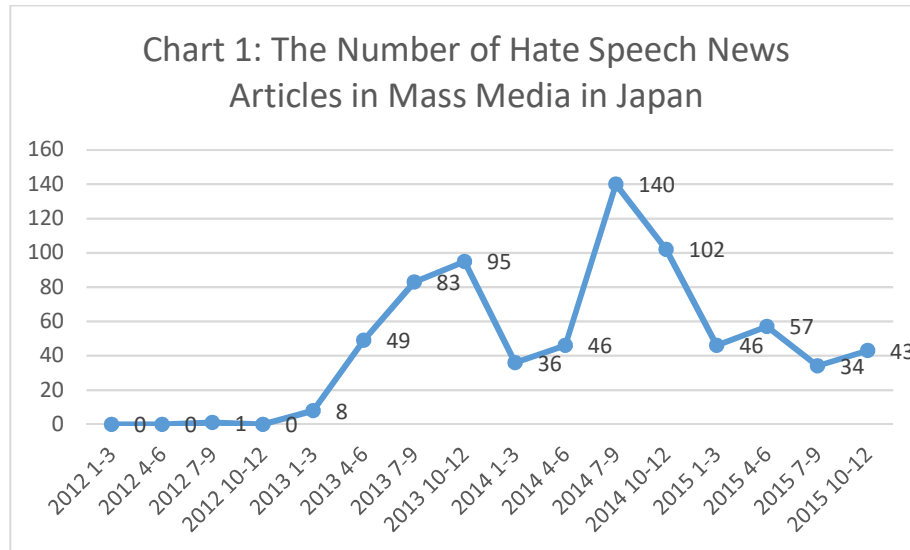
hate speech rose up to 235 in 2013 and 324 in 2014.⁸¹ The word “hate speech” was also placed as one of the top Japanese buzzwords of 2013.⁸² This is precisely the positive external effect of strategic litigation which attracts public attention to filings, hearings, and judgments on hate speech and hate crime cases, which has brought the reality of racism to a broader audience. Rulings on the Kyoto Korean School cases also worked to validate those stories and experience of *Zainichi* Korean people, providing a vehicle for further empathy among people for victims of the derogatory and brutal speech, as well as a sense of “shame” and “sorrow” as Japanese citizens even among conservatives.⁸³ It should be noted that the counsels of the Kyoto Korean School cases, as well as anti-hate activists, reported to foreign media, for example, through press releases at the Foreign Correspondents’ Club of Japan, which attracted international attention to this case.⁸⁴

⁸¹ *Id.* at 124.

⁸² See 2013 U-Can Shingo Ryukogo Taisho (2013年ユーキャン新語・流行語大賞) [2013 U-Can New Words and Buzzwords Award], <https://www.jiyu.co.jp/singo/index.php?eid=00030> [https://perma.cc/V5VY-PJQJ] (last visited Mar. 31, 2019). The awards are granted for the terms that provide a unique insight into the nation’s social trends, as well as the political, business and sports news of the year.

⁸³ Julian Ryall, *Japan Conservatives: ‘Hate Speech Goes Too Far’*, DEUTSCHE WELLE (Sept. 7, 2013), <https://p.dw.com/p/194X7> [https://perma.cc/R8U3-MKFB]; see Comments from Kunio Suzuki, a founder of *Issuikai*, a well-known radical right-wing group, in a press conference on July 12, 2013, available at https://www.youtube.com/watch?v=J4KgDlrFc7w&lc=j6OQu90A-wdFOy5BxY_YD4_B_hRxzeTsu3qaLltVPtk [https://perma.cc/4VM8-EWDX] (last visited Mar. 7, 2019).

⁸⁴ See Press Conference: Shiki Tomimasu and Sangyun Kim on Feb. 25, 2015 at the Foreign Correspondents Club of Japan, available at <https://www.youtube.com/watch?v=dG91QF8dkfc> [https://perma.cc/AZW8-V65E] (last visited Mar. 22, 2019).



(Source: *Ctr. for Human Rights Report*, *supra* note 17, at 125, modified by the author.)

3. Influence on Counter-racism Movement

Since the Kyoto Korean School issue became publicly known around mid-2010, *Zaitokukai* has encountered a backlash from the anti-hate speech movement.⁸⁵ Lawyers were among the earliest actors to respond to the hate speech by issuing a statement against hate demonstrations. The Kyoto Bar Association announced the President's Statement on Harassment against Korean schools on January 19, 2010.⁸⁶ It states the demonstrations at the Kyoto Korean School were beyond the scope of that allowed as critical speech, and the promotion or incitement of discrimination based on ethnicity or nationality, therefore, should never be permitted and that the police should take necessary measures because there was a possibility that it might be an illegal act. The Kinki Federation of Bar Associations also adopted a resolution "to criticize discrimination against Korean

⁸⁵ Krieger & Kitano, *supra* note 14.

⁸⁶ *Chōsen Gakko ni Taisuru Iyagarase ni Kansuru Kaichō Seimei* (朝鮮学校に対する嫌がらせに関する会長声明) [*A President Statement on Harassment against Korean School*], KYŌTO BENGOSHIKAI (京都弁護士会) [KYŌTO BAR ASS'N] (Jan. 19, 2010), https://www.kyotoben.or.jp/siritai/menu/pages_kobetu.cfm?id=460 (<https://perma.cc/VRU5-PRFZ>) (last visited Mar. 22, 2019).

children in Japan.⁸⁷ The resolution adopted at the Kanto Federation of Bar Associations followed in September 2011, in which the Kyoto Korean case is mentioned as a recent serious case of discrimination and persecution against foreigners by xenophobic organizations.⁸⁸

Stimulated by the Kyoto Korean School incidents and following xenophobic motions of surging hate groups, not only lawyers but also ordinary citizens began to take action. Anti-racism groups emerged around 2009 in an effort to counter surging hate groups.⁸⁹ Counter groups confronted *Zaitokukai* members at their rallies with larger counter-demonstrations, some of which have often developed into brawls.⁹⁰ In September 2013, more than 2,000 people participated in “the Tokyo Anti-Discrimination March” campaigning against recent hate rallies, which was reported in major newspapers and TV channels.⁹¹ It is noteworthy that the movement engaged more people in the “majority” group, not only *Zainichi* Koreans but also Japanese people expressing anger against hate groups and solidarity

⁸⁷ *Zainichi Korian no Kodomotachi ni Taisuru Sabetsu wo Hinan shi, Sabetsu Bōshi no Tameno Shisaku no Jijitsu wo Motomeru Ketsugi* (在日コリアンの子どもたちに対する差別を非難し、差別防止のための施策の充実を求める決議) [*Resolution on Condemning the Discrimination against Zainichi Korean Children and Seeking for Anti-discrimination measure*], KINKI BENGOSHIKAI RENGOKAI (近畿弁護士会連合会) [KINKI FED’N OF BAR ASSO.] (Mar. 10, 2010), <http://www.kinbenren.jp/declare/2009/20100310b.pdf> [<https://perma.cc/3KQP-4KQ3>].

⁸⁸ *Gaikokujin no Jinken ni Kansuru Ketsugi* (外国人の人権に関する決議) [*The Resolution on Human Rights of Foreigners*], KANTO BENGOSHIKAI RENGOKAI (関東弁護士会連合会) [KANTO FEDERATION OF BAR ASSOCIATIONS] (Sept. 30, 2011), <http://www.kanto-ba.org/declaration/detail/h23k2.html> [<https://perma.cc/Z2GP-Q4K5>].

⁸⁹ Anti-racism groups in this study are different from civil rights groups. Maroney describes anti-racism groups “typically have been organized in direct response to hate crimes against their communities and a perceived systemic bias against victims.” Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73(2) N.Y.U. L. Rev. 564, 571 (1998). Naoto Higuchi (樋口直人), *Zaitokukai no Ronri (1)* (在特会の論理) [*The Logic of Zaitokukai Activists (1)*], TOKUSHIMA DAIGAKU SHAKAI KAGAKU KENKYŪ (徳島大学社会科学 研究) [TOKUSHIMA U. SOC. SCI. RES.] 53 (2012), <http://web.ias.tokushima-u.ac.jp/bulletin/soc/soc25-4.pdf> [<https://perma.cc/89R2-Y2U5>] (last visited June 3, 2017).

