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## The Potential for National Hate Speech Legislation and Japan: An International Consideration on Possibilities

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## JAPAN AND THE POTENTIAL FOR NATIONAL HATE SPEECH LEGISLATION: AN INTERNATIONAL CONSIDERATION ON POSSIBILITIES

Freedom of speech is considered to be such a fundamental and universal right that it was included in the United Nations Universal Declaration of Human Rights.<sup>1</sup> Free speech is valuable in that it facilitates the open exchange of ideas.<sup>2</sup> With free speech, however, also comes the ability to use speech to harm others, such as through hate speech. Hate speech is defined by Black's Law Dictionary as "[s]peech that carries no meaning other than the expression of hatred for some group, such as a particular race, esp[ecially] in circumstances in which the communication is likely to provoke violence."<sup>3</sup>

Bhikhu Parekh suggests three potential criteria for identifying hate speech that can be used to distinguish it from other forms of speech. First, hate speech is "directed against a specified or easily identifiable individual or . . . a group of individuals based on an arbitrary and normatively irrelevant feature."<sup>4</sup> Next, "hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable."<sup>5</sup> Finally, "because of its negative qualities, the target group is viewed as an undesirable presence and a legitimate object of hostility."<sup>6</sup>

Hate speech could be considered an inevitable consequence of the availability of free speech. One country that has seen a problematic influx of hate speech is Japan.

On May 3, 1947, a new Constitution was enacted for the Japanese government of post-World War II. Under Article 21 of this Japanese Constitution, freedom of expression is guaranteed and formal censorship is

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1. Per Article 19 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, art. 19, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/index.html>.

2. Alexander Tsesis, *Dignity And Speech: The Regulation Of Hate Speech In A Democracy*, 44 WAKE FOREST L. REV. 497 (2009).

3. SPEECH, Black's Law Dictionary (10th ed. 2014).

4. Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE 37, 40 (Michael Herz and Peter Molnar Ed. 2012).

5. *Id.* at 41.

6. It is important to note that Parekh's criteria allow for the implicit stigmatization of a group wherein a group is presented to be an "undesirable presence because of the kind of people they are believed to be." *Id.* at 42.

prohibited.<sup>7</sup> As a member of the United Nations, Japan may also consider the article on free speech of the United Nations Universal Declaration of Human Rights, though as a declaration its effects are not binding on the state.

Japan has also, however, ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)—United Nations Conventions.<sup>8</sup> True to its title, the CERD has the lofty goal of seeing racial discrimination eliminated in its signatory countries worldwide.<sup>9</sup> The ICCPR, meanwhile, states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>10</sup>

Japan, however, made a reservation on Article 4 of the CERD.<sup>11</sup> A reservation, as defined by the Vienna Convention on the Law of Treaties, is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>12</sup>

Article 4 of the convention calls upon states, in short, to criminalize the incitement of racial hatred.<sup>13</sup> By making a reservation on Article 4 of the

7. The constitution states as follows in English:

“Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.” NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21 (Japan), *available in English at* <https://history.hanover.edu/texts/1947con.html>.

8. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *Signatories*, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=en); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories*, *available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-2&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-2&chapter=4&clang=en).

9. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

10. International Covenant on Civil and Political Rights, art. 20, Dec. 16, 1966, 999 U.N.T.S. 171, *Signatories*, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=en).

11. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195, *Reservations*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-2&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-2&chapter=4&clang=en).

12. Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 332., <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

13. The full text of Article 4 of the CERD states as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this

CERD, Japan expressed its concerns about limitations on freedom of speech as guaranteed under Article 21 of its Constitution.<sup>14</sup> With its reservation to Article 4, Japan continues to be a signatory of the CERD, but specifically opted out of the provision that calls for the criminalization of hate speech.<sup>15</sup> The Japanese government has said that such “actions to spread or promote the idea of racial discrimination have not been taken in Japan to such an extent that legal action is necessary.”<sup>16</sup>

Nevertheless, despite the governmental comments suggesting otherwise, Japan has had an ongoing problem with hate speech particularly aimed towards ethnic Koreans living in Japan. Street protests against ethnic Koreans have been on the rise with participants carrying signs reading things such as “Roaches” and “Go back to Korea” and shouting

Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

14.

In applying the provisions of paragraphs (a) and (b) of article 4 of the [said Convention] Japan fulfills the obligations under those provisions to the extent that fulfillment of the obligations is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan, noting the phrase “with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention” referred to in article 4.

International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195, *Reservations*, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-2&chapter=4&clang=_en); see also UN Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of all Forms of Racial Discrimination : 3rd to 6th periodic reports due in 2007 : Japan*, at 18, 16 June 2009, CERD/C/JPN/3-6, available at <http://www.refworld.org/docid/4c15edba2.html>.

15. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, 660 U.N.T.S. 195, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

16. UN Committee on the Elimination of Racial Discrimination (CERD), *Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of all Forms of Racial Discrimination: 3rd to 6th periodic reports due in 2007 : Japan*, at 18, 16 June 2009, CERD/C/JPN/3-6, available at <http://www.refworld.org/docid/4c15edba2.html>. Japanese Justice Minister Sadakazu Tanigaki specifically addressed his concerns about hate speech at an Upper House Judicial Affairs Committee on May 9, 2013, but fell short of proposing that any form of legal action be taken against the people concerned.

