

# Necessity or Crisis on the freedom of expression in Japan: Legal analysis of Terrace House tragedy

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## 1. Introduction

Terrace House's 22 years-old female suffered from violent and unkindness messages via anonymous SNS users. As a result of this, she committed suicide on 23 May 2020.<sup>1</sup>

After this tragedy, some argues that the Japanese authority should interfere with freedom of expression on the SNS.<sup>2</sup> In general, the freedom of expression constitutes an essential element of our democratic society.<sup>3</sup> In this sense, such a restriction should be careful to be taken into consideration while balancing between individuals' freedom and society's interests. But, it is important to note that this balance depends on each state: for instance, while China tends to protect the interests of society,<sup>4</sup> the United States prefer to respect the freedom of individuals under the First Amendment to the American Constitution.<sup>5</sup> And, in Europe, the intervention to the freedom of expression must comply with Article 10 (2) of the European Convention on Human Rights (ECHR) and must meet three major criteria: (1) in accordance with the law; (2) with legitimate aims; and (3) the necessity for a democratic society.<sup>6</sup> Thus, the restriction on the freedom of expression is a sensible

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<sup>1</sup> Kyodo, "Notes uncovered detailing 'Terrace House' star Hana Kimura's suicide", The Japan Times, published on 26 May 2020. Available at <https://www.japantimes.co.jp/culture/2020/05/26/entertainment-news/suicide-note-written-pro-wrestler-terrace-house-star-hana-kimura-discovered/#.XtFHXC-DEY>.

<sup>2</sup> Kyodo, "Cyberbullying regulation in Japan could have a chilling effect", The Japan Times, published on 1 June 2020. Available at <https://www.japantimes.co.jp/news/2020/06/01/national/japan-cyberbullying-censorship-fears/#.XtV3Qi-DEY>; See also [https://mainichi.jp/articles/20200525/k00/00m/010/214000c?fbclid=IwAR2UL9IUJ2g9OIna4RwElcjpQZRx\\_aps2pI5D9LsMBbKFG4JVCnxiG3Uthg](https://mainichi.jp/articles/20200525/k00/00m/010/214000c?fbclid=IwAR2UL9IUJ2g9OIna4RwElcjpQZRx_aps2pI5D9LsMBbKFG4JVCnxiG3Uthg) (published on 25 May 2020).

<sup>3</sup> Katsuya Anbo, "On Freedom of Expression in Media Society", *Japanese Society for Global Social and Cultural Studies Journal*, 2008, pp. 12-23 at pp. 12-14.

<sup>4</sup> Chinese freedom of expression is recognised as a privilege, not a right. See <https://www.cecc.gov/freedom-of-expression-in-china-a-privilege-not-a-right>.

<sup>5</sup> Recently, President Trump decided to sign an executive order on preventing online censorship to the SNS companies. See White House, "Executive Order on Preventing Online Censorship", published on 28 May 2020 (<https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>). See also First Amendment of the U.S Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".

<sup>6</sup> Article 10 (2) of the ECHR: "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". See [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

and controversial issue in each country.

In light of the foregoing, this article will briefly examine whether Japanese authority should restrict on the freedom of expression under the Japanese Constitution. In doing so, it will be divided into the following chapters: After this introduction, the second chapter will skim through the general understanding of the freedom of expression under Articles 12 and 21 of the Japanese Constitution in the context of the SNS.<sup>7</sup> And, the third chapter will analyse the recent suicide case in the light of Article 21 of the Japanese Constitution.

## **2. The freedom of expression on the SNS in Japan**

According to Article 21(1) of the Japanese Constitution, it stipulates that:

*“Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.”*

In order to guarantee the freedom of expression, Article 21(2) provides for some prohibiting measures:

*“No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.”*

Under Article 21(1) of the Japanese Constitution, there are two types of censorship: (1) pre-censorship; and (2) post-censorship. In general, the pre-censorship is barred under the Constitution: for instance, before publishing a comment on Twitter, the SNS company or the state authority censors whether the contents of that comment is appropriate for the state concerned. However, individuals can easily have access to the SNS and publish their comments on the digital forums with their smartphones so that it may be difficult to govern the pre-censorship in the context of the SNS.

To the contrary, deleting or alarming the comments on the SNS by the company or the state authority may be controversial because the acts can be considered as the post-censorship within the meaning of Article 21(2) of the Japanese Constitution.<sup>8</sup> In this context, such post-censorship constitutes a violation of Article 21(1) of the Constitution due to the prohibited measure under Article 21(2).