⁹⁰ For example, “Racist Shibaki-tai (レイシストしばき隊) (The Corps to Bash Racists, which changed the name later to ‘C.R.A.C’, after the acronym for Counter-Racist Action Collective)” is one of the biggest counter hate groups which often takes aggressive measures to counter hate speech demonstrations. Shibuichi, *supra* note 23, at 76–77.

⁹¹ *2,000 Rally Against Hate Speech in Tokyo’s Shinjuku*, THE JAPAN TODAY (Sept. 23, 2016, 4:30 PM), <https://japantoday.com/category/national/2000-rally-against-hate-speech-in-tokyo-shinjuku> [<https://perma.cc/56S2-XJ6S>]; *Sabetsu Teppai Tōkyō Daikōshin no Daiippō Repōto* (差別撤廃東京大行進の第一報レポート) [*First Report of March on Freedom in Tokyo*], INDEP. WEB J. (Sept. 22, 2013), <http://iwj.co.jp/wj/open/archives/102809> [<https://perma.cc/VB2L-TD6R>].

with the minorities targeted by haters. Also, many of them were not even members of civil society groups, namely “ordinary people” who had not been engaged in the human rights movement before.

4. Influence on Following Judicial Rulings and Orders

The rulings of the Kyoto Korean School case influenced the similar cases such as the Tokushima Prefectural Teachers Union case in which members of ultra-nationalist groups including *Zaitokukai* stormed a local branch of the Japan Teachers’ Union in Tokushima Prefecture and threatened the union’s officers in April 2010, alleging the union financially supported a Korean school.⁹² *Zaitokukai* and other intruders were sued over forcible obstruction of business, unlawful entry and threatening the union members.⁹³ In April 2016, the Takamatsu High Court ordered *Zaitokukai* to pay more than 4 million yen (approximately 36,000 dollars) in compensation for mental suffering of teachers and union members, which nearly doubled the amount of the compensation the primary court ruled.⁹⁴ This ruling, referring to the act of the group as “racial discrimination” under ICERD which leads to strong condemnation and illegality, clearly succeeds the rulings on the Kyoto Korean School case.⁹⁵

⁹² They insulted the officials over a loudspeaker and physically harassed one of them, with video of the incident being posted on the Internet. Both criminal and civil suits have been raised by Tokushima Prefectural Teachers Union against the intruders.

⁹³ *Zaitokukai* and other members were sued in both civil and criminal cases in regard to this incident at Tokushima Prefectural Teachers Union. In criminal case, they were convicted in Tokushima Chihō Saibansho [Tokushima Dist. Ct.] Dec. 1, 2010, Hei 22(wa) no. 299 and Hei 22 (wa) no. 344; Kyōto Chihō Saibansho [Kyoto Dist. Ct.], Apr. 21, 2011, Hei 22(wa) no. 1257 and Hei 22 (wa) no. 1641. However, Tomimasu, also joined the group of counsels for Tokushima Teachers Union, criticizes those judgements, as well as the primary decision of the civil case did not weigh the grave importance of racial discrimination in this case (Tokushima Chihō Saibansho [Tokushima Dist. Ct.] Mar. 27, 2013, Hei 25 (wa) no. 282) issued before the Kyoto Korean school case was confirmed at the Supreme Court. Shiki Tomimasu (富増四季), *Zaitokukai, Tokushimaken Kyōso Gyōmu Bōgai Jiken* (在特会、徳島県教組業務妨害事件), SEINEN HÖRITSUKA (青年法律家), 9–11 (July 2015).

⁹⁴ *High Court Doubles Damages Owed by Anti-Korean Group, Labels Attack Against Japanese as Racist*, THE JAPAN TIMES (Apr. 25, 2016), <https://www.japantimes.co.jp/news/2016/04/25/national/high-court-doubles-damages-owed-anti-korean-group-labels-attack-japanese-racist/#.XIdah4j0IPY> [<https://perma.cc/Q6YB-RFAS>]. See Takamatsu Kōtō Saibansho [Takamatsu High Ct.], Apr. 25, 2016, Hei 27(ne) no.144, no.254, which was confirmed at the decision of Supreme Court on November 1, 2016. Interview with Shiki Tomimasu, *supra* note 24.

⁹⁵ *Id.*

The victory of the Kyoto Korean School in the legal battle induced a cascade of other racial discrimination lawsuits as it encouraged other victims and gave them hope in seeking justice in the legal system. For example, in August 2014, a *Zainichi* Korean woman filed two lawsuits against *Zaitokukai*, its former chairman and a conservative website, demanding compensation for her mental suffering from their defaming words and ethnic discrimination remarks on the Internet. She won favorable rulings in both lawsuits in 2018, on the ground of similar principles to the Kyoto Korean School case and Tokushima Prefectural Teachers Union case.⁹⁶ Another *Zainichi* Korean woman sued the company she worked for on the ground of hate harassment in the workplace in 2015.⁹⁷ On March 16, 2016, in Kawasaki, a city with a large ethnic Korean population, three residents filed an application for human rights relief to the Ministry of Justice, and the Ministry in August urged the hate rally organizer not to repeat similar acts.⁹⁸ This was the first nationwide case of local residents seeking assistance from the government after being targeted by hate speech in a specific area. Furthermore, the Yokohama District Court's Kawasaki branch in June 2016 handed down a provisional injunction banning an anti-Korean group from holding demonstrations within 500 meters of the

⁹⁶ *Court Orders Anti-Korean Group to Compensate Woman over Hate Speech*, MAINICHI (Sept. 28, 2016), <http://mainichi.jp/english/articles/20160928/p2a/00m/0na/003000c#csidx69617aa1ac377d89b57d93b680900da> [<https://perma.cc/WHE5-W7ES>]; *Zaitokukai Heito Saiban Ri Shine San Songen Kaifuku no Tatakai* [*Lee Shinhae, Legal Battle against Zaitokukai's Hate Speech for Restoring the Dignity*], MAINICHI (Mar. 9, 2018, 8:04 PM), <https://mainichi.jp/articles/20180310/k00/00m/040/095000c> [<https://perma.cc/M494-XNMS>]; Krieger & Kitano, *supra* note 14. See Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2016 (Japan), Ōsaka Kōtō Saibansho [Osaka High Ct.] June 19, 2017 (Japan) and Saikō Saibansho [Sup. Court] Nov. 29, 2017 (Japan) for a case against *Zaitokukai* and its former chairman; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Nov. 16, 2017 (Japan), Ōsaka Kōtō Saibansho [Osaka High Ct.] June 28, 2018 (Japan) and Saikō Saibansho [Sup. Court] Dec. 11, 2018 (Japan) for a lawsuit against a conservative website.

⁹⁷ Mieko Takenobu (竹信三恵子), *Shokuba no Heito to Nihongata Rōmu Kanri no Ayauya* (職場のヘイトと日本型労務管理の危うさ) [*Hate Speech in Workplaces and the Danger of Japanese Labor Management*], WEBRONZA (Aug. 2, 2016), <http://webronza.asahi.com/business/articles/2016072800005.html> [<https://perma.cc/6HWN-CJX4>]. The case is still ongoing as of March 2019.

⁹⁸ KANAGAWA-SHIMBUN, "JIDAI NO SHŌTAI" SHUZAIHAN, HEITO DEMO WO TOMETA MACHI—KAWASAKI SAKURAMOTO NO HITOBITO [A TOWN WHERE HATE DEMONSTRATIONS ARE CEASED—PEOPLE IN SAKURAMOTO, KAWASAKI] 88 (2016).

office of a citizens' group to support *Zainichi* Koreans.⁹⁹ The judge's strong words to determine the hate demonstrations as unconstitutional beyond freedom of speech and infringing on the right to live peacefully are reminiscent of the rulings of the Kyoto Korean School case.¹⁰⁰

5. Change in Law and Policies

According to many of the anti-hate activists interviewed, the Kyoto Korean School case and subsequent lawsuits also helped develop anti-hate speech legislation.¹⁰¹ The Japanese government had long been reluctant to regulate hate speech, even to acknowledge the existence of racial discrimination in Japan.¹⁰² However, the Kyoto District Court ruling visualized the issue of the hate speech through the judgment itself and its influence on the media and citizen movement. It became difficult for the government to deny that discriminative hate speech was rampant in 2013 when the judiciary recognized "racial discrimination" in Japan by quoting the Convention on the Elimination of Racial Discrimination in its judgment. Since 2013, Prime Minister Shinzo Abe, Chief Cabinet Secretary Yoshihide Suga, and Justice Minister Sadakazu Tanigaki have expressed concerns about the increase in hate speech.¹⁰³ The Japanese Ministry of Justice posted, in November 2014, a newspaper advertisement with a big eye-catching phrase "HEITO SUPĪCHI YURUSANAI (ヘイトスピーチ許さない) [STOP HATE

⁹⁹ Tomohiro Osaki, *Japanese Court Issues First-ever Injunction against Hate-speech Rally*, THE JAPAN TIMES (June 3, 2016), <http://www.japantimes.co.jp/news/2016/06/03/national/crime-legal/japanese-court-issues-first-ever-injunction-hate-speech-rally/> [https://perma.cc/L8TZ-B98U].

