Arudou v. Earth Cure: Judgment of November 11, 2002 Sapporo District Court

Translation by Timothy Webster[*]

I. INTRODUCTION TO TRANSLATION

David Aldwinckle sought to enter the Yunohana bathhouse in Otaru, Japan.[1] He wanted to test the firmness of the "No Foreigners" policy posted on its door. He assembled a multinational, multiracial cast outside the bathhouse, bought tickets, and attempted to enter. With him were his Japanese wife and their two daughters; his German friend, Olaf Karthaus, his Japanese wife and their two daughters; and a Japanese husband and his Chinese wife.

The bathhouse did not strictly apply its "No Foreigners" policy. It allowed the Chinese woman to enter, but not the white men. When pressed, the bathhouse manager admitted he would have accepted the more "Asian-looking" of Aldwinckle's two daughters, but not the more phenotypically Caucasian one.

In October 2000, Aldwinckle returned to Yunohana, under the name Arudou Debito, as a naturalized citizen of Japan.[2] But Yunohana's policy had not changed and he was refused entrance. Arudou then did what foreigners are increasingly doing in Japan: he sued Yunohana bathhouse for racial discrimination.[3] This trend in litigation was

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[1] *See* ARUDOU DEBITO, JAPANESE ONLY: THE OTARU HOT SPRINGS CASE AND RACIAL DISCRIMINATION IN JAPAN 51-4 (Akashi Shoten, Inc. 2004).

[2] Aldwinckle made up a "Japanese-sounding name" when he decided to take on Japanese citizenship. *See*, *generally*, Arudou Debito, *What's In My Name? Japanese Naturalization Update*, Aug. 24, 1999, *available at* http://www.debito.org/kikaupdate3.html.

[3] *See Bortz v. Suzuki*, 1718 HANREI JIHÔ 92 (Shizuoka Dist. Ct., Oct. 12, 1999), *translated in* Timothy Webster, Translation*, Bortz v. Suzuki, Judgment of October 12, 1999, Hammatsu Branch, Shizuoka District Court*, 16 PAC. RIM L. & POL'Y J. 631 (2007) (discussing how a Brazilian journalist successfully sued a Japanese jewelry store that discriminated against her); *Harmon v. Asahi Bank*, 1789 HANREI JIHÔ 96 (Tokyo Dist. Ct., Nov. 12, 2001) (discussing how an American journalist unsuccessfully sued a Japanese bank for refusing his application for a housing loan).

encouraged by a 1998 decision rendered by the Shizuoka District Court, where a Brazilian journalist won a 1.5 million yen damages award after a Japanese jeweler expelled her from his store. Since then, numerous foreign plaintiffs, including Chinese, Indian, and African-American, have sued for private acts of racial discrimination. Many have succeeded.[4]

In February 2001, Arudou sued Yunohana bathhouse for racial discrimination. He won one million yen in damages from Yunohana. In light of the fact that Japan has no law banning private acts of discrimination, Arudou's success is somewhat remarkable. To fill in this lacuna, Japanese courts developed the principle of rational discrimination. If defendants can articulate a good-faith rationale for their discriminatory policy or conduct, courts will frequently tolerate it. But when defendants put forth a less convincing rationale, courts will often favor the victims of discrimination: this is what happened in Arudou's case.

Like other foreign human rights litigants in Japan, Arudou pled claims under international law[5] and domestic law.[6] As with the Brazilian plaintiff mentioned earlier, the district court responded well to the combination of international and domestic law. In brief, the district court's decision was influenced by the normative prescriptions of contemporary international law, which stipulates that racial discrimination is unacceptable, and domestic tort law, which determines which acts are illegal.[7] In other words, international law provided an "interpretative standard" by which Japanese judges could determine international legal norms. A categorical ban on foreigners, or at least foreign-looking people, clearly ran afoul of those norms. This fact influenced the judges' determination that the ban was illegal.

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[4] *Court Says City Not Remiss for Letting Bathhouse Bar Foreigners*, JAPAN TIMES ONLINE, Sept. 16, 2004, available at http://www.debito.org/highcourthanketsupress.html; Timothy Webster, Case Note, *McGowan v. Narita*, 9 AUSTRALIAN J. ASIAN L. (forthcoming 2008) (translating both the Osaka District Court's denial of recovery to an African-American man shooed away from an eyeglasses store, and the Osaka High Court's reversal on appeal); Higashizawa Yasushi, *Jinshu Sabetsu Soshô o Meguru Hanrei Hôri no Hatten to Kadai* [*The Development and Issues of Legal Principles from Racial Discrimination Lawsuits*] *in* NIHON NO MINZOKU SABETSU: JINSHU SABETSU TEPPAI JÔYAKU KARA MITA KADAI [JAPAN'S ETHNIC DISCRIMINATION: ISSUES FROM CERD] 322, 326 (Okamoto Masataka ed., 2005)

[5] Arudou cited the International Convention on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S. 171 (ICCPR), and the International Convention to End All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (CERD).

[6] Arudou also pled violations of Articles 709 and 710 of the Japanese Civil Code (akin to common law torts) and Article 14 of the Japanese Constitution. MINPÔ, arts. 709, 910; KENPÔ, art. 14.

[7] *See infra* Part III.B.2 ("The ICCPR and CERD can serve as interpretative standards in interpreting some provisions of private [domestic] law").

But Arudou was less successful in his suit against the city of Otaru. Arudou argued that the city's failure to enact anti-discrimination laws violated its obligations under the International Covenant to End All Forms of Racial Discrimination (CERD).[8] The Sapporo District Court disagreed, holding that "issues such as which measures to take, and how to implement them, are properly left to the discretion of Otaru."[9] As described below, the city took various measures in response to the bathhouses' refusals, such as holding meetings and advising public baths to desist their exclusionary policies. The court decided that the city's measures fulfilled its obligations under international law.[10]

On appeal, the Sapporo High Court further noted that Members of the Japanese Diet are not legally obliged to pass legislation dealing with the individual rights of a citizen.[11] Since CERD did not unambiguously specify *which* measures a local government body should take to handle racial discrimination, Otaru only had a political obligation, not a legal one.[12] The Supreme Court affirmed the lower courts' rulings.[13] In practice, the Japanese judiciary rarely tells the governments what kind of law to pass.

