

# Trashing

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## Introduction

Ms. Hana Kimura — a 22-year-old professional female wrestler — appeared on “Terrace House,” a popular TV reality program that depicts relationship drama among several young participants who share the same house. She partnered with another young male participant, but quickly became frustrated because of his insensitivity and reluctance to find stable job. One day, she washed her very valuable and important wrestling costume, but forgot to remove the costume from the laundry basket. Consequently, the young male partner accidentally put his washed clothes together with her costume in the dryer. Because of the heat from the dryer, her costume shrank and became useless. She was preparing to wear it for an important wrestling match and was furious with his carelessness. She accused him of being lazy and reluctant to work hard to earn a living. She even slapped his hat. He apologized and offered to pay her damages, but she refused to accept any damage payment because of the importance of the costume. After this episode was aired, her social media account was filled with fierce and nasty comments about her short temper. She left the program, but the nasty comments against her continued. She was then found dead in her apartment after apparently committing suicide. Her death left people to soberly reflect on the impact of fierce and nasty comments against a particular person, known by the term “trashing”<sup>1</sup>: “a form of expressions of extreme hate, negative comments and even death threats.” The program was then cut from production.<sup>2</sup>

“Trashing” has become a serious social issue in Japan. It could involve defamation, invasion of privacy, and death threats. However, the most egregious form of trashing is insult, including the total denial of worth as a human being, strong endorsement for suicide, and expression of extreme negative feelings or anger against a particular person. Many other celebrities have been targeted by such

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<sup>1</sup> The Japanese word for “trashing” is “hibo/chusho.” Hibo means serious condemnation and chusho means false accusation. Combined together, it signifies a huge array of personal attacks.

<sup>2</sup> “Hana Kimura: Netflix star and Japanese wrestler dies at 22,” BBC (23 May 2020), <https://www.bbc.com/news/world-asia-52782235>; Eric Margolis, ‘The Fall of ‘Terrace House’, New York Times (July 17, 2020), <https://www.nytimes.com/2020/07/17/arts/television/terrace-house-suicide.html>.

trashing in the past. After her death, however, her mother stood up and called for more effective relief and more severe punishment against such forms of extreme personal hate. Moreover, increasing numbers of victims came to feel frustration when the social media platforms were reluctant to take down or remove offending comments. Gradually, many came to realize that some kind of reform needed to be introduced.

In this short comment, I will outline what trashing is and explore some specific examples to demonstrate the pervasive existence of trashing and its impact (part I), examine why traditional remedies and sanctions are insufficient (part II), and outline the reforms introduced to provide much better relief and sanctions (part III). Then, this comment points out the possible conflict with freedom of expression and suggests how we can justify a better response (part IV). In conclusion, this comment will argue that, while certain types of extreme trashing could surely be subjected to civil liability, and while imposition of criminal punishment for certain egregious trashing may be justified, imposition of blanket criminal punishment runs the risk of stifling freedom of expression. It will further argue that the system of forcing the platforms to reveal identity information of sender without going to the court is not justified and that an attempt to force social media platforms to take down trashing messages further aggravates the danger that freedom of expression could be stifled.

## I Trashing

### A. *What is Trashing*

Trashing is an expression of extreme negative feelings against a particular person. It is a personal attack directed against a particular person that is not based on affiliation with a particular race, color, origin, religion, or sex. In this sense, it is not “hate speech.” It is a particularly nasty comment attacking the dignity or worth as a human being of the target person, and may often call for the person to die or go away.

For example, some of the nasty comments Ms. Kimura had received after the costume incident were “you are partly responsible for the accident by leaving your costume in the laundry basket,” “if the costume is so valuable and important to you, why don’t you pay more attention to it yourself,” or “you don’t have any right to question his way of living.” Gradually, these comments escalated into extreme hate such as “your face is so ugly, you’re a bad person and your life is not worth living”, “when you are going to die?”, “disgusting,” “never go back on television,” or “go away already.” Even after her death, the nasty comments simply continued. “Thank you, everyone is happy that you died” or “go to hell.” After the cancelation of the program due to this tragedy, someone posted “thanks to your stupid actions, my favorite program was cancelled” or “you are embarrassing to everyone even after your death.” Imagine receiving thousands of these comments every day.

Ms. Shiori Ito alleged that she was drug raped by Mr. Noriyuki Yamaguchi, a former Washington bureau chief for the broadcasting company TBS, and a former biographer to prime minister Shinzo Abe, when she asked his advice on the job over drinks. Her criminal complaint did not lead to criminal prosecution, and she had to file a civil lawsuit against him. She was bombarded by trashing comments and messages after she came forward and filed this lawsuit. Some argued that the alleged rape was simply a failed honey trap, and tweeted illustrations at her titled “failed honey trap”, “let’s make it up,” “lawsuit is so easy,” and “you can win the lawsuit by crying before the judges.” Some retweeted them and repeatedly endorsed these accusations by clicking on “like.” Some pointed out that she was using a fake name, citing the official gazette that contained the bankruptcy record of a foreign woman who went by the name Shiori Ito. Ms. Ito herself recalled:

“I was vilified on social media and received hate messages and emails and calls from unknown numbers. I was called a ‘slut’ and ‘prostitute’ and told I should ‘be dead.’ There were arguments over my nationality, because a true Japanese woman wouldn’t speak about such ‘shameful’ things.”<sup>3</sup>

On April 19, 2019, a car driven by a senior male driver, Mr. Kozo Iizuka, aged 90, lost control in the intersection of the busy Ikebukuro, Tokyo, and struck 9 pedestrians, killing the wife and daughter of Mr. Takuya Matsunaga. Mr. Matsunaga was furious about the accident and the driver’s denial of wrongdoing. The driver denied any liability and blamed the accident on the mechanical failure of the car. The car manufacturer examined the vehicle and found no evidence of malfunction, and the police believed that the driver confused the accelerator with the brake and plowed into the pedestrians. Mr. Matsunaga, understandably, worked hard to prevent further accidents that would claim the lives of individuals from accidents such as the one which claimed the lives of his family. Because of this, nasty comments were posted on Mr. Matsunaga’s Twitter account, criticizing him for “making fuss for money” and “do you really think that your wife and daughter would be happy to see what you’re doing,” or ‘you should start over finding a new woman. It would be far easier for you now the burden that your kid had imposed upon you, is gone’.

Mr. Ken Watabe, a popular comedian, aged 47, married a beautiful young actress named Ms. Nozomi Sasaki, and was widely envied by many men for this. However, the envy for him was replaced by fierce backlash when he revealed that he was involved in several sexual acts with other women in public washrooms designed for people with disabilities and nursing mothers after his marriage. He apparently had several partners and called them to washrooms where the sexual acts took place and provided them with money. He stepped down from all regular television

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<sup>3</sup> Kurumi Mori & Shoko Oda, “#MeToo Becomes #WeToo in Victim-Blaming Japan,” Bloomberg (May 9, 2018), <https://www.bloomberg.com/news/articles/2018-05-09/-metoo-becomes-wetoo-in-victim-blaming-japan#xj4y7vzkg>.

programs altogether and went missing from the public eye, avoiding persistent gossip and media reporters who were trying to get interviews and meetings with him. His wife made a public apology for him and denied any intention of divorcing him. Later, he held a public press interview with the intention of making a return, but the press conference turned out to be a private lynching by gossip media reporters. Many women hated him for cheating on his beautiful newlywed wife (many mothers hated him also for using the public washrooms that are supposed to be used to change diapers for their babies for sex) and many men hated him for cheating on Ms. Nozomi Sasaki. He was probably the most-hated man in the entertainment world at that time. Naturally, he faced fierce and nasty trashing from the public. Some users commented on Twitter “apologize to your wife, Nozomi Sasaki,” “die,” “ugly. Don’t touch me,” “such an empty man with no substance and with no entertainment talent” or “just running away to wait for the storm to cool down,” “worst person as a human being and a man,” or “sloppy and cowardly,” “so disgusting and no one wants to see his face again.” In cyberspace, many users commented on “I am totally allergic to Watabe,” meaning that if a viewer saw Watabe in the television or maybe even heard the name of Watabe, viewer would show strong allergic reaction, feeling sick.

These are just a few examples of the trashing rampant in cyberspace, especially on social media. Many other celebrities and other prominent people are bombarded with such trashing.