¹⁰⁰ KANAGAWA-SHIMBUN, *supra* note 98, at 168.

¹⁰¹ MOROOKA, *supra* note 1, at 20. Interview with a program coordinator of IMADR and the members of ARP, *supra* note 24.

¹⁰² According to the report by the Japanese government submitted to the CERD in 2013, "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 acts should be considered even at the risk of unduly stifling legitimate speech." The Government 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, at 20, (Jan. 2013), <http://www.mofa.go.jp/mofaj/files/000023045.pdf> [https://perma.cc/9CX3-4UZ5].

¹⁰³ On May 7, 2013, in the Upper House, Prime Minister Abe said these demonstrations were "regrettable." Justice Minister Taniguchi used the same word. Chief Cabinet Secretary Suga also said these were "not good things." Johnston, *supra* note 16.

SPEECH]” followed by a campaign raising awareness against hate using posters and leaflets, which was “a big leap” for the conservative ministry as there was no law or policy guidance with a definition of “hate speech,” when they started the campaign.¹⁰⁴ The Ministry also conducted research in 2015–2016 on the situation of the hate speech in Japan, which revealed the stunning situation of demonstrations, parades, and comments posted on the Internet with derogatory speech threatening violence against foreign residents of Japan, especially *Zainichi* Koreans.¹⁰⁵ Local municipalities also urged the national government to develop the law to curb hate speech. Over 230 municipalities sent comments to the government as of November 2015, seeking for the strengthening of measures against hate speech including legal development, many of which referred to the Kyoto Korean School case and its ruling to demonstrate the seriousness of the issue to justify their allegation.¹⁰⁶ The Kyoto Korean School case was also cited a number of times in the parliamentary discussion over the development of anti-hate speech law. For example, Toshio Ogawa, a former justice minister and a member of the parliament, mentioned in the Committee on Judicial Affairs in the House of Councilors:¹⁰⁷

In the Kyoto Korean School case, the court ruled hate speech illegal in light of the principle of the Japanese Constitution and the International Convention on the Elimination of All Forms of Racial Discrimination. The court somewhat struggled in making this judgment since there was no basic law prohibiting racial discrimination. It would have been much easier for the court to rule that hate speech was illegal if there was a specific law embracing the principle that racially discriminatory statements and hate speech cannot be tolerated. With that in mind, I

¹⁰⁴ Interview with a government official of Ministry of Justice, *supra* note 24.

¹⁰⁵ *Id.*; Ctr. for Human Rights Report, *supra* note 17, at 1–2.

¹⁰⁶ Jichiroren (自治労連), *Jichitai kara Hasshin suru Jinken Seisaku* (自治体から発信する人権政策) [*Human Rights Policy Initiated by Local Government*] at 1, http://www.jichiro.gr.jp/jichiken_kako/sagyouiinnkai/36-jinkenseisaku/contents.htm [<https://perma.cc/DC35-VYYB>] (last visited Mar. 7, 2019).

¹⁰⁷ YŪICHIRO UOZUMI ET AL. (魚住裕一郎他), HEITO SUPĪCHI KAISHŌHŌ —SEIRITSU NO KEII TO KIHONTEKI NA KANGAEKATA (ヘイトスピーチ解消法 成立の経緯と基本的な考え方) [THE HATE SPEECH ACT – BACKGROUND OF APPROVAL AND BASIC POINT OF VIEW] 84 (2016).

would say the basic principle of no tolerance against racial discrimination will be more respected and exercised in the legal rulings, policies and elsewhere if such legislation is developed.

After contentious debates on freedom of speech and political bargaining among conservative and liberal parties,¹⁰⁸ in June 2016, the Japanese Diet enacted the Hate Speech Elimination Act.¹⁰⁹ Although the law is decried ineffective as it does not legally ban hate speech nor impose penalties on those who engage in it as well as with the narrow scope of protection,¹¹⁰ the activists in the anti-hate movement generally welcomed it as the important first step forward to fight against racial discrimination although more is needed to be done.¹¹¹ The law represents progress in that Japan now has at least a symbolic law to send the message that hate speech is not acceptable in society. It also gives courts stronger grounds for issuing unfavorable rulings or imposing punishment on hate groups when their members are sued or charged under existing civil or criminal law.¹¹² Moreover, this law will help municipal governments and

¹⁰⁸ For the political process of the development of anti-hate speech law, see Higuchi, *supra* note 78.

¹⁰⁹ The law has been passed in the National Diet on May 24, 2016 and enacted on June 3, 2016. UOZUMI ET AL. *supra* note 107.

¹¹⁰ The critics say its definition of victim protected by the law is too narrow as the law is written specifically to protect legal residents of overseas origin and their descendants, and does not include other ethnic minorities in Japan. Interview with a program coordinator of IMADR, *supra* note 24. See also Martin, *supra* note 17, at 466–470; Junko Kotani, *Proceed with Caution: Hate Speech Regulation in Japan*, 45 HASTINGS CONST. L. Q. 603 (2017); Junko Kotani, *A Comment on Hate Speech Regulation in Japan After the Enactment of the Hate Speech Elimination Act of 2016*, 21 Shizuoka University Journal of Law and Politics (2017).

¹¹¹ A program coordinator of IMADR mentioned “This is a first, big step toward a more holistic anti-discriminatory law. We will continue our movement to aim for revision of the law.” She also mentioned the supplementary resolutions by the Committee of Judicial Affairs of both the upper and lower houses of the Diet are one of their achievements of advocacy for human rights. The supplementary resolutions declare that any form of discriminatory speech and behavior shall be appropriately dealt with in view of the International Convention on the Elimination of All Forms of Racial Discrimination. See Interview with a program coordinator of IMADR, *supra* note 24.

¹¹² In fact, on June 2, 2016, the Kawasaki Branch of Yokohama District Court also issued a first-ever provisional injunction preventing an anti-Korean activist from holding rallies, referring to the Hate Speech Elimination Act. Yokohama Chihō Saibansho Kawasaki Shibu [Yokohama Dist. Ct., Kawasaki Branch] June 2, 2016, Hei 28 (wo) no. 42 (Japan); see also Tomohiro Osaki, *Japanese Court Issues First-Ever Injunction Against Hate-Speech Rally*, JAPAN TIMES (June 3, 2016),

police to take anti-hate measures, as they often need a legal basis to act.¹¹³

The Kyoto Korean School case also helped develop an unprecedented anti-hate-speech ordinance in Japan. In January 2016, even before the enactment of the Hate Speech Elimination Act, the Council of the City of Osaka passed the nation's first ordinance against hate speech which came into effect in July 2016.¹¹⁴ On July 10, 2014, Osaka Mayor Hashimoto declared that he ordered relevant offices to take action to tackle the issue on hate speech, clearly saying this was triggered by the Osaka High Court ruling on the Kyoto Korean School case and emphasizing “public intervention is necessary, and I have no tolerance of hate speech in Osaka City.”¹¹⁵ The Committee of experts on human rights of Osaka City started to discuss the measures against hate speech in September 2014.¹¹⁶ Uozumi points out the ruling of the Osaka High Court on the Kyoto Korean School case in July 2014 has created a social trend against hate speech which directed and pushed the discussion in the

<https://www.japantimes.co.jp/news/2016/06/03/national/crime-legal/japanese-court-issues-first-ever-injunction-hate-speech-rally/> [<https://perma.cc/KA9H-RNZ8>] (reporting on a decision by the Yokohama District Court). Kotani also argues, “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.” Junko Kotani, *Proceed with Caution: Hate Speech Regulation in Japan*, Hastings Const. LQ 45 (2017) at 619.

