

**Presentation by the Japan Civil Liberties Union for
Mr. Doudou Diène
The Special Rapporteur on Contemporary Forms of
Racism, Racial Discrimination, Xenophobia and Related Intolerance**

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by
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1 Current Status of Law Regarding Prohibition of Racial Discrimination

There is no legislation which is specifically directed towards prohibition or elimination of racism.

Provisions can be found here and there in statutes for certain licensed businesses, which prohibit refusal to provide services without justifiable cause. These provisions can be interpreted to include refusal to provide service based on race, but the statutes are sporadic and not useful to solve problems that commonly occur, such as housing.

There is an article in the Labor Standards Law which prohibits different treatment of employees based on nationality (Art. 3). However, since a famous 1974 decision which found the termination of employment of a Korean employee to be invalid as violation of this Art. 3, only 3 court decisions have been published. In none of these 3 cases did the court find that the employer was in violation of Art. 3.

Article 14, Par. 1 of the Constitution stipulates that “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race...” This equal rights clause addresses equal treatment by the government and other public entities, and is not directly applicable to discrimination by a private entity. However, by established court precedent, the equal rights clause is interpreted to be applicable indirectly to relationships between private individuals or entities, through specific provisions of legislation such as the Civil Code. For example, unreasonable discrimination may constitute tort under the Civil Code and thus give rise to a claim for damages based on tort.

The International Covenant on Economic, Social and Cultural Rights (Art. 2, Par. 2) and the International Covenant on Civil and Political Rights (Art. 2, Par. 1, Art. 26), both of which entered into effect in 1979 in Japan, also require that the rights recognized in the Covenants are ensured without discrimination of any kind including discrimination based on race. In Japan, international treaties have direct effect as internal law and do not require separate legislation proceedings. However, as these provisions are directed toward the State Party, i.e., the Japanese government, they are not directly applicable to discrimination by private entities. Nonetheless, as in the case of Art. 14 of the Constitution, the provisions of these Conventions may be considered in the interpretation of tort law.

Most importantly, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) entered into effect in 1996. Several lawsuits followed, where victims of discriminatory acts by private entities invoked the ICERD in the interpretation of tort law.

- a. Hamamatsu jewelry store case : A Brazilian customer was asked to leave a jewelry store when the storeowner learned that she was Brazilian.
 - b. Otaru public bath case (presented by Mr. Arudo earlier today)
 - c. Saitama housing case : When an Indian engineer called a real estate agent to find housing, the staff asked him repeatedly the color of his skin.
- The court in these cases found that the discriminatory acts constituted tort.

The Japanese government has officially stated that current legislation sufficiently addresses the issues of discrimination which exists in Japan. As explained, relief under general tort law can be given to some cases of discrimination, such as the blatant discrimination cases which I mentioned. However, there are several important issues that are left unsolved by current legislation. This leads me to the next topic.

2 Issues Unsolved by Current Legislation

Firstly, as a matter of substantive law,

- (1) What constitutes illegal “discrimination” based on race as opposed to permissible “distinction” is unclear.

Here are two examples.

- a. Housing Loan case : A U.S. citizen residing in Japan with his Japanese spouse and family applied for a housing loan with a bank and was refused on the ground that he did not have a permanent resident visa. The court affirmed the bank’s criteria to give housing loans only to Japanese citizens or permanent residents in Japan on the ground that such a distinction was “reasonable” because the bank needed to lower its costs in deciding which applications to accept, and categorically excluding all foreigners without permanent resident visas was justifiable.

1 Shizuoka Dist. Ct., Hamamatsu Branch, Oct. 12, 1999, 1718 HANREI JIHOU 92.

2 Sapporo Dist. Ct., Nov. 11, 2002, 1806 HANREI JIHOU 84; affirmed by Sapporo High Ct., Sep. 16, 2004.

3 Saitama Dist. Ct., Jan. 14, 2003.

4 Tokyo Dist. Ct., Nov. 12, 2001, 1789 HANREI JIHOU 96; affirmed by Tokyo High Ct., Aug. 29, 2002, 1155 KIN-YU SHOUJI HANREI 20.

5 Sendai Dist. Ct., Nov. 25, 2002; affirmed by Sendai High Ct., Jul. 25, 2003; appeal dismissed by Sup. Ct., Jun. 11, 2004.

- b. b. National Sports Festival case : A U.S. citizen residing in Japan sought relief when he could not join a local ice hockey team. The hockey team's reason was that the plaintiff could not participate in the National Sports Festival which is co-sponsored by the government because of the Festival's requirement that participants must have Japanese nationality. The Sendai High Court held that excluding foreigners was "reasonable" in light of the purpose and role of the Festival. This decision was upheld by the Supreme Court.