### ***B. Significant Harms of Trashing***

Naturally, if you are targeted, the first reaction you would have to this kind of repeated and widespread nasty commenting is a feeling of deep hurt. You would be deeply offended. You might feel sick. The infliction of severe mental anguish is the primary harm of this kind of trashing. More seriously, you might receive anonymous phone calls repeatedly that contain yelled messages, or even death threats. You could be scared for your personal safety. You would be mortified.

Often, we hear people say that “you don’t have to read [the messages]. Just ignore them.” While this may be true, as no one is forcing you to read the comments and you can live your life ignoring them, it is often not that simple. The fact remains that many people are consistently posting nasty comments about you, and that there is no one on your side defending you. If you know that there are thousands of comments every day about you, you will naturally feel negatively affected. Sometimes, you won’t want to see anyone and won’t want to go out, fearing nasty comments you may encounter. You may face unfavorable treatment or negative reactions outside, such as ignorance or rude treatment from store clerks or other customers. Sometimes, you may be yelled at by others, or at least must face the unhappy experience of hearing other people whispering about you behind your back. Your social activities outside might be seriously hampered.

Your mental health would be deeply affected by the extreme feelings of isolation. These sorts of experience would also leave a deep impact on you, as your physical health may be seriously affected as well, for example, by not eating enough, or by drinking alcohol excessively in an effort to cope. When the anonymous phone calls repeat, many people come to fear the sound of the phone ringing. If these calls continue in the middle of the night, then many people cannot sleep and may seriously suffer from sleep deprivation. In some cases, this form of depression and physical damage may also lead to suicide. This was exactly what happened to Ms. Kimura.

There is also a toll on society. Many of the people who are deeply motivated by wishes for social reforms will stand out and could be targeted and trashed. Naturally, other people might hesitate to join a positive social movement. Then, these movements led by activists could be ruined or at least significantly constrained. If you stand out, then you are much more likely to face such extreme trashing. This would naturally undermine any incentive for those who would potentially lead social reform movements. In other words, trashing not only hurts the individual person targeted, but harms society by preventing the public from participating in social activities.

### ***C. Why Has Trashing Become Such a Huge Social Issue in Japan?***

Nasty comments can be found in other countries as well. Indeed, trashing may be a very serious social issue in these countries too. A common factor that has contributed to the significant increase of trashing and its serious impacts is the rise of social media. Thanks to the rapid and extreme development of social media, individual users have obtained the opportunity to express themselves. They can create blogs, post comments on the blog, and post comments on the other user's blog as well. They can post comments on bulletin boards, they can share comments among friends, and they can share comments through social media platforms such as Facebook, Instagram, Twitter, or Tik Tok.

This allows every user to post any comments, including critical comments or condemnation and accusations. Moreover, unlike traditional media where there are content filters such as editors to prevent publication of comments found to be unfounded or too nasty, these platforms do not have similar kinds of filters. In most cases, users are allowed to post comments freely and it is rare for these bulletin boards or social media to intervene and remove such trashing comments.

Moreover, these social media platforms allow users to upload or post comments immediately, without leaving any room for sober reflection. As a result, many users simply upload or post comments out of emotional outrage without thinking twice about the possible impacts or implications of uploading or posting comments.

Additionally, people are naturally frustrated and disappointed by developments in the world. Especially due to the COVID-19 pandemic, many people are

depressed. They want to release their frustration and disappointment by expressing it outwardly. If there is a target, then it is easy for the frustrated public to release their stress by attacking him or her. It is especially easy to target those celebrities who committed wrongdoings that are commonly seen as shameful, as it is undeniable that they are at fault. Such people could likely become easy targets.

Furthermore, there are certain unique characteristics of Japanese media, Japanese society, and the Japanese people which are contributing to such a rampant proliferation of trashing in Japan.

The most important contributing factor is the unique characteristics of Japanese media. Japanese media is filled with gossip papers and magazines. They report on what's happening to celebrities and famous people obsessively. Gossip papers include so-called "sport newspapers," daily newspapers reporting on sporting events, as well as entertainment and social events. Gossip magazines include weekly or monthly magazines, focusing on celebrities and social events, including weekly photo magazines. Unlike traditional newspapers or mass media, these gossip media platforms prefer sensational stories rather than well-investigated and well-written articles. Moreover, Japanese media publish articles without naming the authors of the articles. This creates room for irresponsible and untrustworthy reporting. The readers tend to believe, however, that their reports are true and trustworthy, especially when the same reports are shared by many media sites without independent verification. Indeed, many media outlets report that there are unverified reports by other outlets without checking whether the report was accurate by themselves. For the Japanese media, the fact that these stories are widely shared is more important than whether they are true or trustworthy. Some media report on "what is trending," disregarding whether the report that is then widely spread is true or accurate, prompting much wider readers and audience to reach out to original sloppy stories. Readers naturally come to believe these stories that are repeated by many media sources.

Secondly, for some reasons, Japanese media, especially non-established high-end newspapers, tend to believe that accusation is their true calling. Unlike established Western traditional media, Japanese media are not simply content with objective reporting of facts. They want sensational stories, and they want to sensationalize the stories. Moreover, they jump in to criticize and blame someone responsible and pressure him or her to step down. As a result, in many cases, targeted persons could be subject to accusations and condemnations by the media.

Thirdly, there is widespread expectation in Japan that, if you are accused of some wrongdoings, you are supposed to hold a press conference and apologize to the public. Regardless of whether it was an illegal violation of the law, negligent conduct resulting in great harms, or highly personal misbehavior such as cheating, you are expected to hold the press conference, allowing mass media reporters to question you. Often, such press conferences end with a private lynching by the mass

media, who accuse and blame the person who appeared on behalf of the readers and the public. These reporters tend to believe that they are standing on higher ground, and that they have the qualifications and entitlement to ask questions. In many instances, the media accuses and blames the person who appears before the press. If you do not wish to hold such a conference and ignore the opportunity to apologize, you will be regarded as arrogant or somehow liable. Such perception further aggravates the bad publicity you will face in the aftermath of backlash. Essentially, the accused is stuck between a rock and a hard place and suffers regardless of whether they choose to hold the press conference or not.

Fourth, Japanese media, similarly to some of the aggressive media in other countries, tends to be highly aggressive in gathering information. Gossip magazines follow celebrities in anticipation of some “juicy” story with photographers or a camera crew, and often wait around outside of a person’s residence. Once a scandal breaks out, many media reporters join in the frenzy efforts to get interviews and speak with the targeted person, together with photographers or camera crew. Often, a huge number of reporters, photographers, and camera crews stay in front of the private residence for days, asking questions to other family members and even neighbors. It is very hard to stop them or prevent them from doing this.

Fifth, Japanese television stations usually run morning and afternoon shows, featuring the information-reporting type of entertainment (they are often called news entertainment or info-tainment). They cover the news of the day, focusing on celebrities and important events, accidents, or crimes. Their reports are not strictly news reports. It is a combination of news and entertainment. As a result, the boundary between news and commentary is very ambiguous. Furthermore, these shows usually invite several guest commentators, sometimes regular and sometimes ad hoc. They are not necessarily experts or professional journalists, and these guest commentators freely comment on the news story or reports. Since they are not experts nor professional journalists, their comments tend to be highly biased and subjective. Nevertheless, viewers tend to take their comments as authoritative and reliable and accept them.

Moreover, in Japan, “Yahoo Japan!” is a major platform in cyberspace. It has a unique newsfeed column, “Yahoo Japan! News,” featuring various headlines from various newspapers, magazines, and websites. This newsfeed presents highly minor papers and magazines not familiar to many users, and as a result, the newsfeed can provide a unique opportunity for these obscure media platforms to reach out to the general users. Again, some of the reports are not trustworthy and can be more of a personal opinion rather than a news report. Moreover, this newsfeed has a unique comments function that allows general users to post comments on the feed. Additionally, its filtering function used to be very loose. As a result, many angry users simply posted emotional and sensational critical comments on the news. The “Yahoo Japan! comments” section thus became the hotbed of trashing in Japan.

Finally, Japanese society generally tends to be highly conformist. When many users post critical comments, others tend to join in and follow the trend. Therefore, it is highly unlikely you will see some defending comments or opposing comments. Rather, anyone who opposes or who casts doubt can be similarly subject to trashing. Many targeted persons, therefore, are likely to see less and less welcome or defending comments or messages.

Altogether, these factors contribute to the significant rise of the trashing and increasing harms in Japan.

## II Available Remedies and Sanctions

### A. *Death Threats, Stalking, and Harassment*

Some of the conduct that is included in trashing may be criminal conduct that could trigger criminal punishment.