*Justice Minister Criticizes Hate Speech In Japan But Won't Punish Offenders*, THE ASAHI SHIMBUN (May 10, 2013), [https://web.archive.org/web/20160304073222/http://ajw.asahi.com/article/behind\\_news/social\\_affairs/AJ201305100069](https://web.archive.org/web/20160304073222/http://ajw.asahi.com/article/behind_news/social_affairs/AJ201305100069).

phrases like “Let’s kill Koreans!”<sup>17</sup> On August 29, 2014, the United Nations Committee on the Elimination of Racial Discrimination “called on Japan to enact legislation to ‘firmly address’ growing incidents of hate speech against ethnic Koreans and other minorities.”<sup>18</sup> Furthermore, on December 2, 2014, the South Korean Parliament adopted a resolution requesting that Japan “crack down on ‘hate speech’ demonstrations targeting Korean residents.”<sup>19</sup> These incidents show a clear pattern of issues regarding hate speech, particularly against ethnic Koreans, in Japan.

Yet, Japan has not been totally passive on the issue of hate speech. On December 9, 2014, “[t]he top court’s Third Petty Bench . . . rejected an appeal filed by Zainichi Tokken wo Yurusanai Shimin no Kai (Group of citizens who do not tolerate privileges for ethnic Korean residents in Japan)”—a group better known as the Zaitokukai.<sup>20</sup> This appeal followed the Osaka High Court upholding a Kyoto District Court’s ruling that ordered the group “to pay about 12 million yen (\$100,000) in compensation to a school attended by ethnic Korean children in Kyoto.”<sup>21</sup> This ruling on hate speech was made based on the CERD.<sup>22</sup>

Additionally, in May of 2015, a bill sponsored by the Democratic Party of Japan that would prohibit all forms of racial discrimination, including hate speech, was submitted to the Upper House for consideration.<sup>23</sup> This bill, however, would not criminalize hate speech, but merely act as a

17. Yuka Hayashi, *Anti-Korean Voices Grow in Japan*, WALL ST. J. (May 16, 2013), <http://www.wsj.com/articles/SB10001424127887324031404578482570250163826>.

18. It has also been suggested that Japan “conduct an investigation and apologize to ‘comfort women’ who were forced to provide sexual services to wartime Japanese military personnel,” as well as work on ending discrimination against foreign workers. Ichiro Matsuo, *U.N. Panel Urges Japan to Enact Law to Prohibit Hate Speech*, THE ASAHI SHIMBUN (Aug. 30, 2014), [https://web.archive.org/web/20160304085028/http://ajw.asahi.com/article/behind\\_news/politics/AJ201408300039](https://web.archive.org/web/20160304085028/http://ajw.asahi.com/article/behind_news/politics/AJ201408300039).

19. Toru Higashioka, *S. Korea Adopts Resolution Demanding Japan Curb ‘Hate Speech’*, THE ASAHI SHIMBUN (Dec. 3, 2014), [https://web.archive.org/web/20150628211548/http://ajw.asahi.com/article/asia/korean\\_peninsula/AJ201412030046](https://web.archive.org/web/20150628211548/http://ajw.asahi.com/article/asia/korean_peninsula/AJ201412030046).

20. *Supreme Court Upholds Compensation Ruling Against ‘Hate Speech’ Group*, THE ASAHI SHIMBUN (Dec. 10, 2014), [https://web.archive.org/web/20160310180800/http://ajw.asahi.com/article/behind\\_news/politics/AJ201412100078](https://web.archive.org/web/20160310180800/http://ajw.asahi.com/article/behind_news/politics/AJ201412100078).

21. The court further “issued an injunction against the use of handheld microphones and other equipment” used in demonstrations against the Kyoto Chosen Elementary School. *Id.*

22. *Id.*

23. The bill was sponsored by the Democratic Party of Japan and the Social Democratic Party, and “place[d] responsibility on the state and municipalities to eliminate racism.” This bill made history, being the very first of its kind in Japan. Tomohiro Osaki, *First Japanese Bill Outlawing Racism, Hate Speech Submitted to Upper House*, THE JAPAN TIMES (May 22, 2015), <http://www.japantimes.co.jp/news/2015/05/22/national/social-issues/first-japanese-bill-outlawing-racism-hate-speech-submitted-to-upper-house/#page>.

potential deterrent, thus circumventing arguments that it infringes upon the freedom of expression.<sup>24</sup> This bill, presently, seems to have stalled.<sup>25</sup>

In contrast, an anti-hate speech “naming and shaming” scheme has been established in the Japanese city of Osaka, as it passed an anti-hate speech ordinance.<sup>26</sup> The ordinance established a hate speech examination committee comprised of lawyers and scholars that would examine hate speech complaints lodged by city residents.<sup>27</sup> If the panel determines the incident to be demonstrative of hate speech, the perpetrator and a description of the incident would be posted on the city website.<sup>28</sup> This novel ordinance has shown itself to possibly be effective at a local level.<sup>29</sup> It certainly does not, however, address the issue of hate speech at a national level.

