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**BORTZ V. SUZUKI,
JUDGMENT OF OCTOBER 12, 1999,
HAMAMATSU BRANCH, SHIZUOKA DISTRICT COURT**

Translated by Timothy Webster[†]

Translator's note: The Bortz case links a series of truly comparative moments. In the first, the unsuspecting foreigner crosses into another culture's blind spot, and emerges a very different person. Ana Bortz was shopping for a necklace in a Japanese jewelry store when the owner asked her where she was from. A westerner in Japan, Bortz likely thought little of the question, having answered it many times. She answered first in Japanese, and then in English, "from Brazil." Neither response pleased the storeowner. Foreigners, or perhaps just Brazilians, were not allowed in the store.

Their ensuing argument revealed other comparative moments. Enraged by unapologetic discrimination and unsympathetic police, Bortz did what many westerners would: she threatened to sue. For the storeowner, Suzuki Takahisa, the threat seemed hyperbolic, or perhaps just odd. One does not sue over such things in Japan. But Bortz made good on her threat; she hired a lawyer, filed her claim, and eventually won damages of 1.5 million yen (\$12,500) from the Suzuki family. The Japanese racial discrimination lawsuit was born.

To be sure, other foreigners—Koreans, Chinese, Taiwanese, Filipinos—have experienced racism in Japan. But racism operates differently between the races. Phenotypically, Asian people experience subtler, perhaps more deeply-rooted, forms of discrimination in Japan. Resident Koreans, many of whom have lived in Japan for generations yet remain "foreigners" by law, routinely encounter discrimination in employment and education. When they sue, their claims are not framed in the language of race, but of nationality.

Latin,¹ African-American,² and European-American³ foreigners, on the other hand, experience more overt forms of discrimination: ejection from a store, denial of entrance into a store, rejection on a housing application, being shooed away. These acts clash with notions of fundamental fairness that westerners expect in society. For the westerner, the lawsuit is the preferred method of restoring persons injured by such behavior.

The challenge for Bortz was where to find relevant law. The Japanese Constitution prohibits discrimination based on race, but only for its own citizens. Bortz's lawyer had the vision to invoke the U.N. Convention to End All Forms of Racial Discrimination (CERD), which Japan signed in 1996. Judge Soh Tetsuro likewise exhibited creativity in applying international law domestically, via tort law, to fashion a modest, but unprecedented, remedy for Bortz.

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¹ See *infra* (Plaintiff in this case is a Brazilian woman).

² In October 2006, the Osaka High Court fined a storeowner 350,000 yen for shooing away an African-American man from his store front. See Eric Johnston, *Plaintiff gets redress but not for racial bias: High court tells shopkeeper with avowed hatred of blacks to pay 350,000 yen*, JAPAN TIMES ONLINE, Oct. 19, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20061019a4.html> (last visited May 21, 2007).

³ In November 2002, the Sapporo District Court ordered a bathhouse that had banned foreigners to pay each of three plaintiffs (an American, a German, and a naturalized Japanese citizen of American descent) 1 million yen. See *City off hook over bathhouse barring of foreigners*, JAPAN TIMES ONLINE, Apr. 8, 2005, <http://search.japantimes.co.jp/cgi-bin/nn20050408a4.html> (last visited May 21, 2007).

The *Bortz* case shows that the Japanese judiciary takes human rights seriously. Though the subsequent judicial record on racial discrimination is not perfect, *Bortz* is a bold salvo toward the entrenchment of the international norm of racial equality into Japanese law. Subsequent lawsuits on racial discrimination—brought by foreigners such as Arudou Debito, and Steve McGowan—evinced Japan's support for international human rights.

I. SUMMARY

[217]

- I. Defendants must pay plaintiff 1.5 million yen plus five percent interest on the judgment from June 16, 1998 until payment is complete.
- II. Litigation expenses shall be borne by defendants.
- III. This decision can be executed presently.

II. BACKGROUND

Petition

I. Substance of the Claims:

- A. That defendants jointly pay plaintiff 1.5 million yen plus five percent interest on the judgment from June 16, 1998 until payment is complete.
- B. That defendants bear litigation expenses.
- C. That the decision be executed forthwith.

II. Defendants' Response:

- A. That plaintiff's claim be dismissed.
- B. That plaintiff bear litigation expenses.

Claims

I. Plaintiff's Claims:

A.

1. Plaintiff was a reporter at the Shizuoka Branch (located in Hamamatsu) of the IPC Television Network, a joint stock company.
2. Defendant Gorō Itsuyama operated an incorporated jewelry store with his siblings known as S Trading Store (not registered as a legal person, hereinafter "S store") in the Sakana District of Hamamatsu city in Shizuoka

prefecture [address omitted]; his mother Hanako also jointly operated the store.

B.

1. At around noon on June 16, 1998, plaintiff entered S store, and looked at the merchandise on display in the showcases. Defendants Hanako Itsuyama, Gorō Itsuyama, and his wife were all present in the store.

Two onyx necklaces were displayed in the showcase at the back of the store. Plaintiff went to the back of the store to look at the necklaces. After finding the necklaces not to her taste, plaintiff was about to leave the store when defendant Gorō Itsuyama approached her and asked, in English, “Where are you from?” Plaintiff smiled and replied in Japanese, “From Brazil.” Upon hearing this, defendant Gorō Itsuyama stopped smiling and cocked his head. Thinking she had not conveyed herself properly, plaintiff replied, this time in English, “From Brazil.”

2. With a look of scorn, defendant Gorō Itsuyama violently rummaged through some documents, then approached plaintiff with arms spread, as if to eject her. He then yelled that the store did not allow foreigners. When plaintiff asked why, defendant angrily pointed to a sign on the wall written in Japanese: “We are presently restricting admission to this store: no more than five customers at a time please. Also, foreigners are strictly forbidden.” Then, he removed a flier from another part of the wall that had been prepared by the Hamamatsu Central Police Station. The flier read “Beware of burglaries.” He thrust it in plaintiff’s face.

The flier read “Recently . . . at fine jewelers and other places . . . incidents of nighttime burglaries have increased. Thieves drive up, break in through the entrance, and walk off with large quantities of merchandise in a short period of time. Pay attention to the suggestions written below, and immediately notify police of any suspicious activity.”

Among the suggestions written below were:

- a. Be careful of casing.
- b. Constantly check the locks of doors and shop entrances.
- c. Take appropriate measures against suspicious persons.

Additional explanations followed these suggestions.

3. Defendant Gorō Itsuyama then threatened, “I will call the police if you do not leave.” Plaintiff responded, “Please do.” Because she did not leave the store, two policemen from the Hamamatsu Central Police Station and a security guard that defendant called entered the store.

Meanwhile, plaintiff called acquaintances and fellow newspaper reporters on her cell phone. Thus, a number of persons showed up at the

store, including the plaintiff's husband Kano Tarō, a reporter for the International Press; Mara Nakagawa, a reporter for the Mundial News Agency; Ricardo Makiyama, a colleague of plaintiff's husband who served as translator; and several Japanese reporters.

The policemen listened to defendant Gorō Itsuyama's description of the events. At the time, defendant charged that previously "Brazilians had stolen from his store," but later changed his story to "the police, despite an investigation, could not confirm where the thief was from." He also claimed that "he had initially thought the plaintiff was French."

Plaintiff told police that "prohibiting foreigners from entering a store was a human rights violation." The policemen replied that "we cannot do anything about a human rights violation" and did nothing to help her.

4. In the meantime, and without apologizing, defendant Gorō Itsuyama left to attend to some business. The plaintiff then asked defendant Hanako Itsuyama to remove the "No foreigners" sign, but defendant Hanako Itsuyama refused.

Plaintiff asked defendant Hanako Itsuyama to write a letter of apology for defendant Gorō Itsuyama's conduct. Defendant Hanako Itsuyama wrote the following on a piece of paper and handed it to plaintiff: "Sorry there was a miscommunication. That's all I'm going to say about it."

Because this was neither an apology nor an admission of racially discriminatory conduct, plaintiff said, "Hanako does not really seem sorry." Defendant Hanako Itsuyama frankly replied that "In fact, I am not sorry. I only wrote it because I was asked to. [218] All I really wanted was for you to leave." At this point the policeman interjected, explaining to the plaintiff that defendant Hanako Itsuyama "could not do any more than this."

Thus, plaintiff left the store, claiming that she could not accept this as an apology, and would sue in court. Approximately three hours had passed since plaintiff entered the store.

5. Thereafter, plaintiff retained a lawyer, Mr. Ogawa Hideyo. Mr. Ogawa stopped by defendants' store twice, phoned them several times, and left several messages stating that he wished to speak with defendant Gorō Itsuyama and asking defendant Gorō Itsuyama to please call him back. Defendant Gorō Itsuyama was not at the store when Mr. Ogawa stopped by, and did not answer the phone. There was no further communication from defendant.