For example, if some people, deeply influenced by this trashing and convinced that the targeted person, especially targeted celebrity, should die, and actually tried to kill that person, that would be homicide.<sup>4</sup> If someone that is obsessed with a celebrity tries to injure him or her, that is criminal assault or injury.<sup>5</sup> If someone attempts to break and enter into a celebrity's residence, that is a criminal trespass.<sup>6</sup> If someone follows the movement of the celebrity and repeatedly harasses him or her, then that kind of behavior could be criminal stalking.<sup>7</sup> Therefore, infliction of physical harm is already prohibited.

Advocacy of homicide, assault, or injury may also be prohibited as well.<sup>8</sup> Therefore, any trashing message calling for such physical harm could be charged as a criminal offence. Moreover, death threats or the typical comments suggesting a killing or bombing could be regarded as a criminal threat.<sup>9</sup> Merely suggesting setting a bomb could trigger the production company or talent management company to notify the police, intensify security, change an event venue or schedule, or even force a company to cancel an event, causing tremendous business damages. Such a threat could be unlawful forcible disruption of business activities.<sup>10</sup> What is left is

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<sup>4</sup> Keihō [Criminal Code], law no. 45 of 1907, art. 199.

<sup>5</sup> Ibid., art. 208 (assault) & art. 204 (injury).

<sup>6</sup> Ibid., art. 130.

<sup>7</sup> Stalker koutō no kiseitō nikansuru hōritsu [Act on Regulation of Stalking Conducts], law no. 81 of 2000, art. 3 (ban on causing anxieties by stalking) (Stalking Regulation Act).

<sup>8</sup> Criminal Code, *supra* note 4, art. 61.

<sup>9</sup> Ibid., art. 222.

<sup>10</sup> Ibid., art. 234. Moreover, although suicide itself is not a crime, abetment of suicide is also a crime. Ibid., art. 202.



the infliction of fear, anxieties, discomfort or embarrassment, and mental anguish by messages.<sup>11</sup>

If the expression falls into criminal acts prohibited by the Criminal Code, the police could search and arrest those responsible and bring the suspect to criminal prosecution. Even when the comments or messages were posted anonymously, the police can search the service providers to identify who sent those comments or messages with a warrant, and then bring the person who sent or posted the comments to justice. All of these crimes are heinous crimes and could result in jail time if convicted.

However, there are several complications which could prevent criminal punishment. The first hurdle is the difficulty of collecting and saving evidence. For the police to be persuaded, the victim needs to show evidence of illegal acts. Thus, the victim will have to keep records of trashing comments or messages and save them as evidence to be presented to the police.

The second hurdle is the difficulty of finding the identity of a sender. As mentioned above, the police can search the service providers to identify the sender of the trashing comment or messages. However, some social media platforms simply record log-in information, but do not keep information on the specific transmission data of messages. In such circumstances, the service providers would not be able to identify the sender of the particular transmission. It is not settled whether the identity of the user who logged in could be enough to identify the offender. Moreover, even when the particular IP address which was used to post trashing comments can be identified, sometime, still it could be unclear who actually posted such comments, when the same IP address were shared by several users.

The third and most difficult task is whether the cooperation of foreign companies could be secured. Most social media providers are operated by foreign companies and are located abroad. For example, Twitter is operated by the U.S. company and is located in the U.S.,<sup>12</sup> and many nasty comments are posted on Twitter. Most of these foreign social media providers are reluctant to cooperate with the Japanese police to identify the sender. Then, the Japanese police will face difficulty in identifying the suspect. If the police could not identify the sender, criminal punishment becomes impossible.

These hurdles sometimes prevent criminal punishment against the most egregious trashing comments or messages.

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<sup>11</sup> Making frequent phone calls or sending e-mails repeatedly could be a criminal stalking. See Stalking Regulation Act, *supra* note 7, at art. 2(1) item 5.

<sup>12</sup> Term of use for Twitter in Japan indicates that the service is offered by Twitter, Inc., located at 1355 Market Street Suite 900 San Francisco, CA 94103 United States. Twitter, terms and conditions, <https://twitter.com/ja/tos>.

## ***B. Defamation***

Some of the nasty comments could be considered to be a defamation. In Japan, there are two separate types of defamation: criminal defamation and civil defamation. Each leads to a different consequence.

First, criminal defamation could lead to criminal punishment under the Criminal Code.<sup>13</sup> From the look of the provision, it appears that any kind of defamation could lead to criminal liability. However, criminal defamation needs to be about a particular individual, the statement needs to point out the ‘facts’ to the public, and the statement needs to be defamatory. The statement does not have to be false.

Nevertheless, if the defendant can prove that the published statement was regarding matters of public concern, that the sole purpose of publication was to advance public interest, and that the published facts are true, then the defendant can be relieved from criminal liability.<sup>14</sup> Since the defendant has to prove that the published facts are true, initially the Supreme Court of Japan (SCJ), the highest court in Japan, denied any protection when the defendant failed to prove that the statement was true, even when there was a plausible reason to believe that the facts were true. Yet, eventually, the SCJ came to accept the protection when there was a plausible reason to believe that the facts were true, even if the defendant could not prove that the facts were indeed true.<sup>15</sup>

Defamation could also lead to civil liability in tort.<sup>16</sup> With respect to civil liability, the statement does not have to be statement of fact, but the statement needs to be defamatory, concerned with a particular person, and needs to be published. The regular requirement for an action in tort is that the plaintiff needs to prove the defendant was infringing the legal rights or interests of the plaintiff, that the plaintiff suffered some damages, that there was a causal relationship between the defendant’s conduct and the plaintiff’s damage, and that the defendant was at fault, i.e., intentional or negligent. Yet, for unknown reasons, the plaintiff in a defamation action does not have to prove to that the plaintiff suffered any damages or that the defendant was at fault. In that sense, civil defamation is a strict liability tort. Moreover, the victim of defamation could file a suit for injunction against defamatory statement.

However, the SCJ accepted limited defense when the defendant could prove that the statement in question was about matters of public concern, that the solo purpose of the publication was to advance public interest, and that the published

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<sup>13</sup> Criminal Code, *supra* note 4, art. 230.

<sup>14</sup> *Ibid.*, art. 230-1.

<sup>15</sup> Saikō saibansho [SCJ], grand bench, June 25, 1969, 23:7 Keishu 975.

<sup>16</sup> Minpō [Civil Code], law no. 89 of 1896, art. 709 & 710.

facts were true or at least there was a plausible reason to believe them to be true.<sup>17</sup>

Although criminal defamation is rarely invoked, some of the defamatory statements involved in trashing could be defamation, and the victims could file civil defamation suits seeking damage awards. In most of the cases, the victim of trashing is a celebrity or person who just became famous for causing an accident or a scandal. In some cases, the defendant can claim that the matter is a public concern. However, it is doubtful whether the defendant posted a comment or message for the purpose of advancing the public interest, since most of the trashing involves just emotional expression of negative feelings. If the plaintiff could show that the published matters are not true and are not based any reasonable grounds to believe them to be true, then the defendant should be liable for defamation.

There are several hurdles, however, for asking for relief against defamation. First, the plaintiff needs to identify the sender to file a suit. Since the plaintiff cannot invoke the power of the government like the police, they usually ask the internet service providers to release the identity of the sender of the comment or message. However, service providers are extremely reluctant to release the identity information as this can be in breach of privacy laws.

They can officially ask the identity information under the Providers Liability Limitation Act (PLLA),<sup>18</sup> which provided for the request and release of identity information from the providers. The PLLA thus provided that a person who claimed that his or her rights were infringed by the right-infringing information of telecommunication service could request the disclosure of sender information (name, address and other useful information to identify the sender as stipulated by the Ministry of Internal Affairs and Communication [MIC] regulation) retained by that telecommunication service provider under the following conditions:<sup>19</sup>

- (1) it was apparent that the right of the requester was infringed by the transmission of right-infringing information, and,
- (2) it was essential for the requester to exercise his or her right to seek damage awards or the requester has a legitimate reason for filing a request.”

When telecommunication service providers received such a disclosure request, they needed to ask for the opinion of the senders about whether he or she agreed to disclose the sender information, unless there were special circumstances, such as they could not reach out to sender of the information.<sup>20</sup> The telecommunication

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<sup>17</sup> Saikō saibansho [SCJ], 1<sup>st</sup> petty bench, June 23, 1966, 20:5 Minshu 1118.