One possibility for quelling the rise of anti-Korean sentiments at a national level is anti-hate speech legislation, like that suggested by the CERD, that would criminalize the incitement of racial hatred rather than simply attempting to deter it. Bhikhu Parekh provides three reasons why a legal prohibition on hate speech is important to society. First, and most obviously, a “direct prohibition would reduce or eliminate speech that causes very real harm to the targets of such speech.”<sup>30</sup> Second, a prohibition on hate speech sends a message to the people of a society that “the state values them all equally and is committed to maintaining a civil public discourse and protecting their fundamental interests.”<sup>31</sup> Third, and finally, a prohibition on hate speech is vital in “preventing political

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24. *Id.*

25. While the bill has stalled, it is noted that “more than 100 local governments across the country have formally condemned hate speech and made it harder to use public areas for hate rallies.” Daniel Krieger, *Japan Combats Rise in Hate Speech*, ALJAZEERA AMERICA (Nov. 30, 2015), <http://america.aljazeera.com/articles/2015/11/30/japan-encounters-rise-in-hate-speech.html>.

26. Eric Johnston, *Osaka Assembly Passes Nation's First Ordinance against Hate Speech*, THE JAPAN TIMES (Jan. 15, 2016), <http://www.japantimes.co.jp/news/2016/01/15/national/osaka-set-pass-japans-first-ordinance-hate-speech-will-name-shame-offenders/>.

27. The establishment of a hate speech examination committee is especially important to Osaka as the city is home to many ethnic Koreans who have been subjected to verbal racism. *Osaka to Adopt Japan's First Anti-Hate Speech Ordinance*, THE ASAHI SHIMBUN (Jan. 14, 2016), [http://digital.asahi.com/articles/ASJ1G619WJ1GUEHF00R.html?\\_requesturl=articles/ASJ1G619WJ1GUEHF00R.html](http://digital.asahi.com/articles/ASJ1G619WJ1GUEHF00R.html?_requesturl=articles/ASJ1G619WJ1GUEHF00R.html).

28. *Id.*

29. According to Mun Gong Hwi, head of the Secretariat of “Hate Speech O Yurusanai! Osaka no Kai” (“Don’t Allow Hate Speech! Osaka Group”), there was an incident during a street demonstration where organizers hurried to stop a participant from using blatantly offensive language and that hate demonstrations have been fewer in number; Hwi also notes, however, that the drop in demonstration numbers may be because the groups “are watching to see how things develop.” *1 Month after Anti-Hate Speech Law Adopted, Marches Down, Language Softened*, THE MAINICHI (July 24, 2016), <http://mainichi.jp/english/articles/20160724/p2a/00m/0na/003000c>.

30. Bhikhu Parekh, *supra* note 4, at 46.

31. *Id.* at 46.

mobilization of hostility against particular groups.”<sup>32</sup>

Of course, anti-hate speech legislation is not without its critics. One criticism of anti-hate speech legislation is that restrictions on free speech can cause people to turn to violence as a method for expressing their feelings.<sup>33</sup> Others still argue that a ban on hate speech will lead to “a chilling effect on public discussion and debate,” which will lead to further restrictions still.<sup>34</sup> Bhikhu Parekh argues that this argument “presupposes that an uninhibited freedom of expression is a good thing” and that the slippery slope argument is misleading because human beings make principle-based exceptions all the time.<sup>35</sup>

Another argument is that hate speech is already policed on its own by society; one might argue that, because hate speech is commonly considered undesirable, it is in fact best for those with racially discriminatory views to be as vocal about them as possible because society will produce further speech to make sure that these people’s harmful ideas are neutralized.<sup>36</sup> People have therefore found “counterspeech” to be a powerful tool against hateful discourse.<sup>37</sup> Bhikhu Parekh, however, argues that the “counterspeech” argument is exaggerated due to limitations on the approach. Parekh notes that the marketplace of ideas is not neutral, but rather “operates against the background of prevailing prejudices” and therefore can push other ideas out of the way.<sup>38</sup> Furthermore, the marketplace of ideas argument presumes that false ideas will necessarily lose against true ideas.<sup>39</sup>

Finally, free speech is valued and could be called “the lifeblood of democracy.”<sup>40</sup> The Japanese constitution guarantees free speech.<sup>41</sup> Parekh, however, argues that instead of considering the issue in abstract terms, one should “ask what sort of liberty . . . is restricted by a ban on hate speech.”<sup>42</sup> Parekh notes that “obscenity, libel, defamation, public display of pornography, and so forth” are banned for being harmful “because we

32. *Id.*

33. John Boyd, *Hate Speech in Japan: To Ban or Not to Ban*, AL JAZEERA (Mar. 19, 2015), <http://www.aljazeera.com/indepth/features/2015/03/hate-speech-japan-ban-ban-150310102402970.html>.

34. Parekh, *supra* note 4, at 49.

35. *Id.*

36. *See id.* at 48.

37. Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 254 (1991).

38. Parekh, *supra* note 4, at 48.

39. *Id.*

40. *Id.* at 47.

41. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21 (Japan), *available in English at* <https://history.hanover.edu/texts/1947con.html>.