Despite a spike in lawsuits by foreign victims of discrimination, the Japanese government maintains that a law banning racial discrimination is unnecessary at this time.[14] While each lawsuit challenges this complacency to some extent, Japanese courts almost always find against those who practice racial discrimination. We can only hope that the Japanese government will learn from its more enlightened jurists.

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[8] *See infra* Part II.B.III.C.2.

[9] *See infra* Part II.B.III.C.3.

[10] *Id.*

[11] *Arudou v. Earth Cure*, 3 (Sapporo H. Ct., Sept. 16, 2004). The decision has not been officially published, though a copy of the original opinion appears online at http://www.debito.org/kousaihanketsu.html. Citations to the appeals case use the page number of the original opinion.

[12] *Id*. at 12-13.

[13] The Sapporo High Court handed down its verdict on September 16, 2004. It affirmed the District Court's decision on separation of powers grounds; the judiciary can only enforce what the legislature enacts. The Supreme Court merely affirmed the lower courts' decisions. *Id.*

[14] One wonders if the government's next report will offer a comparably confident forecast. *See, e.g.,* Comments of the Japanese Government on the Concluding Observations adopted by the Committee on the Elimination of Racial Discrimination on March 20, 2000, regarding initial and second periodic report of the Japanese Government, para. 5(2), http://www.mofa.go.jp/policy/human/comment0110.html ("We do not recognize that the present situation of Japan is one in which discriminative acts cannot be effectively restrained by the existing legal system . . .").

II. OPINION[15]

Summary

I. Defendant Earth Cure ("Earth Cure") shall pay each Plaintiff 1 million yen, plus 5% interest beginning February 16, 2001.

II. Plaintiffs' remaining claims against Earth Cure, and its claims against Defendant Otaru City ("Otaru") are dismissed.

III. Earth Cure shall pay for one-half of its own attorneys' fees, and one-quarter of Plaintiffs'. Plaintiffs shall pay for the remaining fees, plus those incurred by Otaru.

IV. Only the first paragraph of this decision may be provisionally executed.

Judgment

I. Parties' Claims

A. Plaintiffs' Claims

1. Defendants shall jointly pay each Plaintiff 2 million yen, plus 5% interest beginning February 16, 2001 (the date of the illegal conduct).

2. Earth Cure shall print an apology – 2 centimeters by 2 rows – in the morning edition of the *Hokkaido News*, as attached.

3. Defendants shall bear litigation expenses.

4. A declaration of temporary execution shall issue.

B. Earth Cure's Claims

1. Dismissal of both Plaintiff's claims.

2. Plaintiffs shall bear litigation expenses.

C. Otaru's Claims

1. Dismissal of Plaintiff's claim.

2. Plaintiffs shall bear litigation expenses.

II. Outline of the Case

A. This case concerns Earth Cure's refusals (collectively, "the refusals") to admit Plaintiffs into the public bathhouse it operates in Otaru because they are foreign. The refusals are illegal acts of racial discrimination in violation of Article 14 of the Constitution,

[15] The outline numbering below corresponds to the original work.

the International Covenant for Civil and Political Rights ("ICCPR"), and the Convention to End All Forms of Racial Discrimination ("CERD"). Consequently, this violates of Plaintiffs' good name[16] and moral rights. Based on the illegal acts of Earth Cure, Plaintiffs seek compensation and a published apology. Moreover, Otaru's failure to take measures effectuating CERD resulted in these acts of racial discrimination. Due to this failure, Plaintiffs seek compensation for the violation of their moral rights under the State Compensation Law.

B. Underlying Facts[17]

1. Parties

a. Plaintiff Olaf Karthaus ("Karthaus") is a German citizen. On June 8, 1988, he married Hikichi Yuhi ("Yuhi"). Their first son, Daniel Tatsurou, was born on April 10, 1991, and died on August 17, 2000. Their first daughter, Yumi Katarina, was born on September 27, 1992. Their second daughter, Tami Maria, was born on March 16, 1994. Karthaus is an associate professor at the Chitose College of Science and Technology.

b. Plaintiff Kenneth Lee Sutherland ("Sutherland") is an American citizen. On May 6, 1993, he married Tanaka Mizue. He works as a computer programmer at a company in downtown Sapporo.

c. Plaintiff Sugihara Arudou Debito ("Arudou") was an American citizen, but took Japanese citizenship on September 21, 2000. On June 28, 1988, he married Sugihara Fumiko. Their first daughter, Ami, was born on October 16, 1993. Their second daughter, Hana, was born on July 30, 1995. Arudou is a lecturer at Sapporo Information University.

d. Defendant Earth Cure has its main office as listed in the attached document. It is a joint stock company

[16] I have chosen the term "good name" to translate *meiyo*, which is also glossed as "fame" in the official Standard Japanese-English Dictionary of Legal Terms. I believe this choice more idiomatically conveys the sense of the alleged violation; it is easier to violate one's good name than his fame. HÔREI YÔGO NICHI-EI HYÔJUN TAIYAKU JISHO [STANDARD JAPANESE-ENGLISH DICTIONARY OF LEGAL TERMS], 231 (2006), *available at* www.cas.go.jp/jp/seisaku/hourei/0703jisyo.pdf.

[17] In the original, disputed facts are followed by a citation to the evidentiary record. In the interests of economy and minimal confusion, I have omitted all such citations.

operating a public bath called the Otaru Yunohana Natural Hot Springs ("Yunohana"). Yunohana opened on July 12, 1998.