Later, Mr. Ogawa sent defendant Gorō Itsuyama a registered letter on July 18, 1996, which was delivered on July 19, 1996. The letter sought an apology and monetary compensation on behalf of the plaintiff, but defendant Gorō Itsuyama made no response.

C.

1.a. Defendant Gorō Itsuyama's actions—ejecting plaintiff either because she was Brazilian, or because she was not French—are acts of racial discrimination with respect to the Brazilian plaintiff.

Thus, Defendant Gorō Itsuyama's abovementioned conduct is an illegal act under Article 709 of the Civil Code.

b. Furthermore, defendant Hanako Itsuyama jointly operated the jewelry store and engaged in conduct with defendant Gorō Itsuyama which, viewed in its entirety under prevailing social norms, would be considered discrimination against the plaintiff. It was the defendant herself who posted the racially discriminatory sign on the wall of the store. Moreover, from the beginning of the incident, she merely watched while defendant Gorō Itsuyama mistreated the plaintiff, doing nothing to prevent defendant Gorō Itsuyama from ejecting the plaintiff.

Thus, defendant Hanako Itsuyama, together with defendant Gorō Itsuyama, is liable for damages under paragraphs 1 and 2 of Article 719 of the Civil Code.

c. Moreover, when defendant Gorō Itsuyama thrust in plaintiff's face the flier that read, "Beware of burglaries," he groundlessly insinuated she was stealing, damaging her reputation and insulting her.

2. The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")—adopted by the United Nations General Assembly on December 21, 1965, entered into force on January 4, 1969; ratified by Japan on December 20, 1995, entered into force for Japan on January 14, 1996—contains certain provisions (as cited in the attachment).

According to the cited provisions, it is prohibited for any individual, group, or organization to discriminate based on race. This means there is a right *not* to be racially discriminated against; in other words, it confirms that the right to racial equality takes precedence over other individual rights, such as the right to choose one's profession, or engage in private relations.

a. Various provisions of CERD can be applied directly to a private dispute in Japan; the kind of private racial discrimination at issue in this case can be interpreted as a violation of Article 2(d). Specifically:

i. Originally, Japan generally gave domestic legal effect to treaties. The legality of a treaty did not require special legislation to have effect as domestic law.

ii. Article 2(d) of CERD reads "Each State Party shall prohibit . . . by all appropriate means . . . racial discrimination by any persons . . ." Included among the appropriate means is interpreting the treaty so as to apply directly to private relations. Though neither the government nor Diet

of Japan adopted legislative measures after ratifying the treaty, this is because the treaty itself is meant to be applied directly.

iii. Article 6 of CERD lays out measures for relief due to violations of the treaty, in particular the guarantee of a right to seek compensation in domestic courts; it can further be interpreted that each provision of the treaty will fall under the jurisdiction of the domestic courts of signatory nations. If that is the case, then Article 2(d) can be directly applied to cases involving private relations.

Thus, because defendants' conduct is an illegal violation of Articles 2(d) and 6 of CERD, and Article 709 of the Civil Code, plaintiff has the right to seek compensation for damages.

b. Even if CERD does not directly apply to private conduct, it can be ratified and given effect indirectly, through interpreting the human rights provisions of the Constitution. The provisions of the treaty can be understood as interpretative standards of generalized, abstract legal provisions.

It is thought that since defendants' decision to allow or deny a customer into their jewelry store is the first stage in concluding a sales contract, concluding the contract itself would be entrusted to the sphere of private autonomy. But though called "private autonomy," it is not completely unrestricted, for violations of the public order (Article 90 of the Civil Code) will not be tolerated. Thus, since the ratification of CERD, the substance of public order must be understood in light of the meaning of that treaty.

Under Article 2 of CERD, individual acts of racial discrimination should be eliminated in signatory countries. Thus, signatories have a duty not to sponsor, defend, or support acts of discrimination (Article 2(b)); they also have a duty to prohibit, and bring to an end, individual acts of racial discrimination (Article 2(d)). Therefore, acts of racial discrimination, even when committed by an individual, must be seen as illegal acts that violate the public order, according to the provisions of the treaty. In this way, the aforementioned conduct of defendants violated the public order, and is illegal.

Moreover, the existence of illegality or infringement of rights, the constitutive elements of an illegal act under Article 709 of the Civil Code, must likewise be determined in accordance with the treaty. [219] Since the treaty prohibits individual acts of discrimination, there is a right *not* to be discriminated against, even in private relations. Equal rights, including the right to be free from racial discrimination, are protected as legal rights; acts that violate equal rights must be seen as illegal. In this way, the

aforementioned conduct by defendants violated plaintiff's equal rights, and is illegal.

Thus, even if defendants' aforementioned acts of racial discrimination were not direct violations of CERD provisions, they are nonetheless illegal either as violations of the public order, or plaintiff's equal rights. This obligates defendants to compensate plaintiff for damages suffered under Article 709 of the Civil Code.

3.a. Due to defendants' conduct, plaintiff's personal dignity was grievously wounded, and she suffered mental harm. Thus, the right to seek reparations based on Article 709 and paragraph 2 of Article 710 of the Civil Code is recognized.

b. Moreover, as provided in Article 6 of CERD, "the right to seek from [competent national tribunals] just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination" is hereby ordained. Thus, while the amount of plaintiff's reparation must be just and adequate, the special nature of racial discrimination demands consideration of the following factors:

i. Discrimination means conduct in which "a person is not treated as another human being." This is a serious violation of a person's dignity both as an individual and as a human being.

Discriminatory attitudes can easily lead those who discriminate to commit horrific acts of inhumanity, as can be seen in the Nazi massacre of Jews and many other examples. Upon further reflection, the attitude adopted by those who discriminate vis-à-vis the victim is none other than "they are not human beings," or "there is no need to treat them as people." When this attitude is manifested externally through discriminatory conduct, the victim's dignity as a human being is grievously wounded.

ii. This case involves defendants' intentional acts. While aware of their actions, defendants dared to engage in discriminatory conduct.

Even if defendants did not think that it was an illegal act of discrimination, that is a problem of their judgment: of right and wrong, illegal and legal. In criminal law, lacking the knowledge that an act is illegal does not negate the establishment of intent; likewise, it cannot be denied that this was an intentional illegal act.

iii. Furthermore, defendant Gorō Itsuyama did not merely utter discriminatory words, but rather stretched his hands out to eject plaintiff, undertaking a tangible act. Moreover, by calling the police, he sought to instill fear in plaintiff.

This kind of conduct—the realization of actions based on discriminatory attitudes that could easily lead those who discriminate to commit inhuman acts—actually gave plaintiff a tremendous shock and scare.

iv. Moreover, at the time, defendants were not aware that their actions toward plaintiff were discriminatory; they assumed there was no other way to deal with plaintiff at that time—they were unaware that their conduct was wrong.

Moreover, defendant Hanako Itsuyama did not apologize after the discriminatory act, as was plainly expressed in her writing: “Sorry there was a miscommunication. That’s all I’m going to say about it.”

This is similar to so many justifications of violence, such as “I could not make myself understood orally, so instead I made myself understood corporally.” In other words, defendants did not try to change their mistaken understanding of discrimination at the time; this is simply an expression of the idea that it does not matter if one ejects a person because he is a foreigner or a Brazilian.

v. The amount of compensation in this case should include translation fees.

In this case, plaintiff has incurred a total of 452,000 yen in translation and interpretation fees.

In bringing this case, plaintiff relied on an interpreter to translate court records and to make arrangements with her court representative. For a plaintiff with halting Japanese, this is an inevitable cost, and bears a strong causal relationship to the damages she suffered from an intentional illegal act.

vi. Racial discrimination is not a criminal act in Japan. Thus, to sue someone for racial discrimination, as in this case, one can only turn to civil methods; this should be borne in mind when calculating the amount of damages.

But plaintiff is not seeking to sanction defendants by imposing a duty to pay compensation.

In Japan, whether to punish a person, and how much to punish him, are decided in connection with the defendant’s emotional state. As Japan lacks effective criminal sanctions for racial discrimination, the amount of compensation in a civil action should be set to make up for this deficiency.

c. In light of all of the above, and considering in particular the special nature of a case involving racial discrimination and that the defendant intentionally committed an illegal act, plaintiff seeks compensation in the amount of 1 million yen.

Moreover, plaintiff seeks attorney's fees in the amount of 500,000 yen.

D.

1. The city of Hamamatsu has a population of 570,000 people. There are 15,000 foreigners registered in the city, 10,000 of whom are Brazilian, making it the largest Brazilian population in the country.

The Japanese economy has rapidly developed since the latter half of the 1980s. To eliminate the concomitant labor shortage, the Immigration Control and Refugee Recognition Act was amended in June 1990, which allowed those of Japanese ancestry to work legally in all occupations. Because Hamamatsu was home to several thriving industries—such as fibers, transportation equipment, and musical instruments—a number of foreigners came to reside there and work in factories. Many of them were Japanese-Brazilians.