42. Parekh, *supra* note 4, at 47.

believe that our public life should be guided by certain norms” – norms that could allow for a ban on hate speech.<sup>43</sup>

There are a number of countries today that have anti-hate speech legislation in place particularly for issues of racially-motivated hate speech.<sup>44</sup> It may be beneficial for Japan to look to these countries, which can be divided into four groups – Oceania, Western Europe, Africa, and North America – in considering legislation that focuses specifically on race-based hate speech.

#### OCEANIA

One such country in the Oceania group is Australia, which is a signatory to the CERD.<sup>45</sup> Although “the Australian Constitution does not expressly mention the freedom of speech, it is well-established as an implied constitutional right.”<sup>46</sup> Australia has legislation against hate speech on both federal and state levels. At the federal level, there is the Racial Discrimination Act 1975, which makes it unlawful to publicly “offend, insult, humiliate or intimidate another person or a group of people” for racially-motivated reasons.<sup>47</sup>

43. *Id.*

44. See, e.g., *Racial Discrimination Act 1975* (Cth) s 18c (Austl.), [http://www.austlii.edu.au/au/legis/cth/consol\\_act/rda1975202/s18c.html](http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18c.html); Human Rights Act 1993, s 63 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1993/0082/latest/whole.html#DLM304643>; Public Order Act 1986, ch. 64, § 18 (Eng.), <http://www.legislation.gov.uk/ukpga/1986/64>; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 10 (S. Afr.), <http://www.justice.gov.za/legislation/acts/2000-004.pdf>; Canada Criminal Code, R.S.C. 1985, ch. C-46, available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>.

45. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en).

46. Alexander Tsesis, *Dignity And Speech: The Regulation Of Hate Speech In A Democracy*, 44 WAKE FOREST L. REV. 497, 528 (2009), [http://wakeforestlawreview.com/wp-content/uploads/2014/10/Tsesis\\_LawReview\\_01.09.pdf](http://wakeforestlawreview.com/wp-content/uploads/2014/10/Tsesis_LawReview_01.09.pdf) (citing *Lange v. Austl. Broad. Corp.*, 189 C.L.R. 520, 523–24 (1997)).

47. The Racial Discrimination Act 1975 reads, in full:

#### RACIAL DISCRIMINATION ACT 1975 - SECT 18C

Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is



There have been a number of landmark federal cases centered on the Racial Discrimination Act 1975. *Koowarta v. Bjelke-Petersen* upheld the validity of the Act, which had been “enacted to give effect” to the CERD.<sup>48</sup> Thus, Australia’s legislation is just one example of what a CERD-based legislative act against hate speech might look like.

A second landmark case in Australia was *Jones v. Toben*, which extended the reach of the Racial Discrimination Act 1975 to the internet. The case involved a website that posed as a scholarly Holocaust research institute, but the website’s content was successfully proven to be anti-Semitic.<sup>49</sup>

Another country in the Oceania group with hate speech legislation is New Zealand, which is a CERD signatory with no declarations.<sup>50</sup> Section 61 of the New Zealand Human Rights Act of 1993 criminalizes the incitement of racial disharmony.<sup>51</sup> This is paired with the New Zealand

unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

“public place” includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

*Racial Discrimination Act 1975* (Cth) s 18c (Austl.), [http://www.austlii.edu.au/au/legis/cth/consol\\_act/rda1975202/s18c.html](http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18c.html).

48. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; LANDMARK CASES UNDER THE RACIAL DISCRIMINATION ACT 1975, <https://www.humanrights.gov.au/guide-law-landmark-cases-under-racial-discrimination-act-1975>.

49. *Jones v Toben* [2002] FCA 1150 (Austl.). Available at <https://www.humanrights.gov.au/guide-law-landmark-cases-under-racial-discrimination-act-1975>.

50. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en).

51. The relevant portion of Section 61 reads as follows:

It shall be unlawful for any person—

- (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
- (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
- (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television, —being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

Human Rights Act 1993, s 61 (N.Z), available at <http://www.legislation.govt.nz/act/public/1993/0082/latest/whole.html#DLM304643>.

Bill of Rights Act of 1990, which provides for freedom from discrimination.<sup>52</sup>

Quite unlike Australia, however, “the operation of New Zealand’s hate speech laws has been characterised by very infrequent formal enforcement.”<sup>53</sup> This is not to say that complaints about breaches of the section 61 are infrequent, but rather that the New Zealand Human Rights Commission frequently “has declined to proceed on the basis that the conduct does not fall within the legislative definition of unlawful racist hate speech.”<sup>54</sup> Upon an inquiry, the Commission defended itself by suggesting that it narrowly interpreted hate speech laws so as to balance the right to be free of discrimination with the right to freedom of expression. While hate speech laws have therefore been enacted in New Zealand, in reality “they are currently being interpreted as involving such a high threshold that they are effectively beyond the reach of the vast majority of situations” where a person or an organization may wish to use them.<sup>55</sup>

#### WESTERN EUROPE

One Western European country with hate speech legislation is Germany, which is also a signatory to the CERD.<sup>56</sup> Germany has legislation particularly against the “Incitement of Hatred,” known in German as “Volksverhetzung.” Key to the language of the German legislation is that the incitement of racial hatred must be done “in a manner capable of disturbing the public peace” or alternatively distributed in some manner if in print.<sup>57</sup>

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52. The New Zealand Bill of Rights Act provides: “(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” New Zealand Bill of Rights Act 1990, s 19 (N.Z.), <http://www.legislation.govt.nz/act/public/1990/0109/latest/whole.html#DLM224792>.