2. Background to the Refusals

a. Together with their families, Karthaus and Arudou visited Yunohana on September 19, 1999. Posted on the entrance to Yunohana was a sign reading, in Japanese, "No Foreigners" and, in English, "Japanese Only." When Karthaus and Arudou tried to enter Yunohana to take a bath, an employee denied them entrance because of their foreignness ("first refusal").

b. On October 31, 2000, Arudou again visited Yunohana. He told the attending employee that he had taken on Japanese citizenship, and that he wanted to take a bath. But the employee refused him because his foreign appearance had not changed ("second refusal").

c. On December 23, 2000, Sutherland visited Yunohana. He tried to enter the bath, but was refused by an employee because he was foreign ("third refusal").

C. Disputed Points

1. Earth Cure's Liability

a. Plaintiffs' Views

i. Violation of Article 14(1) of the Constitution

The protection of fundamental human rights enshrined in Chapter 3 of the Constitution, excepting those rights that by their nature only extend to Japanese citizens,[18] applies equally to foreigners residing in Japan. Barring special circumstances, equality before the law—as prescribed in Article 14(1)—should by analogy extend to foreigners. Since this provision prohibits irrational discrimination, the question becomes whether the refusals amount to rational discrimination. Earth Cure claims that Japanese customers were dwindling due to the bad manners of Russian sailors in the bathhouse; in order to manage the business of its public bath, Earth Cure had to categorically refuse all foreigners. Since the refusals violate important rights—Plaintiffs' moral

[18] This limitation comes from a 1978 Supreme Court Case, *McLean v. Minister of Justice*. The Court determined that foreigners residing in Japan enjoy most of the rights that Japanese citizens do, save for certain political rights, such as the rights to hold elected office and to vote. *McLean v. Minister of Justice*, 32 MINSHÛ 7, 1223 (Sup. Ct., Oct. 4, 1978), *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at 471 (1996). *See* Timothy Webster, Note, *Legal Excisions "Omissions are not Accidents,"* 39 CORNELL INT'L L. J. 435, 449 (2006).

rights—the business rationale cited above cannot provide a rational basis for discrimination. The refusals, therefore, amount to irrational discrimination and violate the above constitutional provision.

ii. Violation of The International Convention on Civil and Political Rights ("ICCPR")

On June 21, 1979, Japan ratified the ICCPR, which came into effect on September 21, 1979. It is said that once a treaty is promulgated, it has domestic legal effect; there is no need to enact special domestic legislation. Thus, in light of its content, the ICCPR is in principle self-executing, and can be applied directly.

Article 26 of the ICCPR provides "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination on any ground such as race, color, sex, language, religion, political or any other kind of opinion, national or social origin, property, birth or other status." Without additional regulations, it ensures complete equality before the law. But it is not without certain exceptions. The standard is an objective and reasonable one; differential treatment that aims to achieve a legal purpose is not considered discrimination. Looking at the refusals in this light, Earth Cure's purpose of managing a business is limited to protecting its self-interest. Since this is not a legal purpose, we need not consider other factors. There is no reason to except this from the prohibition against discriminatory treatment. Thus, the refusals violate Article 26 of the ICCPR.

iii. Violation of the Convention to End All Forms of Racial Discrimination ("CERD")

Japan acceded to CERD on December 20, 1995, and took on certain obligations as a State Party. As seen in the case law, the general theory is that CERD has legal force as domestic law.

Article 2(1)(d) obligates State Parties to prohibit and end racial discrimination by persons, groups and organizations through legislation and all other appropriate measures. Moreover, according to Article 6, if the state or local body does not take effective and appropriate measures (including legislation) once an act of racial discrimination occurs, a person may seek compensation or other measures for relief from the state or local body for the omission.

Recently, the notion that international human rights law places obligations on private individuals as well as states has quickly taken root in the international community. Using CERD as an example of the international community's public order to judge private acts accords with trends in international law. Given that Article 5(f) protects the "right of access to any place of service intended for use by the general public, such

as transport, hotels, restaurants, cafes, theatres and parks," the refusals violate CERD.

iv. Violations of the Public Bath Law ("PBL")

[7] Article 1(1) of the PBL defines a public bath as "any facility the public may enter to use as a bath, saltwater bath, or hot spring." "Public" refers not only to Japanese citizens, but more broadly to anyone who wants to take a bath. Moreover, public baths receive the permission of prefectural and city authorities to operate; these authorities also regulate the arrangements and standards of public baths through ordinances. To operate businesses, therefore, public baths are not simply private enterprises, but also have a public nature.

Article 4 of the PBL provides that "Businesses must refuse entrance to persons who admit to having contagious diseases." Conversely, those who do not have contagious diseases cannot be refused entrance. The refusals started when a portion of foreign customers behaved badly. Yunohana then categorically refused all foreigners. Article 5 permits a bathhouse to exclude only those who behave badly, "sully the inside of the baths, or engage in conduct that may pose a risk to public hygiene." It does not allow a bathhouse to categorically refuse all foreigners.

Thus, the refusals violate Article 4 of the PBL.

v. Earth Cure's Liability

The refusals, under domestic law, constitute illegal acts in violation of Article 14(1) of the Constitution, and Article 4 of the Public Bath Law. Earth Cure is liable to compensate Plaintiffs for violations of Articles 709 and 710 of the Civil Code.

Moreover, the refusals also violate international law, namely the ICCPR and CERD. Since the refusals satisfy the requirement of illegality, Earth Cure is liable to Plaintiffs for violating Article 26 of the ICCPR, Article 5(f) of CERD, and Article 709 and 710 of the Civil Code. Even if these provisions do not apply directly to private relations, their content constitutes part of the "public order" of Japan. Since violations of the public order can be illegal, Earth Cure is liable to compensate Plaintiffs for violating Articles 709 and 710 of the Civil Code.

b. Defendant's Views

i. When it first opened, Yunohana placed absolutely no restrictions on foreigners. Immediately thereafter, Russian sailors, most of whom entered Japan through the port of Otaru, visited the bathhouse. They stirred up trouble on a number of occasions: entering the bathhouse barefoot, bringing alcohol into the bathrooms, carrying on noisily and

drunkenly, entering the baths with soap still on their bodies, and jumping into the bathtubs. Other customers repeatedly complained. Upon receiving a complaint, a Yunohana employee would attend to the person causing trouble. But there were many instances of miscommunication because the employee could not make himself understood. Moreover, Japanese customers complained to Yunohana that, once foreigners entered the changing room or sauna, their pungent body odor was simply insufferable. There were also complaints that a striking number of foreigners seemed to suffer from skin diseases.