Thus, [220] in order to build a neighborhood for the international community, Hamamatsu actively promoted policies of international exchange and other activities. Moreover, with the help of the private sector, the Hamamatsu International Exchange Association was established, legally assuming foundation status in Shizuoka Prefecture in 1991. This has become a pillar of international exchange.

2.a. In 1995, Hamamatsu was recognized by the Ministry of Home Affairs as a “city that has promoted internationalization in the region” in the Ministry's recognized system of “cities open to the world.” It was commended “together with its citizens, for remarkable achievements as a city comprehensively working to promote internationalization in the region by cultivating an international sensibility among its citizens, making the city comfortable for foreigners, and engaging in international exchange.”

b. In 1998, Hamamatsu city received the designation of “Model Human Rights District” by both the Ministry of Justice and the National Association for the Protection of Human Rights. Hamamatsu, with its mayor acting as the head, also set up the Council to Promote a Model Human Rights District. For a year the Council, with the help of the private and public sectors, was supposed to “actively promote activities that would diffuse the idea of human rights, while raising awareness and a correct understanding about protection and respect for fundamental human rights” (Article 1 of Council Regulations).

3. However, according to plaintiff's investigations, at least within Hamamatsu city, citizens were neither sufficiently enlightened about racial discrimination, nor could their level of awareness be described as high.

Thus, even now, visible forms of racial discrimination come from both private persons and private organizations.

For instance, according to plaintiff's investigation, the following acts of racial discrimination were confirmed to have recently occurred in either Hamamatsu city or its surrounding areas:

a. In Hamamatsu city, though there was no sign, foreigners were denied entrance to a fishing tackle store. Whenever a foreigner entered, he was promptly ejected either by the storeowner or an employee of the store.

b. In a karaoke bar in Hamamatsu city, a sign on the front door read, in Portuguese, "No Brazilians or Peruvians Allowed." Foreigners were denied entrance.

c. Even now, a sizable proportion of apartments will not rent rooms to foreigners.

d. In summer of 1996, a "No Foreigners Allowed" sign hung in a convenience store in Kosei city, Shizuoka Prefecture.

This sign was written in Portuguese, Spanish, and Chinese. It elicited strong protests from foreigners, and was taken down after being discussed in newspapers.

e. In 1996, in Hamamatsu city, immediately after a Brazilian boarded a bus, the bus driver made the following warning on the microphone: "Please watch your bags. A foreigner has boarded the bus" The Brazilian got off at the next bus stop, in tears, and has probably been unable to take the bus since.

f. Though not an issue of private relations, on May 16, 1997, the Hamamatsu City Council's Welfare and Insurance Committee convened a hearing on "Propositions for Medical Insurance for Foreign Residents." Members of the committee made statements such as "ideally, they would all go back to their home countries," which created a stir in the media.

These discriminatory acts are only the tip of the iceberg, but it is not because these people do not have Japanese citizenship. Whether they have Japanese citizenship or not, discrimination based on race or skin color is clearly prohibited as racial discrimination under CERD.

4. To be sure, the mass media has taken up racial discrimination as a social issue, whether by a private person or a group. However, before ratification of CERD, there was the deeply-rooted, albeit mistaken, belief that "discrimination is the right of the individual." But even now cases of discrimination continue, despite admonitions to rectify human rights violations issued by local Ministries of Justice and lawyers' groups, as well as the social commentary of the mass media. In the courts, there have been

no verdicts holding purely private acts of racial discrimination illegal. This stems from problems of constitutional interpretation.

In Japan, before the ratification of CERD, the only law that generally and comprehensively prohibited racial discrimination was Article 14 of the Constitution. Article 14(1) states 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”

Even though this provision has been interpreted to apply to foreign residents, it only prohibits racial discrimination by the state or a state body. Racial discrimination by a private person or group lies outside the scope of the Constitution. This has therefore not been interpreted as unconstitutional.

5. However, since the ratification of CERD, racial discrimination by a private person or a group is clearly prohibited in Japan, and is illegal. Under this interpretation, the treaty reinforces Article 14’s human rights protections (the right to equality), and encompasses racial discrimination.

But this reinforcement has not been widely publicized in Japan. Even now, people commit acts of discrimination such as those mentioned above. As this case and the previous examples of discrimination make clear, it cannot be denied that Japan even now has an extremely low awareness of racial discrimination. This is particularly apparent when compared with the discrimination problems that *burakumin* faced against the state in their campaigns to change consciousness and dispel discrimination.⁴ By merely ratifying CERD, but not adequately educating people about its meaning, the country has not fulfilled its responsibility to enact the legislative measures suggested by the treaty. To cope in the era of rapid internationalization and international exchange, this is an important issue with which Japan must soon grapple.

6. One of the activities Hamamatsu city undertook in its Model Human Rights Region campaign was a contest to come up with a human rights slogan. [221] The winning slogan was “It’s so sad—why discriminate against another human being?”

As the slogan notes, racial discrimination is the act of not treating another person as a human being because he is of a different race, clearly an unjustifiable and inappropriate act. When one treats a person in this manner, one deeply wounds her character. Right now, the number of foreign residents is increasing. In Japan, where international exchange of both a

⁴ The burakumin are a historically disadvantaged class, or caste, of Japanese society charged with the “unclean” professions: butchers, undertakers, leather-workers.

public and private nature is becoming more important, all acts of racial discrimination must quickly be eliminated, including private acts.

To that end, since Japan ratified CERD, any act of racial discrimination—whether by a private person or group—is socially unacceptable, and illegal. One by one, citizens need to be made clearly aware of this.

II. Defendants' Response:

A.

1. Defendants have no knowledge of this claim.
2. Defendants admit this claim.

B.

1. With regard to this claim, on June 16, 1996, defendants admit that plaintiff entered S jewelry store, that there was another person present in addition to the two defendants, and that plaintiff said, "Brazil." However, plaintiff entered the store at around 1:48 p.m. The additional person mentioned above was defendant Gorō Itsuyama's younger sister. Defendants deny the remainder.

2. Defendant Gorō Itsuyama admits that he arranged the sign, spread his arms, and approached the plaintiff, as if to eject her. But the arrangement of the sign was not violent. The rest he denies.

Moreover, the timing of the actions was different. At around 1:50:50 p.m. defendant extended his right hand downward; afterward, plaintiff stepped back in the direction of the store's entrance. At around 1:51:39 p.m., defendant Gorō Itsuyama made a phone call. From around 1:52 to 1:53:15 p.m. plaintiff made a phone call, after which she once more looked inside the southeast showcase. She made another phone call, and slowly retreated, ending the call at around 1:54:22 p.m. At around 1:54:26 p.m., defendant Gorō Itsuyama finished his phone call. Then, defendant Gorō Itsuyama spread his hands, and pointed to the poster to the wall with his right hand.

Therefore, the discriminatory acts happened only after plaintiff and defendant Gorō Itsuyama had become antagonistic toward each other. Defendant did not take action to remove plaintiff because she was foreign, but rather as a defensive act against plaintiff, who had been acting antagonistically toward defendant.

3. Defendant Gorō Itsuyama admits that he said he would call the police, that two policemen rushed over, that a security guard came to the store, that the foreigner he thought plaintiff had phoned came to the store,

and that he thought plaintiff might have been French when she entered the store. But the security guard came at a much later time. The rest he denies.

4. Defendant Gorō Itsuyama admits that he left while plaintiffs were still in the store. He left at around 2:45 p.m., and plaintiffs left at around 3:25 p.m.; an hour and forty minutes had passed since they entered the store. The rest he denies.

5. Defendants deny this claim.

C.

1. Defendants dispute this claim

2. Defendants admit the first part of this claim. However, they dispute the point that the right to racial equality in private relations supersedes other individual freedoms such as the freedom of occupation.

a. Defendants dispute this claim. It was not intended that the treaty would apply directly to legal relations between private parties. Rather, it was to be applied indirectly through individual provisions of existing private substantive law, or to provide a standard or general guide for a legal system; it was not to create concrete obligations—either acts or omissions—on private citizens.

b. Though called private autonomy, it is not completely unrestricted; defendants admit the general theory that violations of the public order (Article 90 of the Civil Code) will not be tolerated. The rest defendants deny.

3.a. Defendants dispute this claim.

b.(i) & (vi) Defendants dispute these claims.

c. Defendants dispute this claim.

D.

1. Defendants admit this claim.

2.a. Defendants admit this claim.

b. Defendants admit this claim.

3.f. Defendants admit this claim. The rest he does not know about.

4. Defendants admit this claim.

5. Defendants dispute this claim. The effect of CERD is as above. However, defendants are of the same opinion as that written above.

6. Defendants dispute this claim. They are of the same opinion as that written above.

III. Defendants' Counterarguments

A.

1.a. S store is located on Yūroku Street, a busy shopping district in central Hamamatsu. It is a narrow store, measuring only 33 square meters.

In the store, defendants Gorō Itsuyama and Hanako Itsuyama take care of customer service, while Gorō's younger sister often comes in to help.