¹¹³ Many local governments developed or started to develop anti-hate speech guidelines and ordinances including Osaka, Kawasaki, Setagaya, Kyoto, Tokyo, Nagoya and Kobe as of 2018.

¹¹⁴ Ōsaka-shi Heito Supīchi no Taisho ni Kansuru Jyōrei (大阪市ヘイトスピーチへの対処に関する条例) [Osaka City Ordinance on Treatment of Hate Speech], Osaka City Ordinance No. 1 of 2016 (Japan); 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. (2017) (unofficial translation); see also Eric Johnston, *Osaka Assembly Passes Nation’s First Ordinance Against Hate Speech*, JAPAN TIMES (Jan. 15, 2016),

<https://www.japantimes.co.jp/news/2016/01/15/national/osaka-set-pass-japans-first-ordinance-hate-speech-will-name-shame-offenders/#.XF3mzrh7k2w> [<https://perma.cc/5YAN-GZ6K>].

¹¹⁵ Shimin Sectā Seisaku Kikō (市民セクター政策機構 [Civil Policy Research Institute (CPRI)]), *Heito Supīchi ha Tomerareru: Sabetsu no Nai Shakai wo Tsukurō* (ヘイトスピーチは止められる、差別の無い社会をつくろう [We Can Stop Hate Speech, Let’s Make a Society without Discrimination]), 432 Shakai Undou (社会運動)(Oct. 2018), at 109-110.

¹¹⁶ See Shinji Uozumi (魚住真司), *Ōsaka-shi Heito Supīchi Jyōrei: Sono Keii to Kongo* (大阪市反ヘイトスピーチ条例：その経緯と今後) [*Osaka City Anti-hate Speech Ordinance: the Process of Development and Thereafter*], 20 JINKEN WO KANGAERU 1 (人権を考える) (2017).

Committee and the Council towards the development of the ordinance.¹¹⁷ This, Japan's first ordinance aimed at deterring a broad range of hate speech based on race or ethnicity, was welcomed by many local Korean residents.¹¹⁸

6. Decrease in the Number of Hate Demonstrations

According to the survey by the Ministry of Justice, the number of hateful demonstrations declined considerably in 2015 compared to the previous two years, though it cannot be said that the hate speech demonstration has completely disappeared as of 2016.¹¹⁹ Chart 2 shows that the number of hate rallies has declined since mid-2014, particularly in the Kansai area.¹²⁰ The chart also shows that the number again declined after the Osaka High Court confirmed the high amount of compensation against *Zaitokukai* with strong condemnation of hate speech in July 2014. Several sources point out that pressure from the courts may have played a role in restraining hate groups in the long term and the financial damage of the high amount of compensation in the Kyoto Korean School case on hate groups in Kansai area has made their activities difficult.¹²¹ This is a typical positive external effect that strategic litigation delivers. The growth in membership of *Zaitokukai* has also slowed and members

¹¹⁷ *Id.* at 4.

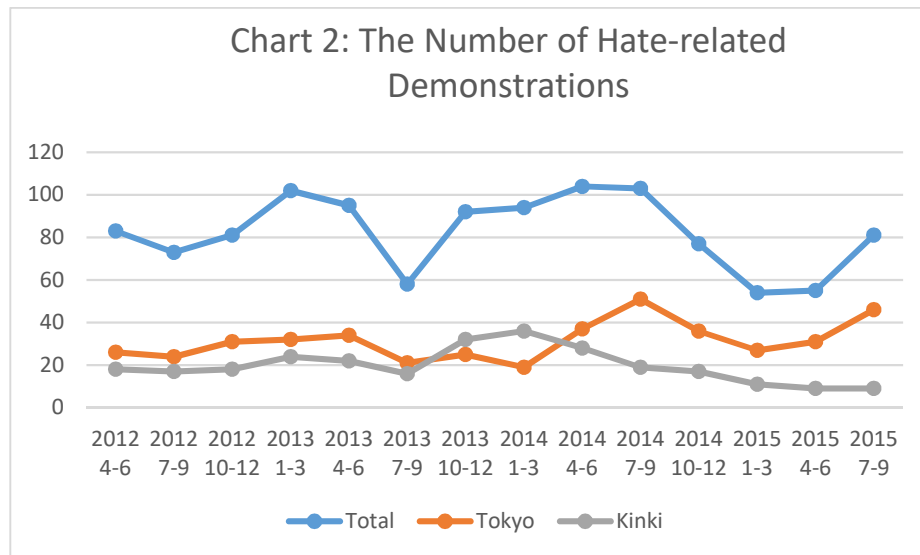
¹¹⁸ Osaka ordinance covers a broader area of speech, not only words used at demonstrations and in public speeches, but also online dissemination of such activities. The ordinance sets the expert panel to review the hate speech complaint and to disclose the names of individuals or groups judged to have engaged in hate-speech activities. Under the ordinance, the city can also ask internet service providers to delete the offending content and take other steps to prevent posting footage of hate-speech rallies and discriminatory remarks on social media. Local officials also have broad discretion in interpreting the meaning of public safety and can reject the use of public facilities by hate-speech propagators for parades or rallies. Johnston, *supra* note 20. In fact, there are several barriers in national laws to bar the implementation of the ordinance. Osaka city mayor expressed his views on April 22, 2018 that the city requested the government to revise the related laws so that the government's support for municipalities could curb hate speech. Takashi Yoshikawa & Emi Tadama (吉川 喬、田玉 恵美), *Heito Hasshinsya no Tokutei ni Kabe Ōsaka-shi Jyōrei no Medama Fuhatsu* (ヘイト発信者の特定に壁：大阪市、条例の「目玉」不発) [*Barriers to Identify Hate Caller under Osaka City Ordinance*], ASAHI SHIMBUN (Mar. 31, 2018, 7:52 PM), <https://digital.asahi.com/articles/ASL3X6SJVL3XUTIL05G.html> [<https://perma.cc/T2LW-GQPW>].

¹¹⁹ Ctr. for Human Rights Report, *supra* note 17, at 35.

¹²⁰ See *infra* Chart 2; Shibuchi, *supra* note 23, at 80; Uozumi, *supra* note 116, at 9.

¹²¹ Shibuchi, *supra* note 23, at 80; Uozumi, *supra* note 116, at 9–10.

of hate groups are reported to have somewhat softened their rhetoric in demonstrations being afraid of legal action.¹²²



(Source: *Ctr. for Human Rights Report*, *supra* note 17, at 38. *Uozumi supra* note 116 at 8–9, modified by the author.)

C. Analysis: Why Are the Korean School Cases Impactful?

As is seen above, the Kyoto Korean School cases can be evaluated successful strategic litigation seeing the tremendous positive impacts on anti-hate movement mentioned above, without a huge backlash. A question arises here: why did the Kyoto Korean School cases gain the media attention, expand to a nationwide movement and result in the new ordinance and legislation? Here are several reasons analyzed.

1. Universalism in the Kyoto Korean School Case Rulings

One of the reasons why the Korean School cases were powerful in pushing forward the anti-hate speech movement may be attributed to the tactical ruling of the Kyoto District Court on the civil case based on the universal value of human rights. Though the counsels for the Kyoto Korean School asserted the importance of ethnic education in their argument, the Kyoto District Court did not

¹²² Krieger & Kitano, *supra* note 14; Shibuichi, *supra* note 23, at 80.

refer to the rights to ethnic education of *Zainichi* Koreans.¹²³ Instead, the court condemned the demonstrations which constitute “racial discrimination” as defined under the ICERD for the ground of the extraordinary amount of compensation.¹²⁴ This ruling solidified the ground to legitimize the argument of plaintiff side in the shape to be accepted in public opinion, uttering this issue should be considered a matter of universal human rights, which is not only for *Zainichi* Korean people but important for the whole of humankind. Tomimasu added:

Thinking about the fragile situation at that time, it was probably best for us that the district court emphasized racial discrimination as a violation of international human rights law and affirmed a high amount of compensation based on the discussion. If the court focused on the right to ethnic education, at this first trial stage, the judgment could have resulted in a backlash against the Kyoto Korean School, which may have made it difficult for the plaintiffs to fight in the subsequent trials.¹²⁵

It cannot be proved that the court was worried about a backlash against the Korean people, which might have been fueled by a ruling emphasizing ethnic identity. However, this paramount ruling was in fact generally accepted favorably by the majority in society. The unusual application of the ICERD for extraordinary compensation in the ruling by the Kyoto District Court also got attention from not only among scholars and anti-discrimination NGOs but also news media, which helped hate speech issues highlighted more in public discussion and created a tailwind for the plaintiffs for further effort in fighting for justice.¹²⁶ In light of Japan’s difficulty with the domestic implementation of a number of the provisions of the treaties it has ratified, this ruling is

¹²³ Kyōto Chihō Saibansho [Kyoto Dist. Ct.] Oct. 7, 2013, Heisei 22 (wa) no. 2655, 2208 HANREI JIHŌ [HANJI] 74 (Japan); Interview with Shiki Tomimasu, *supra* note 24.