In another bathhouse managed by the Earth Cure Group, there were numerous incidents such as those described above at Yunohana. Groups thought to be comprised of Russians would come to the bathhouse and stir up trouble. Customers dwindled by the day, such that the management had no choice but to close the business.

Based on these experiences, Earth Cure determined that Yunohana would most likely encounter management difficulties if it kept on accepting foreign customers. For the time being, Yunohana decided to refuse all foreigners, and implemented this policy on August 18, 1998. They posted a sign on the front door that read, in English, "Japanese Only." In December 1999, they posted another sign that read, in Japanese, "Based on various circumstances, we are asking foreigners to refrain from entering. We are still discussing an appropriate response at this time."

ii. Plaintiffs assert that the refusals are illegal because of racial discrimination. But Earth Cure—unlike the state or local bodies—is a private legal person that enjoys the right to practice a profession. In thinking about the illegality of the refusals, we must specifically balance Earth Cure's right to practice a profession against the rights Plaintiffs claim were infringed. If Earth Cure's conduct in fact exceeds social norms, this would be the first judgment to call such conduct illegal.

> In other words, even if Earth Cure refused foreigners the use of its facilities for a period of time, as noted above, this is a highly necessary measure indispensable to the protection of their right to practice a profession. The refusals may or may not be appropriate, but they cannot be recognized as illegal violations of social norms. Moreover, Arudou learned of Yunohana's refusals through the internet. In order to protest Earth Cure's policy, Arudou—together with fellow *Issho Kikaku*[19] member Karthaus—took their families to Yunohana on September 19, 1999. As expected, they were refused entrance. Furthermore, they notified a newspaper reported beforehand so that the refusal would be broadcast through the mass media to the rest of the world. Sutherland was refused entrance on December 23, 2000. Like Arudou and Karthaus, he wanted to protest Earth Cure's policies. More concretely, he wanted to add his name to the list of plaintiffs in this lawsuit. He went to Yunohana fully expecting to be refused, thus purposely effectuating his own refusal. Moreover, since Plaintiffs live in downtown Sapporo, and the Nanporo District of Sorachi County, there was absolutely no need to go to Yunohana, which is located in downtown Otaru. In light of the rights of Plaintiffs actually infringed, it is difficult to recognize that Earth Cure's refusals violate social norms.

2. Otaru's Liability

    a. Plaintiffs' Views

        i. In the fall of 1993, public bathhouses in Otaru categorically refused foreigners. Likewise, Yunohana started to categorically refuse foreigners in July, 1998. However, since Otaru did not fulfill its obligations to prevent and bring to an end racial discrimination, as required by CERD, Earth Cure

[19] A nongovernmental organization dedicated to advancing the rights of foreigners in Japan. *See*, *e.g.*, Taro Karasaki, *Town's Foreigners Get Higher Profile*, ASAHI NEWS SERVICE, June 19, 2003 (calling Issho Kikaku "an advocacy group for a multicultural society"); Paul Murphy, *Docomo's 'Foreign' Tariff*, ASAHI NEWS SERVICE, Apr. 12, 2002 (calling Issho Kikaku "a nongovernmental organization that studies multicultural issues").

continued to categorically refuse foreigners, which in turn led to the refusals.

ii. Article 2(1)(d) obligates states and local bodies to take all appropriate measures—including legislation—to end racial discrimination by persons, groups, or organizations. Article 6 provides that, if the state or local body does not take effective measures, compensation or other relief measures may be sought for this omission. If the state or local body takes measures that do not eliminate racial discrimination, victims may seek " all forms of compensation resulting from the discrimination" from the state or local body.

As noted, the refusals are covered by Article 5(f) of CERD. Based on Article 2(1)(d), Otaru should take all effective measures to end the categorical refusal of foreigners, including enacting legislation to punish racial discrimination. Since Otaru has neglected this obligation, Plaintiffs' moral rights were infringed.

Therefore, Otaru has an obligation to compensate Plaintiffs based on Articles 2(1)(d) and 6 of CERD, Articles 709 and 710 of the Civil Code, and Article 1 of the State Compensation Law.

iii. Otaru claims that CERD imposes obligations on State Parties, but not on local bodies, to take measures. However, because local bodies possess some aspect of state sovereignty, their conduct is considered state action under international law. Like states, local bodies also have obligations to implement treaties domestically in the field of human rights, whether through their independent power to enact legislation, or other administrative measures. Thus, Otaru is liable for its omissions under CERD.

Otaru also claims that a State Party has the discretion to determine the contents of the measures it adopts. CERD does not specifically list the measures or policies a State Party should adopt. But it does obligate State Parties "to prohibit and bring to an end racial discrimination by any individual, group or organization." Thus, CERD

obligates Otaru to achieve a certain result: the elimination of racial discrimination.

b. Otaru's Views

i. In order for the provisions of an international treaty, such as CERD, to be directly applied in domestic courts, they must be recognized domestically as legally binding. Whether treaty provisions can be directly applied in domestic courts must be decided on an individual basis, in light of the purpose and content of the provision. When a provision is only a declaration—either an abstract and general principle, or a political duty—and the relation between rights and obligations is not clearly delineated, it does not have domestic legal effect. Particularly in a case like this, when an omission (a violation of the duty to legislate) is at issue, the treaty must clearly spell out the contents of the duty to legislate.