53. LUKE MCNAMARA, HUMAN RIGHTS CONTROVERSIES: THE IMPACT OF LEGAL FORM 216 (2007).

54. *Id.*

55. *Id.* at 217.

56. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en).

57. The relevant statute reads in full as follows:

(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the

German hate speech laws have been particularly relevant with the influx of Middle Eastern refugees into Western Europe.<sup>58</sup> In October 2015, a German man was sentenced to five months of probation and received a fine “after the man [posted] on his Facebook page that refugees should ‘burn alive’ or ‘drown’ in the Mediterranean.”<sup>59</sup> Similarly, a German woman in July 2015 received five months of probation for posting “‘Filth out!’ . . . arguing that if tougher measures against refugees were not deployed, ‘more asylum seekers’ homes will burn.”<sup>60</sup>

These efforts to curb hate speech via criminalization have been met with mixed reviews.<sup>61</sup> Those in favor of stronger controls on hate speech “say there is a direct correlation to the vitriol now flying in the German public domain and the sharp spike of attacks on refugee centers,” and indeed, Germany has seen a fourfold increase in attacks against asylum seekers’ homes as compared to 2014.<sup>62</sup> Proponents also see the laws as a way of stopping racist or National Socialist-type thinking.<sup>63</sup> Opponents,

aforementioned groups or segments of the population, or defaming segments of the population,

shall be liable to imprisonment from three months to five years.

(2) Whosoever

1. with respect to written materials (section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them,

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services shall be liable to imprisonment not exceeding three years or a fine.

STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDEGESETZBLATT, Teil I [BGBL I] 3322, § 130 (Ger.), available in English at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1241](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1241).

58. German hate speech laws reach all the way to the internet on websites such as Facebook, Google, and Twitter, which have agreed to apply German domestic law over corporate policy when reviewing posts. Anthony Faiola, *Germany Springs to Action Over Hate Speech Against Migrants*, WASH. POST (Jan. 6, 2016), [https://www.washingtonpost.com/world/europe/germany-springs-to-action-over-hate-speech-against-migrants/2016/01/06/6031218e-b315-11e5-8abc-d09392edc612\\_story.html](https://www.washingtonpost.com/world/europe/germany-springs-to-action-over-hate-speech-against-migrants/2016/01/06/6031218e-b315-11e5-8abc-d09392edc612_story.html).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

meanwhile, argue that the laws go too far, verging into the territory of censorship.<sup>64</sup>

Another Western European country with hate speech legislation is Sweden, which is also a CERD signatory.<sup>65</sup> Chapter 16 section 8 of the Swedish penal code contains a provision that criminalizes the dissemination or communication of a threat or contempt for a national, ethnic, or other such group of persons.<sup>66</sup>

A major example of Swedish usage of this provision includes the fining and imprisonment of the controversial Swedish street artist Dan Park. Park's infamy began in 2011, when "Park created and distributed posters with a picture of Jallow Momodou of the National Afro-Swedish Association (Afrosvenskarnas riksförbund) superimposed on the image of a naked man in chains."<sup>67</sup> The Swedish Courts ruled against the artist's claims of freedom of expression and held that "the posters were needlessly insulting and an attack on the rights of dark skinned people"—the artist was fined.<sup>68</sup>

Then, in August of 2014, Dan Park was once more in hot water for his art. Having already been twice found guilty and previously sentenced to four months in prison, a Swedish court sentenced Park to six months in prison for the incitement to racial agitation and defamation related to pictures deemed offensive to African and Roma peoples.<sup>69</sup>

A third country in the Western European group, the United Kingdom, is a CERD signatory and also has multiple forms of hate speech legislation in place.<sup>70</sup> Section 18 of Public Order Act 1986, for example, criminalizes

64. *Id.*

65. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en).

66. Ch. 16 § 8 of the Swedish Penal Code reads in full:

A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin or religious belief shall, be sentenced for agitation against a national or ethnic group to imprisonment for at most two years or, if the crime is petty, to a fine.

(Law 1988:835) Brottsbalken [BrB] [Penal Code] 16:8 (Swed.) *available in English at* <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf>.

67. *Artist Avoids Jail for 'Negro Slave Taunt'*, THE LOCAL (Jan. 27, 2012), <http://www.thelocal.se/20120127/38756>.

68. *Id.*

69. The chief of the gallery that was displaying said offensive pictures was also found guilty of racial agitation and was both fined and given a suspended sentence. *Swedish Artist Jailed for 'Race Hate' Pictures*, THE LOCAL (Aug. 21, 2014), <http://www.thelocal.se/20140821/swedish-artist-jailed-for-race-hate-pictures>. The Roma people are a traditionally itinerant people from northern India that now live all over the world, particularly in Europe. For more about the Roma people, *see generally Rom*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.britannica.com/topic/Rom>.

70. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7,

the intentional incitement of racial hatred.<sup>71</sup> Section 5 of the same Act describes, however, a lesser crime that involves harassing or alarming another person via words or behavior.<sup>72</sup> Under section 5, there is no

1966, 660 U.N.T.S. 195, *Signatories available at* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=IV-2&chapter=4&clang=en>.