<sup>18</sup> Tokutei denkitsushin ekimu teikyousha no songaibaishou sekinin no seigen oyobi hasshinsha jouhou no kaiji nikansuru hōritsu [Act on Limitation of Damage Award Liability of the Telecommunication Service Providers and on Disclosure of Sender Information], law no. 137 of 2001 (Provider Liability Limitation Act, PLLA).

<sup>19</sup> Ibid., art. 4(1)(as originally provided).

<sup>20</sup> Ibid., art. 4(2).

service providers were not liable for any damages resulting to the requester of information by non-disclosure, unless they had intent or were grossly negligent.<sup>21</sup>

However, if the providers are not cooperating, the requester needed to file a lawsuit to compel the providers to release the identity of the sender. Only when the plaintiffs win the suit and when the court orders the service providers to release the identity information, then the plaintiffs could find out the sender and file defamation suit against sender. This process is complicated and time-consuming and is also costly. Besides, there was no statutory authorization of such lawsuit against service providers.

Next, in many trashing cases, it is not only one particular person who is posting the nasty comments. Many copy the original defamatory statement and resend it to their friends, repeat the original defamatory statement, and support or endorse the defamatory statement. Victims often face a difficult task of going after a huge number of users who joined the chorus of nasty comments individually. Moreover, there are still ambiguities on how far the civil liability of defamation could expand. Sure, those who repeated the original defamatory statement are liable for defamation. But for those other users who simply resend it to other users, or those other users who simply supported or endorsed the statement, their civil liability is still not clear. Ms. Ito, the rape victim previously discussed, was subjected to repeated and fierce and nasty comments, accusing that she made up the story or that it was a failed honey trap. She filed a suit against an illustrator who tweeted an illustration with a caption stating her story was a failed honey trap, and a suit also against users who retweeted the original defamatory tweets and clicked “like” repeatedly. The courts, so far, have upheld the civil liability of the illustrator<sup>22</sup> and the users who retweeted the defamatory statement<sup>23</sup> but her claims against users who clicked “like” to defamatory posting was still unsettled.<sup>24</sup>

Third, civil litigation is complicated, time-consuming, and highly costly. The victim needs to spend several years before the court makes a final ruling. If the defendant decides not to defend him or herself or come to court for defense, that would be the best (and luckiest) outcome. But if the defendant challenges the lawsuit, or if the defendant is not happy with the damage award of the district court,

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<sup>21</sup> Ibid., art. 4(4).

<sup>22</sup> Tokyo chihō saibansho [Tokyo DC], Nov. 30, 2021, unreported.

<sup>23</sup> Ibid. Tokyo High Court sustained the judgment. Tokyo kōtō saibansho [Tokyo HC], Nov. 10, 2022, unreported.

<sup>24</sup> Tokyo chihō saibansho [Tokyo DC], Mar. 25, 2022, unreported, first dismissed her claim, but Tokyo High Court sustained the damage award. Tokyo kōtō saibansho [Tokyo HC], Oct. 20, 2022, unreported. It looks like the Tokyo High Court found the defendant’s conduct as infringing emotional well-being by clicking “like”, endorsing the defamatory statement. This is equal to accepting extreme psychological damages as a basis of tort.

he or she can file an appeal to the high court, and then finally to the SCJ. In totality, it will usually take more than six or seven years before the judgment becomes final. This further extends the amount of emotional damage done by such issues as the victim is dealing with the fallout of the trashing for many years following the date of the posts. Moreover, the victim needs to anticipate also many more lawsuits against many other users who posted similar trashing comments or messages.

Fourth, the amount of damage awards in Japan is highly limited. It is limited to compensation for actual loss or damage. It used to be several thousand dollars, but recently we have come to see much higher damage awards such as forty or fifty thousand dollars. Still, generally, awarded damages are fairly limited, and there are no punitive damages in Japan. Therefore, damage awards are often not sufficient to compensate for the harms and damages the victim has suffered.<sup>25</sup>

Fifth and finally, most of the trashing cases are not publication of fact. They are just condemnation, or extreme expression of personal hate. If a statement is just an opinion, then it is hard to classify it as defamation. Opinions should not become defamation because an expression of opinion is not likely to damage the social reputation of the victim.<sup>26</sup> Therefore, there is a serious limit on how useful a defamation suit can be for a victim of trashing.

### ***C. Invasion of Privacy***

Invasion of privacy could also be a potential action in tort. Privacy is the intimate and sensitive information of an individual that most people would not want to be shared. The publication of such private information without consent would be unlawful, and the victim can ask for damages from the court.<sup>27</sup> For example, Mr. Iizuka, the senior driver who caused the horrific traffic accident in the Ikebukuro, was personally attacked for his seemingly arrogant attitude of not accepting any negligence. His personal residence address was released by someone on the Internet. There were also several reports on his family members and their occupations during these personal attacks. These can be challenged as invasion of privacy against him and his family members. Victims could also ask for injunction against invasions of privacy. An injunction, however, does not always help in the trashing in the cyberspace, since once posted, it is extremely difficult to remove all information from the cyberspace. Moreover, the injunction will never ease the pain the victim already suffered.

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<sup>25</sup> Ms. Ito was awarded 800,000JPY (6,000USD) from the illustration writer, and 110,000JPY (800USD) from two users retweeted the original defamatory illustration. Although the damage award was increased by the High Court to 1.1 million JPY (8,000USD), still the amount of the damage award is very small.

<sup>26</sup> Saikō saibansho [SCJ], 1<sup>st</sup> petty bench, Dec. 21, 1989, 43:12 Minshu 2252 (criticizing school teachers as “harmful and no talent”).

<sup>27</sup> Tokyo chihō saibansho [Tokyo DC], Sep. 28, 1964, 15:9 Kaminshu 2317.

However, the same kinds of hurdles prevent victims to seek legal redress. First, the victim must identify the sender of comments or messages. Second, the victim needs to file lawsuits against senders. These hurdles are the same ones victim encounters with respect to defamation.

In the case of invasion of privacy litigation, the plaintiff needs to prove that the defendant published the information, and that the published facts were concerned with privacy of the plaintiff. If the facts were concerned with highly sensitive information, for example, a medical condition of the plaintiff, then there would be no difficulty in determining an invasion of privacy. But if the published facts are the street address of the personal home of a plaintiff, then there would be some questions on whether these facts are indeed private and sensitive.

Finally, the defendant can invoke the defense of public interest in disclosure. In most trashing cases, it might be hard for the defendant to invoke public interest, since the public usually does not have any public interest in knowing the private information about the plaintiff. But, if the plaintiff is a public official or public figure, then the possibility of invoking the public interest in disclosure might be enhanced.

#### ***D. Insult***

The most typical type of trashing can be classified as insult. Insult is an assault on the dignity of the targeted person alongside the denial of their worth as a human being. It could be a call for death, or even a simple “go away.” Many of the examples we pointed out at the beginning of this article are exactly this type of insult.

In common law countries, it is rare to see a criminal ban on insult. Yet, in Japan, the Criminal Code does have an insult provision; under the Criminal Code, any insult can be punished.<sup>28</sup> However, the courts used to interpret this provision as protecting the social reputation of the targeted person, similar to how defamation functions. The insult is an infringement of social reputation, without the requirement of publication of facts in the public, unlike defamation. This interpretation led many people to wonder in what circumstances the negative comments or nasty messages would injure the social reputation of the targeted individuals. As a result, this provision was difficult to apply and, prior to the recent increase in serious trashing comments, there had been very scattered examples of convictions under this provision.

However, in the face of extreme trashing, some victims of trashing asked the police to charge the person who was trashing them under the crime of insult and, in response, the police eventually came to actively use this provision. There are now

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<sup>28</sup> Criminal Code, *supra* note 4, art. 231.

several highly notorious cases where the person who posted trashing was prosecuted under this provision, eventually resulting in conviction. For instance, the person who posted trashing comments about Ms. Kimura's mother<sup>29</sup> as well as the person who posted trashing comments about Mr. Matsunaga were both prosecuted.<sup>30</sup> This is a good sign that the criminal sanction of insult could work to punish whoever who posted trashing.

However, prosecution and conviction for insult is still very rare and many of the victims of trashing simply see no justice. Moreover, the sanction available was the lenient penalty of detention for less than 30 days, or monetary sanctions of less than 10,000JPY (roughly 75USD)—no jail time or criminal fine could be imposed.<sup>31</sup> Additionally, the criminal arrest of the defendant is practically precluded for such a minor crime.<sup>32</sup> All the police can do is to investigate and send the defendant for prosecution to the prosecutors, and all the prosecutors could do was to file prosecutions against them with the evidence the police could find. Many of the victims of trashing were thus frustrated because of the extreme lenience in punishment. They thus called for major amendments to the insult provision and imposition of more serious punishment.