The first sentence of Article 2(1) of CERD, on which Plaintiffs rely, is merely a declaration that the state has a basic duty to enact effective policies aiming to eliminate racial discrimination and denounce racism; it does not impose a specific or concrete obligation. Furthermore, Article 1(d) provides that a State Party shall use all appropriate means, including legislation, to end racial discrimination between private persons. But this imposes merely a basic, general duty on State Parties; the specific policies, which may include legislative measures, are left to the State Party's discretion. Moreover, Article 6 provides "State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." It does not prescribe, as Plaintiffs claim, that a local body must provide compensation for legislative omissions. Moreover, these provisions define obligations for the State Parties; they do not give a

private individual the specific right to seek specific measures from the state when he encounters racial discrimination. These specific rights should be defined through legislative measures. Therefore, the responsibilities belong to State Parties; the treaty provisions do not directly require local bodies to pass measures of any kind.

ii. Even if Article 2 of CERD is directly applicable, and the state had an obligation to pass legislation aiming to eliminate racial discrimination, the content of that legislation would still be chosen and implemented in light of the State Party's domestic conditions, social system and judiciary. It would, in sum, be left to the State Party's discretion.

Likewise, if a state's legislative measures did not clearly define the obligations and systems under domestic law, the local body could choose which measures to implement in light of its own unique circumstances: the conditions of discrimination, regional sentiments, legal provisions, the state systems, financial conditions, and so on. It would be left to the local body's discretion.

iii. In resolving the human rights violations at stake in the refusals, Otaru has taken numerous actions: repeated consultations with Yunohana; oral guidance and requests; written petitions; educating citizens through publications (both online and print) on categorically denying entrance to foreigners; educating foreigners through the distribution of fliers on proper bathing etiquette; support networks to handle this problem in bathhouses and; hosting meetings to resolve this issue with the participation of a wide array of international organizations. It is difficult for the government to prevent discrimination against foreigners in the private sphere through the use of force. Otaru thought deeply and made various efforts toward a solution. The measures taken by Otaru were effective insofar as two facilities that had banned foreigners began to accept them. As the measures required by CERD are fully within Otaru's discretion, there is no reason to doubt that Otaru discharged its legal duties. There is debate as to whether Otaru should

> enact penalties in the absence of national laws. However that debate may conclude, Otaru is not liable for a legislative omission for not enacting such a measure.

3. Damages

a. Plaintiff's Views

Because Earth Cure refused Plaintiffs, and Otaru failed to take effective measures relating to the refusals, Plaintiffs have not only been deprived of the right to enjoy a bath, but have also suffered grievous injury to their dignity as human beings, their moral rights, and their good name. Therefore, Earth Cure and Otaru are jointly and severally liable to each Plaintiff for two million yen as compensation for mental suffering. Moreover, Earth Cure is obligated to publish an apology for defaming Plaintiffs.

b. Earth Cure's Views

Since Plaintiffs knew beforehand that they would be refused entrance at Yunohana, and visited for the purpose of appealing to society, they in effect created the situation in which they would be refused. As far as Plaintiffs are concerned, there was absolutely no need to go to Yunohana. Thus, since Plaintiffs have not suffered any mental harm from the refusals, there is no reason to recognize their claims for damages or apology. Earth Cure also disputes the idea that Plaintiffs were defamed.

c. Otaru's Views

Otaru disputes the damages.

III. Decision of this Court

A. Based on all the evidence [various exhibits and the witness statements of Takeuchi Kazuho, Arudou Debito, Olaf Karthaus, Ken Sutherland, and a representative of Earth Cure][20] and pleadings, the following facts are recognized:

1. The Refusals

a. The Earth Cure group managed the Green Sauna bathhouse. Russian sailors visited this bathhouse, and stirred up trouble on numerous occasions: they entered the bathtubs with soap still on their bodies, ate and yelled in the bathrooms, took photographs in the bathroom and lounge. Green Sauna printed pamphlets on bathing etiquette and distributed them to foreign

[20] Translator's note: Here, the court lists various exhibit numbers from the trial (e.g. Exhibit A3(2), A3(4), etc.) omitted here because they provide no concrete reference.

patrons, but the situation did not improve. Customers at Green Sauna dwindled, the management broke down, and the establishment shut down at the end of August, 1998.

When Yunohana opened in July, 1998, there were no restrictions on foreign patrons. Russian sailors, most of whom entered Japan through the port of Otaru, visited the bathhouse. There were many instances where they made trouble: entering the establishment barefoot; bringing alcohol into the bathroom; drinking and yelling; entering the bathtubs with soap still on their bodies; jumping into the bathtubs. Other customers complained.

Based on these experiences, Earth Cure determined that it was extremely likely that Yunohana would fall into management difficulty; other customers would dwindle if they continued to accept foreign patrons. On August 18, 1998, Yunohana posted a sign reading, in Japanese, "No Foreigners," and, in English, "Japanese Only." Yunohana categorically refused foreign patrons.

Moreover, in downtown Otaru, the Otaru Spa banned all foreigners as of July 1993, while the Panorama public bath did the same as of April 1994.

b. Arudou has resided in Japan since 1988, and Karthaus since 1992. Both belonged to *Issho Kikaku*, an NGO dedicated to protecting the human rights of foreigners in Japan. In the summer of 1999, both men learned through the internet that Yunohana categorically banned foreigners, and thus hoped to enter it. To confirm that Yunohana did, in fact, ban foreigners, they visited with their families, and two other foreign families on September 19, 1999. They purchased tickets and were about to enter when a Yunohana employee refused them ("first refusal"). The employee explained that Russian sailors had not followed proper bathing etiquette and bothered other Japanese customers; that Japanese customers had stopped coming; and that Yunohana had adopted a policy banning foreigners. Both men argued that they were not Russian sailors; that they had married Japanese women; they had lived in Japan for many years; and that they should therefore be admitted. But they were

not admitted. Instead, on their way home, they stopped at the Fleizeit public bath in downtown Otaru.