S store is a small-scale jeweler, with many regular customers, as well as those who were introduced to the store and make appointments.

b. On May 15, 1992, defendant Gorō Itsuyama's father, Ichirō, and older brother were robbed by two men, who stole some jewelry.

After that experience, defendants became nervous about security. Thus, they closed their store everyday at 6 p.m., earlier than the other stores.

The week before June 16, 1998, two people—one Japanese, and one who looked Brazilian—were caught on camera taking photographs of the narrow alley between S store and the game center to its north. At the time, defendant feared that someone might break into the store through the alley wall. [222]

c. S store was having business problems with a French company. Defendant Gorō Itsuyama had phoned France to negotiate with the company.

The day before the incident in this case, the company made certain demands on defendant Gorō Itsuyama through a Japanese interpreter.

2.a. In mid-May, 1996, three policemen visited S store, and posted a sign saying, "Beware of burglaries." They also orally warned defendants to "be careful of foreigners."

b. Afterwards, defendants put a sign on their wall in Japanese to the effect that "No foreigners allowed," but they took it down.

Foot traffic would thin out on Yūroku Street in the afternoons. Defendants became worried about the security of the store due to foreigners and, with the purest of intentions, once again posted a sign in Japanese to the effect of "Beware of burglaries."

i. On occasion, defendant Hanako Itsuyama had to tend the store by herself.

ii. Because defendants did not store all the merchandise in a safe at closing time, they were worried that someone would become particularly knowledgeable about the merchandise and its value.

3.a. A little after 1:40 p.m. on June 16, 1998, plaintiff was looking at a showcase and display cart outside S store.

Defendants confirmed that she was, in fact, looking very intently; but from their perspective, plaintiff was staring fixedly at one thing, and did not seem to be looking at the merchandise in the showcase.

b.i. The following events derive from video taken by the security camera in S store:

(1) At around 1:48:30 p.m., plaintiff entered S store through the automatic door.

(2) Upon entering the store, plaintiff looked at the showcase immediately to the right of the door (Position 1 on the attached map).

Approximately eight seconds later, she looked to the western portion of the store, turning her eyes to the area near the showcase in the southeastern section of the store.

(3) At around 1:49:16 p.m., she walked for roughly three seconds to position 2 on the attached map. During this three second interval, she did not look forward, nor did she turn to the showcases on her left and right. It seemed as if she was looking at defendant Gorō Itsuyama, who was seated and occupied the position of the triangle on the attached map.

(4) At around 1:49:19 p.m., she moved to position 3 on the attached map, and looked at the store's northern wall.

(5) At around 1:49:22 p.m., she moved to position 4 on the attached map, looked to the northwest, and then at the main showcase.

(6) At around 1:50:01 p.m., with her body facing north, she turned her face toward the west, lowered her eyes to the showcase, and stepped back.

(7) At around 1:50:11 p.m., with her body still facing north, she turned her head backward, and for fourteen seconds her body faced toward the west; from position 3 on the attached map she looked over in the direction of defendant Gorō Itsuyama.

ii. (1) From the time she entered the store, defendants thought she might be a representative from the French company with which they were having problems.

(2) Plaintiff's behavior in the store was strange for someone just coming to look at jewelry:

(a) If she were only looking at merchandise, her conduct was unusual. She went out of her way to approach employees and show her face.

(b) If she were looking at the onyx necklace, it would have been more normal to walk down the aisle toward the north of the store.

(c) She spent little time actually looking at the jewelry, mostly looking at the wall and off into the distance.

c.i. Plaintiff stood in position 4 on the attached map, facing the north of the store. Since defendant Gorō Itsuyama was still unsure as to whether plaintiff was the representative of the French company, he said something like "Bonjour, Madam," "How are you," or "Senorita." But she gave absolutely no response.

ii. So when plaintiff made eye contact with defendant Gorō Itsuyama, he asked her where she was from. “Brazil,” she responded.

Realizing she was not the French representative he was so concerned about, defendant Gorō Itsuyama found plaintiff’s behavior all the more suspicious.

iii. Defendant Gorō Itsuyama and plaintiff then had the following exchange:

(1) “Madame, could you please go out? I’m busy. No foreigner allowed here.” (Defendant Gorō Itsuyama).

(2) “Why?” (Plaintiff).

(3) “Please.” (Defendant Gorō Itsuyama).

(4) “No!” (Plaintiff).

(5) “Please (I’m busy. I’m asking you to please leave). I will call the police.” (Defendant Gorō Itsuyama).

(6) “Okay” (Plaintiff).

iv. So, at around 1:51:39 p.m., defendant Gorō Itsuyama, following instructions given to him by the police, phoned the police.

Plaintiff also phoned someone at around 1:52:40 p.m.

v. At around 2:05:14 p.m., the man that plaintiff had called arrived, and at around 2:05:29 p.m. the policemen arrived at S store. In the meantime, plaintiff made five phone calls.

When the police arrived, the two policemen talked primarily with plaintiffs; defendants frequently joined in the discussion, however, and over time it turned into a conversation between defendant and the police.

Then, at around 2:25 p.m., plaintiff said to defendant Gorō Itsuyama “You know I am working for a newspaper company. Is that okay?”

vi. At around 2:45 p.m., defendant Gorō Itsuyama left the store to accompany his eldest daughter to the Seirei Hamamatsu Hospital. [223]

Having left the store, defendant returned at 2:48 p.m., and threw himself into a chair by the window overlooking the street. The exchange continued between the policemen and the people plaintiff had called. At around 3:25:27 p.m., plaintiffs and policemen left the store.

B.

1. Defendants have the freedom to choose their profession (Article 21(1) of the Constitution); they also have the freedom to carry out the profession they have chosen. Included in the freedom to choose one’s profession is the freedom to conduct business, that is, the freedom to engage in independent activities for commercial purposes.

The freedom to conduct one's own business involves questions of whom to take as a customer, and, moreover, how to control who enters the store. This, in turn, is based on the right to manage the store's facilities. These are properly under the domain of personal autonomy (the notion that one must be free to engage in private relations).

In other words, defendants—based upon judgments made in their own independent discretion—can decide whether to allow someone into their store, and whether to seek that person's ejection after entering the store.

2. The decision of defendants, even if it violated another person's fundamental freedom and equality, would not rise to the level of a violation of public order and decency, as long as it did not exceed the limits of socially acceptable behavior.

Public order means a general benefit to society, whereas good customs refer to the general ethics of a society.

3. The store defendants run is not a general store, but a jewelry store that sells a number of expensive items.

Moreover, crimes committed by foreigners (including serious felonies such as burglaries) are not limited to the Hamamatsu area, but happen all over the country, as is sensationally reported in the media. Defendants are easy targets for criminals, as is evident from the fact that jewelers like them receive individual instructions from the police.

Thus, when faced with business activities and crime-prevention measures, defendants—based on their high-level business judgment as store managers—limit their clientele, and must restrict entrance into their store. They could limit customers only to invitees, or form a completely exclusive association.

Moreover, it is possible to exclude foreigners from the potential pool of clients; if this were the case, it would not generally upset the public order as an act of discrimination. Why? Because apart from the numerous differences between Japanese people and foreigners—lifestyle, behavior, customs, ways of thinking, emotions, spiritual activities—there are linguistic impediments that make communication with Japanese people difficult. Numerous difficulties arise when forming a relationship of mutual trust.

Needless to say, without denying the aims of CERD, as the idea of "co-existence with foreigners" spreads throughout society, and particularly as it spreads to the consciousness of individual citizens, the formation of trusting relationships will become easier, to the point where such exclusions *could* be violations of the public order.

4. When defendants encountered the conduct of plaintiff mentioned in III.A.3(a) and (b), they deemed it suspicious. But one certainly cannot say that this judgment was a mistake, nor that it violated the public order.

With regard to plaintiff's conduct, defendants applied the first suggestion on the "Beware of burglars" flier. Addressing plaintiff, observing her reaction, and then seeking her ejection would not have been an extraordinary course of events.

To sum up, defendants did not seek to eject plaintiff only because she was Brazilian.

5. Even if it were a mistake to consider plaintiff's conduct suspicious, this was inevitable in light of the conditions at the time, and the position in which defendants were placed. The mistake was neither a violation of the public order, nor an illegal act.

6. Defendants regret being unable to satisfactorily explain to plaintiff why her actions aroused their suspicion. At the very least, defendants wish to apologize to plaintiff. They should reflect on why they subjected plaintiff to racial discrimination. Further, they intend to make use of this lesson in future dealings and existence of S Trade & Jewelry Store.

7. But the fact is they still harbor certain feelings.

One reporter—thought to be communicating by phone with plaintiff while she was in the store—recorded the contents of their conversation; another reporter took pictures of the interior of S store without obtaining defendants' consent.

This is clearly a human rights violation. Even if it were for the purposes of reporting, it is an unforgivable act that deviates from the freedom to interview.