¹²⁴ *Id.*

¹²⁵ Interview with Shiki Tomimasu, *supra* note 24.

¹²⁶ *Id.* Tomimasu also mentioned “the unprecedented judgment raised the news value, as it seems after all rather ‘directly’ applied ICERD. If it did not refer to the international human rights law, it would not be picked up by national news media.”

groundbreaking.¹²⁷ The Japanese judiciary has often ignored or not looked seriously at arguments based on international human rights laws until the 1990s but some scholars note that this trend has changed with a recent series of racial discrimination lawsuits. Especially in the absence of domestic legislation, judges can make bold and often unprecedented applications of international law.¹²⁸ Tomimasu also agrees there is a recent change in the trend of judicial rulings:

When I became a lawyer ten years ago, if I tried to make an argument based on human rights treaties, the court never looked into the argument seriously. However, in recent years, there have been several cases in which the Supreme Court referred to international human rights treaties when they held an issue unconstitutional. That has made it easier for the judiciary to use international human rights instruments to develop its reasoning for rulings.¹²⁹

In sum, it is important to note that the unprecedented reference of ICERD in the Kyoto District Court ruling can be seen as indicative of a change in the attitude of the Courts in Japan toward universal international human rights, at least in racial discrimination cases.

Moreover, some characteristics of the Kyoto Korean School case explain why the ruling is accepted by the general public without a backlash other than from extreme right-wing groups. Among all, this is an extreme hate crime case, which is clearly illegal even under the current legal framework, as is shown in the criminal case in which haters were convicted. This clear criminality of the incident as well as the fact that the violence was against children and schools attracts sympathy and attention of the general public and made it difficult for

¹²⁷ Judicial tendency to dismiss claims based on international human rights laws has been pointed out in previous cases. See YŪJI IWASAWA, *INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 232 (1998); Hatano, *supra* note 52.

¹²⁸ *Id.* at 267. TIMOTHY WEBSTER, *International Human Rights Law in Japan: The View at Thirty*, 29 COLUM. J. OF ASIAN L. 242 (2010).

¹²⁹ Interview with Shiki Tomimasu, *supra* note 24.

others to assert the legitimacy of *Zaitokukai*, which led to no visible backlash, a negative effect of strategic litigation.¹³⁰

On the other hand, it should be noted that the ruling of the Kyoto Korean School case and media coverage may “de-radicalize” the arguments on the rights to ethnic education of the Korean School children which have been strongly asserted by the lawyers for the Korean School.¹³¹ To make the argument more general and universal to be accepted in the media and by the general public in Japan may have meant at the same time to deprive the issue of its ethnic essence, not opening the Pandora’s box of discussion over historical discrimination against the *Zainichi* Koreans in Japan. Tomimasu says he had ambiguous feelings when he spoke at the press conference after the “successful” ruling at the Kyoto District Court, which has left an essential discussion on ethnic education behind or shelved it for future discussion.¹³² The unprecedented ruling of the Kyoto District Court had a big impact in creating a public groundswell against hate speech which led not only to public acceptance but also to a counter-movement against *Zaitokukai* with the support of the majority. However, it also means leaving the in-depth issue on ethnic education and identity of *Zainichi* Koreans out of the center of the discussion.¹³³ It is true that strategic litigation often results in a social change but is not necessarily best for an individual case. In this case, it seems that external effects such as remedy, public attention, and social recognition required the sacrifice,

¹³⁰ *Id.*

¹³¹ Albiston, *supra* note 28, at 75.

¹³² Interview with Shiki Tomimasu, *supra* note 24.

¹³³ Interview with Shiki Tomimasu, *supra* note 24. Osaka High Court has referred to the importance on the ethnic education, which was not touched upon in the primary ruling. Tomimasu mentions the Kyoto District Court ruling solidified the foundation of the discussion and sentiment for the Osaka High Court ruling to be also accepted in the society. However, the issue of ethnic education was not fully discussed in public sphere. Later, in other case in which Osaka Korean High School sought to annul the government’s decision to exclude it from the tuition-free high school education program, the court found the government’s exclusion of Korean High School was legal in 2018. *Osaka High Court Tosses Lower Court Ruling, Denies Korean School’s Right to Government Subsidies*, JAPAN TIMES (Sept. 28, 2018), <https://www.japantimes.co.jp/news/2018/09/28/national/crime-legal/osaka-high-court-tosses-lower-court-ruling-denies-korean-schools-right-government-subsidies/#.XKL72Zj7RPY> [https://perma.cc/GN8N-AUNE].

to a certain extent, of the internal effect which centers on nurturing the collective identity of *Zainichi* Koreans.¹³⁴

2. Spread of the Anti-Hate Speech Movement into the Mainstream

As discussed above, the Kyoto Korean School case rulings did not atomize the issue, as the strategic litigation critics often argue. Rather, the universality of the rulings and its process may have pushed the Japanese majority as a center of activism. It is true that minority-led civil rights movements have existed in Japan throughout the 20th century, but this recent anti-racism movement may have become different from those in more engagement of majority under the banner of “universal human rights” or “anti-discrimination.”¹³⁵ Resonating with the Kyoto Korean School case rulings, Japanese activists view racial discrimination as a problem that is harmful not only for *Zainichi* Koreans but to Japanese society as a whole and mainstreamed the anti-racism movement among the Japanese majority.¹³⁶ As is mentioned, many of those in anti-racism activism

¹³⁴ While Tomimasu asserts the importance of the ethnic education and identity, he also states “As the very first step, it is very important to create an environment for ethnic minorities including Korean people to raise their voice as accepted member of society and empower their argument even in the long run.” Shiki Tomimasu (富増四季), *Kyōto Chōsen Gakkō Shūgeki Jiken ni Kansuru Kyōto Chisai Hanketsu no Hyōka to Sono Ikashikata* (京都朝鮮学校襲撃事件に関する京都地裁判決の評価とその活かし方) [Evaluation and Utilization of the Kyoto District Court’s Judgment on the Kyoto Korean School Attack Case], 37 JINKEN TO SEIKATSU (人権と生活) [HUM. RTS. AND LIFE] 10 (2013). Interview with Shiki Tomimasu, *supra* note 24.