Of course, the victim can file a tort action for extreme psychological damages. There are some cases in this area granting damage awards for insult.<sup>33</sup> In one case, the defendant ridiculed the ugliness of the plaintiff's face, and in another case, the defendant Ms. Miri Yu, a famous novel writer, wrote a story modelled after one of her friends with severe deformity on her face, using shocking words to describe her supposed disfiguration. In both cases, the court found that the insult was unlawful.<sup>34</sup>

However, it is still unclear what kind of expression can be classified as insult, and when the insult becomes unlawful. Mocking and ridiculing someone can deeply hurt the targeted person, but it would be too much to wipe out all freedom for

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<sup>29</sup> "Kimura san haha chushō de ryakushiki kiso [Summary Prosecution for Insult toward the Mother of Ms. Kimura], Sankei News (May 19, 2022), <https://www.sankei.com/article/20220519-HGEJRPFKRNJSHHW5MUHEO6HPNU/>.

<sup>30</sup> Ikebukuro bōsō jiko no izoku wo chushō [Insult toward the Surviving Families of the Ikebukuro Traffic Accident Victims], Asahi Shimbun (June 15, 2022), <https://www.asahi.com/articles/ASQ6H6KRQQ6HUTIL02P.html>.

<sup>31</sup> Criminal Code, *supra* note 4, art. 231.

<sup>32</sup> An arrest was possible for crime which could be punished by detention or monetary sanction only under either condition:

when the suspect does not have established residence, or

when the suspect does not accept the request to come to the police station without legitimate reason.

Keiji soshōhō [Code of Criminal Procedure], law no. 131 of 1948, art. 199(1). Therefore, the arrest of suspect of insult was very difficult.

<sup>33</sup> Tokyo chihō saibansho [Tokyo DC], Apr. 30, 1986, 1223 Hanrei jiho 71.

<sup>34</sup> Saikō saibansho [SCJ], 3<sup>rd</sup> petty bench, Sep. 24, 2002, 1802 Hanrei jiho 60.

individuals to joke. Most of us can agree that no one has any right to insult the others, but the truth is that we cannot live without ever hurting others.

### ***E. Liability of the Platform***

In many cases, victims want social media platforms to take down or remove offending comments. If they refuse or fail to take down or remove such offending comments, they may wish to seek liability against the social media platforms for allowing offending comments to be shared. Instead of going after so many individual users who posted nasty trashing comments, it is far more easy and economically beneficial to target social media platforms. As a result, the platforms' obligation and possible liability has become a huge issue in the past.

It is well known that in the United States, section 230 of the Communication Decency Act (CDA) provides for the immunity for service providers in return for allowing them to prevent or take down offending comments.<sup>35</sup> Thus, it defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions"<sup>36</sup> and provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>37</sup> It also provides that "No provider or user of an interactive computer service shall be held liable on account of—

- (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."<sup>38</sup>

In other words, even when the service provider decides to block or remove offending comments or messages, this action does not make service provider liable as exercising editorial function. If the service provider does not take this action, then it is also immune from liability. This protection thus covers a very broad range of intermediaries, virtually "any online service that publishes third-party content."<sup>39</sup> As a result, this "has allowed for YouTube and Vimeo users to upload their own videos, Amazon and Yelp to offer countless user reviews, Craigslist to host classified ads, and Facebook and Twitter to offer social networking to hundreds of millions of

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<sup>35</sup> Communication Decency Act, 47 U.S.C. s.230 (CDA).

<sup>36</sup> Ibid., at s. 230(f)(2).

<sup>37</sup> Ibid., at s. 230(c)(1).

<sup>38</sup> Ibid., at 2. 230(c)(2).

<sup>39</sup> EFF, CDA230, <https://www.eff.org/issues/cda230>.



Internet users.”<sup>40</sup> This also offers its legal shield to “bloggers who act as intermediaries by hosting comments on their blogs. Under the law, bloggers are not liable for comments left by readers, the work of guest bloggers, tips sent via email, or information received through RSS feeds. This legal protection can still hold even if a blogger is aware of the objectionable content or makes editorial judgments.”<sup>41</sup>

The legal protection offered by the CDA has been interpreted by the courts as relieving all these service providers of any liability as distributors as well as publishers.<sup>42</sup> Therefore, in the United States, it is impossible to seek liability from social media platforms.<sup>43</sup>

In Japan, however, the PLLA provides for the limited liability of the service providers. Thus, the PPLA, as originally enacted, defined “specified telecommunication” as “provision of telecommunication intended for reception by the unspecified person,” “specified telecommunication service facility” as “telecommunication service facility used for specified telecommunication,” and “specified telecommunication service provider” as “those who are providing specified telecommunication service (telecommunication service through specified telecommunication facility).”<sup>44</sup> It then provided that a “specified telecommunication service provider that use specified telecommunication facility to provide specified telecommunication involved is not held liable for damages caused to the legal rights of others by the transmission of information provided by that specified telecommunication, except when it is technologically feasible to prevent the transmission of right-infringing information to the unspecified users and when either of the following circumstances exist:

- (1) the relevant telecommunication service provider involved knew that the legal rights of others are infringed by the transmission of the specified telecommunication involved, or
- (2) the relevant telecommunication service provider involved knew of the transmission of information and there is a plausible reason to believe that it could have known that rights of others would be infringed by the transmission of that specified telecommunication.”<sup>45</sup>

It also provides that a “specified telecommunication service provider is not held

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

<sup>43</sup> The CDA provides that “Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.” CDA, *supra* note 35, s.230(e)(1). Therefore, the service providers could be criminally charged for a violation of the federal criminal law.

<sup>44</sup> PLLA, *supra* note 18, art. 2.

<sup>45</sup> Ibid., art. 3(1). There is an exception for cases when the specified telecommunication service provider itself was a sender of that infringing information involved.

liable for damages to be caused to the sender of the information that is blocked by the measures to prevent the transmission of information of specified telecommunication when that measure was adopted to the degree of necessity to prevent such transmission of information involved to the unspecified users and when either of the following circumstances exist:

- (1) there is a sufficient ground to believe for the specified telecommunication service provider that the transmission of the information involved is improperly infringing the rights of others, or
- (2) there is a petition against the specified telecommunication service provider involved from anyone who is allegedly infringed of their legal rights by the transmission of information by the specified telecommunication to adopt a measure to prevent the transmission (hereinafter cited as prevention measure) by specifying the right-infringing information (right-infringing information) and the infringement and reasons to believe that this is infringing his or her right (hereinafter cited as information about the infringement) and, when the specified telecommunication service provider involved asked the sender whether he or she agrees with the service providers to adopt prevention measure showing the information about the infringement and sender has not replied that he or she did not agree for adoption of such measure within seven days.<sup>46</sup>

Therefore, in Japan, there is the possibility of seeking civil liability against the platform.<sup>47</sup> Yet, in many trashing cases, it is not clear whether the comments are really infringing the legal rights of targeted person. Moreover, when the sender replies to disagree with the adoption of the prevention measure, then the service provider is forced to decide for itself whether to adopt some prevention measure with possible legal liability to the sender. This would make service provider somewhat reluctant to adopt prevention measures. Then, the alleged victim needs to show that there was a plausible reason to believe that the service provider should have known that the transmission of information involved would infringe legal rights of others. This is not an easy task for the alleged victim.

### III Attempts to Improve Remedies

#### A. *Major Reforms*

Since the significant increase in cases and serious impact of trashing became clear, the public has come to believe that the victims of trashing need to be granted much more effective remedies and that more effective punishment needs to be

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<sup>46</sup> Ibid. art. 3(2).

<sup>47</sup> Taro Komukai, *Internet-jō no hibō chushou to baikaisha sekinin* [Intermediary Liability for Defamation on the Internet], 1 *Kokusai jouhou-gaku kenkyu* 53 (2021).

imposed against trashing. Moved by such wide-spread calls for reforms, the government came to change its stance toward trashing. The MIC, which regulates the telecommunication industry, now has a website for victims of trashing.<sup>48</sup> This website called for a study on possible countermeasures against trashing on the internet, and published an urgent call for countermeasures against trashing on the internet on 7 August 2020.<sup>49</sup> The MIC also published a policy package on countermeasures against trashing on 1 September 2020.<sup>50</sup> Their focus was on what kind of measures should be adopted by platforms and telecommunication service providers to make it much easier for the victims to get access to sender information from these service providers.