IV. Evidence

As in the affidavit of the recording, and transcript of the witness statements.

III. REASONING

I. Parties

A. Plaintiff is a reporter at the Shizuoka Branch of the IPC Television Network, Incorporated, residing in Hamamatsu. This has been maintained throughout the pleadings, and is hereby acknowledged.

B. There is no dispute between the parties that defendant Gorō Itsuyama operated an incorporated jewelry store with his siblings known as S Trading House in the Sakana District of Hamamatsu city in Shizuoka

prefecture (address omitted); his mother, Hanako, also jointly operated the establishment.

II. On CERD

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted at the twentieth meeting of the United Nations General Assembly on December 21, 1965, and entered into force on January 4, 1969. At the time (October 1, 1995), 221 countries had signed the agreement. On December 20, 1995, Japan ratified it.

Below, several problems surrounding the treaty are discussed. [224]

A.

1. Treaties and Domestic Law

a. With regard to the relationship between treaties and domestic law, there are the separatist and unified theories.

Under the separatist theory, international law is an agreement between states, and international custom is a source. Because its subjects are international organizations and states, it is a legal system distinct from domestic law. Under the unified theory, treaties actually influence domestic law, and require the enactment and reorganization of domestic laws; because states are a member of the international community, international law and domestic law are a unified legal system.

Various countries' constitutions have provisions relating to the domestication of treaties:

- “The generally recognized rules of international law are valid as binding elements of German Reich Law.” (Weimar Constitution, Art. 4).
- “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” (United States Constitution, Art. 6).
- “Diplomatic treaties regularly ratified and published have the force of law, even where they may be contrary to French domestic law. Diplomatic treaties regularly ratified and published have an authority superior to that of domestic law; their provisions cannot be changed, modified or suspended except by a regular denunciation, notified through diplomatic channels.” (French Constitution of 1946, Articles 26-27).

b. The Japanese Constitution does not have such specific provisions, but clearly follows the unified theory in Article 98 (2).

Today, as we welcome the era of globalization, when developments in communication send information across the world, when human exchanges grow globally, when companies cross borders to expand their businesses, when problems such as acid rain and global warming require solutions on a global scale, the separatist theory simply cannot be supported.

2. Treaties and the Constitution

a. Theory of Treaty Primacy

i. Article 98(2) imposes an obligation to faithfully observe treaties, which means that a treaty should be observed above domestic law. In that case, a treaty that violated the Constitution would not be observed. If national organs or citizens could refuse to enforce the treaty, it would not be observed. According to Article 98(2), even if the treaty violated the Constitution, it would be observed, and must be enforced. In short, treaties supersede the constitution.

ii. Article 81 gives the Supreme Court jurisdiction to determine the constitutionality of “any law, regulation or official act.” But it excludes treaties. This means that the Supreme Court renounced jurisdiction to find a treaty unconstitutional, and that an unconstitutional treaty would still have effect.

iii. This explains the theory of treaty primacy, which derives from the international cooperation that controls the entire Constitution.

b. Theory of Constitutional Primacy

i. Article 98(2) simply determines that treaties will become part of domestic law. It does not determine whether a treaty or the Constitution is superior.

ii. Treaty precedence cannot be automatically inferred from Article 81. Treaties are arrangements between partnering states. If only one side incorporated the treaty into its domestic law, that in itself would not deny the force of international law. Article 81 does not contain specific language about treaties, leaving it instead to interpretation and actual application.

iii. Of course, the Constitution strongly supports the idea of international cooperation. At the same time, it also strongly supports the idea that sovereignty resides in the people, meaning that citizens must vote in order to amend the Constitution. But, according to the theory of treaty primacy, the Constitution can be modified by a treaty. In other words, the Constitution could be amended without the vote of the people, but simply by

the cabinet and Diet's establishment of a treaty. This contravenes the idea of citizen sovereignty.

c. In Support of the Theory of Constitutional Primacy

Even in the era of globalization, the nation—constituted of people and territory—exercises sovereignty domestically, and serves as the highest independent unit internationally, on an equal footing with other countries. The functions and barriers of the nation have still not crumbled. With this as a premise, the present state of affairs appears to be one in which the United Nations and other international organizations attend to regulation and dispute resolution among the various nations.

Moreover, though the concept of internationalism in the Japanese Constitution could provide a standard by which to judge the constitutionality of a particular treaty, it cannot be the case that any treaty supersedes the Constitution merely based on international cooperation. In other words, even though international cooperation coexists alongside citizen sovereignty, it does not go so far as to eliminate the latter.

3. The Status of CERD

a. As shown above, CERD is beneath the Constitution, but still has effect in this country as domestic law.

i. However, Japan submitted a reservation to the effect that “[i]n applying the provisions of paragraphs (a) and (b) of Article 4 of CERD, Japan fulfills the obligations under those provisions to the extent that fulfillment of the obligations is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan, noting the phrase ‘with due regard to the principles embodied in the Universal Declaration of Human Rights.’”

ii. Moreover, the Ministry of Foreign Affairs explained that “[n]ew legislative measures and budgetary measures are not needed to effectuate this treaty.”

The Japanese Constitution—which contains the phrase “sovereign power resides with the people” in the Preface—takes democracy as a universal principle of mankind. Moreover, not only does the Constitution promote international cooperation, Chapter III of the Constitution guarantees the individual's right to dignity and life, liberty and the pursuit of happiness. Chapter III also declares that people are equal under the law, and there shall be no discrimination because of race, creed, sex, social status, or family origin. [225] It also mentions basic human rights for the individual, such as freedom of thought and conscience. These basic human rights are inviolable and permanent, and must be maintained through the unending efforts of the

people. To ensure they are adequately safeguarded, do we dare think that legislative measures and budgetary measures will not be necessary?

b. On the one hand, the Universal Declaration of Human Rights, which CERD cites in the preamble, only goes as far as to *proclaim* basic human rights such as freedom, equality, and the prohibition of racial discrimination to the world. By comparison, CERD goes one step farther by requiring signatories to take legislative and other measures to deal with individual and group acts of racial discrimination.

This means that if an act of racial discrimination violated a provision of CERD, and the state or organization did not take the measures that it should have, then one could, in accordance with Article 6 of CERD, at the very least seek compensation for damages, or take other measures for relief, against the state or organization due to the omission.

Thus, assuming the opinion of the Ministry of Foreign Affairs—that no legislative measures are necessary—in a case involving a compensation claim against an individual for an illegal act, the text of CERD should be used as the interpretative standard.

B. Providing Evidence of Basic Human Rights

1.a. Human beings differ from other animals, both in having two legs, and very large brains. Though they have lost certain basic survival instincts, they have gained the ability to think; thus they need a long time—almost twenty years—to become adults and lead socially independent lives. During this time, through trial and error and other means, they have the capacity to think limitlessly of grounds on which to establish the self.

Thinking has no limits. Likewise, the actual world longs to move from the limited toward the limitless. Moreover, as the actual world with its imperfections confronts absolute perfection, it dreams of absolute values, rather than of the relative world. In the West, this was accomplished in the world of religion through the Holy Trinity, which drew on Greek philosophy. In the East, Confucius professed the idea of the virtuous gentleman. However difficult Confucius's own life was, through his disciples' scheming and the need to rule vast territories, the ideology of dynastic change was put in place by the Former Han Dynasty. This held that the sage king who cultivated virtue would receive the mandate of heaven. By further cultivating magical powers, he could become the divine king who ruled the world. In this way, Confucianism was greatly transformed, and assumed the status of an expedient state religion by ordering human relations.

In this conceptual universe, these products of an absurd imagination and unverifiable substitutes mingled with the teachings of sages like Buddha

and Christ, which deeply affected human nature. For these sages, and sovereigns in particular, it created a myth providing a basis for their authority and legitimacy.

But since they only existed in the conceptual universe, they were confined to that set universe, and lacked flexibility. Religious fundamentalism is an example.

In medieval Europe, monks withdrew to monasteries so that they could devote themselves entirely to serving God. The ideal life consisted of placing the ideal above the real. Even in the actual world, life was controlled by this kind of religious beliefs. In the East, Confucianism was the state religion of China for a long time, and brought about a hierarchical bureaucracy that invited social stagnation. In Yi Dynasty Korea, the lineal *Yangban* bureaucracy—also influenced by China—likewise invited social stagnation.

Natural law emerged against the backdrop of the idealism prominent since the Middle Ages; it opposed the peculiar, relativistic positive law that changed constantly throughout history. It was conceived of as a standard that necessarily followed natural conditions, or a natural order independent of human agency, based on transcendental ethics or values.

b. In the sixteenth century, Descartes proposed the theory of dualism, differentiating the methods by which one understood spirit and matter. As to matter, one made a hypothesis based on numerical and other formulae, and substantiated the hypothesis by experimentation. By establishing a method that proved accuracy, the natural sciences developed, producing everything from Newton's classical mechanics to Einstein's theory of relativity and quantum mechanics. This in turn is connected to technologies used in the real world and, after the industrial revolution, formed the basis of today's material civilization. Moreover, the methodology has been used in the humanities and social sciences, and has even clarified social principles to a certain extent.

c. It has also influenced the social lives of people. Beginning with Martin Luther's reformation, the West experienced the Renaissance. Based on certain beliefs, one sect of Christians, the Protestants, valued the realization of things in the actual world, forming the basis of today's capitalist prosperity.