¹³⁵ Cho also argues that since around 2013 the issue of racism has been more recognized as a problem of the Japanese society, a new characteristic of the anti-racism movement which may be different from previous strategic litigations in the 1970-80s. Akedo et al. *supra* note at 23, at 55–64. One of the successful litigations was that a *Zainichi* Korean sued the Hitachi conglomerate in 1970 for cancelling his recruitment after they discovered his ancestry. On June 19, 1974, the Yokohama District Court ruled the case for his favor. Hifumi Okunuki, *Forty Years after Zainichi Labor Case Victory, Is Japan Turning Back the Clock?*, JAPAN TIMES (Jan. 25, 2015), <https://www.japantimes.co.jp/community/2015/01/21/issues/forty-years-zainichi-labor-case-victory-japan-turning-back-clock/#.XJf1RSj0IPY> [https://perma.cc/J4AW-RSTC]; *Supreme Court Dismisses Korean’s Fingerprint Refusal Case*, JAPAN TIMES (Apr. 10, 1998, 8:04 PM),

¹³⁶ It may be noteworthy that many of anti-racism counter-activists also engaged in anti-nuclear protestors after the Tsunami and the nuclear accidents in 2011 in Fukushima. Shaw argues that Fukushima incidents triggered an awakened consciousness for many Japanese people with a vision of shared vulnerability that includes foreigners, sexual minorities, people suffering from life-threatening and chronic illnesses, and those forced to live near or exposed to nuclear power plants. Vivian Shaw, *How Fukushima Gave Rise to A New Anti-Racism Movement*, AL JAZEERA (Mar. 12, 2017),

are those who have not been conventionally involved in the human rights movement before. For example, Suzuki, a member of a local counter hate speech organization Anti-Racism Project (ARP), is a Japanese national and temporary worker for an IT company who had never been involved in the human rights movement before he started to engage in the recent anti-racism activity in 2013. Shocked by unbearably derogatory anti-Korean demonstrations on TV and the Internet, he started to engage in a grassroots movement against racial discrimination, non-political and peaceful activities such as raising balloons with anti-discrimination messages, distributing T-shirts and flowers.¹³⁷ The inclusive approach engaging majorities with avoiding atomizing the issue was also heard in the interview with Kang-ija Choi, a third-generation *Zainichi* Korean resident in Sakuramoto in Kawasaki City¹³⁸, who is one of the leading figures in the local and national anti-racism advocacy as well as a local movement against racism in Kawasaki.¹³⁹ She emphasized the need for protecting their dignity as “human beings” rather than asserting the rights of *Zainichi* Koreans apart from the majority, which resonates with the approach of the Kyoto Korean School case rulings.¹⁴⁰ She also repeated that she would collaborate with anyone who fights against discrimination, reiterating “Every person is an important stakeholder in the movement against hate speech and discrimination. As long as we live in the same society, no one can claim to be irrelevant to the issue.”¹⁴¹ In Kawasaki, people created the “Kawasaki Citizen’s Network against Hate Speech” (“*Heito Supīchi wo Yurusanai*” *Kawasaki Shimin Nettowāku* [「ヘイトスピーチを許さない」川崎市民ネットワーク]) in January 2016, a civic group in which a number of local NGOs, churches, labor unions, journalists, lawyers and members of the City Council work together for counter-hate movement as “all-Kawasaki.”¹⁴² In addition to

<http://www.aljazeera.com/indepth/features/2017/03/fukushima-gave-rise-anti-racism-movement-170310103716807.html> [perma.cc/XFS8-LNPS].

¹³⁷ Interview with the members of Anti-Racism Project, *supra* note 24.

¹³⁸ Sakuramoto in Kawasaki City is the area where many *Zainichi* Korean people reside for long and is often targeted by hate demonstrators.

¹³⁹ Interview with Kang-ija Choi, *supra* note 24.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Interview with Takao Yamada, a member of the secretariat of “Kawasaki Citizen’s Network against Hate Speech,” on August 21, 2017. Yamada mentions more than 168 organizations responded to a call for making a local anti-hate network in 2016. It is

actively holding study sessions and awareness raising events, and advocating with the local government and lawmakers on racism, they concerted the power of local community and civic movement to conduct counter-demonstrations to stop the haters to come into their residential areas.¹⁴³ Moreover, a new NGO, “the International Network to Overcome Hate Speech and Racism” (*Heito Supīchi to Reishizumu wo Norikoeru Kokusai Nettowāku* [ヘイトスピーチとレイシズムを乗り越える国際ネットワーク], hereinafter *Norikoe Net*) was established in September 2013, an engaging variety of people including *Zainichi* Korean human rights activists, a former prime minister, lawyers, writers, journalists, and academics. Leveraging the publicity and network of those high profiles and celebrities, *Norikoe Net* engaged in a wide range of activities, including organizing study groups of racial discrimination and hate speech nationwide, sharing information, organizing and supporting counter-demonstrations, connecting with domestic and foreign groups, supporting lawsuits against racist groups, lobbying legislators, training local leaders, producing anti-discrimination media programs, and disseminating anti-racism advertisements.¹⁴⁴ It is noteworthy that *Norikoe Net* declares in its mission statement to take a universal human rights approach as follows (underlined by author)¹⁴⁵:

Hate speech is not only against the immediate target of Korean residents in Japan, but has also attacked minorities in society including women, people from Okinawa (*Uchinanchu*), *Buraku* people, people born out of wedlock, disabled people, and sexual minorities Let us think about what hate speech harms fundamentally. It is not just *Zainichi* Koreans. It is not just minority groups in society. Hate speech hurts everyone with a conscience. Haters cast hatred

noteworthy that Kawasaki has a long history of promoting multiculturalism and Yamada himself has been engaged in this activism since he supported the employment discrimination dispute of *Zainichi* Korean and anti-fingerprint movement in 1970s. See Shibuichi, *supra* note 23, at 72.

¹⁴³ *Id.*

¹⁴⁴ Shibuichi argues *Norikoe Net* seems to be successfully carrying all those daunting tasks due to the resource and capability of the leftist elites. Shibuichi, *supra* note 23, at 78. See Website of *Norikoe Net*, <https://norikoenet.jp/> [<https://perma.cc/FD89-7Y99>] (last visited Mar. 7, 2019).

¹⁴⁵ *Norikoe Net—About Us*, https://norikoenet.jp/about_us/declaration/ [<https://perma.cc/9HSA-QF7U>] (last visited Mar. 7, 2019).

verbally and physically towards, and insult and hurt, people who believe that everyone has universal dignity and human rights, and the beliefs of people who are going to live peacefully than anything else regardless of nationality, ethnicity, gender, or origin. It attacks, ridicules and ruins the value of the universal human rights embrace that the international community has built in history and is also advocated in the Universal Declaration of Human Rights.

This approach brought the network to connect with a variety of established civic groups and associations such as the resident Korean associations, the *Buraku* minority association, the Ainu minority association, Okinawan anti-war groups, a major trade union and the nationwide federation of bar associations and even a well-known radical right-wing group which has been critical to *Zaitokukai*, under the banner of “anti-discrimination”.¹⁴⁶ The network also engaged intellectuals in diverse fields such as law, politics, sociology, gender, feminism, history, culture, migration, peacebuilding.

Moreover, it should be noted that a large number of participants in the abovementioned “Tokyo Anti-Discrimination March” in September 2013, consist of various people including non-Koreans and those who claim no discrimination in general, called on the Japanese government to “sincerely adhere” to the ICERD, which was indicative of a spread of the anti-racism movement into majority based on a universal human rights centered approach.¹⁴⁷

3. Acceleration of the Movement through the Internet: “New Social Movement”?

The Internet played a big role in accelerating the spread of activism following universalization of issues by the court. The hateful demonstration in front of the Kyoto Korean School and other hate rallies were uploaded online, spreading through social media and other online communication tools. To appeal to a wider audience, those assailants sought the extensive recording and dissemination of aggressive hate speech and demonstrations, which might have

¹⁴⁶ Shibuichi, *supra* note 23, at 79. Kunio Suzuki, a founder of a well-known radical right-wing group, joined *Norikoe Net* as one of the co-representatives.

¹⁴⁷ *2,000 Rally Against Hate Speech in Tokyo's Shinjuku*, *supra* note 91.

attracted some allies but created more enemies who were shocked and disgusted by hateful words directed relentlessly at minorities including women and children, and jolted them into action. The Internet also helped counter-hate groups such as Counter-Racist Action Collective (C.R.A.C) which often mobilized hundreds of participants through the Internet when it held counter-demonstrations against hate groups while its founder says that formal members of his group actually only number in the dozens.¹⁴⁸ They recruited participants through the Internet publicity including Facebook and Twitter, and the numbers of volunteers ballooned around early 2013. A counter-hate group member Tanaka also says the participants of anti-racism demonstrations gather just on the day of the hate rally, responding to the call on social media but they are not necessarily formal members of the organization.¹⁴⁹ Interestingly, at least a large portion of participants in the counter-demonstrations, particularly at the big cities such as Tokyo and Osaka, seems to be more spontaneous than organized or planned. The Internet helps to make it easy for ordinary people who are not usually involved in those activities to join the anti-racism movement and keeps loose ties among participants or supporters of the counter-hate groups.