Likewise, the National Police Agency (NPA) that supervises all police agencies in Japan, now has a website for victims of trashing.<sup>51</sup> Additionally, the Ministry of Justice (MOJ), which has jurisdiction on the Criminal Code as well as the protection of individual rights, participated in the expert study group's discussion about legal issues on trashing on the internet by the Japan Institute on Business Law, a non-profit public interest corporation. The study group published its interim summary on 1 April 2020,<sup>52</sup> and a final summary of its discussion in May 2022.<sup>53</sup>

These efforts led to the introduction of several major legal reforms. They include:

- (1) allowing victims to get sender identity information more easily,
- (2) prompting platforms to remove trashing comments, and
- (3) imposing much serious criminal punishment against insult.

Let us examine the significance of these changes.

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<sup>48</sup> Ministry of Internal Affairs and Telecommunication (MIC), Internet jō no hibō chusho eno taisaku [Responses to Trashing on the Internet], [https://www.soumu.go.jp/main\\_sosiki/joho\\_tsusin/d\\_syohi/hiboutyusyou.html](https://www.soumu.go.jp/main_sosiki/joho_tsusin/d_syohi/hiboutyusyou.html).

<sup>49</sup> MIC, Expert Group on Platform Service, Urgent Recommendations on How to Deal with Online Harassment (7 Aug. 2020), [https://www.soumu.go.jp/main\\_content/000718532.pdf](https://www.soumu.go.jp/main_content/000718532.pdf).

<sup>50</sup> Ministry of Internal Affairs and Telecommunications (MIC), Internet jou no hibou/chushou eno taiou nikansuru seisaku package [Policy Package on Countermeasures against Trashing on the Internet], (1 Sept. 2020), [https://www.soumu.go.jp/main\\_content/000757631.pdf](https://www.soumu.go.jp/main_content/000757631.pdf).

<sup>51</sup> Keisatucho [National Police Agency], Internet/SNS no hibo/chusho nikansurukoto [Trashing by SNS and on the Internet], <https://www.npa.go.jp/hanzaihigai/soudan/net.html>.

<sup>52</sup> Japan Institute of Business Law, Expert Group's Study on Legal Issues of Trashing on the Internet, Interim Summary, [https://www.shojihomu.or.jp/documents/10448/14925697/20220120\\_f.pdf/aa2b1367-de04-4075-8650-e70ae911fe63](https://www.shojihomu.or.jp/documents/10448/14925697/20220120_f.pdf/aa2b1367-de04-4075-8650-e70ae911fe63).

<sup>53</sup> Japan Institute of Business Law, Expert Group's Study on Legal Issues of Trashing on the Internet, Final Summary, <https://www.shojihomu.or.jp/documents/10448/14925697/インターネット上の誹謗中傷をめぐる法的問題に関する有識者検討会%20取りまとめ/4024bd00-6890-424a-9348-6b0fa65f2dea>

### ***B. Allowing Victims to Get the Sender Identity Information More Easily***

First, the amendment to the PLLA in 2021<sup>54</sup> allowed victims of trashing to obtain sender identity information much more quickly and much efficiently.

According to the amendment, these victims no longer have to litigate several times to obtain sender identity information. As we saw earlier, under the previous PLLA, the victim had to ask the content provider for the release of the identity of content sender. The content provider then had to notify the sender as to whether he or she agrees to the release. In most of the cases, however, the content provider is reluctant to reveal the identity of sender. As a result, many victims then needed to file a lawsuit against the content provider asking the court for an order to compel the content provider to reveal the identity of sender (usually the IP address). Then, the victim can use that information to identify the access provider of the sender to track down the name and postal address of the sender. But the access provider may be similarly reluctant to reveal the information requested. Therefore, victims often had to file a second lawsuit against the access provider to obtain the name and address of the sender of that IP address. This was extremely time-consuming, expensive, and exhausting for victims.

Considering this, a new petition was created to ask the court to compel the disclosure through a new, more informal procedure.<sup>55</sup> Unlike the previous PLLA that did not have any provision on legal procedure against service providers, the amended PLLA explicitly allows victims to go after service providers. Moreover, the procedure is not a regular lawsuit. Therefore, this process does not require a full trial type of hearing to decide the order.

Additionally, in the past, there were ambiguities about the PLLA's reach into social media. Since most social media platforms only allow users to share comments after logging in, they have records of user log ins. But most of them don't keep track of IP address when the user actually posted a trashing comment. Moreover, many social media platforms allow users to access the service through multiple devices. In such cases, social media might have only one log-in record, while the users might be using different access providers through devices such as cellphones, desktop computers, or laptops. In such cases, it is not clear which access provider was used to post trashing comments. As a result, there were ambiguities as to whether the

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<sup>54</sup> Tokutei denkitsushin ekimu teikyousha no songaibaisho sekinin no seigen oyobi hasshinsha johō no kaiji nikansuru hōritsu no ichibu wo kaiseisuru hōritsu [Act to Amend Parts of the PLLA], law no. 27 of 2021. The PLLA, as amended in 2021, and was enforced from 1 October 2022.

<sup>55</sup> PLLA, *supra* note 18, as amended in 2021, art. 2, item 9; art. 8. The court can order the service provider to disclose the identity as requested by a decision after hearing statements by the provider and not by the judgment after trial. *Ibid.*, art. 8 & art. 11(3). Those who are not happy with the decision can file an objection by a lawsuit within one month. *Ibid.*, art. 14(1). If the objection was dismissed by the court or if the objection was not filed, then the initial decision becomes final. *Ibid.*, art. 14(4)&(5).

PLLA can be used to mandate social media platforms to disclose sender information.<sup>56</sup> Now, the new PLLA allows victims to seek sender information from such social media platforms, which carry log-in records.<sup>57</sup>

According to the PLLA, as amended in 2021, the person who alleged the infringement of their rights by the dissemination of information through specified telecommunication providers can request a disclosure of sender information other than the “specified sender information”, defined as “sender information mostly concerned with infringement related telecommunication as stipulated by the MIC regulation,” if the following two conditions are both met:

- (1) it is apparent that the right of the requester was infringed by the transmission of right-infringing information, and
- (2) it is essential for the requester to exercise his or her right to seek damage awards or the requester has a legitimate reason for filing a request.<sup>58</sup>

On the other hands, “the specific sender information” can be requested when above-mentioned two conditions plus the additional following condition are met:

- (3) one of the following circumstances exists:
  - a. specified telecommunication service provider involved does not have sender information other than specified sender information as to the infringement of rights involved,
  - b. the sender information retained by the telecommunication service provider involved other than the specified sender information as the infringement of rights involved is one of the following sender information other than the specified sender information and is stipulated by the MIC regulation:
    - i. name and address of the sender of the right infringing information related to the disclosure request, or
    - ii. other sender information which can be used to identify the other related service providers with respect to infringement of rights

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<sup>56</sup> PLLA, supra note 18, as originally enacted, allowed the alleged victim to request disclosure against “specified telecommunication service provider” that “mediate telecommunication by others by using specified telecommunication facility or provide specified telecommunication facilities for the use of telecommunication by others.” Ibid, art. 2(3), as originally enacted.

<sup>57</sup> PLLA, supra note 18, as amended in 2021, art. 2, item 3, defines “specified telecommunication service provider” as “those who are providing specified telecommunication service (telecommunication service through specified telecommunication facility).” Moreover, the amended PLLA now defines “sender” as “a person who recorded information on the recording media of the specified telecommunication facility to be used by the specified telecommunication service provider or a person who put information into the transmission devices of the specified telecommunication facility.” Ibid., art. 2, item 6. And the disclosure related service providers as specified telecommunication service provider and related telecommunication service providers.” Ibid., art. 2, item 7.

<sup>58</sup> Ibid., art. 5(1).

- involved, or
- c. the requester will not be able to identify the sender of the right infringing information involved in the disclosure request by the sender information disclosed under this subsection (other than the specified sender information).<sup>59</sup>

On the other hand, the person who alleges infringements of their rights by the transmission of information through telecommunication can request a disclosure of sender information “related to the infringing telecommunication” from the “related telecommunication service provider,” as defined as “service providers using their telecommunication facility for the use of infringing telecommunication involved by the specified telecommunication,” when the following conditions are met:

- (1) it is apparent that the right of the requester was infringed by the transmission of right-infringing information, and
- (2) it is essential for the requester to exercise his or her right to seek damage awards, or the requester has a legitimate reason for filing a request.<sup>60</sup>

As a result, the victim can request disclosure from all telecommunication service providers who are involved in transmitting the trashing comment or message.