Since a reporter from the *Hokkaido News* accompanied them, an article appeared on September 21, 1999 entitled "Public Baths in Downtown Otaru Enact Categorical Ban on Foreigners."

c. On January 3, 2000, Arudou and Karthaus revisited Yunohana. They asked Yunohana's branch manager, Kobayashi Katsuyuki ("Manager Kobayashi"), to lift the categorical ban. He refused. In December 1999, however, Yunohana replaced the "Japanese Only" sign with one that read "Based on various circumstances, we are asking foreigners to refrain from entering. We are still discussing an appropriate response at this time."

On September 21, 2000, Arudou naturalized, and became a citizen of Japan. He returned to Yunohana with a friend on October 31, 2000. He showed the employee his driver's license, explained that he was Japanese, and asked to enter the bath. The employee again refused, saying "You're white. People won't understand that you're Japanese because of your appearance. Please don't go in" ("second refusal").

d. Sutherland has resided in Japan since 1988. Since 1995, he has made monthly visits to a friend living in a nursing home in downtown Otaru. Coming home from a hike one day in July 1999, he wanted to to into Yunohana. However, since the sign prohibiting foreigners was posted, he did not enter. Approving of Arudou's and Karthaus's movement to eliminate discrimination against foreigners, Sutherland learned that they were considering a lawsuit because of the refusals. He decided to join as a litigant. So he revisited Yunohana on December 23, 2000, hoping to enter the bath, or gather evidence for the lawsuit if denied. He bought a ticket and was about to enter when an employee told him of the decision to ban foreigners. He was refused entrance ("third refusal").

2. Otaru's Response to the Refusal

a. On October 5, 1998, representatives from the International Cooperative Committee of the Catholic Diocese of Sapporo and the Society for the Protection of Rights of Foreigners—Hokkaido visited Otaru. They presented a letter, on behalf of both groups, entitled

"Request for a Favorable Disposition of the Yunohana Bathhouse's Sign Banning Foreigners." The letter requested Otaru to tell Yunohana to take down the sign refusing foreigners because of its racial prejudice and discrimination, and advised Yunohana to accept foreign patrons. Otaru's International Affairs Division and Department of Health and Environmental Hygiene were charged with dealing with the refusals. On October 6, 1998, and October 9, 1998, representatives from the two organizations visited Yunohana. They confirmed the existence of the sign, and asked Manager Kobayashi about the categorical ban of foreigners. They advised him to try to understand and work with the foreigners.

b. On October 26, 1998, and February 1, 1999, foreigners who had been denied entrance to Yunohana sent letters to Otaru seeking a favorable disposition and its opinion. In late June, 1999, a Japanese husband and his Brazilian wife were also denied entrance; they too sent a complaint to Otaru. On July 13, 1999, professional representatives of Otaru visited Yunohana and asked Manager Kobayashi why Yunohana categorically denied foreigners; they also told him "Since this is a tourist spa and various kinds of people will be coming, we would like you not to refuse them. If you must refuse people, please give a full explanation and try to make them understand." Manager Kobayashi replied, "We have no choice but to continue to refuse all foreigners. We will try to give a full explanation and make them understand." But he refused to suspend the categorical ban.

c. After the first refusal, Karthaus's wife Yuhi wrote a letter to the mayor of Otaru postmarked September 27, 1999. She summarized the public baths in Otaru that categorically refuse foreigners, including Yunohana. She asked the mayor what he thought about the refusals, and requested that he make public what the city intended to do about it.

The mayor responded on October 12, 1999. In his letter, he acknowledged the fact of the refusals. He regretted the unhappy events to which Yuhi and the others had been subjected. He wanted the concerned businesses to understand that the ban would have to end, and to continue discussions in the future.

d. The *Issho Kikaku* group, through its representative Tony Laszlo, submitted a written report to the mayor of Otaru on October 14, 1999. Because the refusals violated CERD, the letter made three requests: (1) to persuade Otaru to enact an ordinance banning racial discrimination; (2) to implement the measures necessary to ensure public baths that categorically refused foreigners would stop the exclusionary practice; (3) to convene a roundtable discussion to be attended by Otaru, *Issho Kikaku*, and the relevant parties from the bathhouses.

Otaru sent *Issho Kikaku* a letter on November 1, 1999. It stated that the problem of the refusals would have to be solved through mutual understanding. As Otaru was not presently considering an ordinance to implement CERD, Otaru hoped to find an appropriate measure by convening a meeting with the International Affairs Division in which the public baths had already participated.

e. On October 26, 1999, Otaru convened a meeting of the International Affairs Division to discuss the issue of accepting foreigners at Otaru's public baths. Representatives of Otaru, the Chamber of Commerce and Industry, the Otaru Youth League, the International Exchange Center at the Otaru College of Commerce and Science, and the International Affairs Division all took part in the discussion. On October 23, Arudou called Otaru to ask if he could attend the meeting. But since the attendees had already been set, he was not allowed to attend.

f. On November 5, 1999, Otaru convened a Town Hall Meeting of the International Affairs Division to discuss the issue of accepting foreigners at Otaru's public baths. In addition to the participants of the October 26 meeting, managers of the public baths—including Earth Cure—partook in the discussion. Consensus emerged that Otaru and the public baths would need to devise a response as soon as possible. On November 2, 1999, Arudou asked if he could attend the meeting on behalf of *Issho Kikaku*, but was again refused.

g. On November 9, 1999, Arudou met with Secretary Takeuchi Kazuho ("Secretary Takeuchi") of the International Affairs Division. The managers of

Otaru's public baths, residents of Otaru, and foreigners attended a forum to discuss the refusals. Arudou proposed an ordinance based on CERD, but Secretary Takeuchi replied that there were no plans to implement such a measure.

h. In mid-November, the Panorama spa suspended its categorical refusal of foreigners. After the Town Meeting, Otaru distributed the fliers they had printed explaining bathing etiquette. Otaru also set up a system whereby representatives of Otaru would help out if there were trouble at a public bath. They proposed this to Yunohana and Otaru Spa, and requested both establishments to start accepting foreigners. Yunohana was unsympathetic, replying that it would respond in its own way. Otaru Spa said they would conduct a review based on surveys and other methods. The above events were mentioned at the December 7, 1999 Town Meeting sponsored by the International Affairs Division.