The phenomena resonate with what is called “New Social Movement” that appeared around the world in the recent decade that put great emphasis on bringing about social mobilization about post-material values such as human rights, distinct from worker’s movement driven by class-based ideology.¹⁵⁰ Oguma argues that the anti-nuclear movement after the earthquake, tsunami and the nuclear disaster of March 2011 in Japan “had much in common with contemporaneous movements around the world, such as Occupy Wall Street” analyzing its characteristics displayed by its main actors and participants, the structure of the organizing group and its methods of mobilization.¹⁵¹ He mentions “demonstrations on this scale last occurred in Japan half a century ago, during the 1960 struggle against the US-Japan Security Treaty (*Ampo*). This time, however, the rallies and demonstrations that took place all over Japan were organized by

¹⁴⁸ Shibuichi, *supra* note 23, at 77. See also text accompanying *supra* note 89 and 90.

¹⁴⁹ Interview with the members of Anti-Racism Project, *supra* note 24.

¹⁵⁰ Eiji Oguma, *A New Wave Against the Rock: New Social Movements in Japan Since The Fukushima Nuclear Meltdown*, THE ASIA PAC. J.: JAPAN FOCUS (July 1, 2016), <http://apjjf.org/2016/13/Oguma.html> [<https://perma.cc/FM6T-RFMG>].

¹⁵¹ *Id.*

small groups of concerned individuals with no connection to existing political parties, in sharp contrast to the tightly organized anti-*Ampo* movement half a century earlier” and “(t)he demonstration was called over the internet by a group of workers in their 20s and 30s who were involved in the precariat movement. Drawing on the style of earlier precariat movements, the demonstrations and rallies organized by this group had a “free” style and made effective use of music and design.”¹⁵² This characteristic is applied to the anti-racism movement prominent around 2013, in which people are not really structured nor organized but loosely connected by social media and mobilized spontaneously once the hate demonstrations are announced. This loose and anonymous characteristic of the counter-movement against racial discrimination seemed to make it easy for many ordinary people such as Suzuki to join and organize the movement.

4. Collaboration of Diverse Actors for Change in Law and Politics

As the Kyoto Korean School cases proceeded while the hate speech movement and counter-movement become violent, there became concerns and interest rising among lawmakers.¹⁵³ One of the leading lawmakers who pushed forward this movement and a Diet effort to enact legal measures curbing hate speech was Yoshifu Arita. He is a member of the House of Councillor from the Democratic Party of Japan, who started a parliamentary panel with a dozen colleagues to introduce hate speech legislation.¹⁵⁴ Since 2013, Arita and other concerned legislators held several meetings at the House of Councilors with human rights lawyers, civil society organizations and local activists, including *Zainichi* Koreans affected by hate demonstrations, and people who join in counter-demonstrations, who have conducted passionate advocacy both with domestic lawmakers and with the UN human rights treaty bodies. In addition to the

¹⁵² *Id.*

¹⁵³ Several scholars emphasize the role of party politics on agenda setting for policy and legal measures against hate speech. See Higuchi, *supra* note 78. Takahiro Akedo (明戸 隆浩), 2015 *Nen Jinshu Sabetsu Teppai Sesaku Suishin Hōan Shingi no Haikai to Katei* (2015 年人種差別撤廃施策推進法案審議の背景と過程), 8 *IMIN SEISAKU KENKYU* (移民政策研究) 182–192.

¹⁵⁴ Mari Yamaguchi, ‘Hate Speech’ Not Free Speech, Says Japan; Korean School Awarded Compensation for Rally, *THE STAR* (Oct. 7, 2013), https://www.thestar.com/news/world/2013/10/07/hate_speech_not_free_speech_says_japan_korean_school_awarded_compensation_for_rally.html [<https://perma.cc/9CR2-TFZA>].

Norikoe-Net, Arita also works with many civic groups including *Gaikokujin Jinkenhou Renrakukai* (外国人権法連絡会 [the Japan Network towards Human Rights Legislation for Non-Japanese Nationals and Ethnic Minorities]),¹⁵⁵ in which many cause lawyers fighting racism and racial discrimination are actively engaged, and the NGO Network for the Elimination of Racial Discrimination Japan (ERD Net), a nationwide network of NGOs and individuals which reported the issue of “hate speech” including the Kyoto Korean School cases to the international fora at the UN.¹⁵⁶ Arita also joined the UN treaty bodies’ sessions to review the Japanese government’s periodic reports on the implementation of the UN human rights conventions in 2014. The Kyoto Korean School cases were mentioned in the NGO’s statements and reports to the UN international human rights treaty bodies with a video documenting extremely disparaging and malicious hate speech demonstrations in Japan, which gave a great shock to the Committee members.¹⁵⁷

This combination of increased media attention and collaboration between activists, policymakers, and human rights organizations led to the United Nations issuing a stern recommendation for Japan to rectify the problem of hate speech in the summer of 2014.¹⁵⁸ According to the interview with an officer of the Human Rights Protection Bureau within the Ministry of Justice, the recognition of the rampant situation with hate and anti-hate

¹⁵⁵ Gaikokujin Jinkenhou Renrakukai (外国人権法連絡会) [the Japan Network towards Human Rights Legislation for Non-Japanese Nationals and Ethnic Minorities], <https://gjinken.wordpress.com/about/> [<https://perma.cc/4KSG-U9X5>] (last visited Mar. 19, 2019).

¹⁵⁶ The International Movement Against All Forms of Discrimination and Racism, Jinshu Sabetsu Teppai NGO Nettowaku no Gaiyo (人種差別撤廃 NGO ネットワークの概要) [Overview of the NGO Network for the Elimination of Racial Discrimination Japan (ERD NET)] https://imadr.net/wordpress/wp-content/themes/imadr2017/pdf/p_erd01.pdf [<https://perma.cc/XK7T-SR4T>] (last visited Mar. 7, 2019). As of July 10, 2013, 85 organizations and 30 individuals are members of ERD network. The International Movement Against All Forms of Discrimination and Racism is a facilitating organization of the network. See NGO Network for the Elimination of Racial Discrimination Japan (ERD Net), *supra* note 2; Interview with a program coordinator of IMADR, *supra* note 24.

¹⁵⁷ Interview with a program coordinator of IMADR, *supra* note 24.

¹⁵⁸ Human Rights Comm., *Concluding Observation on the Sixth Periodic Rep. of Japan*, UN Doc. CCPR/C/JPN/CO/6 (2014). Comm. on the Elimination of Racial Discrimination, *Concluding Observation on the Combined Seventh to Ninth Periodic Rep. of Japan*, UN Doc. CERD/C/JPN/CO/7-9 (2014). The Kyoto Korean School cases were mentioned in the shadow reports to the UN international human rights treaty bodies and discussions in the Committees.

speech rallies and the fact that the UN has been applying pressure on Japan, seem to have been one of the factors for the change in government attitude.¹⁵⁹ The Justice Ministry officer states that trends in society and social consensus are important for the Ministry to take measures.¹⁶⁰ In fact, the homepage of the Ministry of Justice on promotion activities focusing on hate speech refers to “Ways of dealing with hate speech were recommended to the government in Concluding Observations on the Sixth Periodic Report of Japan by the UN Human Rights Committee in July 2014¹⁶¹ and Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan by the UN Committee on the Elimination of Racial Discrimination in August of the same year”¹⁶² as the background of development of the law.¹⁶³

¹⁵⁹ Interview with a government official from the Ministry of Justice, *supra* note 24.

¹⁶⁰ *Id.*

¹⁶¹ Human Rights Comm, *supra* note 158. On July 23, 2014, the UN Human Rights Committee, having examined the Japanese government’s report, adopted its concluding observations (on the sixth periodic report of Japan), stating “The State (Japan, hereinafter the same) 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 attack to ensure that the alleged perpetrators are thoroughly investigated, prosecuted and, if convicted, punished with appropriate sanctions.” In its recommendations to Japan, the committee 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.

¹⁶² Comm. on the Elimination of Racial Discrimination, *supra* note 158. The U.N. Committee on the Elimination of Racial Discrimination (CERD in its concluding observations to the Japanese government (on the combined seventh to ninth periodic reports of Japan), adopted on August 29, 2014, states: “The Committee encourages the State party to 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 recommends 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.” It demanded that Japan 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. 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, it said. It urged the Japanese government to regulate hate speech by law, following a rise in racist demonstrations mainly targeting Korean residents in the country.