In the meantime, the French Revolution and the American Declaration of Independence loudly proclaimed basic human rights on the grounds that people are naturally endowed with them.

Likewise in the nineteenth century, as Nietzsche mourned God's death, enlightenment thought came into ascendancy, and brought with it

delight in human rationality. As Rousseau explained in the social contract, the state is established through the general will of people. In founding a state, democracy—where sovereignty resides in the people—is the highest ideal. The idea that people are rational beings who constitute the state gradually came into ascendancy.

d. But while people lead a rational existence, they also lead an absurd animal existence, and are spurred into action by desire.

Scholarship that sheds light on this irrational aspect of people is conducted by borrowing the methodologies of natural science: psychology, social psychology, and cultural anthropology. Even political science has adopted this methodology to explore political phenomena. Moreover, with Freud, [226] who first investigated people's unconsciousness at the most basic level, Jung and others, the psychoanalytic school was born.

e. In the twentieth century, science and technology are tied together, mass-producing a limitless supply of modern conveniences, one after another. People use and consume these conveniences in great volume, giving rise to money-worship. Thus are the manifestations of large-scale mass society.

Technology, for its part, flies back and forth in enormous quantities, such that people gulp it down fragment by fragment. Now, with the development of computers, information has become increasingly personal and secretive. People, given all of life's conveniences, use them for intimate and hedonistic purposes, forgetting about relations with other people, the meaning of a noble life, and their responsibilities to society.

Thus, today, there are natural phenomena, and there are social phenomena, created by human endeavor. As a matter of fact, considerable progress has been made, and people's material lives have been enriched. But it is said that the examination of their values, ethics, and morals has fallen behind.

Human beings are social animals. In order to live with other people as members of a society, one first learns, and then follows, social standards derived from law, ethics, morals, and so on. Inevitably, people must pursue values.

Though it takes time, only through careful debate of effective methods and the ethics of human values can one raise the wisdom of the world.

The evil spirits released when the ancient Greek goddess Pandora opened the box were eventually put back into their original casing by the wisdom of the nineteenth and twentieth centuries. However, the descendants of those spirits have newly emerged from the whirling chaos in large

numbers. The wisdom of the world must endeavor to renew values and discover moral and ethics through another round of debate.

2.

a. Historically, basic human rights were explained conceptually: either they were innate, or part of natural law. Now, it seems there has been progress of sorts.

Currently, it is explained by legal philosophers in the following way. People initially create their own independent worlds through their unique experiences and free thinking. As spiritual beings with free will, people cannot measure the significance of their existence by comparison with others'. People are little individual universes unto themselves, each with an irreplaceable value. Moreover, the notion that all people have an irreplaceable value means that all people are free and equal. All people share equally the right to survive, and the right to realize themselves through their own creativity and individual judgment. In other words, so long as people can autonomously judge good and evil, and reconcile these ideas with their peers, peoples can freely believe they are good. Now, in order for the values of freedom and equality to fulfill each and every person's personal dignity, they engage in a complementary relationship wherein each needs the other. This is absolutely the case.

Of the two, freedom is easier to understand because it deals with personal matters. Equality, on the other hand, requires both human empathy and a sense of solidarity. In other words, I am an irreplaceable human being; you too are an irreplaceable human being just as I am. Mutual comprehension and regard for people, in the language of psychology, hinge on the sense of empathy.

b. The relationship of irreplaceable people is explained by existential philosophy in the following way.

Life consists of the various ways in which people should act. A necessary condition of being human is the possession of natural desires, which in turn gives us vitality; engaging in activities helps satisfy these desires. Taking this as their foundation, and then exceeding it, people give their lives new meaning and value. They seek ideas and ideals that endow their lives with a purpose. This is called the spirit. The truth of seeking knowledge; the good of differentiating good from evil; the beauty of valuing beautiful things as beautiful—these are the cultural products of science, morality, and aesthetics. Science advances through technology, morality advances through legal systems, and aesthetics produces works of art. Through long periods of creative endeavor, human life is given cultural richness.

When values emerge in the real world, they take the form of opposites: true versus false, beautiful versus ugly, good versus bad. But original morality is deeply rooted in the basic ways people ought to be. Making the best of what is human can be said to be the basis for human dignity. By transcending value oppositions like good and bad, and taking absolute charity and all-embracing, absolute love as one's religion, the true person emerges as an irreplaceable being. In other words, people are independent, irreplaceable beings that cannot be substituted, including the private aspect found in a life companion. This extends to the union of one existence with another, where people relate to one another mutually, as irreplaceable entities. [227]

Absolute love gives deep roots and a basis to grasp modern mankind, but respect for basic human rights cannot be understood without a strong understanding of people.

3. Japan adopted democracy after World War II.

a. From 1948 to 1953, the Ministry of Education published *Democracy*, which was used as a social studies textbook for middle-school and high-school students. An excerpt follows:

The word democracy is overused in today's world. Everyone knows what it is. But how many people know the true meaning of democracy? The number is extremely limited.

So what is democracy? Most people would respond that democracy is a form of politics where people vote for all those who will represent them in government. No doubt that is one manifestation of democracy. But it is wrong to think that democracy is simply a form of politics. The basis of democracy lies somewhere deeper: in the hearts of everyone. A heart that tries to treat all people respectfully, and as individuals, forms the basic spirit of democracy.

A person who knows the dignity of people would not think to bend on his convictions, nor deceive his boss. This person cares deeply about ensuring the dignity of life for all people, whether they live in the same society, a neighboring country, or across the sea. What is more, this person would cooperate with all people and work for all people in the world; this person is determined to build a world that is peaceful and comfortable. By taking equal opportunity to fully display the talents, strengths, and virtues of every person, we can achieve mutual happiness and prosperity. Thus will we clearly realize

the highest aim of politics. That is democracy; anything else is not.

Democracy is extremely broad and deep; it must be realized in every aspect of life. Democracy exists in the home, but also in the rural village and city district. At the same time that democracy is a political principle, it is also an economic principle, and the spirit of education. It permeates all of society, and is fundamentally the way things should be for the coexistence of humanity. Thoroughly investigating it from all angles, it is no easy thing to get a firm grasp on its essence.

Thus began Japanese democracy.

b. Yet, from the 1990s, after the collapse of the bubble economy, the bankruptcies of financial institutions and bureaucratic scandals, the Aum Shinri Sarin Attack and the Sakakibara Incident, multiple insurance killings all indicate soulless abundance. Voices were heard that Japanese society was abnormal; scholars worried about an irresponsible society. Democracy had been blithely given to Japan after the war, but that was not real democracy. Real democracy, we are taught, requires daily struggle.

i. Japan is an island country, considerably distant from the nearest country and surrounded by water.

Therefore, while Japan has a proper capacity to import foreign culture and civilization, it changes them to accommodate Japanese characteristics. Thus was the adoption of Buddhism; as was the importation of kanji, which produced a Japanese language sprinkled with its own unique kanji. Likewise, Confucianism performed its own functions during the feudal era. After the Meiji Restoration, under the rubric of “Japanese spirit, Western learning,” Japan endeavored to bring in western culture, the only Asian country to do so.

ii. But because it was a country set off by oceans, a homogenous society was formed. At the same time, a childish aspect remained, making exchange with foreigners difficult for both sides.

For a long time, the Japanese have drawn their life values from the Confucian ideal that the well-ordered society begins with a well-ordered person. Even now, after the adoption of democracy, this principle lives on, deeply rooted in the base of society.

In the old Japanese family system, several nuclear families lived with close relatives as a single unit. The patriarch, who ruled the group, held great power, and other family members lived under his domination, control, and protection. Group solidarity was maintained through the authority of the

patriarch, who was charged with maintaining, improving, and developing the family. The property that served as the economic basis of the family group belonged to the family, at least in practice, but the patriarch was thought to be the manager of the property.

The moral code, informed by the notion that human relations among family members would perpetuate the family, survives even now. In Japan, this so-called *tate* society remains deeply rooted. In this type of society, parental relations are more important than spousal relations; among siblings, boys are more important than girls; the eldest son is more important than his younger brothers. Direct relatives and lateral relatives expand through the genealogies of two families. Thus, Japanese people efface themselves, and distinguish between inner society and outer society. One is generous towards inner society, but severe towards outer society; this characteristic extends to social life more generally. Of course, this trait opposes the spirit of democracy.

iii. On the one hand, the Protestants seriously evaluated themselves before the absolutists, [228] plumbing their souls to see what ought to be inside of them. On the other hand, polytheistic Japan recognized mystery in nature, and sought to become one with it. Some amount of difference between the two cultures is perhaps inevitable. It has been pointed out that when Japanese people, in making a decision, look to the atmosphere of the particular situation. But they are not properly trained in debate, and will not reach a constructive conclusion after adequate debate in situations where there are differences of value or different views of the facts.