71. The relevant section of the legislation reads in full as follows:

18 Use of words or behaviour or display of written material.

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme included in a programme service.

Public Order Act 1986, ch. 64, § 18 (Eng.), <http://www.legislation.gov.uk/ukpga/1986/64>.

72. The relevant legislation reads as follows:

5 Harassment, alarm or distress.

(1) A person is guilty of an offence if he—

(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove—

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable.

(4) A constable may arrest a person without warrant if—

(a) he engages in offensive conduct which a constable warns him to stop, and

(b) he engages in further offensive conduct immediately or shortly after the warning.

(5) In subsection (4) “offensive conduct” means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the

penalty of imprisonment and therefore section 5 is seen as a method of regulating hate speech that is also a less controversial infringement on the right of expression than section 18.<sup>73</sup>

There are a few key features of the Act that are considered to be weaknesses.<sup>74</sup> First, the Act doesn't cover subtle or superficially moderate expressions of racial hatred, which are arguably no less damaging than threatening or abusive expressions.<sup>75</sup> Second, the Act requires the "stirring up" of hatred when an act may be accomplished without arousing such extreme emotions, or the hatred may already be felt without being stirred up.<sup>76</sup> The final weakness of the Act is that a prosecution requires the Attorney General's consent.<sup>77</sup>

#### AFRICA

South Africa is a country in the Africa group with hate speech legislation, and is a signatory to the CERD.<sup>78</sup> Unlike Japan, there are certain types of speech that the South African Constitution expressly does not protect. One of these is the "[a]dvocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."<sup>79</sup> The South African Constitution, therefore, does not extend free speech protections to several kinds of hate speech and refuses protections for solely racially-motivated hate speech.<sup>80</sup> Yet, South Africa goes even further than this in its regulation of hate speech. as Section 10 of the

further conduct need not be of the same nature.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Public Order Act 1986, ch. 64, § 5 (Eng.), <http://www.legislation.gov.uk/ukpga/1986/64>.

73. LUKE MCNAMARA, HUMAN RIGHTS CONTROVERSIES: THE IMPACT OF LEGAL FORM 177 (2007).

74. One weakness of the act is the lack of prosecutions that have been brought under it. Geoffrey Bindman, *Incitement to Racial Hatred in the United Kingdom: Have We Got the Law We Need?*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION 258, 261 (Sandra Coliver ed., 1992), <https://www.article19.org/data/files/pdfs/publications/striking-a-balance.pdf>.

75. *Id.* at 260-61.

76. For example, hatred would not be stirred up if a person were to make an insensitive remark at a gathering consisting primarily of their followers. *Id.*

77. *Id.*

78. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en). The signatories' pdf. Cites South Africa on p. 2 – Not sure if you want to focus citation on the signatory pdf. Or not. [The issue is that the signatories page is separate from the CERD's actual page so I wasn't sure what to do about that].

79. S. AFR. CONST., 1996, <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf>.

80. *Id.*

Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 contains language that does not allow communications which express the intent to be hurtful, harmful, or to propagate hatred.<sup>81</sup>

Furthermore, South Africa has established Equality Courts under the above-mentioned 2000 Act.<sup>82</sup> The Equality Courts specifically “adjudicate matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech, with a view toward eradicating the ever-present post-apartheid spectre, which essentially has divided the country along racial, gender and monetary related lines.”<sup>83</sup>

There have been several landmark cases related to hate speech in South Africa. *Afri-forum and Another v. Malema and Others* is considered to be the leading hate speech case in South Africa. In it, Malema was accused of uttering hate speech by publicly singing a song with racially inflammatory lyrics.<sup>84</sup> The judge found that the lyrics constituted hate speech and went even further by interdicting Malema from singing the song in both public and private spaces.<sup>85</sup>

Another South African landmark case, also involving a song, is *Human Rights Commission of South Africa v. SABC*. The Court held that a song with polarizing racial lyrics was advocacy of hatred based in race.<sup>86</sup> Noteworthy here, however, is that in an attempt to continue to protect free speech, the courts recognized that offensive speech does not rise to the

81.

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s.10 (S. Afr.), available at <http://www.justice.gov.za/legislation/acts/2000-004.pdf>.

82. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 10 (S. Afr.), <http://www.justice.gov.za/legislation/acts/2000-004.pdf>. *Id.*

83. Freedom of Expression Inst., *Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa*, FREEDOM OF EXPRESSION INST. FXI.ORG (2013), [http://fxi.org.za/home/fxi\\_downloads/Hate\\_Speech\\_and\\_Freedom\\_of\\_Expression\\_in\\_SA.pdf](http://fxi.org.za/home/fxi_downloads/Hate_Speech_and_Freedom_of_Expression_in_SA.pdf). For general information about apartheid in South Africa, see generally *Apartheid*, HISTORY.COM, <http://www.history.com/topics/apartheid>.