These decisions show that the rule applied by the court to determine "discrimination" is very relaxed, especially when the difference of treatment is based on nationality. Distinctions based on nationality are often upheld as "reasonable" without any careful consideration of whether the means taken is proportionate to its purpose.

- (2) The rule by which conflict with other constitutional rights is solved is unclear.

A good example is the line of cases regarding refusal of membership of private golf clubs.

Several lawsuits have been raised by Korean plaintiffs who were refused membership of private golf clubs based on the clubs' internal rules restricting membership to Japanese persons. All of the courts recognized that the golf clubs are private entities whose freedom of association should be protected, but there are limits to their discretion in their operation and the court can interfere in some cases. Nonetheless, most of the courts affirmed the refusal by the clubs; at least one court found the refusal illegal.

Here, the courts need clearer guidance to decide in which cases rights of others must yield to the need to eliminate discrimination.

- (3) A specific victim needs to be present.

The traditional framework of tort law requires damages incurred by a specific victim. Thus, tort law cannot resolve discriminatory behavior or expressions addressed towards a group.

We are especially concerned with discriminatory remarks made by influential public officials. While these problems should be resolved through the political process, that could be very difficult in the case of discrimination against minorities because the victims of discrimination, especially foreigners, lack political power.

6 Tokyo Dist. Ct., Sep. 9, 1981, 1043 HANREI JIHOU 74. Tokyo Dist. Ct., Mar. 23, 1995, 1531 HANREI JIHOU 53. Tokyo Dist. Ct., May 31, 2001, 1773 HANREI JIHO 36; affirmed by Tokyo High Ct., Jan. 23, 2002, 1773 HANREI JIHO 34; appeal dismissed by Sup. Ct., Jul. 18, 2002.

7 Tokyo Dist. Ct., Mar. 23, 1995.

As a matter of measures for relief,

(1) No adequate measures other than compensation for damages through litigation

The victims of racial discrimination are often vulnerable people without the resources to take legal action to protect their rights. Very few choices exist for them, even if it was clear that the discrimination they suffered constitutes tort.

I must make a note about the Human Rights Protection Bill drafted by the Ministry of Justice that is under discussion at the diet. As you may know, this Bill intends to establish a Human Rights Commission which will handle human rights infringement cases including racial and other forms of discrimination. While there are major problems with this Bill, including the lack of independence of the Human Rights Commission which is designed to be established under the Ministry of Justice, the relief measures to be taken by the commission as set forth in the Bill are useful. In fact, our proposal for a law on the elimination of racial discrimination is based on the premise that a truly independent Human Rights Commission is established and will play a major role in enforcing the law.

(2) The obligations of the administration are not sufficiently defined.

The national government has not adopted any policies regarding the elimination of racial discrimination. Some local governments have adopted declarations which state their intention to aim for a multi-cultural, non-discriminatory society, and some have included in their housing ordinances a provision regarding the need to eliminate discrimination based on nationality. This is far from sufficient.

In the Saitama housing case and the Otaru public bath case previously mentioned, the plaintiffs also sought the responsibility of the local government in failing to enforce an ordinance or otherwise adopt measures to stop the discriminatory practices which widely existed. However, the courts rejected this argument on the ground that it was within the discretion of the government to select which policies should be implemented, even under the ICERD.

While it is possible to argue against the court's reasoning, it would be very much different if there was a law specifically setting forth the obligations of the government to adopt and implement policies to eliminate discrimination.

3 JCLU's Proposal for Legislation

This proposal for legislation was drafted by the JCLU's Subcommittee on the Rights of Foreigners.

It aims to resolve the issues of the current legislation which I have just explained. Some of the features include:

- Including “nationality” as a ground for discrimination prohibited by this law
- Defining and limiting the exceptions that are allowed under the law
- Specific provisions prohibiting discrimination in various areas
- Imposing criminal sanctions
 - a. direct and indirect discrimination
 - b. harassment by public officials (including making discriminatory statements)
 - c. harassment by private individuals if committed in violation of court order
- Intended for enforcement by the Human Rights Commission to be established under a separate law, and provision of special proceedings for discrimination cases

We have encountered oppositions to this proposal even from within the JCLU. The oppositions mainly concern the need for criminal sanctions, especially as applied to discriminatory statements. We are currently continuing discussions to modify our proposal.