   In the meantime, Otaru printed up fliers explaining bathing etiquette to foreigners. They distributed four thousand fliers to shipping businesses and tax-free shops. When disputes arose because customers did not follow the rules printed on the fliers, bathhouses could turn to representatives of Otaru for help in resolving the issue.

i. On November 29, 1999, the Consulate of the Federal Republic of Germany sent a letter to the mayor of Otaru. In light of the traditionally amiable relations between Germany and Japan, the letter said, it was a serious problem to discriminate against German citizens based solely on their appearance or nationality. It went on to state that the issue could not be resolved by simply excluding foreigners from public baths. Instead, the proper solution was to seek mutual understanding between public baths and foreigners.

j. On January 13, 2002, Karthaus and Arudou, together with representatives from *Issho Kikaku*, petitioned Otaru and the Otaru City Assembly to enact an ordinance banning racial discrimination. The proposed bill included provisions to a) obligate Otaru to issue restraining orders to those engaging in racial discrimination; b) levy a fine on those who violated the

restraining orders; and c) recognize the right to seek compensation for material and mental damage from those who racially discriminated. Otaru considered the proposal. But there is no national law on racial discrimination. Moreover, one would have to specify which acts of discrimination would give rise to a restraining order or fine. Since that would be extremely difficult, Otaru decided that such an ordinance was premature. Because the Otaru City Assembly had engaged in a similar discussion, the petition was stayed.

k. On March 31, 2000, Otaru hosted a conference on the problem of refusing foreigners at public baths. In addition to the abovementioned participants of the Town Meeting, Karthaus, and Arudou also participated in the discussion. Otaru extended an invitation to Karthaus and Arudou twenty-four hours before the conference.

l. Since November 26, 1999, Otaru placed a link on its homepage entitled "On Foreigners and Bathing Facilities." With regard to the categorical refusal of foreigners at public baths, the homepage described the course of events described above, as well as the city's responses. It also sought the understanding and cooperation of citizens.

Moreover, Otaru issued circulars on December 15, 1999 and April 15, 2000 with the above information; these also sought the understanding and cooperation citizens.

m. In March, 2000, Otaru Spa began accepting foreigners, making Yunohana the only bathhouse to refuse them.

On April 17, 2000, Otaru sent a request to Earth Cure, signed by the mayor of Otaru. It acknowledged the course of events that inevitably led Yunohana to refuse foreigners categorically. But it asked Yunohana to admit foreigners, and take down the sign banning foreigners; this would make Yunohana a place where Japanese and foreigners could mingle, and help remove prejudice against foreigners.

n. As of January 17, 2001, Earth Cure started to admit foreigners at Yunohana who met the following three conditions: 1) they had resided in Japan for more than one year; 2) they fully understood Japanese customs, bathing methods, and bathing etiquette; 3) they

understood the Japanese language. Thereafter, through the managerial efforts of Earth Cure, sales at Yunohana did not decrease.

B. Based on the facts premised and acknowledged above, we examine the first dispute: whether Earth Cure has a legal obligation.

1. Plaintiffs allege that Earth Cure's refusals are illegal violations of Article 14(1) of the Constitution, Article 26 of the ICCPR, and Articles 5(f) and 6 of CERD. But Article 14(1) of the Constitution only applies to relations between the state and the individual; it should not apply to relations between private persons such as Plaintiffs and Earth Cure. As a practical matter, applying this provision to private relations would unjustly infringe on the private sphere inherent in the principle of private autonomy. Likewise, even if the ICCPR and CERD had legal force as domestic law, their provisions would regulate relations between the state and the individual; it would prescribe international obligations on the state, but would not directly regulate interpersonal relationships. The Public Bath Law sets out proper standards for maintaining public hygiene at public baths. Though it licenses bathhouses, it does not empower courts to determine the legality of conduct such as this, which is not related to public hygiene. Thus, Plaintiffs' claim cannot be accepted.

2. As noted, Article 14(1) of the Constitution, the ICCPR, and CERD do not apply directly to relations between private persons. But if private conduct specifically violates, or risks violating, another person's basic rights or equality, these provisions can be used to evaluate social norms. Articles 1 and 90 of the Civil Code, among others, generally regulate private autonomy, and protect an individual's interests against illegal infringements of basic rights and equality. Thus, Article 14(1) of the Constitution, the ICCPR, and CERD can serve as one standard in interpreting the above provisions of private law.

With regard to the refusals, it seems that the signs banning foreigners posted at the entrance of Yunohana evince discrimination based on nationality. But there are situations, such as in the second refusal, when one cannot differentiate national origin from physical appearance; Arudou was refused even after taking Japanese nationality. The substantive issue is not discrimination based on nationality, but whether one appears to be foreign. This is discrimination based on race, skin color, descent, ethnic origin or racial origin. In light of the meaning of Article 14(1) of the Constitution, Article 26 of the

ICCPR, and CERD, these amount to private acts of racial discrimination that ought to be eliminated.