Today's world is marked by the trend toward globalization. Debate has become absolutely essential, either because one expects mutual comprehension of another person, or simply because all people have inalienable basic human rights.

Likewise, upon reflecting that the Nazis rose to power as a result of the mass social conditions of the Weimar constitution, the philosopher Karl Jaspers theorized that German citizens should bear responsibility for their crimes after the war. In addition to normal crimes, political crimes and moral crimes, Jaspers also explained their metaphysical crimes. He called on individual citizens to think deeply about their various crimes. In Japan, that kind of phenomenon has been largely absent.

In particular, basic human rights were the result of reflection within a cultural context of guilt, born of one sect of Christians, the Protestants. But human rights are not just one sect's religious doctrines; they transcend this, developing into universal principles that have persuaded people of various creeds. Their prevalence should be noted.

People will see the value of both foreigners and Japanese if they remember all people enjoy irreplaceable basic human rights, they all harbor deep feelings of empathy for others, and they then put this into daily practice by respecting others. There are many differences between foreigners and Japanese with regard to mental activities: general lifestyle, behavior, customs, ways of thinking, emotions, etc. In addition, there are linguistic barriers, making communication between foreigners and Japanese difficult. Inevitably, defendants' arguments to employ Japanese standards of behavior and customs cannot be accepted in the era of globalization.

It is probably the case that differences in people's mental processes—general lifestyle, behavior, customs, ways of thinking, emotions, etc.—arise from the cultural environment in which they grow up. But evaluating those differences as superior and inferior, or good and bad, does not come naturally.

c. In other words, one could say that the idea of observing basic human rights is not deeply rooted in Japan.

One inhibiting factor is the idea of "Japanese spirit, Western learning." Since the Meiji Restoration, Japan's modernization has borrowed from Europe and America. But even now there remains an aversion to subjecting family relations to the modern legal system. For the Japanese, who partake in various social worlds, the characteristic of hiding one's individual identity still persists. Moreover, there is a tendency to exclude anybody who does not belong to one's group. Scholars have pointed out that the proper use of *tatemae* and *honne* is born of this characteristic, because Japanese education proceeds solely through *tatemae*.⁵

As noted above, insofar as we recognize that freedom and equality derive from respect for other people, and from sympathy toward another person's basic human rights, freedom and equality should be understood as accompaniments to responsibility. If we do not recognize this, and do not take responsibility, only the most frivolous of freedom and equality will persist.

Another trend would try to solve contemporary problems by restoring patriarchy. Some think of Japan as a shame culture; if we proceed from psychoanalytic theories that consider Japan more of a matriarchy than a society based on *tatemae*, one would think that Japan should be suffused with more paternalism. If we understand the father's role in the household as bringing in social standards, and the values of contemporary society are

⁵ *Translator's note:* These are two basic concepts of Japanese society. *Honne* refers to one's true intentions, which may not be immediately discernible. *Tatemae* refers to one's facade—the public face one shows.

confused, we must all reflect seriously on these values from contemporary perspectives.

According to G.W. Allport, democracy is a serious burden, weighing particularly heavily on the personality. A person in a mature democracy must have percipience and tolerance; the capacity to think rationally about cause and effect; the ability to form appropriately specific categories for ethnic groups and their characteristics; the generosity to give other people their freedom; and the strength to use these independently and constructively. He adds that it is difficult both to cultivate and maintain these traits.

III. The Actual Course of Events

A.

1.

a. There is no dispute with regard to exhibits A4 and A5 (the petition that plaintiff wrote and its translation), and B4 (videotape); they are the synthesis of the results of plaintiff's and defendants' cross-examinations.

i. On June 16, 1996, plaintiff left her house, and tarried for a while on her way to the Asahi Bone-setting Clinic. She passed by S store while walking on Yūroku Street. The store had on display certain jewels, known as *ematita*, that are produced in Brazil. This piqued her interest, and she entered the store at around 1:43 p.m. that afternoon. [229]

ii. Plaintiff thought it was the onyx necklace she had been searching for; when she looked more closely at the shop window, the storeowner, defendant Gorō Itsuyama approached her and asked in English, "Where are you from?" Plaintiff replied with a smile, in Japanese, "From Brazil." Because he appeared not to understand, she repeated herself in English "From Brazil."

iii. Defendant rummaged through some documents on the table, spread his hands out, and approached plaintiff. He demanded that she leave the store, saying in English, "This store does not allow foreigners." Plaintiff asked in English why foreigners were not allowed in the store. Defendant repeated the same phrase, and pushed plaintiff. Plaintiff asked again why foreigners were not allowed in the store. Defendant shouted that "foreigners are no good." Plaintiff continued to ask "Why?"

iv. Defendant, now irritated, quickly pointed to the poster hanging on the store's left wall. He then also took down the flier off the back wall, and pushed it into plaintiff's face. It said "Beware of burglaries." Plaintiff replied, "I can't read kanji."

v. Defendant then said in Japanese, “If you don’t leave, I’m going to call the police.” “Please do,” plaintiff replied.

vi. While defendant started to call, plaintiff requested her husband, Kano Tarō, an employee of the International Press Company, to translate. She also contacted Mara Nakagawa of the Mondial Company.

vii. Several minutes later, the translator Ricardo Makiyama arrived. Soon after, two policemen and a security guard showed up. Soon after that, Claudio Endo, a certain Koike from the Shizuoka Press Club, and Marsha Saito of the International Division of Hamamatsu Ward came to the store.

b. Things became complicated after that. Because the conversation between plaintiff and defendant was mediated through a translator, it might not have been accurately presented. Plaintiff’s testimony was as follows:

i.

(1) Mara Nakagawa tried to take pictures of the store’s interior, but was stopped by the policemen. Others saw the posters in the store. Policemen told plaintiffs, through Ricardo Makiyama’s translations, that “to prevent congestion, the store no longer allowed more than five customers at one time. Foreigners are strictly prohibited.”

(2) According to the translator, defendant Gorō Itsuyama made a number of statements. He stated, “Foreigners first come into the store to look at jewelry prices, and come back later to steal them.” He also said that “Brazilians had stolen from the store.” He then corrected himself: “Non-Brazilian foreigners had stolen from the store.” He also admitted that “the police, despite an investigation, could not ascertain where the thieves were from.” Finally, he also noted, “At first, I thought she was French.”

(3) Defendant Gorō Itsuyama also claimed that, “She did not understand English or Japanese.” Plaintiff, in the presence of the policemen, then asked defendant in English, “What are you talking about? I understand everything you are saying in English. What about you? Can you understand what I am saying?” Defendant made no reply.

(4) Through the translator, plaintiff responded, “I had absolutely no intention of stealing. To ban foreigners from one’s store is a human rights violation.”

(5) Defendant Gorō Itsuyama and the policemen said that they did not know about human rights. The policemen then said, “There’s nothing we can do. This is something you must discuss with defendant in private.” Plaintiff realized that even if the policemen left, there was nothing to be done.

(6) Later that afternoon, defendant Gorō Itsuyama left the store, but the policemen said nothing.

(7) Shortly thereafter plaintiff, hoping to bring the matter to a close, requested that defendant Hanako Itsuyama “take the poster off the wall, and make a written apology on behalf of defendant Gorō Itsuyama.” Defendant Hanako Itsuyama replied that she would not take the poster down, but asked plaintiff, “What do you want me to write?” Plaintiff explained that “if you were apologizing to a Japanese customer, you would write a letter. I want you to write the same thing for me.” Defendant Hanako Itsuyama took out a notebook, wrote “Sorry,” handed it to plaintiff, and asked, “Now will you please leave?” Plaintiff then asked, “Please write my name and the reasons for the apology.” Defendant Hanako Itsuyama then said that she did not understand what to write, and wrote plaintiff’s name.

(8) Plaintiff told defendant Hanako Itsuyama, who had been present for the incident, that she did not really seem sorry. Defendant Hanako Itsuyama replied, “In fact, I am not sorry. I only wrote it because I was asked to. All I really wanted was for you to leave.” To this the policemen, who had been standing and waiting, added, “Ms. Itsuyama cannot write any more than this. It is really embarrassing for Ms. Itsuyama.”

(9) Plaintiff added, “If that’s the case, I cannot accept this as an apology, and will take the matter to court.” She then left the store, some three hours after she first entered.

ii. The above is a translated summary of the conversation between plaintiff and defendants. There are doubts as to whether the conversation was accurately conveyed between the parties. Nonetheless, as plaintiff and defendant Gorō Itsuyama called in people from various standpoints to bring the matter to an end, the matter itself changed. The measures defendant Gorō Itsuyama initially took stemmed from his abhorrence that plaintiff was Brazilian. He misunderstood the function of the sign; by showing it to plaintiff, it was as if he were trying to prevent her from committing a crime. It was only natural that plaintiff became angry. Her subsequent measures—asking for the support of her husband and friends, making defendant apologize—must be seen in that light.