¹⁶³ Ministry of Justice, *Promotion Activities Focusing on Hate Speech*,

The international advocacy brought the local issue into the international realm, but also delivered the universal standard of hate speech and racial discrimination into the local movement and national lawmakers through study seminars, gatherings, and collaborative advocacy.¹⁶⁴ Suzuki from ARP has participated in those seminars and takes a human rights based approach in combating hate speech: “Our organization is driven by the concept of protecting universal human rights. Through spreading the concept, we aim to diminish hate speech.”¹⁶⁵ Kan-Ija Choi, the aforementioned *Zainichi* Korean advocate from Sakuramoto in Kawasaki, has been working ardently with those human rights lawyers and NGOs in local and international advocacy. She spoke at an official hearing of the Committee on Judicial Affairs at the House of Councilors to seek legislation to prohibit hate speech, to protect everyday life in peace and with dignity in the local community, which is a core principle of human rights and humanism.¹⁶⁶ This desperate voice of a direct victim moved the lawmakers, including the conservative party in power, to visit Sakuramoto and listen to local concerns and victims’ trauma on March 31, 2016.¹⁶⁷ After the visit, the chair of the Committee on Judicial Affairs of House of Councilors said, “I understand the hate speech destroyed everyday [lives] of people [,] and we need to work on the extermination of the hate speech.”¹⁶⁸ 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 for everyone, not only

http://www.moj.go.jp/ENGLISH/m_jinken04_00001.html [<https://perma.cc/AV9G-4769>] (last visited Dec. 26, 2016).

¹⁶⁴ Shaw, *supra* note 136. It is reported that “Japanese activists’ battle against racism often feels global. T-shirt designs in English, signs that feature photos of Trayvon Martin and Angela Davis, and C.R.A.C. Twitter accounts in the United Kingdom and North America gesture towards an international audience. Twitter-savvy activists reference Black Lives Matter, NoDAPL, and the Women’s March as allies and examples. Political shifts towards nativism and authoritarianism in the United States and Europe have inspired some activists to see their battle as part of a larger one for democracy.”

¹⁶⁵ Interview with members of Anti-Racism Project, *supra* note 24.

¹⁶⁶ UOZUMI ET AL., *supra* note 107, at 72.

¹⁶⁷ *Id.* at 112–115. HEITO SUPICHI WO YURUSANAI KAWASAKI SHIMIN NETTOWAKU (ヘイトスピーチを許さない川崎市民ネットワーク), KONZETSU! HEITO TO NO TATAKAI : KYOSEI NO MACHI KAWASAKI KARA (根絶！ヘイトとの戦い 共生の街川崎から) [FIGHT FOR EXTERMINATION OF HATE SPEECH: FROM KAWASAKI, CITY OF DIVERSITY] 75 (2017).

¹⁶⁸ KANAGAWA-SHIMBUN, *supra* note 98, at 74.

Zainichi Korean but also all Japanese and all people. In our society, it is intolerable to neglect the acts to harm the dignity as a human being.”¹⁶⁹ 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.”¹⁷⁰ Though the law itself is criticized as toothless and narrow, an NGO emphasizes “It was the outcome of civil society’s passionate advocacy that the hate speech legislation comes with supplementary resolutions which refer to the ICERD, and urge the government to take measures to restrain online acts to escalate discriminatory words and behavior as well.”¹⁷¹ It shows behind the successful influence of the Kyoto Korean School cases were ardent advocacy efforts and surging anti-racism movement, which was realized with the collaborative network among diverse stakeholders bringing globally generated ideas and strategies to the local level, namely vernacularizing universal human rights on the grounds.¹⁷²

IV. CONCLUSION

Strategic litigation is about situating individual client interests or human rights within larger social goals, or about creating progressive jurisprudence, instigating reform of laws and policies, which advance human rights and re-balance historic or systematic injustices. It also aims to enable individuals to seek remedies for human rights violations and empower people who have been victims of human rights abuses.

Law and society debate over litigation and social change highlights not only the positive side but also the negative side of strategic litigation. On one hand, the positive view emphasizes that strategic litigation can change social attitudes and raise issues around which to organize a movement by attracting publicity, media attention and participants to a movement. On the other hand, critics

¹⁶⁹ *Id.* at 115–116 (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).

¹⁷⁰ UOZUMI ET AL., *supra* note 107, at 2.

¹⁷¹ Interview with a programme coordinator of IMADR, *supra* note 24.

¹⁷² Levitt & Merry, *supra* note 22.

point out the limits of individual litigation as a strategy for social change and even its negative effects, arguing that legal victories bring no real change and individual litigation can narrow issues and atomize collective grievances, undermining broader collective action.

This empirical socio-legal study examines the Kyoto Korean School cases in the dynamic process of the anti-hate speech and racism movement in Japan as an example of successful strategic human rights litigation, aiming to propose a broader framework through which we understand strategic litigation, focusing on the diffusion of the international human rights norms.

The first part of this paper examines the major impacts of the Kyoto Korean School cases in light of strategic litigation framework. This study has shown that the Kyoto Korean School cases had an enormous positive impact on the anti-racism movement in Japan including the raising of consciousness among the plaintiffs and public awareness without backlash and led to the enactment of the very first anti-hate speech law and a municipal ordinance, with the support of increased media attention and public opinion against hate speech. In this case, those effects were not primarily pursued but grew out of not only the judicial decisions but also from the process of seeking justice. It was a transformative process for both plaintiffs and lawyers, later the general public and policymakers, and iterative and interactive process of human rights norms diffusion, rather than a top-down process.

This paper also analyzes the reasons behind this “success” of the Kyoto Korean School cases as strategic human rights litigation. First, the rulings of the Kyoto Korean School case, which condemned hateful demonstrations as “racial discrimination” under the international human rights convention, framed the issue as a matter of universal concern which affects the Japanese society as a whole. The rulings focusing on universal rights were accepted by the majority in Japanese society without inducing a significant backlash. Unprecedented application of the international human rights convention was highlighted by media, while some extreme characters of this hate crime case against elementary school children also attracted media attention. This brought the long-standing efforts of civil society groups and activists to vernacularize the universal human rights norms against racial discrimination into the attention of majorities, spreading the anti-racism movement to a massive number of individuals who joined the counter-movement. In this process, the

Internet played a key role in mobilizing people and transforming the anti-hate speech activism into a nation-wide movement against racial discrimination, which makes the movement somewhat different from previous minority-led movements. It shows the recent anti-racism movement in Japan is not only a leftist elite or professional activist movement but also involves ordinary people connected loosely via the Internet, as well as the local community including *Zainichi* Korean people to embrace living in peace in an inclusive society. It pushed a majority of the society into major actors of the expanding anti-racism movement and also brought the Kyoto Korean School cases, its process of proceedings, and the subsequent results to domestic and international attention. Historic efforts of a civic network of diverse stakeholders brought the case to the attention of the UN human rights bodies which urged the Japanese government to take immediate action to curb hate speech. The combination of the bottom-up human rights movement based on the locality and the international and national advocacy of leftist groups have provided an impetus in advancing policy development against hate speech and racism. The culmination of the activists' efforts, in collaboration with hate survivors, civil society organizations, and lawmakers, and supported by public opinions, came in May 2016, when Japan passed its first law against hate speech. In this sense, the "success" of the Kyoto Korean School cases was not only thanks to the legal professionals involved in the case, but the collaboration of multiple stakeholders who built a united front against hate speech.

To conclude, this analysis shows the Kyoto Korean School cases were successful as strategic human rights litigation, despite not specifically being so intended, since diverse actors brought a universal human rights ideology embedded in the rulings into a wide range of communities in society. The universal idea of all humans having rights to be free from hate speech and racial discrimination regardless of ethnicity gave legitimacy for a social movement against hate speech and racism. Consequently, in this case, the litigation became not a conservative strategy monopolized by elites but a dynamic process involving diverse actors including not only legal professionals and plaintiffs, but also nationwide civil society organizations, counteraction groups, local communities, journalists, academics, law and policymakers, individual activists and supporters, and even international human rights organizations, where the purpose of social movements is complemented by legal means.

Though the scope of the analysis of this article is limited to providing an overview of the social causes and effects of the Kyoto Korean School cases as strategic human rights litigation, I hope this analysis marks a step forward in the nation's long-stalled efforts to curb racial discrimination and will inspire discussion over strategic litigation and social mobilization in a global context.