84. *Afri-Forum and Another v. Malema and Others* 2011 (6) SA 240 (EqC) (S. Afr.); Freedom of Expression Inst., *Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa*, FXI.ORG (2013), [http://fxi.org.za/home/fxi\\_downloads/Hate\\_Speech\\_and\\_Freedom\\_of\\_Expression\\_in\\_SA.pdf](http://fxi.org.za/home/fxi_downloads/Hate_Speech_and_Freedom_of_Expression_in_SA.pdf).

85. *Id.*

86. *Human Rights Commission of South Africa v. SABC* 2003(11) BCLR 92 (BCCSA); Freedom of Expression Inst., *Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa*, FXI.ORG (2013), [http://fxi.org.za/home/fxi\\_downloads/Hate\\_Speech\\_and\\_Freedom\\_of\\_Expression\\_in\\_SA.pdf](http://fxi.org.za/home/fxi_downloads/Hate_Speech_and_Freedom_of_Expression_in_SA.pdf).

level of hate speech if it does not “also tends to ‘incitement to cause harm.’”<sup>87</sup>

A third landmark case, once again involving a song, is *Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music*.<sup>88</sup> In this case, there had been an interim interdict, or injunction, against the publishing, marketing, distribution, and selling of a particular racist song.<sup>89</sup> The court declined to extend the interdict as “there had not been a single documented case of violent action by Blacks against Indians which could be ascribed to the song during that time, and found that the fear expressed by the applicant that the song would lead to race riots and bloodshed was founded merely on his own opinion and was not borne out by any fact.”<sup>90</sup> This judgment follows the previously mentioned recognition of the courts that there must be some incitement of harm present on top of the racially-based hatred for the speech to rise to the level of hate speech.<sup>91</sup>

#### NORTH AMERICA

A country in the North America group with hate speech legislation is Canada, which is also a CERD signatory.<sup>92</sup> At a federal level, sections 318 through 320 of the Canadian Criminal Code fall under the section for “Hate Propaganda.”<sup>93</sup> Section 318 criminalizes the advocacy for or promotion of genocide and section 320 allows a judge to seize any publication that appears to be hate propaganda.<sup>94</sup> Most on point, however, is section 319, which criminalizes the public incitement of hatred against not just racial groups, but rather any identifiable group; section 319 also, however, has some notable exceptions.<sup>95</sup>

87. *Id.*

88. *Ramesh Dharamshee Jethalal v Mbongeni Ngema and Universal Music* (Case No: 3524/2002, 28 June 2002); Freedom of Expression Inst., *Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa*, FXI.ORG (2013), [http://fxi.org.za/home/fxi\\_downloads/Hate\\_Speech\\_and\\_Freedom\\_of\\_Expression\\_in\\_SA.pdf](http://fxi.org.za/home/fxi_downloads/Hate_Speech_and_Freedom_of_Expression_in_SA.pdf).

89. *Id.*

90. *Id.*

91. *Id.*

92. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.C. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en).

93. Canada Criminal Code R.S.C. 1985, c. C-46, <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>.

94. *Id.*

95. Section 319 of the Canadian Criminal Code reads in relevant part:

Public incitement of hatred

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace



There have been a few landmark cases under section 319 of the Canadian Criminal Code. The most important of these cases would most likely be *R v. Keegstra*. In *R v. Keegstra*, a schoolteacher from Alberta was charged for making anti-Semitic statements to his students.<sup>96</sup> The Court in this case upheld the constitutionality of section 319.<sup>97</sup>

The Canadian Criminal Code is not the only piece of federal legislation in Canada to criminalize hate speech. Canada also has the Canadian Human Rights Act, which functionally acts against hate speech.<sup>98</sup>

A landmark case under the Canadian Human Rights Act is *Canada v. Taylor*.<sup>99</sup> In that case, the appellants distributed cards with a Toronto phone number that, when called, would play an anti-Semitic message. Appellants were charged under section 13(1) of the Canadian Human Rights Act.<sup>100</sup>

is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Defences

(3) No person shall be convicted of an offence under subsection (2)

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.” *Id.* at §319

96. *R. v. Keegstra*, (1990) 3 S.C.R. 697 (Can.).

97. The Court also held that section 319 constituted a “reasonable limit prescribed by law in a free and democratic society” that furthered an “immensely important” legislative objective. *Id.* at para. 142.

98. It is immediately obvious from the text of the Act that the Canadian legislation has a far broader sweep in its protections than many countries, which often focus simply on racial and ethnic hate speech: the Canadian Human Rights Act prohibits discrimination based on “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.” Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 3.

99. *Canada v. Taylor*, [1990] 3 S.C.R. 892, para. 4-12 (Can.)

100. Section 13(1) of the Canadian Human Rights Act stated:

It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

This section, however, has been repealed as of 2013. *Id.*; see Canadian Human Rights Act, 1984, R.S.C. 1985, c. H-6.

They argued that section 13(1) violated section 2 of the Canadian Charter of Rights and Freedoms, which provides in part that “[e]veryone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” but the court rejected this argument.<sup>101</sup> The court did not see the existence of a free speech right as preventing the court from stopping hate speech.