However, this intervention to the freedom of expression can be justified under Article 12 of the Japanese Constitution.<sup>9</sup> In other words, the state authority or the SNS company may intervene to the individual’s freedom, when the exercise of the freedom is considered as an abuse of their rights and freedoms or a violation of public welfare under Article 12. In this sense, an important question arises as to how the Japanese law can draw a line

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<sup>7</sup> English translation is available at [http://www.japaneselawtranslation.go.jp/law/detail\\_main?id=174](http://www.japaneselawtranslation.go.jp/law/detail_main?id=174).

<sup>8</sup> Miyoko Tsujimura, *Kenpō, 6<sup>th</sup> edition*, Nihon-hyōronsha, 2018, pp. 200-207.

<sup>9</sup> Article 12 of the Japanese Constitution: “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare”.

between the interest of individuals (freedom of expression) and society (abuses of the freedom or violation of public welfare).<sup>10</sup>

But, this answer depends on the case-by-case basis before the Japanese Courts. The Japanese lower courts usually referred to the American rule, that is, *clear and present danger rule*, to examine whether the state intervention can be justified or not.<sup>11</sup> To be precise, this rule constitutes the following two conditions: (1) “the speech must impose a threat that a substantive evil might follow”; and (2) “threat is a real, imminent threat. The court had to identify and quantify both the nature of the threatened evil and the imminence of the perceived danger”.<sup>12</sup> But, the Supreme Court did not follow this rule, but took it into account to make a judgment.<sup>13</sup>

When the victims suffered from violent messages on their SNS, there are two ways for them to obtain legal remedy: (1) the infringement of “*personality rights*” under Japanese case-law<sup>14</sup>; and (2) criminal liability under the Japanese Penal Code,<sup>15</sup> especially, under Articles 233 (defamation of trust and obstruction of business), 230 (libel and slander), 231 (contempt) and 222(1) (intimidation).<sup>16</sup>

In light of the foregoing, Japanese law does not provide sufficient protection for victims from the excessive cyberbullying<sup>17</sup> because it is difficult to draw a line between the interest of individuals and society. In other words, it remains unclear how the state authority decides which expression is recognised as the abuse of the freedom or violation of public warfare under Articles 12 and 21 of the Japanese Constitution. When interfering with the freedom of expression, the state authority must justify such interference under

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<sup>10</sup> Anbo, *supra* note 3, pp. 12-23.

<sup>11</sup> Tsujimura, *supra* note 8, p. 205.

<sup>12</sup> See [https://www.law.cornell.edu/wex/clear\\_and\\_present\\_danger](https://www.law.cornell.edu/wex/clear_and_present_danger).

<sup>13</sup> Tsujimura, *supra* note 8, p. 205.

<sup>14</sup> It is important to note that the Japanese jurisprudence invented the concept of “personality rights” so that there is no provision that expressly guarantees that right under Japanese law. Kazunari Kimura, “The right of personality in case law”, *Ritsumeikan-hōgaku*, Vol. 5-6 (2015), pp. 1424-1453.

<sup>15</sup> The Japanese Court recognised online defamation as a criminal offence. See Supreme Court Judgment, 15 March 2010 (*Keishu*, Vol. 64, No. 2) p. 1 ss. Available at [http://floralaw.net/site0000\\_3/meiyokison.html](http://floralaw.net/site0000_3/meiyokison.html) (In Japanese); See also, Nobuyoshi Ashibe, *Kenpō*, 7<sup>th</sup> edition, Iwanami-shoten, 2019, pp. 194.

<sup>16</sup> See <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02>.

<sup>17</sup> Concerning Japanese special law against hate speech, the Japanese Diet enacted *Hate Speech Act of 2016* that encourages to eliminate hate speech against “foreigners” in Japan. This law does not provide for any criminal and administrative sanctions on the hate speakers and it does not stipulate any restrictions on hate speech on the Internet. Thus, there is no special legislation in Japan against online hate speech. See Hate Speech Act, 25 May 2016 (entered into force on the same date). Available at [https://elaws.e-gov.go.jp/search/elawsSearch/elaws\\_search/lsg0500/detail?lawId=428AC1000000068](https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=428AC1000000068); See Junichi Sato, “The legal problems of Hate Speech regulations: from a perspective of the Constitution and International Human Rights Law”, *Kokusaijinnkenn-no-hiroba*, no. 133, May 2017 (in Japanese). Available at <https://www.hurights.or.jp/archives/newsletter/section4/2017/05/post-13.html>.

the *clear and present danger rule* on the case-by-case basis.<sup>18</sup>

Concerning the protection of victims against violent and brutal comments from anonymous users, they may theoretically accuse the users of criminal perpetrators under the Japanese Penal Code. And, they also exercise their personality rights to obtain pecuniary damages from the users. In practice, there are so many obstacles to bring their allegations before the Japanese Courts.