### ***C. Prompting the Platforms to Release the Identity Information***

In the past, when the service provider received a request to reveal the sender information to victims, it was mandated to ask the opinion of the sender with respect to the disclosure of information.<sup>61</sup> However, if the sender refused to give consent, then the provider had to decide on its own whether to disclose the sender information. The service provider that received disclosure requests were not given reason as to why the sender was reluctant to give consent. Now, the service provider is not only mandated to ask the opinion of the sender as to the disclosure,<sup>62</sup> but also the reason for refusal from the sender if the sender refuses disclosure.<sup>63</sup> There is still no provision mandating the service provider to disclose the sender information. Yet, at the least this provision, in mandating the service provider to ask the reason for refusal, could provide important information for the decision of the service provider and might prompt disclosure of the sender information if there is no legitimate reason for refusal.

### ***D. Imposing More Serious Punishment on Insult***

Fourth, the insult provision of the Criminal Code was amended in 2022 to

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid., art. 5(2).

<sup>61</sup> PLLA, supra note 18, as originally enacted, art. 4(2).

<sup>62</sup> PLLA, supra note 18, as amended in 2022, art. 6(1).

<sup>63</sup> Ibid.

allow the imposition of a jail sentence for the first time. In the past, it was possible to impose detention for less than 30 days or a monetary sanction of less than 10,000JPY (75USD). As we explained earlier, detention is a criminal punishment, but a very lenient one when compared to criminal confinement, and a monetary penalty is different from a criminal fine. Therefore, even if convicted, the offender would not have to go to jail or pay a criminal fine (most of the defendants have been ordered to pay 9,000JPY or 70USD). One of the resulting consequences of this lenience toward trashing was that the police were practically prevented from arresting the suspect.

Now, the Criminal Code has been amended, and it is possible to impose imprisonment or criminal confinement for not more than one year and criminal fine for not more than 300,000JPY (2,300USD), in addition to detention and monetary penalty.<sup>64</sup> This means that an offender could be sent to jail. Moreover, as a result of the amendment, it became possible to arrest the suspect.

It is expected that the imposition of much more serious punishment against insult could, at the least, deter the future increase of trashing comments and messages.<sup>65</sup>

## IV Trashing and Freedom of Expression Reconsidered

### A. *Freedom of Expression and Trashing*

Many of the victims of trashing are pleased to see some changes against trashing, although they are not necessarily completely satisfied with these reforms. They still believe that trashing is rampant and wide-spread and all these reforms are inadequate in combatting against them. Because of this, they are now calling for further reforms to aid the victims of trashing.

It is true that, despite all these reforms, there is an abundance of trashing comments and messages available everywhere. Therefore, it is undeniable that further reforms may be necessary to protect from them.

However, everyone has a constitutional freedom of expression under article 21 of the Constitution of Japan.<sup>66</sup> Imposing criminal punishment and civil liability upon trashing comments could be considered to be a restriction of freedom of expression. As a result, naturally, we must examine whether further restriction could be justified.

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<sup>64</sup> Criminal Code, *supra* note 4, as amended in 2022, s. 231. The Japanese Criminal Code distinguished imprisonment from confinement to impose forced labor as a punishment for the former. Yet this difference between imprisonment and confinement was abolished at the same amendment and the distinction is supposed to be wiped out by 2025. Then all prison sentence as a punishment will be a criminal confinement.

<sup>65</sup> The amendment was enforced from July 7, 2022.

<sup>66</sup> Nihonkoku kenpō [Constitution of Japan], 1946, art. 21.

In the past, there has not been any challenges to the constitutionality of PLLA's grant of limited immunity toward service providers against civil liability. There have been no challenges to the constitutionality of allowing the victims of defamation to ask for the identity of the sender from service providers as well. Moreover, the constitutionality of criminal punishment for defamation was already upheld by the SCJ as constitutional.<sup>67</sup> The SCJ also held it was constitutional to impose civil liability for defamation for damages as well.<sup>68</sup> It has upheld the availability of injunction against the publication of defamatory statements.<sup>69</sup> Moreover, the SCJ upheld the constitutionality of imposing civil liability for invasion of privacy, allowing damage awards<sup>70</sup> as well as civil injunction.<sup>71</sup> In light of these precedents, it is settled that there is no hurdle for imposing civil and criminal liability against defamation, and civil liability against invasion of privacy.

There has been no serious discussion about whether criminal punishment for defamation, as well as civil liability for defamation and invasion of privacy, are really justified when they are applied to public officials and public figures, especially high-ranking politicians such as the Prime Minister, Cabinet ministers, and members of the Diet. This is important since trashing could also involve these public officials and public figures, especially high-ranking politicians such as former prime minister Shinzo Abe. On the one hand, there could be an argument that these public officials and public figures need to be protected against trashing just as other fellow private citizens, and that it is inappropriate to exclude or limit criminal and civil liability for trashing against them. On the other hand, there could be an argument that the freedom of expression of the public needs to be secured to its upper limit with respect to discussion and criticism against public officials and public figures. Imposition of criminal punishment on defamation as well as imposition of civil liability for defamation or invasion of privacy with respect to such public officials and public figures may thus be questioned as being against the public interest.

### ***B. Freedom of Expression and Insult***

Moreover, there has been scant discussion on whether imposition of civil liability for insult can be justified. As we saw, although there are scattered cases where damage awards were granted against insult, there is no clear standard to decide whether an accusation or criticism can be an insult and damage awards should be allowed. The defense of public interest is also not clearly established. It is doubtful whether the blanket imposition of civil liability against insult can be

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<sup>67</sup> Saikō saibansho [SCJ], 1<sup>st</sup> petty bench, Apr. 10, 1958, 12:5 Keishu 830.

<sup>68</sup> Saikō saibansho [SCJ], grand bench, July 4, 1956, 10:7 Minshu 785.

<sup>69</sup> Saikō saibansho [SCJ], grand bench, June 11, 1986, 40:4 Minshu 872.

<sup>70</sup> Saikō saibansho [SCJ], 3rd petty bench, Feb. 8, 1994, 48:2 Minshu 148.

<sup>71</sup> Saikō saibansho [SCJ], 3rd petty bench, Sep. 24, 2002, 1802 Hanrei jiho 60.



justified.<sup>72</sup>

Furthermore, the constitutionality of criminal punishment on insult, especially criminal punishment with possible jail time, is still open to question.

There is no doubt that insult will hurt the feeling of victim. Everyone can perhaps agree that no one should hurt or offend others and that no one has a right to be mean to others. Thus, it is understandable that many people will support the criminal punishment of insult, especially with regard to egregious trashing comment or messages. On the other hand, there are so many offensive and annoying expressions that will hurt or annoy people. Even a legitimate criticism could hurt or offend the person criticized. Since freedom of expression is guaranteed, everyone has a right to criticize others, and no one has a right to be exempted from legitimate criticism. The difficult task is to separate the illegitimate trashing from legitimate criticism.

Potentially, we will be able to isolate exceptionally egregious nasty insult for criminal punishment. If the scope of the ban is sufficiently narrowed down, then it might be able to justify such a criminal punishment. Yet, the trouble with respect to amended insult ban in the Criminal Code, especially with jail time and criminal fine, is that there is no definition of “insult” in the provision and there is no clear boundary that separates lawful criticism and unlawful insult. In other words, there is nothing to limit its applicability only to the most egregious and ugly trashing comment or message. Furthermore, no distinction is found between insult against public officials, public figures, and private persons. No defense was also inserted in the offence for public interest. On the face of the provision, all insult could be subject to criminal punishment. This is evidently overbroad.

Therefore, unfortunately, the amended insult provision cannot be constitutionally justified.<sup>73</sup> In most cases, civil litigation could be used to fight against most trashing and no criminal punishment should be necessary. In light of

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<sup>72</sup> See supra note 34. The United States Supreme Court as well as the Supreme Court of Canada are reluctant to accept damage action against insult. See *Snyder v. Phelps*, 562 U.S. 443 (2011)(Supreme Court of the United States held that speech on a matter of public concern, on a public street, cannot be subjected to civil liability for a tort of emotional distress, even in the circumstances that the speech is viewed or interpreted as “offensive” or “outrageous”); *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 (Supreme Court of Canada held that professional comedian’s joke that may be “nasty,” “disgraceful” and even “repugnant,” should not be viewed as discriminatory subject to administrative order) .