On the other hand, defendant Gorō Itsuyama—who avoided the situation by abruptly excusing himself from the scene—cannot avoid the charge of irresponsibility. [230]

From the atmosphere at the time and the note appearing below in III.b., it is clear that defendant Hanako Itsuyama’s real intention was to get plaintiff quickly out of the store. This was how defendant Hanako Itsuyama felt when she wrote “Sorry,” which cannot be seen as a humble apology.

b.
i. Contents of the “Beware of burglaries” appear in an attached sheet.

ii. The contents of defendant Hanako Itsuyama’s note are as follows:
“Sorry there was a miscommunication. That’s all I’m going to say about it. Ms. Kano Haruko. S Jewelry Store.”

2.a. Defendant Gorō Itsuyama testified to the following (wherein he is referred to simply as “defendant”):

i.

(1) In May, 1992, when defendant’s predecessors were operating S store, two criminals broke into the store and stole merchandise.

(2) Policemen started to patrol the area in 1998 as a crime prevention measure; at this time defendants received the attached sign.

(3) Afterward, defendants paid attention to crime prevention. In addition to putting up a sign that prohibited more than five customers in the store at one time, defendant Hanako Itsuyama posted a sign prohibiting foreigners from entering the store. There were three or four incidents where people—who appeared to be illegal Chinese immigrants—lined up in the store and inspected the goods. Defendant Hanako Itsuyama was frightened by these events.

(4) Before this incident, two Brazilians had taken photographs next to S store. Suspicions aroused, defendant asked them if they were not going to photograph the inside of the store. The men left, irritated. In the end, defendant never learned the purpose of the photographs.

ii.

(1) On the day of the incident, plaintiff looked at the store window for a short time, and quickly entered the store. She seemed not to want to talk to the employees, nor did she seem particularly interested in the merchandise. Instead, she stood still and seemed to be looking at each individual display case, contemplatively and carefully.

(2) At first, defendant thought she was from the French company with which S store was having problems, and was holding herself out as a customer while really investigating the store. He asked her where she was from, and when she replied, “Brazil,” defendant realized his first impression was mistaken.

(3) That day, defendant had plans to take his child to the hospital, so he asked his younger sister to tend to the store. He had to leave the store at around 2:30 p.m. to pick up his child. Since it would take time to show foreign plaintiff the merchandise, he felt uneasy about leaving the store to his mother Hanako and his younger sister.

(4) When he told plaintiff he was busy and she would have to leave, she said, “No” and “Why?” Afterward, defendant left the counter and approached plaintiff, holding out his hand and repeatedly saying “Please. Please.” He spread his hands to convey that he wanted her to leave.

(5) Because plaintiff did not leave the store after being asked, defendant called the police. Thinking it suspicious that plaintiff was so adamant about not leaving the store, he suddenly remembered the manual he had received from the police. He called the police, thinking that if they came, he would temporarily entrust the situation to them, and could go to the hospital.

(6) The argument between plaintiff and defendant continued until the police came. Because the plaintiff made some calls on her cell phone, defendant became nervous. While showing plaintiff the manual he had received from the police, and the flyer reading: “No foreigners allowed,” he said to plaintiff in English, “Please get out. We cannot accept foreigners.”

(7) After the police arrived, defendant did not speak directly with plaintiff. Through a translator, plaintiff repeated several things: If this is a store, why are they driving out customers? Why are Brazilians not allowed? Why aren’t they arresting plaintiff?⁶ I’m going to sue.

(8) Defendant left the store at around 2:45 p.m.

(9) He heard from defendant Hanako Itsuyama about what happened after he left the store. Because they could not do any business until plaintiff left, defendant Hanako Itsuyama handed her a written apology. After saying sorry, and shaking hands with plaintiff, Hanako got plaintiff to leave.

b. Considering the above testimony—that the predecessors of defendant Gorō Itsuyama’s suffered an incident of robbery by foreign elements as described in 2.a.i.(1) and 2.a.i.(4); that he himself sustained injury; and the misfortune described in exhibit 2—it is understandable why defendant would be nervous about foreign robbers. Nevertheless, one can certainly not mistreat everyone who falls into the category of foreigner simply because she is Chinese or Brazilian. According to Allport, people are predisposed to prejudice. This predisposition generalizes things, conceptualizes, and then categorizes them. The world of experience manifest through this process is excessively simplified.

Though not directly at issue in this case, in medieval Europe, in preparing questions for the inquisition, there were only two answers: yes or no. In inquisition after inquisition, this binary—which was used in medieval

⁶ *Translator’s Note:* In the original source, this sentence reads “Why aren’t they arresting plaintiff?” This has been corrected to be consistent with the rest of the text.

witch trials, and tended invariably to brand women as witches—buried an incalculable number of innocent women as witches. This should be seen as one extreme example of the excessive categorization into which people can easily fall, bearing out Allport's theories.

Plaintiff's behavior in 2.b.(i), 2.b.(ii), and 2.b.(iv) was ordinary for a customer, and did not seem guilty at all. On the other hand, defendant Gorō Itsuyama's business about leaving the store was a completely personal matter, unrelated to plaintiff. Moreover, he used this as a pretext to take down the poster and show it to plaintiff, and then call the police; these can in no way be called peaceful methods. [231]

Moreover, the testimony that defendant Itsuyama Haruko and plaintiff shook hands and parted company, given the atmosphere at the time, is ultimately difficult to believe.

B.

1.a. In legal theory, a tenet of criminal law says "if there is no law, there is no crime, and no punishment." (*Nullum crimen, nulla poena sine lege*).

This has opposed arbitrariness in criminal punishment since at least the Middle Ages. From the standpoint of respect for basic human rights, people are the products of the Enlightenment, being subjects that judge reasonably and rationally, and subjects that act thereon. Moreover, the presumption that people are innocent until proven guilty is a consequence of respect for basic human rights adopted in criminal procedure. This conclusion rests on the idea that people have value.

However, it is an uncontested fact that crime really happens in actual society.

In criminology and victimology, fields that emerged through the development of sociology, social psychology, and psychology, the idea that crime is one form of social disorientation in large societies is well established. This is the result of analyzing the factual aspects of society.

b. The attachments prepared by the Hamamatsu Central Police were produced for managers of jewelry stores like defendants'. They exhorted storeowners to take care of daily things such as hiring strong employees for security purposes, being firm with customers, or paying attention to ways to reduce damage. They were not to be shown to customers, or posted in order to make them feel guilty.

2. Admittedly, by running a high-end jewelry store, defendants are easy targets for prospective criminals. But a store on the street, from a structural or functional vantage, should be open to any walk-in customer,

Japanese or foreign. Moreover, their crime-prevention policies should be prepared so as to be invisible to customers.

With certain exceptions—such as placing merchandise in a storehouse, or conducting mail-order sales (where the merchandise is introduced to customers)—managers who run stores like defendants' do not have the freedom to restrict target customers, place restraints on who may enter, limit people who receive introductions, or form a completely exclusive association.

3. Thus, despite the fact that plaintiff entered S jewelry store, looked around as a normal customer, and did not appear suspicious, defendants planned to eject her upon discovering that she was Brazilian. This way of thinking blatantly treats foreigners differently simply because they are foreign. They hurt plaintiff's feelings by showing her a flyer that they should not have; they called the police to initiate a criminal investigation. Their acts lacked all manner of propriety; they treated plaintiff as if they were military policemen. It cannot be denied that this hurt plaintiff's feelings.

IV. AMOUNT OF COMPENSATION

In light of the above, defendant Gorō Itsuyama became nervous because his predecessors suffered a robbery with foreign elements in the past. He showed plaintiff a "No foreigners allowed" sign because she was Brazilian; he then called the police. Based on these unreasonable methods, it cannot be denied that he sought to expel plaintiff from his store, and injured plaintiff's dignity and honor. Defendant Hanako Itsuyama prepared the "No foreigners allowed" sign. She also sought to expel plaintiff as quickly as possible, presenting her with a note that was not heartfelt. These deeply injured plaintiff's honor. Based on Articles 709 and 710 of the Civil Code, defendant Hanako Itsuyama should be liable to plaintiff and apologize for the mental anguish. As plaintiff proposes, an appropriate amount would be 1.5 million yen, which would cover both compensation and attorney's fees.

Though plaintiff also proposes that translation fees should be included in the compensation, this will not be included in the total amount of the claim.

V. CONCLUSION

Therefore, as against defendants jointly, this decision approves the claim seeking 1.5 million yen plus five percent interest on the judgment

from June 16, 1998 until payment is complete. Litigation expenses shall also be borne by defendant, pursuant to Civil Litigation Law Articles 65(1), 61, and 259(1).