We acknowledge that Earth Cure, with respect to Yunohana, enjoys a right to a profession based on the protection of property rights. However, pursuant to the Public Bath Law, Yunohana is a public bath operating under the license of the governor of Hokkaido. Because it contributes to maintaining and advancing public hygiene, Yunohana has a public nature. Patrons, upon paying the appropriate fee, can enjoy a bath unlike the ones in their own homes, and thereby maintain cleanliness. As far as public baths are concerned, patrons should be able to use them without regard to nationality or race. However, though called a "public" bath, one who causes trouble to other patrons may be ejected or denied use. Thus, Earth Cure may—with the assistance of Otaru and the Otaru police—eject people who do not follow bathing etiquette after receiving instructions. Earth Cure can also refuse persons who are drunk or possess alcohol. There are undeniably situations where the implementation of such methods will not be easy. But as a *public* bath, Earth Cure should implement the above methods to the extent it is able. In situations where it might not be easy, Earth Cure cannot just categorically refuse foreigners. That would clearly be irrational. Furthermore, there was absolutely no risk that these Plaintiffs were causing trouble for other patrons.

Thus, categorically refusing all foreigners constitutes irrational discrimination, exceeds social norms, and amounts to an illegal act.

Defendant Earth Cure claims that the refusals do not exceed social norms. Because Plaintiffs visited Yunohana to appeal to the mass media and protest Earth Cure's policies, the violation they suffered does not substantively compare to the economic freedom enjoyed by Earth Cure. By contrast, Plaintiffs claim that even if they intended to publicize their protest of Earth Cure, such facts do not alter their basic desire to take a bath. Since Plaintiffs suffered irrational discrimination, their intent does not change the illegality of the refusals.

C. Next we examine the second dispute: whether Otaru has a legal obligation.

1. At present, Japan has no law or ordinance by which the state, or a local body, may force a privately run public bath to suspend its policy of exclusion, or penalize racial

discrimination. In such a legal system, Otaru, commensurate with its duties as a municipal body, undertook the above activities in response to Yunohana's categorical refusal of foreigners.

2. Plaintiffs claim that Otaru had a duty to pass an ordinance banning discrimination through the use of force and penalties, but it has failed to do so. Since Articles 2 and 6 of CERD obligate a member state to end the uniform exclusion of foreigners, Otaru's failure to pass an anti-discrimination law is illegal.

However, as a local body, Otaru—like the Diet—only has a political obligation toward the citizenry as a whole; it has no legal obligation to pass a law relating to the rights of an individual citizen. An anti-discrimination ordinance—unlike those required by constitutional, treaty or statutory law—is not required to have a set content. The first sentence of Article 2(1) of CERD, and subsection (d) provide that:

State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. […] Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstance, racial discrimination by any person, group or organization.

Like the state, Otaru—as a body that exercises state power—is obliged to prohibit and bring to an end racial discrimination. But this is merely a political obligation; it should not be interpreted to impose a clear and uniform obligation to prohibit and bring to an end specific acts of racial discrimination by enacting laws between individual citizens. Moreover, Article 6 provides that:

State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

But this provision in the main relates to procedural guarantees, ensuring relief measures through a court of law. Since there is no specific reference to a substantive requirement to provide compensation or relief, it cannot be said

that Otaru is obligated to pass an ordinance banning racial discrimination. Because there is no clear and uniform obligation—such as that imposed by the Constitution, treaty or statute—Otaru's failure to enact a law is not illegal.

3. Plaintiffs next argue that, independent of anti-discrimination ordinances, Otaru is obligated to take measures to prohibit and end Earth Cure's categorical refusal of foreigners; Otaru's failure to do so is illegal.

   However, apart from anti-discrimination ordinances, there is a limited number of measures Otaru could take to prohibit and end the kind of racial discrimination at stake here. Nor can one be sure that these measures would prove effective. Thus, issues such as which measures to take, and how to implement them, are properly left to the discretion of Otaru. Even if Otaru had not taken the measures described above, that would not in principle be illegal. Exceptionally, if Otaru could easily take effective measures to deal with the categorical refusal of foreigners, and many citizens expected Otaru to do so, only then would the omission rise to the level of illegal violation.

   Regarding this case, Otaru—after the first refusal—hosted several meetings (including the Town Meeting of the International Affairs Division and the Meeting to Discuss the Issue of Banning Foreigners at Bathhouses); distributed fliers to shipping businesses and duty-free shops instructing foreigners on proper bathing etiquette; requested and advised public bath managers, such as Earth Cure, to desist from categorically refusing foreigners. As a result of these various measures, the mass media took up the categorical refusal of foreigners as a social issue. Public opinion made an important contribution. Indeed, in November, 1999 and March, 2000, two public baths suspended their policies of categorically refusing foreigners, proof that the various measures Otaru adopted were, in the end, fairly effective. In the present legal system, even considering the viewpoints of citizens, it is difficult to think of measures beyond those already taken by Otaru (Facilities to instruct foreigners on proper bathing etiquette would, in the end, result in bathing facilities for foreigners only, in effect abetting racial discrimination). Thus, we do not consider Otaru's failure to pass a law illegal.

4. In light of the above, Otaru did not have a legal obligation.

D. We finally examine the third dispute: damages.

1. Plaintiffs argue that the refusals not only deprived them of their interest in taking a bath at Yunohana, but also violated their moral rights. The racial discrimination they suffered because of their foreign appearance also caused mental anguish. For these reasons, one million yen is appropriate compensation.
2. Earth Cure argues that Plaintiffs did not suffer mental anguish because Plaintiffs visited Yunohana simply to appeal to the public, they knew beforehand that they would be refused, and they did not need to go to Yunohana. But, even if Plaintiffs intended to publicize the fact of their refusal by going to Yunohana, they were in fact denied entrance, and suffered mental anguish. It cannot be said that they suffered no harm. Thus, we cannot accept Earth Cure's claim.
3. Thus, Earth Cure is ordered to pay each Plaintiff one million yen in damages. However, since Plaintiffs were not defamed by the refusals, Plaintiffs' claim for a published apology fails.

IV. Conclusion

For the above reasons, we recognize Plaintiffs' first claim against Earth Cure. Earth Cure shall pay each Plaintiff one million yen, plus five percent interest as of February 16, 2001. We dismiss the additional claims against Earth Cure, and those against Otaru, as stated in the Summary.