

8. International Law and Organizations

X v. Y

Osaka High Court, July 8, 2014

Case No. (*ne*) 3235 of 2014

Summary:

The Osaka High Court (OHC) upheld the original decision of the Kyoto District Court (KDC) in which the KDC accepted the following claims by the plaintiff: namely, *Zaitokukai*, which demonstrated against the Korean School operated by the plaintiff with coercive pressure and racial slurs in 2009, shall pay damages to the plaintiff. In this case, the issue of the so-called “hate speech” was brought before the Japanese courts for the first time and the relationship between International Convention on the Elimination of All Forms of Racial Discrimination and tort under the Civil Code of Japan was deeply deliberated.

Reference:

Constitution of Japan, Article 13 and Article 14 (1); Civil Code of Japan, Article 709; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 1 (1)

Facts:

The appellants (the defendants, Y) are the members of a nationalist group, *Zaitokukai* which is opposed to the alleged privileges of Korean people in Japan. The dispute stems from the fact that a Korean School operated by the appellee (the plaintiff, X) used a public park near the school. Voicing a complaint against this use, Y demonstrated against the Korean School with coercive pressure and racial slurs, and broadcasted this demonstration on the Internet, three times in December 2009.

In response, X filed the claims for the payment of damages and the prohibition against these acts on the basis of Article 709 of the Civil Code

which provides tort. In the first instance, the KDC generally accepted the claims of X referring to the ICERD by which Japan is legally bound as a State party.

Opinion:

The appeal is dismissed.

1. The Relationship between the International Convention on the Elimination of All Forms of Racial Discrimination and Tort

According to the Court, “the ICERD, as one form of Japanese domestic law, has a domestic legal effect, and in light of the provisions of the ICERD, it provides not only the international obligation for States but also the relationship between public authority and individuals as Articles 13 and 14 (1) of the Constitution of Japan do. The ICERD cannot be applied directly nor by analogy to the mutual relations of private persons, and therefore is not supposed to directly regulate the relations among private persons like the appellants and the appellee in the present case. The purpose of the ICERD should be realized through the interpretation of particular provisions of municipal law such as Article 709 of the Civil Code, being harmonized with the other doctrines of the Constitution and the principle of private autonomy.

Generally a statement made by private persons is to be protected under Article 21 (1) of the Constitution of Japan. However, that statement should be regarded to meet the requirement of ‘intentionally or negligently to infringe any right of others, or legally protected interest of others’ as Article 709 provides; if (i) a racist statement is made against a particular group of people, and (ii) the statement in question is devoid of rational reasons and then infringes the legal interest of others beyond the socially acceptable scope in light of Articles 13 and 14 (1) of the Constitution of Japan and the purpose of the ICERD.”

Applying these criteria to the present case, the OHC concluded that the demonstration against X and the broadcasting of it by Y on the Internet constituted the discrimination stipulated in Article 1 (1) of the ICERD and the act of tort under Article 709.

2. The Relationship between the International Convention on the Elimination of All Forms of Racial Discrimination and the Payment of Damages

The OHC also held that “the claim for damage by tortious acts in Japan intends to evaluate monetarily actual damages caused to victims and to enforce the perpetrator to pay for it. Thereby, it aims to compensate for the injuries the victims suffered, and restore it to the *status quo ante*. Since the purpose of the claim for damage, therefore, is not to impose sanctions on perpetrators nor to deter the repetition of similar acts for the future, the Court cannot add any extra to the actual amount of damages caused to victims and order the payment of damages for the purpose of sanction and general prevention. In light of the purpose and object of the ICERD to eliminate all forms of racial discrimination, the conduct of Y can be deemed as heinous discrimination, and the amount of damages paid by them should be evaluated by taking into consideration the feelings of victims which was hurt by the outrageous acts of Y and the gravity of intangible damages like their mental distress.”

3. The Relationship between the “Racial Discrimination” and Nationality

Y also argued that their statements in the demonstration on the distinction between foreigners not having the nationality of Japan and Japanese nationals constitute their political opinion concerning the policy on foreigners or immigration, not “racial discrimination” under Article 1 (1) of the ICERD which, according to Y, does not include the distinction based on nationality in the definition of racial discrimination.

However, the OHC concludes that “since the statement in question aims to ostracize from Japan the Korean people living in Japan and to prevent them from enjoying the rights and fundamental freedoms on an equal footing with Japanese and other foreigners, it should be regarded as the discrimination or exclusion based on national origin, not as the lawful distinction on nationality. The statement thus constitutes ‘racial discrimination’ under Article 1 (1) of the ICERD.”

Editorial Note:

With regard to the relationship between the ICERD and tort, the

reasoning of the OHC is harshly criticized because of the following reasons. First, the OHC without any substantive deliberations denied the direct application of the ICERD to the relationship among private persons. It is true that, in the Japanese legal system, it is not so clear whether and, if any, under what conditions the treaty can be applied to the relationship among private persons. Nonetheless, since it is most likely that racial discrimination takes place in a private sphere in democratic States like Japan, the OHC should have discussed the issue in greater depth.

Second, the OHC is criticized in that, even in its indirect application, it did not fully rely on the ICERD. According to Article 98(2) of the Constitution of Japan, Japan shall faithfully observe the treaties which it ratifies. This provision has been interpreted by the judiciary and understood by the government that a treaty constitutes a form of domestic law. Accordingly, Japanese Courts have used treaties (especially, human rights treaties) as an independent guideline for interpreting municipal laws. Actually the KDC in the first instance used the ICERD as the sole guidance to interpret Article 709 of the Civil Code. On the other hand, the OHC deleted this part of the reasoning made by the KDC and, with listing some guidance for the interpretation, used the ICERD as just one of them, in parallel with Articles 13 and 14(1) of the Constitution. In this regard, one could argue that the OHC underestimated the role of the ICERD in the Japanese legal system when it interpreted Article 709.

In terms of the relationship between the ICERD and the payment of damages, the KDC in the first instance highlighted the role of ICERD more strongly by arguing that the ICERD provides “effective” remedy against racial discrimination. While the OHC did not adopt this argument, it also concluded that the case law in which the ICERD is taken into account when calculating damages seems to be established under Japanese municipal laws.

In conjunction with the definition of “racial discrimination”, some commentators say that the demonstration by Y is so-called racial “hate speech” and thereby may constitute the violation of Article 4 of the ICERD. However, in light of the fact that X had not alleged the violation of Article 4 before the OHC, it seems sound that the OHC reached the conclusion that the statement by Y constituted an act of racial discrimination solely by relying on the interpretation of Article 1(1) of the ICERD.

On 9th December 2014, the Supreme Court of Japan rejected Y's appeal. Therefore, the judgment of the OHC becomes final and conclusive.