#### LINGERING CONCERNS AND ISSUES

Of course, none of these countries have the same particular issues that Japan has, and none of them are in the same region as Japan.<sup>102</sup> Japan’s regional East Asian neighbors similarly show no signs of following the generally Western trend of hate speech legislation.<sup>103</sup> South Korea, for example, does not ban hate speech nor have anti-discrimination laws.<sup>104</sup> Unlike Japan, however, South Korea is not a signatory to the CERD.<sup>105</sup>

As previously mentioned, some of the arguments against anti-hate speech legislation include the slippery slope argument that it will lead to bans on other beneficial forms of speech, that “counterspeech” is already an effective counter to hate speech, and that free speech is valued in democratic societies.<sup>106</sup> Jacob Mchangama, moreover, has argued that the origin of hate speech legislation in the Eastern communist states reveals that such laws are antithetical to Western liberal democracies.<sup>107</sup> He notes that attitudes towards hate speech legislation have since softened, particularly in Europe, because of “the belief that social peace in an increasingly multiculturalist Europe requires certain restriction on

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101. Taylor, 3 S.C.R. at para. 10-12; Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Sched. B, Pt. I, s. 2.

102. See *supra* notes 17–19 and accompanying text.

103. See *supra* note 42.

104. Korea, as a country, has its own unique issues which are spurring hate speech-related concerns, such as the sinking of the ferry Sewol and conflict with North Korea, as well as racism and xenophobia. Defining hate speech, however, has been difficult in Korea due to the peninsula’s divided state. Claire Lee, *Korea Struggles to Enact Hate Speech Laws*, THE KOREA HERALD (Jan. 1, 2015), <http://www.koreaherald.com/view.php?ud=20141228000346>.

105. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-2&chapter=4&clang=_en). South Korea is, however, a signatory to the ICCPR without a reservation to Article 20. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *Signatories available at* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&clang=_en).

106. See *supra* notes 32–41 and accompanying text.

107. Mchangama states that the greatest proponent of hate speech restrictions was the former Soviet Union, while the United States and United Kingdom led the opposition. Jacob Mchangama, *The Problem with Hate Speech Laws*, in 13:1 THE REV. OF FAITH AND INT’L AFF. 75, 75-76 (2015).

expressions aimed at racial, ethnic, and religious (and recently also sexual) minorities.”<sup>108</sup>

There are three other notable arguments against hate speech legislation. One such argument is that banning hate speech would make the state a moral arbiter, which could potentially “skew political debate, and constrict[] individual liberty.”<sup>109</sup> To this end, Parekh suggests that every state already “exercises the right to limit speech in the interest of other equally important values,” which it cannot do “without passing some judgment on its content.”<sup>110</sup> Next, Parekh argues that it’s problematic for a state to be morally neutral, as “some values are so central to its moral identity that it cannot remain neutral with respect to them.”<sup>111</sup>

The third argument against hate speech legislation is that human beings as “responsible and autonomous individuals” in a democratic society “should be trusted to see through hate speech.”<sup>112</sup> Parekh criticizes this notion as “an idealized view of personal autonomy” since human beings have clearly held onto racist and bigoted ideas for centuries.<sup>113</sup> He argues, moreover, that the strong presence of “racism, sexism, nationalism, and xenophobia” actually limits autonomy, which makes it important for the law “to lay down norms of decency.”<sup>114</sup>

The last argument outlined by Parekh involves numerous practical objections. First, it is argued that “law . . . cannot by itself change people’s attitudes and eliminate hatred.”<sup>115</sup> Parekh argues that, while this is true, law does influence human attitudes as well as the importance of the law in denying the public expression of negative attitudes.<sup>116</sup> Another practical objection to hate speech legislation is that such legislation can send extremist groups underground making them more difficult to understand and also providing them with a recruiting tool.<sup>117</sup> Here, Parekh argues that the argument works both ways and that a hate speech ban would keep moderates away from disreputable groups as well as makes it more difficult for these groups to operate.<sup>118</sup>

108. *Id.* at 77.

109. Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*, in *THE CONTENT AND SONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSE* 37, 49 (2012) (Michael Herz & Peter Molnar eds., 2012).

110. *Id.* at 50.

111. Some examples of values given by Parekh include human dignity, gender and race equality, and the spirit of free inquiry. *Id.*

112. *Id.*

113. *Id.* at 51.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 52.

118. *Id.*

## RESOLUTION

Based on these considerations, Japan may benefit from instituting legislation like that of Australia, which is limited in scope to criminalize only racially-based hate speech. This is not to suggest that other forms of hate speech do not exist, but rather that hate speech legislation against racially discriminatory remarks would constitute a conservative response to the most immediate concerns Japan currently faces. The requirement that the language incite hatred against a particular ethnic group would act to limit the scope of the prohibition. Of course, this should not detract from the steps that Japan has already taken towards ending racism—specifically in the city of Osaka. It is possible that a naming and shaming system is most appropriate culturally in Japan.<sup>119</sup> The obvious advantage of implementing Osaka’s city ordinance on a wider scale would be that it is the least inhibitive towards free speech because it deters without criminalizing.<sup>120</sup> Japan is therefore a country with active issues of hate speech in its society—though this is not societally unique to Japan. Japan has started making a foray into the world of hate speech legislation through the anti-hate speech ordinance in Osaka. Nevertheless, Japan may benefit from reduced hate speech through the national adoption of anti-hate speech legislation that specifically criminalizes the incitement of racial hatred.

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119. *See supra* notes 26–28 and accompanying text.

120. *Id.*

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