### **3. Terrace House’s suicide case in the light of the freedom of expression under the Japanese Constitution**

Based on the previous chapter, this chapter will analyse the recent tragedy in Japan concerning Terrace House’s suicide case in light of Articles 12 and 21 of the Japanese Constitution.

In this case, Hanna Kimura, a 22-year-old pro wrestler, joined in the popular reality show “Terrace House” committed suicide at her home in Tokyo on 25 May 2020. She left several suicide notes in her room. According to the press news, the reason for the suicide is violent and unkindness messages from SNS users who watched the “Terrace House”. In other words, she suffered from the cyberbullying from anonymous users of the SNS.

This case may arise several questions as follow:

- (1) How should this case be understood under the Japanese Constitution?
- (2) How can we understand the relationship between the freedom of expression and abuse of the freedom and violation of public warfare?
- (3) What could the Japanese Constitution provide the protection for her against the cyberbullying?

According to the analysis of the previous chapter, Japanese legislation concerning the SNS is not sufficient to protect them from the cyberbullying. In the present case, the victim was of the quasi-public figure because she was present at the Terrace House TV show. In this sense, it can be considered that she implicitly consented to be suffered from some critics on the Internet before joining in the Terrace House. However, such critics should not become a cyberbullying against the victim, such as insults on her with violent and unkindness messages. Due to such messages, she had indeed suffered from mental illness. Thus, from my perspective, the victims are entitled to bring their complaints of a violation of personality rights or to accuse the SNS users of criminal perpetrators under the Japanese Penal Code because she had suffered from numerous violent messages from

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<sup>18</sup> In light of the ECHR, there is no doubt that the state authority must justify its interference with the freedom of expression in accordance with the law and necessity of democratic society with the legitimate aims. Unfortunately, the Japanese Constitution did not provide for such criteria to examine whether the intervention is necessary for the Japanese democratic society. So, it depends on the case-by-case basis.

other SNS users. But, it is important to note that the borderline between the cyberbullying and reasonable critics remains unclear under the Japanese legal system. So, it must be examined on the case-by-case basis.

In short, there is no effective legal system in Japan in order to protect the SNS users from cyberbullying. And, the SNS regulations still pose a complex and sensitive issue for the protection of the freedom of expression under Article 21 of the Japanese Constitution. When the victims suffered from violent and unkindness messages via the SNS, they may theoretically claim the violation of personality rights to obtain pecuniary damages from the perpetrators, and accuse the abusers of criminal perpetrators under the Japanese Penal Code. However, it still exists many obstacles to argue these rights, such as how can they detect who published or sent a violent message via the SNS? If the victims succeed to remove all obstacles, they can have access to the legal remedy under Japanese law.

#### **4. Final remarks**

In conclusion, freedom of expression is an essential element for a democratic society, but it is necessary to consider how the state authority and SNS company can protect the SNS users from violent and unkindness messages from other users. In doing so, they need to regulate such online forums to protect the victims from all manner of online abuse.

But, such intervention may be considered as a prohibited post-censorship under Article 21(2) of the Japanese Constitution. So, it must be justified under Article 12 of the Japanese Constitution. If it is justified, there is no violation of Article 21(1) of the Japanese Constitution. The reason is that such intervention to the freedom is necessary for the democratic society to protect the victims on the Internet. On the contrary, there is a violation of Article 21(1) of the Japanese Constitution when such intervention is not justified. In this context, the victims can exercise their rights to obtain legal remedies before the Japanese Courts on the ground of the following two reasons: (i) the infringement of their personality rights; and (ii) the criminal offences, such as defamation, intimidation and contempt and so on.

However, they are reluctant to exercise them before the Courts on the ground of our customs. In this context, Japanese society must develop the legal understandings that it is usual for Japanese population to exercise their rights under the law to obtain legal remedies when violating their rights.