<sup>73</sup> Japan Federation of Bar Associations, *Bujokuzai no hoteikei no hikiage nikansuru ikensho* [Opinion on the Imposition of Heavier Punishment on Insult] (Mar. 17, 2022), <https://www.nichibenren.or.jp/library/pdf/document/opinion/2022/220317.pdf>. In anticipation of the enforcement, Justice Minister instructed all prosecution agencies for proper enforcement. Press Interview by the Justice Minister (July 5, 2022), [https://www.moj.go.jp/hisho/kouhou/hisho08\\_00317.html](https://www.moj.go.jp/hisho/kouhou/hisho08_00317.html). But such instruction does not change the inherent risks of improper application.

the difficulty of drawing a clear boundary between legitimate criticism and unlawful insult, any attempt to impose criminal punishment on insult may be unfortunately questionable.

### ***C. Forcing the Platform to Reveal the Identity of Sender***

The PLLA, as amended, now allows the victim of trashing to request a disclosure of sender information from telecommunication service providers who sent or saved the trashing content or message. It also extends to all the information which could be used to identify the sender. At the least, it is a relief for the victim. However, right now, service providers are not mandated to disclose the sender information, and the victims need to go to the courts to force the service providers to disclose the sender information. Even when the service providers refuse to disclose the sender information, their damage liability is limited by the PLLA. The victims likely wish to have more efficient and prompt measures to force the service provider to disclose the sender information.

However, the identity of someone who sent a comment or message is a confidential information that needs to be protected.<sup>74</sup> Therefore, it is questionable whether the legislature can force the service providers to release confidential information without a judicial order or judgment from the court. It is an important improvement that the amended PLLA stipulates on the petition for disclosure to the court. The procedure is not a regular trial process one would find in civil litigation. But still, it is a judicial proceeding the function of which is to allow the court to make a decision on whether forcing the service provider to disclose the sender information is justified. It is questionable then why the victims need to go to service providers first to request sender information rather than going to the courts to ask for judicial order to compel disclosure.

The better approach would allow victims to file lawsuits against unnamed defendants who sent or posted egregious and heinous trashing comments or messages and then, ask for the court order to compel service providers to reveal the identity of the senders. Then, victims do not have to find the sender identity individually before filing lawsuits. For the service providers, they then don't need to decide whether the disclosure request is justified. They can trust the court judgment. So long as they are releasing identity information in accordance with the court order, there is no question as to the legality of the release.

The current scheme of forcing the platforms to reveal the identity of the sender without the court judgment is surely more convenient and economical for victims. For them, going to the court is more difficult, time-consuming and highly expensive. But the service providers are simply platform managers that provide forums for users to post comments and messages and share them with other users; they do not

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<sup>74</sup> Constitution of Japan, art 21(2).

have a legal capacity to decide whether these comments are illegal or not or necessarily to decide if the release of identity information and therefore to some extent a breach of privacy is justified. Sometimes, the anonymity of the sender is critical to secure freedom of expression, especially for whistle blowers. We cannot force or allow the service providers to reveal the identity of the sender in the absence of court judgment.

#### ***D. Forcing the Platform to Remove Trashing Messages***

Finally, one of the possible additional measures that could be introduced is a mandate for platforms on social media to remove trashing messages. This is an approach already adopted in Germany<sup>75</sup> and apparently endorsed in the EU.<sup>76</sup> It is thus conceivable that the Japanese government will consider this measure in the future if an increasing voice calling for additional measures continues into the future.

If the message is a threat of violence, bombing, or assault, then it is illegal, in violation of the Criminal Code. If the message is defamation or insult, then it is also apparently illegal, in violation of the Criminal Code. If the message is invasion of privacy, then it is illegal, but not a violation of the Criminal Code. Some insults could be similar. The obligation of the platforms, such as social media ones, could be different depending upon how obligations are imposed. If the statute obliges the platforms to remove illegal content in violation of the Criminal Code, then the platforms would be mandated to take down at least the former type of illegal

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<sup>75</sup> Act to Improve Enforcement of the Law in Social Networks of 2017, <https://perma.cc/7UCW-AA3A>, together with the Act to Amend the Network Enforcement Act of 2021, <https://perma.cc/9W8E-GSWM>. Library of Congress, Germany: Network Enforcement Act Amended to Better Fight Online Hate Speech, <https://www.loc.gov/item/global-legal-monitor/2021-07-06/germany-network-enforcement-act-amended-to-better-fight-online-hate-speech/>. This Act is applied to “telemedia service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public (social networks)” but the provider of a social network shall be exempt from the obligations stipulated in this Act if the social network has fewer than two million registered users in the Federal Republic of Germany. *Ibid.*, section 1. The Act obliged the provider to “maintain an effective and transparent procedure for handling complaints about unlawful content in accordance with the statute and the procedure shall ensure that the provider of the social network:

1. takes immediate note of the complaint and checks whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked,
2. removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint or removes or blocks access to all unlawful content immediately, this generally being within 7 days of receiving the complaint. *Ibid.* section 3.

<sup>76</sup> European Parliament, Digital Services Act: agreement for a transparent and safe online environment, <https://www.europarl.europa.eu/news/en/press-room/20220412IPR27111/digital-services-act-agreement-for-a-transparent-and-safe-online-environment>.

content, which would certainly be a start towards tackling the issue of particularly egregious trashing.

However, if the platform is mandated to take down messages, then the platforms could argue that their freedom of expression is infringed. The author and sender of the removed message could also claim infringement of their freedom of expression. Since, in this case, platforms are mandated to take down any violating comments, it becomes a government infringement on freedom of expression.

With regard to this, it looks like European countries do not view that the platforms such as social media platforms have any independent freedom of expression. They may be able to invoke the freedom of expression interest of the author/sender, but they themselves don't have any independent freedom of expression. This understanding is wrong. Even when they allow users to post comments and share them among other users, they retain some responsibilities to edit their comments. Usually, they remove certain offending comments or messages, such as hate speech. They do have independent editorial policies and they have freedom to choose such policies. This, in essence, is an editorial function, although their function is highly different from newspapers or broadcaster, which choose what articles or messages to be included into the newspapers or news programs. Just like newspapers and broadcasters, therefore, platforms such as social media platforms should be granted constitutional freedom of expression.

It is a gross infringement of their freedom of expression when a statute forces platforms to review and remove content since the content could be illegal, but there is no court judgment yet. This system forces social media platforms to take down/remove the content before the court makes a final finding on the illegality of the content. Such a system practically forces social media platforms to take down/remove content when it is objected against. There would be no freedom of expression left. If the victims want the content to be taken down/removed, they should go to the court for a take down/removal order, and the legislature should create a system forcing courts to make a prompt decision on the request. If there is an urgent situation, the legislation should allow the courts to issue temporary injunction to stop carriage until the court makes a prompt final decision. If the court makes prompt decision, there would be no need to force social media to take down/

remove content before they are ordered by the courts to do so.<sup>77</sup>

## Conclusion

Trashing is a very serious social issue; it is easy to understand that many of the victims of trashing deserve better and more effective relief. If justified, they should be granted sufficient damage awards promptly and without hurdles, and there could be some kinds of criminal punishment against the most egregious trashing comments and messages. Nevertheless, people do have freedom of expression and the fact that someone is hurt, or even deeply hurt by comments or messages may not justify legal restrictions, let alone blanket criminal punishment. The Japanese experience will give an important lesson for the delicate task of preserving freedom of expression while providing effective relief for victims of trashing.

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<sup>77</sup> Yahoo! Comment came to introduce some limitations on the comment section. Yahoo! News Helps, <https://support.yahoo-net.jp/PccNews/s/article/H000006456>. The comment basic policy now prohibits trashing comment. Yahoo! News Comment Policy, <https://news.yahoo.co.jp/info/comment-policy>. It is possible to close the comment section or block a particular user. Tokutei no user karano toukouwo hihojinisuru [How to Block the Comment of a Particular User], <https://support.yahoo-net.jp/PccNews/s/article/H000006470> It also allows user to ask for removal of improper comments. Hukaina toukou [Improper Comment], <https://support.yahoo-net.jp/PccNews/s/article/H000006461>. Moreover, it came to close the comment section if that section is filled with extreme negative comments beyond the maximum limit. Then, it came to require the registration of cell phone number to post comments. Comment no toukou [Posting a Comment], <https://support.yahoo-net.jp/PccNews/s/article/H000015766>. We will have to see whether all these additional measures could reduce trashing comments on Yahoo!.

